THE

# FEDERAL REPORTER.

## VOLUME 162.

CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

AUGUST—SEPTEMBER, 1908.

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

A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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(162 FED.)

# JUDGES

OF THE

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

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

[1] Appointed July 6, 1908, to succeed Lochren, District Judge.
[2] Resigned April 30, 1908.

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# CASES

## ARGUED AND DETERMINED

IN THE

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

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

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,490.

1. TRUSTS—BREACH OF TRUST—LIABILITY OF TRUSTEE.

Defendant contracted to sell a vessel to a steamship company, which being indebted to complainant, it was agreed that defendant should transfer the vessel to the steamship company, take a mortgage covering, first, the remainder of the purchase price, and, second, the indebtedness due complainant, evidenced by a note executed by the steamship company to defendant as trustee. The bill of sale of the vessel was never in fact delivered, nor was the mortgage executed. Thereafter defendant, without notifying complainant or giving him any opportunity to protect his interest, which he was able to do, executed mutual releases with the steamship company, and with K., the moneyed man of that concern, formed another corporation, to which the vessel was conveyed; the steamship company going out of business. Defendant received of the stock of the new company an amount equal to the amount remaining due on the vessel; K. receiving an amount equal to cash contributions which he made, necessary to free the vessel from liens for indebtedness incurred by the steamship company. *Held*, that such transaction constituted a breach of trust on defendant's part, rendering it liable to complainant for the amount of its debt against the steamship company.

2. SAME—PARTIES.

The steamship company was not an indispensable party to a suit by complainant against defendant for breach of trust.

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

For opinion below, see 156 Fed. 57.

W. H. Bogle, Thomas B. Hardin, and Charles P. Spooner, for appellant.

George H. King (Theodore M. Taft and P. Tecumseh, of counsel), for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellee Dodge filed in the court below a bill against the appellant and Frank Waterhouse individually, in effect charging the appellant with a breach of trust by reason of its al-

leged failure to apply the security with which the trustee was charged to the payment of a note for $10,000 given by the North Alaska Steamship Company to the appellant as trustee for the complainant, and praying, among other things, for a judgment for the amount due thereon. The court below held that there was no ground for recovery against Frank Waterhouse individually, and accordingly dismissed the bill as to him, with costs, but gave the complainant judgment for the money sought against the appellant, which is a corporation of the state of Washington; the complainant being a citizen of the state of New York.

The case shows that in January, 1904, Frank Waterhouse & Co., Incorporated, was the owner of the steamship Garonne, which was then out of commission in the waters of Puget Sound near Tacoma and in need of certain repairs. In the early part of the next month the North Alaska Steamship Company, a corporation of the state of New York, through one Ferguson, entered into negotiations with Frank Waterhouse & Co., Incorporated, for the purchase of the Garonne, which negotiations resulted in a contract by which Frank Waterhouse & Co., Incorporated, agreed to sell the vessel to the North Alaska Steamship Company for $85,000; $1,000 to be paid in cash, $14,000 to be paid February 15, 1904, and the balance in deferred payments extending over a period of two years, which deferred payments were to be secured by a first mortgage on the vessel, an assignment of the marine insurance thereon, a bond to protect the seller against any indebtedness that might be contracted by the purchaser on the credit of the vessel, and other securities satisfactory to the seller. At that time it was contemplated that the purchaser would accept title to the steamer on February 15th, when the $14,000 was to be paid, and would at that time furnish the securities called for by the contract; but on February 5, 1904, Ferguson wrote from New York to Waterhouse at Seattle, among other things, as follows:

"Your various communications, including confirmation of the sale of the steamer Garonne, duly received, and we have confirmed a compliance with the terms by telegraph. We have written our Mr. Hastings to make a thorough inspection of the steamer and wire us the results of the said inspection. I expect to be in Seattle myself in time to go over the ship and follow the lines of inspection; but it is just possible that I may not arrive there in time, and may be detained here a week or 10 days longer than I anticipate. In regard to the second payment on the Garonne, we will follow this mode, which we trust will be satisfactory: On or before February 15th we will deposit in the Chase National Bank of New York $14,000, and the bank will wire the Washington National Bank of Seattle to pay your draft for this $14,000 on account of the purchase price of the steamer Garonne. We will also notify you at the same time that we have paid money in to your credit, and a receipt given by you to our Mr. Hastings will cover the ground. As soon as I arrive in Seattle we will finish up the matter as to details as per arrangement, so as to make the transfer of the vessel on the next payment of $10,000."

On the 10th of February, 1904, Waterhouse telegraphed Ferguson at New York as follows:

"Received your letter 5th. A vital condition of sale Garonne to you was that purchase should be entirely completed by February 15th by exchange of steamer for fifteen thousand cash, notes, mortgage bond and other satisfactory col-

lateral. Am willing accept fourteen thousand next Monday provided you agree execute notes, mortgage bond and deliver securities by March 1st, or forfeit the fifteen thousand if you fail; but I want you to advise by wire what character of collateral to deferred payments you will furnish in addition to mortgage and bond, so I may pass upon same Monday. I guarantee Garonne good insurable risk, and will pass United States inspection for commission, by expenditure on your part of about seventy-five hundred dollars. Am now doing considerable work on her my own expense, preparatory to inspection. Other parties anxious to purchase her next Monday at same price for practically cash."

The next day, February 11, 1904, Ferguson wired Waterhouse at Seattle as follows:

"Understand Garonne transfer on payment twenty-five thousand my principal understands same and has gone South cannot reach Seattle until March 10th or 12th. We propose pay fourteen thousand February 15th, ten thousand March 15th make then notes for balance mortgage insurance policy good security bonds or cash I may not reach Seattle until March 5th will pay shipkeeper until transfer."

February 15, 1904, C. B. Smith, president of the North Alaska Steamship Company, for whom Ferguson had been acting, paid the appellant, Frank Waterhouse & Co., Incorporated, $14,000, receiving from that company the following:

"Received, Seattle, February 15, 1904, of C. B. Smith, fourteen thousand dollars, being payment due this day on contract for purchase of steamship Garonne. Another payment of $10,000 and the execution of notes, mortgage, bond, and collateral for deferred payments are to be made and completed on or before March 15, 1904, as per terms of contract; and if default is made by said Smith in making said further payment or in execution of said securities on or before March 15th next, then his right to purchase said vessel shall cease, and all moneys paid by him toward such purchase shall be forfeited to and be and remain the moneys of this company.

"Frank Waterhouse & Co., Inc.,
"By Frank Waterhouse, President."

On March 15, 1904, the purchaser remitted to the appellant from New York $7,000, and on March 18th $3,000, making the $10,000 due March 15th, but did not furnish the bond and other securities called for by the contract, or take title to the steamship. The record shows that from that time forward the seller was constantly insisting that the purchaser should complete the contract and take the title, and that the purchaser was continually promising to do so, and that subsequent to March 15th the appellant permitted the purchaser to take possession of the vessel for the purpose of making certain repairs which it desired to make in preparation for the approaching Alaska season, in which trade the steamship was to be engaged. This arrangement, however, was upon the distinct agreement that no indebtedness should be incurred against the vessel, and that all of the repairs, betterments, and supplies should be paid for in cash by the purchaser and the steamship kept free from all incumbrance. Ferguson and one Hastings were the representatives at the time of the North Alaska Steamship Company, and it soon appeared that they were making the repairs and procuring supplies on the credit of the vessel. The appellant thereupon insisted that such indebtedness should be promptly paid by the purchaser, and threatened to cancel the contract and forfeit the payments theretofore

made by the purchasing company unless those debts were paid and the securities called for by the contract furnished. The North Alaska Steamship Company made various payments upon the purchase price of the Garonne and upon the indebtedness so incurred in making the repairs and procuring the supplies, and made various promises of complete performance of the terms of the agreement, and engaged a full cargo of freight and passengers for the voyage of the ship, to commence from Seattle about the 1st day of June. In the latter part of May, 1904, the appellant notified the North Alaska Steamship Company that unless all of the debts incurred against the ship by its representatives, Ferguson and Hastings, were promptly paid and the terms of the contract of purchase complied with, it would not permit the vessel to sail in charge of the North Alaska Steamship Company and would cancel the contract to purchase. About the 1st of June, 1904, the president of the North Alaska Steamship Company, C. B. Smith, came to Seattle, as did Frank S. Pusey, as the representative of the appellee Dodge. Pusey stated, what appears to have been the fact, that the North Alaska Steamship Company was indebted to Dodge in the sum of $10,000, which it had borrowed from him and paid to the appellant, which indebtedness Pusey came to enforce or have secured for Dodge. At that time the balance of the purchase price of the steamer remaining unpaid to Waterhouse & Co. was $37,671.46, or thereabouts, and the amount due from the North Alaska Steamship Company to Dodge was about $10,000. To arrange for the payment of that indebtedness and the security of the interested parties and for the sailing of the ship to Nome with the passengers and freight it had secured, Pusey and the Waterhouse Company then entered into this written agreement:

"Memorandum between Frank S. Pusey, agent for G. M. Dodge, of New York, and Frank Waterhouse & Co., Inc., of Seattle, Washington: The North Alaska Steamship Company is indebted to said Waterhouse & Co., Inc., in the sum of about $37,671.46, being balance due on purchase price of the steamship Garonne, and are also indebted to said G. M. Dodge in the sum of about ten thousand dollars for borrowed money. It is agreed that said Waterhouse & Co., Inc., shall take a mortgage from said North Alaska Steamship Co. upon the steamship Garonne to secure both claims above mentioned. The claim of said Waterhouse & Co., Inc., shall be prior and paramount under such mortgage, and the claim of said Dodge shall be secondary. Said Waterhouse & Co., Inc., shall take a note from said North Alaska Steamship Co., payable to them as trustee, for the amount so owing to said Dodge, said note to be payable in two months from date. It is agreed that said Waterhouse & Co., Inc., in acting as such trustee for said Dodge in the securing of said indebtedness, assumes no liability whatever with reference thereto, except that it agrees to act in good faith.

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

In pursuance of that agreement the contemplated mortgage was prepared and signed by Smith as president of the North Alaska Steamship Company, and Smith also gave to the Waterhouse Company, as trustee for Dodge, an assignment of freight moneys to be earned by the steamer on her contemplated trip to Alaska, although it does not

appear that any money was ever received on that account. A bill of sale of the steamship Garonne, together with the mortgage, was then forwarded by the Waterhouse Company to the Chase National Bank of New York, with instructions to that bank to deliver the bill of sale to the North Alaska Steamship Company upon the completion of the execution of the mortgage, which was never done, and the bill of sale was consequently never delivered. The North Alaska Steamship Company, however, sailed the ship to Nome, leaving Seattle June 2, 1904, during which time the Waterhouse Company acted as agent for the ship, receiving commissions on both receipts and disbursements. After entering into the agreement above set out Pusey returned East, and neither he nor Dodge heard anything further from the Waterhouse Company until about August 25, 1904, when Pusey received a letter from Waterhouse, dated August 2, 1904, which, by reason of misdirection, was returned to Seattle and was remailed August 19, 1904. That letter is as follows:

"Seattle, Aug. 2, 1904.

"F. S. Pusey, Esq., 101 Broadway, New York—Dear Sir: I duly received your telegram of the 15th ult., reading as follows: 'Have you advised of collection of trustee freight money? Just returned yesterday. Please wire present status of our joint claims. [Signed] Frank S. Pusey.' This was not replied to, for the sole reason that I was not in possession of your address, and had no means of knowing where a telegram would reach you, and it was only through your letter of July 27th, which reached me yesterday, that I learned of your address. I must confess to a feeling of surprise and annoyance at the tone of your above-mentioned letter, for the reason that it was specifically understood and put in writing that I was to be in no way personally responsible to you for the collection of your debt against the North Alaska Steamship Company. I agreed to act in the capacity of trustee solely as a matter of accommodation to you, and in that capacity to receive and remit to you the money which the officers of the North Alaska Steamship Company promised to remit to you from Cape Nome and to pay to you out of the revenues of their company thereafter. This was the only duty that I undertook in my capacity as trustee. The money has not been remitted to me from Cape Nome. Therefore I have had no opportunity to receive it or forward it to you. The North Alaska Steamship Company became defunct and has retired from business. In the settlement of my own affairs with the company, I was obliged to take back the steamship Garonne and assume an indebtedness which the North Alaska Steamship Company had loaded her with, amounting to almost $35,000. I took the steamer back and assumed the indebtedness, and subsequently sold her to another corporation. I have no opportunity for protecting your claim. When I was in New York, I was informed that both yourself and Gen. Dodge were out of the city. An effort to get into communication with you was made several times while I was there. I have no idea what disposition was made of the funds that were to be collected by Mr. Smith at Cape Nome, as I have received no advice from either him or from Capt. Ferguson regarding the same. The settlement I was obliged to make with the North Alaska Steamship Company was very unsatisfactory to me. I inclose herewith notes and other papers, which I have been holding in this connection for you. I regret very much that I have been unable to collect this money for you, but the circumstances have been as above. Kindly acknowledge receipt of enclosures.

"Very truly yours, [Signed] Frank Waterhouse."

And this is the way, according to the record, that Waterhouse "settled his own affairs with the company" and left his cestui que trust without protection. It appears that about the middle of June some of the parties interested in the North Alaska Steamship Company, hav-

ing become dissatisfied with the amount of Ferguson's expenditures at Seattle, sent one Mead to that city to look into the affairs. Mead found upon investigation that the expenditures and debts so incurred by Ferguson amounted to $30,000 or thereabouts, and, as a large part of them constituted liens upon the ship, Waterhouse, who still held the title thereto, was very naturally insistent upon their being paid. Accordingly he, with his attorney, went with Mead on his return to New York, and there in the early part of July had a number of meetings with the persons interested in the North Alaska Steamship Company and their attorneys, of none of which meetings was Dodge in any way notified. The only evidence we find in the record upon that subject is the following from the testimony of Waterhouse:

"Q. Was Gen. Dodge present at any of those meetings? A. No, sir. Q. What efforts, if any, were made to communicate with Gen. Dodge or securing his presence? A. Mr. Corwine—

"Mr. King: We want the witness' testimony limited to his own knowledge.

"A. (continuing). Mr. Corwine endeavored to get in communication with him, and reported at one of the meetings that Gen. Dodge was out of town and he had been unable to learn of his address."

At those meetings Waterhouse was insistent upon the payment of the indebtedness incurred by Ferguson and upon the balance due himself, amounting in all to about $67,000; but it does not appear that he made any allusion to the $10,000 due Dodge. While the North Alaska Steamship Company undoubtedly treated the Waterhouse Company badly in failing to perform its agreement, that fact afforded no just ground for the disposition the appellant then and there made of the trust property, which the record shows to have been this: The North Alaska Steamship Company failing to make the payments insisted upon by the Waterhouse Company, those two companies agreed to exchange general releases, which they thereupon did, and Waterhouse and F. W. King, who seems to have been the moneyed man of the North Alaska Steamship Company, at the same time entered into an agreement to organize a corporation styled the Merchants' & Miners' Steamship Company, with a capital stock of $67,000, to which the Waterhouse Company should convey the steamship Garonne, in consideration of which conveyance the Merchants' & Miners' Steamship Company should issue to the Waterhouse Company its stock to the amount of $37,000, which amount was practically the unpaid balance of the purchase price the North Alaska Steamship Company had originally agreed to pay for the Garonne, and the remaining $30,000 of stock of the Merchants' & Miners' Steamship Company was to be issued to King in consideration of that much cash that he agreed to advance with which to pay and discharge the indebtedness incurred by Ferguson at Seattle. That arrangement, the record shows, was carried into effect. The upshot of it all was that the Waterhouse Company got all but $37,000 of the $85,000 the North Alaska Steamship Company had agreed to pay it for the steamship Garonne, and for the remaining $37,000 of the purchase money he got $37,000 of the $67,000 of the stock of the Merchants' & Miners' Steamship Company, with that company holding the Garonne freed of all the liens that Ferguson had created against it, by the $30,000 advanced by King for the $30,000

of stock of the Merchants' & Miners' Steamship Company that he received.

We are of the opinion that the court below was right in holding that such disposition of the trust property by the appellant, in utter disregard of the interest of the cestui que trust and without notice to him, entitled the appellee Dodge in equity and good conscience to judgment against the appellant for the amount due upon the $10,000 note mentioned in the trust agreement. The evidence is uncontradicted that Gen. Dodge was financially able to have protected his interest, and would have done so, had he been advised of the transactions in question. It is idle to contend that Waterhouse could not have notified him of the proceedings because he did not know where to find him. The record shows that the appellee Dodge then, and for about 18 years had, maintained offices at No. 1 Broadway, New York, where he was almost daily during the negotiations in question, and with which he was in constant telephone communication; that his business and house address appeared in a standard directory of the city; that he was a man of prominence in New York, and, indeed, throughout the country; was personally known to many of the persons attending the meetings in question; and that Waterhouse was personally told of the appellee's New York address by Pusey while in Seattle in the early part of 1904, when the latter was asked by Waterhouse whether Gen. Dodge would not join him in purchasing two steamships in the East and putting them into the traffic between Seattle and Alaska.

We also agree with the court below that the real controversy in this case is between the appellant and the appellee Dodge, and that the North Alaska Steamship Company is not an indispensable party.

The judgment is affirmed.

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## WATSON et al. v. NATIONAL LIFE & TRUST CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. May 7, 1908.)

No. 2,691.

1. EQUITY—PLEADING—MULTIFARIOUSNESS OF BILL.
   The joining of several complainants in a bill in equity, the purpose of which is to secure an accounting of a trust fund in which all of the complainants claim an interest, with others, although their interests are several, does not render such bill multifarious.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 368.]

2. SAME—PARTIES—ONE OR MORE SUING IN BEHALF OF ALL.
   Where a large number of persons are separately, but similarly, interested in a trust fund, a bill in equity for an accounting with respect to such fund and for direction as to its administration may be maintained by a part of such body in behalf of all.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 257.]

3. SAME—GROUNDS OF JURISDICTION—ENFORCEMENT OF TRUST.
   An insurance corporation issued a large number of policies, by which in consideration of the payment of premiums during a fixed term it contracted to pay a certain sum to each policy holder at the end of such term, together with an equitable portion of a profit fund to be made up from gains and profits from lapses and other sources. While such policies

*Rehearing denied Sept. 14, 1908.

were outstanding the company transferred its assets to another company, disenabling itself from performing its contracts, and went out of business. Its successor, after issuing similar policies, transferred its assets to a third, and the third to a fourth, company. *Held*, that holders of policies in the transferring companies were entitled to join in a bill in equity for some form of relief with respect to the assets transferred as a trust fund, and where the bill contained allegations tending to negative any novation to join all of the companies as defendants.

4. TRUSTS—SUIT TO ENFORCE—CONDITIONS PRECEDENT.
Such bill being for the enforcement of a trust, and not a creditors' bill, it was not essential that the claims of complainants should first be reduced to judgment against the companies issuing the policies.

5. SAME—PARTIES.
Where one part of the relief prayed for related to funds deposited by some of the companies with a State Auditor, in such aspect of the bill the Auditor was an indispensable party; but his absence would not prevent the granting of relief to which complainants might be entitled with respect to the fund in the hands of defendants, nor render the bill subject to demurrer.

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

J. M. Parsons (William H. Atwood, on the brief), for appellants.
L. A. Stebbins (Dudley & Coffin, on the brief), for appellees.

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

ADAMS, Circuit Judge. This was a bill in equity, brought by complainants Watson and Olson, for themselves and others similarly situated, against the National Life & Trust Company, an Iowa corporation, hereinafter called "Trust Company," the Security Life & Savings Insurance Company, an Iowa corporation, hereinafter called "Security Company," the National Life Insurance Company of the United States of America, incorporated by an act of Congress, hereinafter called "Federal Company," and the National Life Insurance Company of the United States of America, an Illinois corporation, hereinafter called the "Illinois Company," for equitable relief to which complainants deemed themselves entitled by reason of breach of contracts of insurance originally made by them with the Trust Company and Security Company. After demurrer had been filed to the amended bill, George Rodecker, Frank R. Conklin, Amelia M. Conklin, Dennis E. Sullivan, and Russell T. Barr claiming to be situated similarly to complainants, Watson and Olson, filed their bill of intervention, to which also a demurrer was interposed. Both demurrers were sustained by the court below, and the bills were dismissed for want of equity. Complainants and interveners both appeal.

The bill sets up the following facts: That the Security Company in March, 1902, executed and delivered to complainant Olson a 10-year term policy whereby, in consideration of the immediate payment of $30 and of $15 semiannually thereafter during the term of 10 years, it agreed to pay him at the end of the term the sum of $300, and "in addition thereto the equitable share then apportioned from the savings fund and credited to his policy," in excess of the $300 guaranteed; that many other similar contracts were then and thereafter executed

and delivered by the Security Company to other persons; that after Olson had paid two premiums, and had otherwise performed all the conditions of the contract required of him, the Security Company on or about November 1, 1902, unlawfully sold and delivered all its assets and accumulations to the Trust Company, renounced its obligations, distributed its capital among its stockholders, and disempowered itself to further perform any of its contracts; that the Trust Company in October, 1902, executed and delivered to complainant Watson a policy whereby, in consideration of the payment of $30, quarter-annually during the running of the policy, it agreed to pay him at the end of the term of 10 years the sum of $1,200, and "in addition thereto the accumulated profits then apportioned"; that after Watson had paid several premiums, amounting in the aggregate to $397.80, and had otherwise fully performed all the conditions required of him by the contract, the Trust Company in May, 1903, after it had issued many other similar policies to others, unlawfully abandoned its business, sold and transferred all its assets and accumulations to the Federal Company, renounced its obligations, and disempowered itself to perform its contracts; that the Federal Company in March, 1904, unlawfully sold and transferred all its assets including the assets originally belonging to the Security Company and Trust Company, which had been transferred to it, to the Illinois Company; that the Illinois Company admits that it has in its possession "accumulated profits" arising out of the business initiated by the Security and Trust Companies, and in which the holders of policies originally taken out in either of those companies are entitled to participate, the sum of about $184,000.00; that the Trust Company by the law of Iowa and its contract obligations with its policy holders was required to create a reserve fund sufficient to make good the face of the policy as guaranteed and a profit fund for the benefit of persistent policy holders, including the benefits derivable from lapses from the reserve fund and interest earned on the reserve fund which are alleged to constitute items of the profit fund and to deposit the same with the Auditor of the state of Iowa; that no part of the profit fund, as distinguished from the reserve necessary to pay the face of the policies, has ever been deposited with the Auditor of the state; that on November 2, 1902, the Trust Company merged its legal reserve in the hands of the Auditor of the state with the legal reserve of the Security Company, thereby rendering them indistinguishable and constituting a violation of the provisions of the statutes of Iowa in that regard.

By way of anticipating an expected plea of novation, the complainants, in effect conceding that they have performed their part of the contracts of insurance with the successive transferees of their original companies, aver in their bill that the Federal Company improperly withheld from complainants and others similarly situated information of its want of power to do business, its inability to conform to the requirements of the law, and other facts material for them to know, and that by reason of the similarity of the corporate name of the Federal Company and the Illinois Company and certain fraudulent representations made by the Illinois Company the policy holders were deceived into paying premiums as done by them. Complainants claim that they and others similarly situated to them are entitled to an accounting of

the profit fund belonging to the policy holders of the Security Company and Trust Company admitted to be held by the Illinois Company and to a determination of the exact amount thereof and of the amount due to them and others who might join with them, respectively. They claim that the profit fund should also be deposited and maintained with the Auditor of the state of Iowa. The prayers of the bill, among them being one for general relief, are sufficient to cover any relief warranted by the facts as pleaded.

The bill of intervention filed by Rodecker and others charges that the five interveners were insured by the Trust Company in amounts ranging from $3,000 to $1,500 each, by policies similar in all respects to that issued to Watson as disclosed in the bill. They adopt the allegations of the bill relating to the transfer of assets, renunciation of contracts, and commingling of reserve funds as constituting breaches of their contracts. They claim that they are entitled to recover as damages on account of such breaches all moneys paid by them as premiums, with 6 per cent. interest thereon, and also their respective shares in the profit fund properly apportionable to their policies. They admit, in effect, that they have paid the premiums due upon their respective policies to the Illinois Company since the transfer of the assets by the Federal Company to it, but adopt the averments of the bill anticipating and avoiding the plea of novation. They pray for particular and general relief. As the intervening bill adopts averments of the original bill, and adds nothing except what was necessary to connect the interveners with the subject of litigation, we may properly follow the suggestion of defendants' counsel and treat the two as one bill for the purposes of this opinion.

One of the grounds of the demurrer filed below was that the bill is multifarious, and this is urged upon us as a justification of the decree below. By multifariousness in a bill, as defined by Story, Eq. Pl. § 271, is meant:

"The improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of distinct and independent nature against several defendants in the same bill."

This court, in Kelley v. Boettcher, 29 C. C. A. 14, 85 Fed. 55, 64, observed on the subject of multifariousness that:

"There is no fatal misjoinder of causes of action in equity in any bill which presents a common point of litigation, the decision of which will affect the whole subject-matter and will settle the rights of all the parties to the suit."

See, to the same effect, New Hampshire Sav. Bank v. Richey, 58 C. C. A. 294, 121 Fed. 956; Jones v. Missouri-Edison Electric Co., 75 C. C. A. 631, 144 Fed. 765, 780; Rogers v. Penobscot Mining Co., 83 C. C. A. 380, 154 Fed. 606.

In Brown v. Guarantee Trust Co., 128 U. S. 403, 412, 9 Sup. Ct. 127, 130, 32 L. Ed. 468, the Supreme Court, speaking on the same subject, said:

"It is not indispensable that all the parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an in-

terest in some material matters in the suit, and they are connected with the others."

Counsel for defendants make an interesting argument to show that the rights of the complainants, including the interveners, are separate and distinct. They contend that Olson's claim is against all the defendants, the Security Company, the Trust Company, the Federal Company, and the Illinois Company; that Watson's claim is against the Trust Company, the Federal Company, and the Illinois Company only; and that the interveners' claims are against the Illinois Company only. Whether this is a correct statement of the rights of the complainants or the liability of the respective defendants at law is unnecessary to be determined. That depends upon whether there was a novation by the parties, and possibly upon other facts not now before us; but in any event the argument has no application here. This is a bill in equity to secure an accounting of a trust fund in which all the complainants claim to be interested. They claim that they and many others similarly situated have a right at least in the profit fund originating in their contracts with the Security Company and the Trust Company and wrongfully transferred by them to the Illinois Company, which, it is averred, holds it and admits that it is for the benefit of themselves and others similarly situated. It is this fund which affords the point of litigation common to all the complainants. How much it is on a fair accounting, and whether it is to be deposited with the Auditor of the state, or how it should otherwise be made to respond to complainants' demands, afford the chief subject-matter of the bill, and can and should be most conveniently litigated at the suit of all persons entitled to it, either by name or by proper representation. No other course would be fair or equitable to the Illinois Company, the present holder of the fund, or afford an adequate remedy to the numerous parties entitled to participate in it. The bill in our opinion is not multifarious.

It is next contended that this is not a case where the unnamed similarly situated persons can appear or become proper parties by representation. There can be no doubt that the complainants who appear by name and set forth their grounds for relief are proper parties, and whether the unnamed persons similarly situated are made so or not does not necessarily arise on the demurrer, which is alone before us for consideration. There, however, can be no doubt that in a case of this kind, where the parties interested are numerous, running, according to the averments of the bill, into thousands, they may, and properly should, be represented by a portion of their number. The general rule is that all parties interested in a trust fund are ordinarily required to be brought before the court which is administering it. But Story, Eq. Pl. (10th Ed.) § 95, recognizes an exception to this rule founded, as he says, "on the mere fact of numerousness when it may amount to a great practical inconvenience or positive obstruction of justice." He there specifies the exceptions to the rule, among which he mentions cases "where the parties are very numerous, and although they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court." The Supreme Court of the United

States, in Smith v. Swormstedt, 16 How. 288, 302, et seq., 14 L. Ed. 942, recognizes the same rule and exceptions. Mr. Justice Nelson, speaking for the court, said:

"The rule is well settled that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of others. * * * Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

The same doctrine is approved in United States v. Old Settlers, 148 U. S. 427, 480, 13 Sup. Ct. 650, 37 L. Ed. 509; Williams v. Bankhead, 19 Wall. 563, 571, 22 L. Ed. 184.

It is further contended that there is no equity in the bill. Bearing in mind the charges made, which for the purposes of the demurrer must be taken to be true, we have a case in which the defendants Security Company and Trust Company, for a consideration fixed and performed in part by the complainants, had agreed in their policies to pay each of the complainants a certain sum of money at a fixed period, and in addition thereto to pay them a certain portion of a fund, called a "profit fund," to be made up of gains and income of one kind or another to be made during the term of their respective policies. This was an indeterminate amount, but one which the companies agreed should be determined and apportioned at the maturity of the policies. The Security Company and Trust Company, according to the averments of the bill, committed a flagrant breach of their contracts, transferred their assets to another, disempowered themselves to perform any part of their obligations, and went out of business. Complainants had paid money to the companies on the faith of their agreements, and must have some remedy, legal or equitable, for their breach. What it shall be, whether one or more of those prayed for in the bill, is not material at the present time, provided only the facts disclosed warrant some kind of equitable relief which comes within the prayer for general relief.

In the case of Lovell v. St. Louis Mutual Life Ins. Co. and St. Louis Life Insurance Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423, facts were involved in many respects like those here involved. A policy holder in the St. Louis Mutual Life Insurance Company, which afterwards sold and transferred its entire assets to the St. Louis Life Insurance Company, sued both companies in equity for relief. He prayed for the return of the money actually paid by him as premiums, with interest, and also for general relief. Mr. Justice Bradley delivered the opinion of the court, and in answer to the question propounded, whether plaintiff had any right of action against both companies, said:

'It seems to us that the mere statement of the case is enough to show the want of equity in the transaction on the part of the companies, and the right

of the complainants to some relief at the hands of the court. * * * As the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract was executory in its nature, the complainant had a right to consider it as determined by the act of the company and to demand what was justly due in that exigency."

See, to the same effect, Roehm v. Horst, 178 U. S. 1, 14, 20 Sup. Ct. 780, 44 L. Ed. 953.

An action at law by complainants against the Security and Trust Companies only would have afforded them no relief. Those companies had transferred all their assets to the reinsuring company, and such action would have been an idle and futile ceremony. Fortunately for them, their contracts gave them an interest in the fund to be gathered during the terms of their policies, and this fund, according to the averments of the bill, was transferred to the reinsuring companies, and is now recognized by them as a fund in which complainants have an interest.

In the absence of a novation—that is, the giving to the complainants and acceptance by them of the obligation of the Illinois Company in lieu of that of the Security and Trust Companies, which we will presently take up for consideration—complainants could not reach the fund in which they were concededly interested in an action at law. Unless there was a novation, there was no privity between them and the reinsuring companies, involving either an obligation on their part to pay premiums or on the part of the reinsuring company to pay losses. Lovell v. St. Louis Mutual Life Ins. Co., supra; Knapp v. Connecticut Mut. Life Ins. Co., 29 C. C. A. 171, 85 Fed. 329, 40 L. R. A. 861; Price v. St. Louis Mutual Life Ins. Co., 3 Mo. App. 262. Their rights to and interest in the profit fund will be lost to them unless equity affords a remedy.

Assuming the averments of the bill to be true, whatever other remedies complainants may have, there can be no doubt that they have an equitable right to an accounting concerning that fund. If they have not by novation accepted the obligation of the Illinois Company in lieu of that of the companies with which they originally contracted, they have according to the averments of the bill some interest in that fund, and the Illinois Company holds it in trust for them and others similarly situated, and ought to be held to an accounting concerning it, irrespective of any want of abuse of trust or other considerations. Daniell's Ch. Pl. & Pr. (5th Ed.) 1770.

If the facts are as just stated, there was no necessity for reducing complainants' claims to judgment before instituting this proceeding, as urged by defendants' learned counsel. They are not seeking relief on the theory of a creditors' bill. They deny that relationship to the Illinois Company, which holds the fund in question, and proceed exclusively on the theory that that company is in possession of a trust fund in which they are interested. In such case no preliminary reduction of claims to a judgment is required. Equitable jurisdiction is found under the general heading of "Trusts."

It is argued by defendants' counsel that the bill discloses a novation so far, at least, as the interveners are concerned; but after a careful

consideration of the allegations of the intervening bill, and those of the amended bill adopted by it, we are unable to agree with them in this particular. Language is indeed employed which by fair import leads us to believe that all the complainants and interveners formally, at least, accepted provisions made for and tendered to them in the several reinsuring contracts. But in view of the averments of the bill, anticipating and avoiding an expected plea of novation, we are unable on this demurrer to give force or effect to the import of the language in question. This is a proceeding in equity, where general relief is prayed for, and where the averments of the bill are admitted to be true. Accordingly, if an apparent novation occurred, but was brought about by fraud legally sufficient to avoid it, we cannot say that complainants, upon establishing such facts, would not be entitled to some relief. The proof upon final hearing must develop this phase of the case.

It is contended that the Auditor of the state of Iowa is an indispensable party to this suit, and that his absence renders any relief impossible. Undoubtedly he is a necessary and indispensable party to any relief complainants might be entitled to by reason of his alleged possession of the reserve funds of the Trust Company and Security Company, or by reason of the alleged improper intermingling of such funds by him. If the only relief to which complainants are entitled depends upon allegations of the kind just suggested, the Auditor should be here. His rights would be necessarily involved and materially affected. Shields v. Barrow, 17 How. 130, 139, 15 L. Ed. 158; Sioux City Terminal Co. v. Trust Co., 27 C. C. A. 73, 82 Fed. 124; McConnell v. Dennis, 82 C. C. A. 501, 153 Fed. 547; Rogers v. Penobscot Mining Co., supra.

But, if the averments of the bill entitle complainants to any relief in the absence of the Auditor, they are maintainable notwithstanding his absence. Cases supra. It is our opinion that complainants, if their rights were cut off by the reinsuring contracts, as charged, and if they were not affected by the consequences of any valid novation, as charged, are entitled to some relief, without consideration of the legal reserve or the Auditor's relation to or conduct in respect of it. They would seem to be entitled to their share in the "profit fund," which, according to the charges of complainants, has never been turned over to the Auditor, but is now held exclusively by the Illinois Company, and probably, under the doctrine of the Lovell Case, supra, to other damages occasioned by the breach of their contracts, such as restoration of premiums paid by them and interest thereon, and possibly to other relief, dependent upon the facts of the case as they may materialize on final hearing. We do not, however, wish to be understood as expressing any opinion upon the character of relief to which complainants may ultimately be entitled. For the purposes of this case it is sufficient that some relief is available to them without the intervention of the State Auditor. It results that the learned trial court erred in sustaining the demurrers and dismissing the bill.

The decree is reversed, and the cause remanded, with instructions to take such action not inconsistent with this opinion as the case may require.

## SMITH v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1908.)

No. 760.

TRUSTS—CONSTRUCTIVE TRUSTS—RIGHT OF ACTION TO ENFORCE.

Where a surety which agreed to advance money in connection with the purchase of certain mining property by the principal, for which it was bound as surety, and in a certain contingency was to receive a conveyance of such property, to operate the same, account for the proceeds, and, when reimbursed, to reconvey to its principal, by refusing to make agreed payments caused the property to be resold and obtained the title from the court, it took and held the same as a trustee only, and was subject to a suit by the principal for an accounting, and to enforce the trust in accordance with the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 153.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

A. L. Holladay and William E. Bibb (Bibb & Bibb, on the brief), for appellant.

J. Kemp Bartlett and Jas. R. Caton (H. B. Caton, on the brief), for appellee.

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

DAYTON, District Judge. The appellant, Smith, filed his bill against the appellee company in the circuit court of Louisa county, Va., on December 19, 1904. The cause was by defendant removed to the Circuit Court of the United States for the Eastern District of Virginia, and on April 3, 1905, a demurrer was entered to the bill, which on February, 5, 1907, was sustained, and the bill dismissed, with costs. From this decree the plaintiff, Smith, has taken this appeal.

The allegations of the bill and the exhibits filed therewith embrace 68 pages of the printed record; the bill alone requiring 23 such pages. These allegations are largely a detailed account of the involved transactions had by plaintiff with various parties and corporations touching the mining of pyrites under a tract of 394.22 acres of land in Louisa county, Va. As our duty requires us to review only the action of the court below holding these allegations insufficient in law to constitute a cause of action, we cannot see what good would be accomplished by either setting forth the bill, or attempting to fully epitomize its allegations or charges. We deem it sufficient for our purpose to say that at a judicial sale had of said property on January 23, 1901, the appellant, Smith, became the purchaser of the property at the price of $115,550, paying $5,000 in cash, and executing a bond with appellee, the United States Fidelty & Guaranty Company, as surety, for the balance; that on March 4, 1902, Smith and the fidelity company entered into a contract, setting forth the suretyship of the latter upon said bond, its payment and advancement of certain sums for Smith, and its purpose to advance additional sums to pay debts, including a contingent liability of $35,000 in litigation upon appeal to the Supreme Court of

Appeals of Virginia, in consideration whereof it was agreed, among other things:

"(2) In the event that the appeal now before the Supreme Court of Appeals of Virginia shall be decided adversely to said Smith, and the company shall be called upon to pay by order of the court, or in the event that the litigants shall compromise their differences and the company shall in consequence be called upon to pay, the amount of said affirmed decree or the amount as agreed on in said compromise, and shall in fact pay, the said Smith shall, if so requested by said company, contemporaneously with such payment by the company, sign an order of substitution, whereby said company shall be substituted as purchaser of said mining property as originally reported by the commissioner as having been sold to said Smith, so that said company shall, in consequence thereof, be subrogated to whatever rights have accrued to said Smith as purchaser of the property aforesaid."

"(5) That as soon as the company has been reimbursed all moneys that it may have advanced or paid out in any way whatever for or on behalf of said Smith, or for any obligation it may have assumed, directly or indirectly, on account of said Smith, whether growing out of said purchase at commissioners' sale or otherwise, including all interest, expenses, costs, charges, and counsel fees, if any, shall, upon the repayment of the same, reconvey back to said Smith the said property, by good and sufficient deed, so as to revest in him, the said Smith, all the right, title, interest, and estate, originally held by him as purchaser of said property at commissioner's sale, and it shall further deliver over to him any shares of stock in the Pyrites Mining & Chemical Company of Virginia that may have come to it by reason of any of the advances heretofore made by it, or that may be hereafter made by it, including all stock now held by it, or that may hereafter come into its hands by reason of any such advance or advances; the spirit and intent of this agreement being, so far as it relates to the working of the property by the company, that it shall work the same and develop it in its own way, unhampered by said Smith in any way whatever, and that as soon as it has reimbursed itself for all moneys it has paid out or expended on account of its obligation on the purchase-money bond of said Smith to reconvey the property back to him to the same effect as if it had held said property in trust for his express benefit.

"(6) That Jacob S. Rosenthal shall act as attorney for the company in carrying out on its behalf all of the requirements of this contract, on the express condition, however, that the charges for his services, whether legal or otherwise, shall be borne and paid by the said Smith, and not by the company."

The plaintiff's bill, after having set forth this contract, charges in minute detail that the defendant company, in accordance therewith, did take charge of said property, relieved him from all control thereof, refused him access to the premises or to inspection of its books of account, employed an incompetent manager, who negligently and ignorantly destroyed the internal operations of the mines by taking out the supporting pillars, expended large sums of money wantonly and unnecessarily, all of which it charged up against him, but of which it refused him an account, and then deliberately set about to free itself from the trust obligation contained in said contract by failing and refusing to pay the $35,000 decree against plaintiff when it had to be paid, as it had contracted to do; but, on the contrary, it allowed rule for resale of the property to be sued out by the commissioner, and took advantage of his helpless condition in the premises to coerce him into signing a new contract rescinding all others, releasing all claims against the company, agreeing to convey by deed to it his interests therein, which he charges he did, and suffered decree to be entered substituting the company as purchaser instead of himself, and directing

the commissioner to convey to it, instead of to him, all of which it is charged was done in order to secure said company to fulfill its original agreement contained in said contract of March 4, 1902, to pay his purchase money in case the litigation touching it should end, as it did, by requiring its payment.

The new contract between Smith and the company, the deed of Smith and wife to it, the decree of the circuit court of Prince William county, and the deed of Caton, its commissioner, substituting the company to the rights of Smith as purchaser, all executed and entered within 10 days of each other, are exhibited with the bill. This new contract, dated May 15, 1903, while it purports to rescind former agreements, to bind Smith to convey all his interest in the property to the company, and to release the company from all demands of his against it, does reserve to him an option to purchase the property on or before July 1, 1904, following, for a sum sufficient to repay expenditures made by the company and interest, and secured to him right to examine the accounts, and that any dispute arising in regard thereto should be settled by arbitration. The company further agreed during the time not to shut down operations and to allow Smith the privilege of exhibiting the property to bona fide prospective purchasers in company with the resident superintendent, not to exceed once each month and upon two days' notice to the company at its office in Baltimore. The bill distinctly charges that Smith did secure a bona fide purchaser for the property in his interest within this period, and over and again sought to exercise the privilege of having such purchaser examine the property, but was in effect buffeted from pillar to post by the company at Baltimore informing him that the property was in condition for inspection and then being refused such inspection by the resident manager, he declaring it not to be in condition to be inspected, and that in this way he lost out in the negotiation.

For the purposes of passing upon the demurrer, all the allegations of this bill must be taken to be absolutely true. From them it would seem clear that when the defendant company executed the contract of March 4, 1902, it lost its position as surety simply. By this contract clearly was established a trust in which it became the trustee. As creditor and surety it had clear right to demand the sale of the property or the intervention of equity by means of a receivership to manage the same so as to pay its debts and liquidate its liability. It did not do this; but, on the contrary, took possession of the property, undertook control of its management and further development, agreeing to furnish further moneys for the purpose and with the express understanding that such control and possession should be confirmed in it by Smith signing a subrogation order whereby it should be substituted to his rights to the property itself as purchaser, but always with the understanding that reconveyance should be made by it when it had worked out its debts, advancements, liabilities, and expenses. A trust could not be more completely established. This trust relation once established, the relation of the parties to each other became entirely changed.

It is not necessary for us to enter into any extended discussion of legal principles governing such relation. They are too well settled to be open to question. In assuming the control and management of this

property under this contract with its debtor, this company assumed a legal obligation to carefully and prudently conduct the business with the sole view of making it pay out the debts and with no sinister purpose to destroy it, depreciate its value, or by means of the trust relation acquire such control over either the property or the debtor himself as would enable it to purchase or secure the property at less than its full value. As such trustee the law required it to render also a full, true, and accurate account. No trustee is allowed to purchase the trust property at his own sale, or at any judicial sale thereof, against the interest and to the oppression of his cestui que trust. "Principles are applied almost as stern as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was in all things fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes. He must exercise no undue influence. He must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. 1 Bigelow on Fraud, 347." Villa v. Rodriguez, 12 Wall. 323, 20 L. Ed. 406; Russell v. Southard, 12 How. 139, 13 L. Ed. 927; Morris v. Nixon, 1 How. 118, 11 L. Ed. 69.

Deeds of conveyances absolute on their face under such circumstances have by courts of equity been held mortgages, releases of equities of redemption have been set aside, and purchases under judicial sale held to be only in furtherance, and not destruction, of the original trust. "The rule that, when the relation of trustee and cestui que trust is once established, no subsequent dealing with the trust property by the trustee can relieve it of the trust as between him and his cestui que trust, is too well established to require argument. Van Gilder v. Hoffman, 22 W. Va. 1; Lawrence v. Du Bois, 16 W. Va. 443. Therefore the subsequent sale of the land for the purchase money due from Hull and the repurchase by Ward at such sale did not divest or affect the equitable title of the plaintiff to one-half of the land." Murry v. Sell, 23 W. Va. 475. See, also, Currence v. Ward, 43 W. Va. 367, 27 S. E. 329, and Liskey v. Snyder, 56 W. Va. 610, 49 S. E. 515.

Under these well-settled rules, the decree of Prince William County circuit court, confirming title to the property in the defendant company, could not affect the trust or its liability as trustee, and in this case for the even stronger reason that the very terms of the trust agreement itself bound Smith to consent and agree to have this done.

The other grounds of demurrer have been considered, but are deemed without merit. Viewing this transaction as a trust, the sole parties in interest are Smith and the company. By reason of his absolute conveyance to it of his title, and the payment by it of the purchase money, no other parties to the controversy are either necessary or proper. The controversy is between them alone.

The decree of the court below must be reversed, and the cause remanded, with direction to overrule the demurrer and require the defendant to answer.

Reversed.

## CHANLER v. SHERMAN.

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

No. 201.

1. COURTS—FEDERAL COURTS—ARREST—SEIZURE UNDER POLICE POWER WITHOUT WARRANT—POWER OF COURT TO PROTECT LITIGANT.
   A federal court has power to protect a litigant therein from seizure of his person by the authorities of a state while in attendance upon the trial of his case, whether upon process or in the exercise of the police power of the state without process, where necessary for the protection of its own jurisdiction, and where the threatened act must rest for its justification upon a proceeding the validity of which is the very matter it is called upon to determine.
2. SAME—PROTECTION OF PARTY FROM ACTION OF STATE AUTHORITIES.
   Petitioner was adjudged insane by a justice of the Supreme Court of New York, and committed to an asylum, from which he subsequently escaped and went to Virginia. On his application he was adjudged sane by a court of that state, and thereafter instituted an action for conversion in a federal court in New York against his committee appointed by a court of that state on an adjudication of insanity against him, and who had taken possession of his property in that state. In his complaint he alleged that he was a citizen of Virginia, set up the judgment of its court declaring him sane, and alleged that the judgments and orders of the New York courts were void for want of jurisdiction. *Held* that, on the allegations of his complaint, he had the constitutional right to maintain such action in the federal court, which right that court was bound to protect; that it appearing that his presence in that court was necessary for the trial of the issues joined therein, but that, if found in New York, he was subject under its laws to be apprehended and retaken to the asylum without further court proceedings, the federal court had power to grant him a writ of protection which should entitle him to come to that state, to remain during the trial, and to depart therefrom in the custody and under the protection of the United States marshal and without interference with his personal liberty by the officers or agents of the state.

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

W. D. Reed, for plaintiff in error.

Evarts, Choate & Sherman (J. H. Choate, Jr., and George L. Kobbe, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This appeal is from the denial of a petition for an auxiliary order, in the nature of a writ of protection, in an action at law for conversion.

The situation as disclosed by the record in the action and by the affidavits upon the petition may be thus briefly stated:

(1) In 1897 the petitioner—being the plaintiff in said action—was adjudged insane by a justice of the Supreme Court of New York, and ordered committed to the Bloomingdale Asylum, an institution for the custody of the insane, to which he was duly taken and from which he escaped in 1900 and went to Virginia.

(2) In 1899 an order was made by the Supreme Court of New York finding that the petitioner was of unsound mind, and appointing a committee of his person and property, which office is now held by the defendant in said action.

(3) In 1901 upon an application made to the county court of Albemarle county, Va., where the petitioner then resided, alleging that he had previously been adjudged insane in New York and praying for an examination as to his then condition, said court found that he was sane and capable of managing his affairs.

(4) In 1904 the petitioner brought this action in the Circuit Court as a citizen of Virginia, averring that he was sane and had so been declared by the Virginia court and that said orders of the Supreme Court of New York and of the justice thereof were void for want of jurisdiction, and demanding damages from the defendant upon the theory that he had converted the property of the petitioner in his hands as committee.

(5) The defendant in his answer, not only relied upon said New York orders, but went further, and alleged that the plaintiff—the petitioner—was and had been in fact insane, and that the judgment of the Virginia Court was collusive and void.

(6) The time for the trial of said action approaching, the plaintiff filed the present petition, stating that his presence as a witness at the trial was imperatively required, but that, in case he returned to New York, he was threatened with reincarceration in the asylum, notwithstanding the Virginia decree. He, therefore, prayed for an order protecting him while coming into the state of New York, attending the trial and returning.

It is apparent from the record that, upon the issues as they stand, the attendance of the petitioner at the trial is necessary. His case cannot be presented without him. And it is also most probable that, if the petitioner return to New York without protection, he will be apprehended and retaken to the asylum as an escaped patient. Without relief he is in this predicament. He must abandon his action for the recovery of a quarter of a million dollars in order to retain his freedom, or must abandon his liberty in order to try his case.

The Constitution of the United States vests in its judicial department jurisdiction over controversies between citizens of different states. The petitioner, as a citizen of the state of Virginia, in bringing his suit in the Circuit Court of the United States, was availing himself of a right founded upon this constitutional provision. And he came into that court with a decree of the court of the state of which he was a citizen declaring his sanity. We cannot disregard that decree. In considering it we do not ignore the orders of the courts of New York. Insanity is not necessarily permanent. For the purposes of this petition —laying aside jurisdictional questions—we may properly consider that the petitioner was insane when so declared in New York, but that he had recovered his sanity when he was declared sane in Virginia.

The question, then, is whether a Circuit Court of the United States has power to protect a person in the situation of the petitioner while attending the trial of his cause therein. It is objected at the outset that the Circuit Court has no power to grant a protective order because it would have the effect of restraining proceedings in a state court. Section 720 of the Revised Statutes prohibits the granting of writs of injunction to stay proceedings in any court of a state except when authorized in bankruptcy proceedings. But, assuming that the order

at present prayed for would have injunctive effect, our attention has been directed to no proceedings pending in a state court which it would stay. It appears that 10 years ago a judge of a state court signed an order committing the petitioner to an asylum, and that the order was complied with. It does not appear that those proceedings are still pending, or that resort to them would be necessary to recommit the petitioner to the asylum. The statutes of New York apparently provide that patients escaping from insane hospitals may be retaken by peace officers and by designated hospital attendants. No proceedings in court seem necessary or to be provided for. The only other proceedings in New York—those in which a committee was appointed—if still regarded as pending would not be stayed by a protective order because it was not the object of those proceedings to commit the petitioner to an asylum. He was already in one when they were instituted.

The next objection is that the petitioner ought to apply to the courts of the state of New York for the rescission of the orders committing him to the asylum and appointing a committee of his person and property. We have not the slightest doubt that full justice would be done the petitioner should he submit himself to the jurisdiction of the state courts. But to assume that he was under any obligation to resort to them is to beg the whole question at issue. To say that the orders in question were valid and must stand until set aside by the tribunals which granted them is to assert that the petitioner has no cause of action in the Circuit Court. But he states a cause of action. He asserts that the orders were wholly void for want of jurisdiction. And, if they were void, they were of no effect, and the petitioner had a right to assert their invalidity in any court.

We now come to the broad question of the power of the Circuit Court to grant a protective writ. Such writs have been issued since early times to protect witnesses and parties coming from one state into another to attend a trial from arrest and detention upon civil process. It is true that, if the petitioner were retaken as an escaped insane patient, it would not be upon civil process, nor would it be upon criminal process. But whatever the form of the process—if any at all were necessary—the power exercised to retake him would be that of the police. With the exercise of the police power of a state a court of the United States should not lightly interfere. But we have no doubt of its right to interfere when necessary for the efficient exercise of its own jurisdiction and where the threatened act under the police power must rest for its justification upon the validity of the very matter which the court is called upon to determine. The petitioner was given the right under the laws of the United States to try his case in the courts of the United States. He is not permitted to exercise that full right and the court in effect is not permitted to exercise its full jurisdiction, if, while attending the trial and perhaps before he can be heard, he may be seized and taken to an asylum—and so seized for the reason that he had been previously committed under an order which the petitioner in the very case was asserting to be wholly void. Under such extraordinary conditions, we think the Circuit Court had power to grant the protective writ.

Having determined the question of power, we come to the propriety of exercising it. Notwithstanding the fact that the petitioner is at liberty in other states, it is suggested that it would be unsafe for him to be brought to New York. If any danger were to be apprehended, it would furnish a good reason for refusing the writ. There is, however, nothing in the record to indicate the probability of any such danger, and the petitioner's prayer for relief is based upon the express condition that he remain in the custody of United States marshals during his entire sojourn in the state.

For these reasons, we think a writ of protection should issue if the pleadings in the case remain as they are. The defendant joins issue upon the fact of sanity after the New York orders were made, and also sets up that the Virginia decree was obtained by collusion and is void. With respect to these questions the presence of the petitioner upon the trial would be imperatively required. If, however, the defendant as a committee appointed by the Supreme Court of New York, stood squarely upon the decrees of that court as justifying his acts, and asserted that such decrees, while unreversed, constituted a complete defense regardless of the fact whether the petitioner had since recovered his sanity, the question upon the trial in the Circuit Court would simply relate to the validity of those decrees. That question would be principally a question of law. Practically the only facts involved would be as to the notice given the petitioner—if notice be necessary—and perhaps as to his residence. With respect to these questions the proof would necessarily be within narrow limits and the petitioner's testimony if required might be taken by deposition. Upon such issues we think the personal presence of the petitioner not so necessary that he should be granted the extraordinary relief prayed for here.

The order of the Circuit Court is reversed, with costs to the petitioner, and the matter is remanded to that court with instructions, in case the issues remain as at present, to issue a writ of protection to the petitioner prohibiting any person from apprehending or taking him for the purpose of returning him or committing him to an insane asylum while attending the trial of his said action and for such reasonable time before and after the trial as said court may determine is necessary for him to come into the state and return, provided that he shall submit himself during such time to the custody of one or more United States marshals, shall obey their directions, and shall pay the expense of their employment. But that in case all the issues in said action, except with respect to the validity and effect of the said orders of the Supreme Court of New York and of the justice thereof, be eliminated within 60 days, then that said writ of protection do not issue.

## MASON v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1908.)

No. 749.

INTERNAL REVENUE—OFFENSES BY OFFICERS—NEGLIGENCE IN PERFORMANCE OF DUTIES—CRIMINAL INTENT.

On the trial of a government storekeeper and gauger at a distillery, charged under Rev. St. § 3169 (U. S. Comp. St. 1901, p. 2059), with having negligently and designedly permitted a violation of the law by another person by leaving the door of a cistern room unlocked, in consequence of which distilled spirits were unlawfully removed therefrom, proof that the room was negligently left open or unlocked is sufficient to warrant a conviction, and it is not essential that it should have been with intent that the spirits should be removed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, § 100.]

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

George A. Hanson, for plaintiff in error.

L. L. Lewis, U. S. Atty. (Robert H. Talley, Asst. U. S. Atty., on the brief), for the United States.

Before PRITCHARD, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PRITCHARD, Circuit Judge. This is a writ of error to a judgment of the Circuit Court for the Eastern District of Virginia whereby the plaintiff in error was sentenced to six months' imprisonment and to pay a fine of $1,000 upon an indictment charging him with violations of section 3169 of the Revised Statutes (U. S. Comp. St. 1901, p. 2059). The plaintiff in error was, at the time stated in the indictment, a storekeeper and gauger employed at and in charge of a certain distillery near Belfield, known as "Distillery No. 11."

The indictment contains five counts. There was a verdict of guilty, which the court refused to disturb, and upon which the judgment complained of was pronounced. The evidence shows that the plaintiff in error unlocked the door of a cistern room, and in consequence thereof distilled spirits were unlawfully removed from the cistern room, and the first and fifth counts charge that he thereby negligently and designedly permitted a violation of law, etc.

It is contended by counsel for plaintiff in error that the court erred in refusing to grant the following instruction:

"Before the jury can convict the defendant upon the first and fifth counts of the indictment, they must find from the evidence, not only that 20 gallons of distilled spirits, or some part thereof, upon which the tax had not been paid, were actually removed from the grain distillery No. 11 to some other place than the distillery warehouse provided by law, as charged in the indictment, but they must also find that the defendant had knowledge that said distilled spirits were to be so removed from said grain distillery to such other said place, and intended that the distilled spirits so removed should be so removed, or that the defendant, having knowledge that said distilled spirits were to be or were being so removed, failed to prevent such removal by prohibiting the same."

This instruction was predicated upon the theory that the element of intent was an essential ingredient of the offense charged in that indictment. The section under which the plaintiff in error was indicted, among other things, enacts that:

"Every officer or agent appointed and acting under authority of any revenue law of the United States * * * who negligently or designedly permits any violation of the law by any other person * * * shall be dismissed from office and shall be held guilty of a misdemeanor," etc.

This provision is contained in the seventh clause of the section. It is provided in the third clause that any officer who "willfully neglects to perform any of the duties enjoined upon him by law," etc. In the fourth clause it is provided that any such officer "who conspires or colludes with any other person to defraud the United States," etc., and the fifth clause provides that any such officer "who makes opportunity for any person to defraud the United States," etc., and in the sixth clause it is provided that any such officer "who does or admits to do any act with intent to enable any other person to defraud the United States," etc. The provisions of the third, fourth, fifth, and sixth clauses are such that, in order to constitute the offenses therein named, an unlawful intent is made an essential ingredient of the offenses charged in the indictment. However, in the seventh clause, the words, "every officer * * * who negligently or designedly permits any violation of the law by any other person * * * shall be held to be guilty of a misdemeanor," are employed for the purpose of describing the character of the offense for which the defendant was indicted. This clause was evidently enacted for the purpose of stimulating the official to the exercise of a high degree of diligence in the performance of his duty.

There being so many means by which the government can be defrauded of its revenue by evading the payment of taxes on distilled spirits, it is but natural that Congress should legislate so as to carefully guard all the avenues through which the schemes of the unscrupulous dealer can be successfully put into operation. Hence this provision, which makes the negligence of the official the essential ingredient of the offense charged. Therefore, on the trial of one charged with negligently and designedly permitting a violation of the law by another, if it should appear that the accused carelessly and negligently left the cistern room unlocked, so as to afford another an opportunity during his absence to use the keys for the purpose of unlocking the cistern room or the warehouse, as the case might be, for the purpose of unlawfully removing or abstracting spirits therefrom upon which the taxes had not been paid, then the offense would be complete, and it would not be necessary to show that he negligently left the cistern room unlocked with intent that an opportunity should thus be afforded another to commit the offense charged in the indictment. A storekeeper and gauger, by virtue of his office, is enjoined with the duty of keeping all locks securely fastened and retaining in his possession at all times the keys to the same. Where a duty is thus enjoined upon an official, the nonperformance of the same being proven or admitted, the element of intent is not an essential ingredient of the offense charged.

Counsel for the plaintiff in error relies upon Gregory v. Marks, 10 Fed. Cases, 1194, Abrahams v. State, 4 Iowa, 541, Ball v. Campbell, 6 Idaho, 754, 59 Pac. 559, and State v. Pierce (Me.) 15 Atl. 68. We have carefully considered these cases, and are of opinion that they do not apply to the questions presented in this case.

For the reasons hereinbefore stated, the judgment of the Circuit Court is affirmed.

Affirmed.

## NORTH COAST LIGHTERAGE CO. v. GREENWOOD.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,482.

SHIPPING—CARRIAGE OF PASSENGERS—LIABILITY FOR INJURY—DEFECTIVE VESSEL.

Defendant corporation advertised to carry passengers from Nome, Alaska, to points down the coast in the early spring, and undertook to transport them in a gasoline launch. The boat was not heated, was insufficiently supplied with provisions, and the feed pipes were in such leaky condition that the engine froze up and the boat drifted out to sea and was caught in the ice, resulting in serious suffering and injury to the passengers during four or five days before they were landed. Held, that defendant was liable to them for such injuries as a common carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 544.

Carriers by water, see note to Wade v. Lutcher & Moore Cypress Lumber Co., 20 C. C. A. 535.]

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

John P. Hartman, A. J. Bruner, Elwood Bruner, and J. Allison Bruner, for plaintiff in error.

Campbell, Metson, Drew, Oatman & MacKenzie, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action for damages for personal injuries alleged to have been received by the defendant in error, who was the plaintiff in the court below, while a passenger on board a gasoline launch alleged to have been at the time owned and operated by the plaintiff in error between Nome and Bluff, in the district of Alaska. The trial resulted in a verdict and judgment for the plaintiff. For the plaintiff in error, who was the defendant below, exception was taken to the refusal of the trial court to direct a verdict for the defendant, and to its refusal to give certain requested instructions to the jury.

In support of the first exception mentioned, it is contended that the plaintiff failed to show that the defendant was operating the boat at the time in question, failed to show what it was a common carrier, and failed to show that its alleged negligence was the proximate cause of the plaintiff's injury. An examination of the record clearly shows

that counsel for the plaintiff in error is wrong in each particular. In the first place, the testimony of George T. Williams, who was president and manager of the defendant company, plainly shows that the company was a common carrier engaged in the transportation business in the waters of Alaska, and was the owner of the launch in question, which was called the North Coast. It appears from the record that the launch had been dismantled for the winter season, and shortly before the spring season opened, and while the trails were soft and there was little or no travel up or down the coast, an arrangement was made by and between Williams, E. T. McIntyre, and one Capt. Storey, by which McIntyre, who was an engineer, was to fix the engine in the boat, Storey, who appears to have been familiar with the handling of small boats, was to repair the hull, and the vessel then put in operation between Nome, Solomon, and Bluff upon these terms: McIntyre and Storey each to have one-third of the net profits of the respective trips as compensation for their services, and the remaining third to go to the plaintiff in error. In this connection McIntyre testified:

"Williams thought we were getting too much, and wanted to cut us down, so that the North Coast Company would get half, as they were the owners of the boat. I told him I wouldn't do it. We were doing all the work, and taking chances on our lives and everything, and the least compensation we should have should be a third apiece."

McIntyre further testified:

"I was to get one-third of the net profits of the trip, or as many trips as we were to make. There was no stipulated time. We were to take her as quick as I got her repaired, and go on to Solomon and Bluff. Time of using her was until the opening of navigation. George Williams, one of the agents of the North Coast, inspected her. He came out and told me he wanted to make a trial trip with her. We ran around the bay probably three hours. He ran her himself. He is an engineer. In the conversation with reference to the tug North Coast upon this trial trip, I told Williams I saw the feed pipes were leaking. I told him they were pretty bad. The soft solder— The feed pipes were leaking that feed the oil to the engine. I told him that the feed pipes were leaking, and I fixed them up with soft solder. I told him they they were pretty bad, and he said, 'Yes, they are pretty bad,' and he said when we came back from the trip that we would put hard solder on them and that would likely stand. The joints were leaking, and I put soap and stuff on them out there, and stopped them there a while. The condition of the boat otherwise appeared to be pretty good, but she was leaking pretty badly, making water pretty fast. Williams said it was to be expected. She had just been launched a short time before that. Shortly after that we started on the trip."

The evidence shows that Williams advertised for passengers and freight, and had a banner printed and carried through the streets bearing the words:

"The fast launch North Coast sails to-day for Solomon and Bluff. Tickets at the North Coast Lighterage Company."

Two passengers bought tickets from that company—one the plaintiff in the present case, and the other, Sullivan, plaintiff in the companion case next to be disposed of. The supply of provisions, according to the testimony, put upon the boat for the two passengers and McIntyre and Storey, consisted of "a box of hard tack and two two-pound cans of meat and five gallons of water." It is true that it

appears that there were put on board some other provisions, but they were freight consigned to other parties. Just before the boat started it appears that a north wind sprung up. The condition of the boat in which these passengers were sent to sea may be seen from the testimony already quoted and from this further testimony of the witness McIntyre:

"After we got started, she stopped awhile. The feed pipes froze up; the water pipes, at least. The feed pipes leaked badly that we had the soft solder on, and we stopped. The water pipes then froze. We thawed them out, and got started again, and stopped again. I don't know exactly how many times we did start. The ultimate result was that they froze up so badly that we couldn't do anything with them, and the water pump broke, and we couldn't do anything more. It might have been due to the feed pipes. That is what stopped her in the first place. She didn't get proper feed to the cylinder. Then it was impossible to do anything more with her after the water service was gone. The water circulates in a jacket, and keeps the pistons and cylinder cool, and when you don't get the water service your cylinders and pistons expand, and you don't get an explosion, and she wouldn't go. * * * The combinations of the boat were a sliding cover and a piece of tarpaulin hanging down in front. I am not sure whether the sliding cover was stationary or sliding; just a cover over the top of the engine. I think it was made of canvas, with a flap in front of it. We didn't have any arrangement for heating the boat. There was two gasoline torches there to heat the bulbs with; to heat the engine with coal oil or gasoline. There was some freight—some cream, and some cases of potatoes. They froze up. That was all we found in the line of food (in addition to the hard tack and two two-pound cans of meat already referred to). The potatoes and cream and fruit, that was—fruit—consigned to some one down the coast. When the boat became unmanageable, we went to sea and was caught in the ice."

The result was that it was four or five days before the passengers were landed, resulting in serious suffering and injury to them both. That the plaintiff in error was properly held liable in the court below for that injury we do not think admits of question. The instructions of the court presented the case to the jury fairly, and covered every legal phase of it, which was all it was required to do.

The judgment is affirmed.

## NORTH COAST LIGHTERAGE CO. v. SULLIVAN.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,481.

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

John P. Hartman, A. J. Bruner, Elwood Bruner, and J. Allison Bruner, for plaintiff in error.

Campbell, Metson, Drew, Oatman & MacKenzie, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges

PER CURIAM. This case is of the same nature as that of North Coast Lighterage Co. v. Greenwood (just decided) 162 Fed. 25, and the facts and points in each are substantially the same.

For the reasons given in the opinion in the Greenwood Case, the judgment in the present case is affirmed.

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## BULLOCK ELECTRIC MFG. CO. v. GENERAL ELECTRIC CO.

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

No. 13.

PATENTS—INVENTION—ARMATURES.

The Morrow patent, No. 504,401, for an armature for dynamo electric machines, claim 2, which covers an armature core comprising layers of segmental laminæ dovetailed to an internal supporting shell, in which the segments in consecutive layers break joints, in view of the prior art, which discloses segmental laminæ which break joints, and also in the Parshall patent, No. 493,337, the same dovetail connection, except that the laminæ are annular and not segmental, is merely an aggregation of old elements, which do not coact nor perform any new function, and is void for lack of patentable invention.

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

For opinion of the court below, see 155 Fed. 740.

Thomas Francis Sheridan and C. V. Edwards, for appellant.

W. K. Richardson, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from so much of an interlocutory decree entered by the Circuit Court of the United States for the District of New Jersey as adjudges claim 2 of the letters patent No. 504,401, issued September 5, 1893, to the complainant, as assignee of John T. Morrow, to be valid and infringed by apparatus made by the defendant.

The hearing in the Circuit Court involved the consideration of two patents, one of which was the above Morrow patent, and the other was patent No. 559,910, of May 12, 1896, to Reist. The Circuit Court or-

dered that the bill be dismissed, as to the patent to Reist, and from that portion of the decree no appeal has been taken. The defendant has appealed from so much of the decree as relates to the Morrow patent, and this appeal, therefore, involves the consideration of that patent.

The defenses set up in the court below by the defendant, were the usual ones, of invalidity of the patent in suit, by reason of anticipation and want of patentable invention, and noninfringement. The assigments of error to the findings of the court in respect to the Morrow patent, involve the issues raised by these defenses.

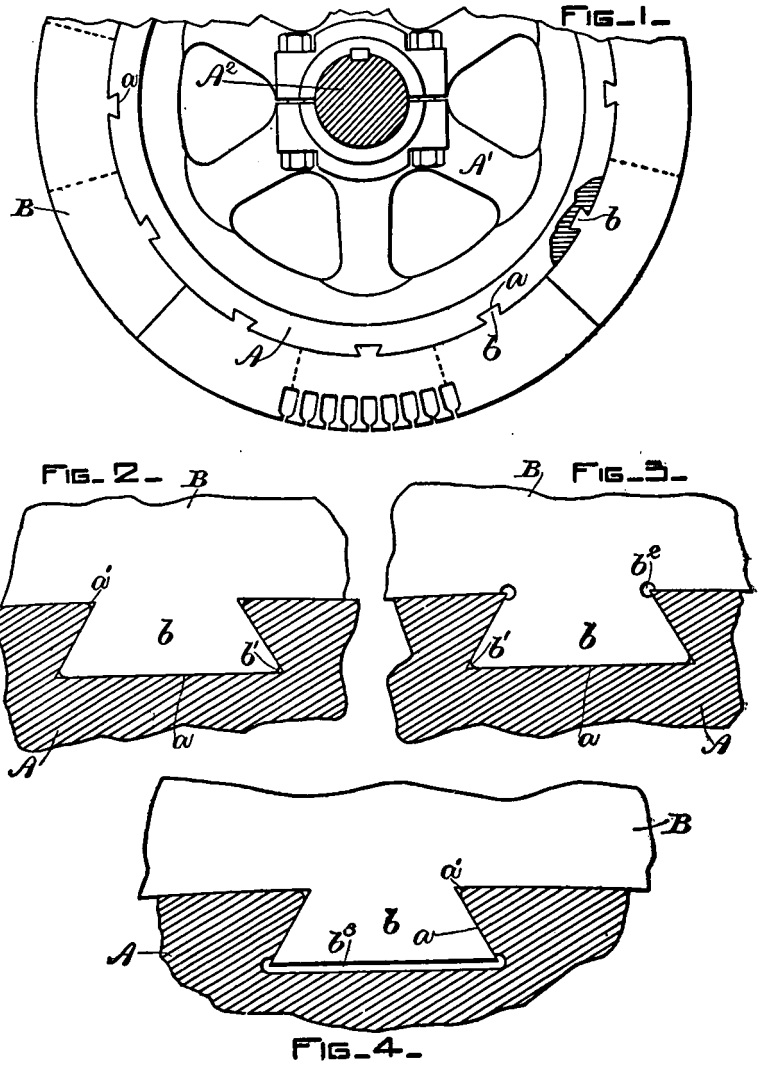
As stated in appellant's brief, the patent in suit, although entitled "armature for dynamo electric machines," in reality concerns only a mechanical detail, and does not relate to the electrical or magnetic part of the machine, nor does it affect in any way the electrical or magnetic operation of the machine.

Armatures of dynamo machines are built up of thin annular plates of iron, of the same dimensions, supported side by side by a solid or spider-like construction, occupying the inner space of the rings and revolving on an axis passing through the centers of said rings. These ring-shaped laminæ in small machines are continuous. In building larger machines, it is more convenient to make the rings in segments, and the joints between the segments of the adjacent rings are staggered so as to overlap, thus securing greater mechanical strength and solidarity to the aggregate structure. Perhaps a better mental picture of the structure of such armatures may be conveyed at the outset to one unfamiliar with the art, by likening them to the ordinary thin iron washers strung upon a supporting rod or cylinder to any required depth —such washers as are in common use to tighten wheels upon axles, etc.

In the specifications of his patent, Morrow thus describes his claimed improvement in the structure of armatures, in connection with the drawings which we here insert:

"My invention relates to the construction of armatures its object being to provide efficient and economical means for building up a laminated core and securing it to its support or carrier. In carrying out my invention I provide an internal cylindrical supporting shell, preferably carried by the usual armature spiders keyed to a shaft, and on the outer surface of said supporting shell longitudinal grooves are cut, into which corresponding projections on the inner surface of an annular armature core are adapted to fit, preferably making a dovetail or undercut joint. The core itself is composed of segmental laminæ of such proportions that a predetermined number of them make one layer of the core; and in adjacent layers the segments are so arranged as to break joints. The said segments are provided at their inner edges with projections adapted to fit the grooves on the supporting shell, and registering with each other when the core is assembled. In the accompanying drawings, Fig. 1 is an end elevation of an armature constructed in accordance with my invention, and Figs. 2, 3 and 4 are modifications in the shape of the grooves and projections whereby the parts are united. Referring to Fig. 1, the cylindrical supporting shell A is carried on spiders $A^1$ keyed to a shaft $A^2$ in the ordinary manner. At regular intervals along the outer surface of said supporting shell A are longitudinal undercut grooves *a*, into which fit the dovetail projections *b*, on the laminæ B. In making up an armature, the spiders and supporting shell are first assembled, and the laminæ of sheet iron punched out in the shape indicated in Fig. 1 are slipped over the surface of the said shell with the projections *a* in the grooves *b*. After one layer is in place, another, breaking joints with the first, is put on, and so on, until the armature is com-

pleted. The dotted lines in Fig. 1 indicate the edges of the laminæ in successive layers, showing the manner of breaking joints."




There are three claims, the first and third of which set forth the alleged invention as described in the specifications, but the second, to which the charge of infringement and the controversy as to validity have been confined in the argument, claims broadly an armature core of segmental laminæ in consecutive layers, dovetailed in any manner to an internal supporting shell. The claims read as follows:

"1. An armature for dynamo electric machines, comprising a cylindrical supporting shell having longitudinal undercut grooves in its outer surface, and an annular core made up of segmental laminæ fitting thereon and pro-

vided with internal dovetail projections integral therewith and engaged by said undercut grooves, as described.

"2. An armature core comprising layers of segmental laminæ dovetailed to an internal supporting shell, in which the segments in consecutive layers break joints, substantially as described.

"3. An armature comprising an internal cylindrical support, undercut grooves on the surface thereof, and a core fitting and surrounding said support, and built up of laminæ punched with internal registering projections engaged and gripped by said grooves, but not fitted exactly thereto, as described."

Only a brief consideration of some of the prior patents displayed in the record, is necessary to show that if the invention claimed in the patent in suit is to be supported, it must be confined within the narrow limits assigned to it by claims 1 and 3, as an improvement in an already well developed art. We think, however, that the history of the prior art does more than this, and seriously challenges patentable novelty of the invention as claimed.

As said by the learned judge of the court below, Morrow was not the first to use segmental laminæ in building up armature cores. In proof of this, he cites the British patent of July 6th, issued to Gibbs & Fesquet, the Geisenhoner patent of November 12, 1889, the British patent, of October 18, 1890, to Hopkinson, the British patent of February 7, 1891, to Kapp, the Lundell patent, of October 20, 1891, and the Smith patent, of February 21, 1893. It is not necessary to discuss these patents at length, as it is admitted that they all describe segmental laminæ, so assembled as to break joints. In none of them, however, are there any dovetailed connections between the spider and the armature. In most of them, the segmental laminæ, as stated by the court below, are fastened to the frame of the armature by bolts running transversely through the laminæ and parallel with the shaft or spider of the armature.

In the United States Crompton patent, of 1888, there is specified an armature consisting of an iron ring core, formed preferably of a large number of separate rings or washers, stamped out of soft annealed sheet iron. These washers are mounted on longitudinal spokes, or radial bars, from the central hub. In carrying this out, the patentee says:

"I stamp or otherwise cut out dovetailed shaped notches in the inner edge of each of the washers. These notches all being cut by the same stamping press, must be exactly alike. The radial bars have corresponding dovetailed projections cut at their outward ends or edges (as the case may be)."

The structure is then further described in the specifications, so as to show that these dovetailed ends of the spider arms, supporting the core by engaging with corresponding dovetailed grooves in the inner circumference of the core, serve not only to support the core, but hold it firmly in place, thus doing away with the necessity for bolts running transversely through the plates of the core and the current wasting passages thereby created. The testimony, however, shows that this objection, arising from wasted electrical energy, has been largely obviated or made negligible by the placing of the bolts near the inner edge of the annular core, and out of the direct path of the electrical currents. The device of the Kapp patent, above cited, exhibits a nota-

ble instance of an innocuous bolt fastening. This patent shows rings of segmental laminæ, precisely like those of the patent in suit, the several layers of which break joints. On the inner side of these laminæ are projecting lugs, through which the bolts pass, quite as much outside the body of the core as the dovetailed projections of the patent in suit, and as little liable to present a convenient path for the electrical current. As said by counsel for the appellant:

"The difference between the Kapp construction and the Morrow construction, in short, is, that Morrow threads the dovetailed projections of his plates into the grooves on the spider, whereas Kapp threads his segmental plates upon bolts carried by the spider."

In both constructions, the individual laminæ are held, in the one case by the dovetailed projection, and in the other case by the bolts. We append illustrative drawings of this bolt construction, from the British patents to Gibbs & Fesquet and to Kapp:

**Fig. 8.**

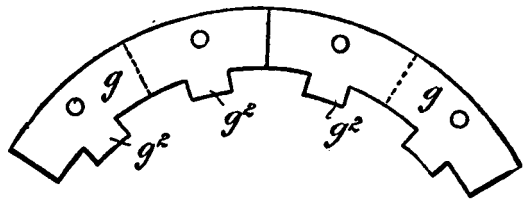
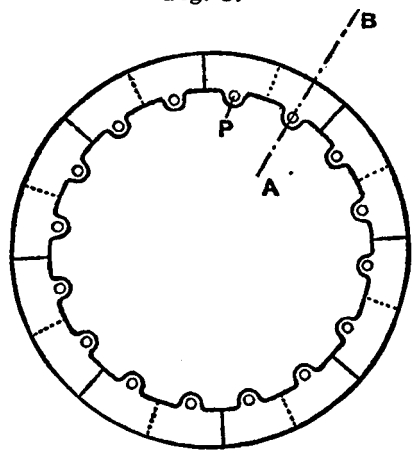



**Fig. 3.**




But we come a step nearer to the device of the patent in suit, if it be not altogether anticipated in the prior patent to Parshall, of March 14, 1893. It is best introduced by quoting from the specifications of the patent in suit, where the patentee says:

"I am aware of patent No. 493,337, granted to Horace F. Parshall, March 14, 1893, and therefore do not claim broadly an annular core supported by and dovetailed to an internal cylindrical support, but confine myself to a core made up of segmental laminæ punched with internal dovetail projections. It

is obviously of material advantage to make the laminæ segmental rather than annular, since the material from which they are punched can in this way be cut much less to waste while by so assembling consecutive layers as to break joints, as above set forth, a practically solid structure is obtained. A further improvement consists in the modifications in the shape of the dovetail connections, as described, which render the parts much more readily assembled. By making the core with internal dovetail projections integral therewith, a greater depth of free iron for the transverse of magnetism is obtained."

Turning to the Parshall patent, we find disclosed in the specifications and drawings an armature spider and a cylindrical supporting shell, substantially the same as that of the Morrow patent; also an armature core made up of thin plates or laminæ. The only differences between the two structures are, that Parshall's laminæ are annular, whereas Morrow's rings are divided into segments, but the continuous annular plate of Parshall, and the segmental annular plate of Morrow are alike fastened to the internal cylindrical supporting shell by dovetailed connections. Figures 1 and 3 of the Parshall patent are here inserted:

Fig. 1.

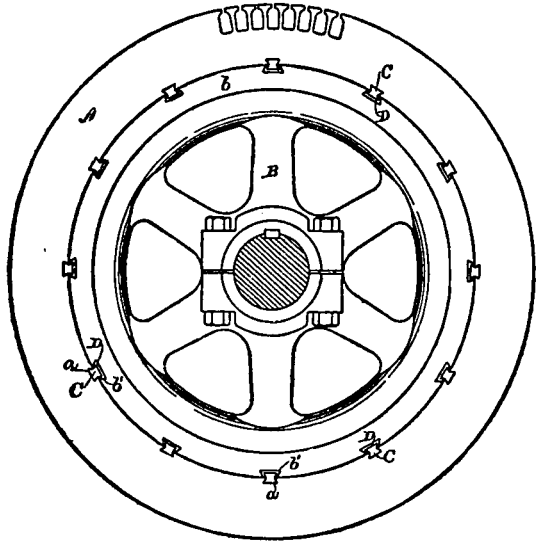
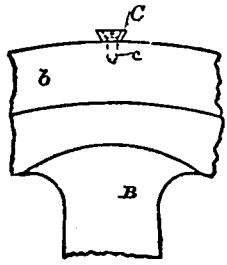



Fig. 3.



Pausing here, it seems obvious that, when once a dovetailed connection between the laminæ and the internal shell is suggested, the particular form of the dovetail is immaterial, so far as invention goes. No method of union between contacting parts of a structure is more common or more efficient under certain circumstances, than a dovetail. It is one of the oldest of mechanical devices, which, though it may be practiced in various forms, is governed by the same mechanical principle. If a dovetailed connection between the parts of a structure is once suggested, the method or precise form of applying the dovetail principle is a matter that would occur to any skilled mechanic, and be varied according to the requirements of convenience or economy. It is here not at all irrelevant to note that the Dodge patent for a band saw pulley, set out in the record, discloses, as applied to a pulley, an almost identical construction with that of the Morrow patent.

It is true, that the device belongs to another art. But the patent is interesting, as exhibiting the application of the dovetail method of connection, under conditions that are mechanically similar to those of the device of the patent in suit. The pulley in this patent consists of a central spider or shell, around which is placed an annular core, composed of wooden segmental laminæ, laid side by side, the required thickness, and glued together, the segments in the successive layers breaking joints. The inner surfaces of the segmental laminæ are dovetailed to the internal supporting shell. The particular method of dovetailing is not that described in the patent in suit, as the dovetailed projections are upon the internal supporting shell, and engage with the corresponding dovetailed grooves in the inner surface of the laminæ. In this respect, the form or method of the dovetail is that of the defendant's armature, as hereinafter described. If we concede that, being of a different art, this is not strictly an anticipation, it nevertheless serves to illustrate the want of novelty in the application of the dovetail principle, to a situation almost precisely similar in the patent in suit.

Having seen just how the dovetail principle, so well known in the mechanical arts, was worked out in the patent in suit, let us turn to see how it was worked out or applied in the prior Parshall patent. A dovetailed key or rib is fixed firmly in the supporting shell, by being inserted in a dovetailed aperture therein. (See Fig. 1 of the Parshall patent.) The other side of the key or rib is correspondingly dovetailed, and projects out of the aperture and above the surface of the supporting shell. The spider and its shell are stood on end, and the annular laminæ, in the inner edge of which are stamped dovetailed apertures, to register and engage with the projecting dovetails of the keys, or ribs, as just described, are slipped on said keys, together with their insulation, until a sufficient number has been piled up to meet the requirements of the particular armature. It appears, therefore, that the assembly of the annular laminæ is made in precisely the same manner as that of the segmental laminæ of the patent in suit. It goes without saying, that the essential construction of the armature is the same, whether the annular laminæ of the Parshall patent be retained or cut into two or more segments. In both cases, they are threaded in precisely the same manner on the supporting shell and dovetailed ribs.

In Fig. 3 of the Parshall patent, is illustrated a modified form of dovetailed joint. This dovetailed projection, C, on the spider, b, is solid and integral with the supporting shell, and projects into and registers with the dovetailed groove on the interior side of the armature core. Claim 2 of the Parshall patent covers a dovetailed projection, integral with either the core or the shell, thus completely meeting the special requirements of the patent in suit in that respect. The patent in suit requires, as we have seen, that the dovetailed projections shall be on the interior of the annular laminæ, and so stamped as to engage and register with corresponding dovetailed apertures in the supporting shell. When once a dovetailed connection has been suggested or resorted to, it would seem immaterial whether the reciprocal dovetailed projections and apertures be on one or the other of the parts to be united. Indeed, as was pointed out by complainant's expert, the dovetailed projections and apertures may be so arranged that they alternate with each other, two dovetailed projections enclosing a dovetailed aperture, so made that the appearance of projections and apertures in the opposing sides are precisely alike.

It has been also insisted by complainant's counsel, in their brief, and by complainant's expert witness, that the defendant's device, though the dovetailed projection was from the supporting spider, and not from the interior circumference of the laminæ, still unlawfully appropriates that part of the claimed invention. The learned judge of the court below also adopts this view, for he says:

"Nor do I think there is any material difference between the two constructions, in that, in the Morrow construction, the projections are on the laminæ, while in the defendant's construction, the grooves are on the laminæ."

We are also of this opinion, and therefore must conclude that the dovetailed connection between the spider and the laminæ, described in the patent in suit, does not materially differ in mechanical effect from the dovetailed connection between the same parts described in the Parshall patent. It is the dovetail principle that is resorted to in both, for the purpose of holding together the armature core and the interior shell.

The device of the patent in suit is plainly an aggregation of old elements, and does not present the essential features of a patentable combination. No new function is achieved by the old elements, either singly or in combination, and no co-action of these elements is shown, whereby a new and desirable result has been obtained. The device is undoubtedly an improvement upon what went before, but this, in our opinion, has not been the product of patentable invention. Indeed, the only purpose disclosed by the patentee himself in his specifications, is to provide an efficient and economical means for building up a laminated core. He says:

"It is obviously of material advantage to make the laminæ segmental, rather than annular, since the material from which they are punched can in this way be cut much less to waste."

Much was said, in argument, though nothing in the patent itself, about the desirable function which attached to the dovetail connection between the spider and laminæ, of holding the laminæ in place against

the centrifugal force, as well as against driving force. But this function was dormant in the dovetail arrangement of the Parshall patent, as long as the laminæ were in annular form, but would at once be brought into operation by dividing the laminæ of that patent into segments. Surely invention cannot be claimed in the appropriation of an old device, by reason of the unthought of and undisclosed function in question.

The views we have here indicated lead irresistibly to the conclusion that the second claim of the patent in suit cannot be sustained as valid, in view of the prior art. But it seems to be admitted that claims 1 and 3, which make dovetailed projections in the laminæ an essential part of the invention, are not infringed by the defendant's structure, which resembles more nearly in its dovetail feature the device of the Parshall patent than it does the device of the patent in suit, the projections in defendant's structure being unquestionably upon the spider, and not upon the interior of the laminæ. The two claims referred to respond to the disclaimer of the specifications of the patent, which we have already quoted. The patentee has, all through his specifications, spoken of internal dovetailed projections, and in the part quoted, he has chosen to confine himself to a "core made up of segmental laminæ punched with internal dovetailed projections," and has coupled this with a disclaimer of any broader claim. In the view we take of this part of the specifications, it is not necessary to discuss the ingenious argument of counsel for complainant, as to how far the claims can control the specifications, or the specifications control the claims. We content ourselves with saying that, in view of the prior art and the specific recognition of that art in the specifications, as quoted, the broad second claim of the patent in suit cannot be sustained.

It is therefore ordered that so much of the decree of the court below as refers to the Morrow patent, No. 504,401, be reversed, and a decree be entered in conformity with this opinion.

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McDUFFEE et al. v. HESTONVILLE, M. & F. PASS. RY. CO. et al.

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

No. 32.

1. TRUSTS—VALIDITY AND CONSTRUCTION—ASSIGNMENT OF PATENT IN TRUST.
An instrument conveying a patent to one in trust for himself and others named, without power to sell the same, creates a valid trust entitled to the protection of a court of equity as a legitimate and peculiarly appropriate means, in view of the nature of the property, of securing the rights of all the joint owners by preventing the use of the patented invention or the granting of licenses to use it except by the trustee for the benefit of all. Under such a trust the trustee cannot convey the legal title, or any part of it, without the consent of all of the equitable owners.

2. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—CONTRACT BY TRUSTEE.
A contract made by one to whom the legal title of a patent has been conveyed in trust for himself and others named, without power to sell, by which as trustee he agrees to sell and convey the patent, cannot be specifically enforced even as to his own equitable interest by the purchaser, who is charged with notice of the trust and its limited character and of the rights of the other joint owners thereunder which would be destroyed by such sale.

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

For opinions below, see 154 Fed. 201, and 158 Fed. 827.

Charles P. Abbey, Thomas F. Sheridan, Clifton V. Edwards, and Jos. C. Fraley, for appellants.

C. L. Buckingham and John G. Johnson, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, John I. McDuffee, trustee, brought suit in December, 1896, against the Hestonville, Mantua & Fairmount Passenger Railway Company, for infringement of patent No. 546,059. That patent had been applied for by William Schlesinger on application No. 183,871, and was later issued to said McDuffee as trustee by virtue of certain writings hereinafter recited. In October, 1906, McDuffee, trustee, and the Allis-Chalmers Company by leave filed a supplemental bill which averred the former and his cestuis que trustent had on June 16, 1906, assigned all their interest in this suit and the patent to the Allis-Chalmers Company. The General Electric Company, the maker of the alleged infringing device, had been defending this suit, and it then applied for leave to intervene as a defendant by reason of the fact that prior to June 16, 1906, it became owner of the patent by an agreement of McDuffee to sell. It alleged the Allis-Chalmers Company had bought with notice of its title and by leave filed a cross-bill to annul the Allis-Chalmers purchase and to compel specific performance by McDuffee, trustee. Testimony was taken, and the question of ownership disposed of on final hearing of the supplemental and cross-bills. The cestuis que trustent of McDuffee, trustee, were not made parties. In an opinion reported in 154 Fed. 201, the court below held it could not decree specific performance of the contract made by McDuffee, trustee, with the General Electric Company, which was for $20,000, saying:

"If, therefore, I repeat, the assignment of June 16th, to the Allis-Chalmers Company had never been made, the electric company could not be granted the decree of specific performance for which the cross-bill prays. The agreement of which the court is asked to compel the performance is an agreement to convey the whole title, and undoubtedly the electric company would be content with no less. But as McDuffee could not convey what he never had, and as the court has no power over persons who are not parties to the cross-bill—even if it were true, as it is not proved, that they authorized or ratified McDuffee's agreement to sell their interests to the electric company—manifestly a decree of specific performance would be out of the question."

On further hearing, however, the court subsequently entered a decree that on payment of $6,666.67, by the electric company, being one-third of the stipulated price, it "shall become the owner of an undivided one-third part of the entire right, title, and interest, both legal and equitable, of, in, and to (naming the patents), and that the said John I. McDuffee shall thereupon execute and deliver to the said General Electric Company an absolute assignment of such an undivided one-third part of the entire right, title, and interest, both legal and equitable, of, in, and to said patents." From such decree McDuffee and the Allis-Chalmers Company appealed.

As the facts are fully set forth in the court's reported opinion, they need not be repeated. The decisive question is the effect given to the instrument which vested title to the patent in question and created the trusteeship in one Schlesinger. On January 22, 1894, one Williams, being the owner, inter alia, of the application on which the patent in suit was issued, conveyed the same by writing to Schlesinger. The material parts of said conveyance are as follows:

"To all whom it may concern: Be it known that for and in consideration of the sum of one dollar in hand paid, and other valuable consideration, the receipt whereof is hereby acknowledged, I, Alfred H. Williams, have sold, assigned and transferred, and by these presents do sell, assign and transfer unto William M. Schlesinger and his assigns and successor in trust as herein provided all my right, title and interest in and to or choses in action under letters patent of the United States, as follows: * * * To have and hold the same unto the said William M. Schlesinger, his assigns and successors, in trust to the full end of the term for which said letters patent or extensions or renewals thereof are or may be granted, or until the trust herein declared has been ended. The said William M. Schlesinger and his sucessors in the trust to have and hold the same in trust without the power to sell, incumber or otherwise dispose of said patents and applications, renewals, extensions or other interests therein or obtained thereon for the following named persons, to wit: William M. Schlesinger, Susan E. McDuffee and the said Alfred H. Williams."

Subsequently, McDuffee was substituted as trustee, and at the time of the sales in suit the cestuis que trustent under this instrument were Alfred H. Williams, William M. Schlesinger, and John I. McDuffee, each of whom owned a third.

It seems to us that the peculiar nature of the subject-matter of this instrument made the trust sui generis and one in the administration of which equity would correspondingly modify the familiar principles incident to trust estates generally. .Patents are personal property (Shaw Company v. New Bedford [C. C.] 19 Fed. 753), and "such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence a gift of personal property to A. simply, without more, is sufficient to vest in him the absolute interest. Whilst, under the very same words, he would acquire a life interest only in real estate, he will become absolutely entitled to personal property. * * * The privileges granted by letters patent are plainly an instance of an incorporeal kind of personal property, which, as personalty, in the absence of context to the contrary, would go to the executor or administrator in trust for the next of kin." De La Vergne Machine Co. v. Featherstone, 147 U. S. 209, 222, 13 Sup. Ct. 283, 37 L. Ed. 138. That the intention of the owners of these patents was that the legal title thereto should be vested in the trustee alone, and that he should not be able to sell them without the consent of the owners, is unquestioned. Now, why should not a status of their property thus made be maintained? No public policy, no principle of ownership, no interdict of perpetuities, or restraints on alienation forbid or call for their application to a patent which at most is a mere privilege to monopolize an invention for a few years; but, while there is no reason to forbid owners from thus vesting the legal title of patents in others while retaining equitable ownership in themselves, there are considerations which make such a result highly desirable. Joint own-

ers of a patent are at the mercy of each other. Each of them may use or license others to use the invention without the consent of his fellows and without responsibility to such fellows for the profits arising from such use or license. Clum v. Brewer, 2 Curt. 523, Fed. Cas. No. 2,909; Aspinwall Mfg. Co. v. Gill (C. C.) 32 Fed. 697; Walker on Patents, § 294.

It will therefore be seen that, to preserve their joint property and prevent its practical destruction by co-owners, it is imperative that all should be permitted to simply vest the legal title in one without imposing any active duties on such holding trustee, and this shows that, while there are no express duties for the trustee to perform, it by no means follows the trust is a dry or inactive one. As holder of the legal title he can bring suit, enjoin infringers from destroying the patent, and the mere holding of the legal title in trust per se preserves the patent for the common good and prevents its destruction by each co-owner. We are of opinion that these views have actuated patent practitioners in thus vesting the legal titles to patents in trustees, and that a holding that such an instrument, contrary to its plain intent, executed itself and left the equitable owners as free to use and license as before would be most unfortunate in its unsettling effects. The intent and effect of this instrument we therefore hold was to vest and retain the legal title to this patent in McDuffee, as trustee; but the equitable ownership thereof remained in his cestuis que trustent, and without their consent he could not convey such legal title, or any part thereof. This works no injustice to the General Electric Company, for it had such notice of the rights of the cestuis que trustent when it took the option of which it asked specific performance as put it on notice. That option was given by McDuffee, who signed himself as trustee, and this fact alone gave notice to any one dealing with him of such facts as inquiry in reference to the terms of the trust would have disclosed. Duncan v. Jaudon, 82 U. S. 165, 21 L. Ed. 142; Flitcraft v. Com. Title Ins. Co., 211 Pa. 119, 60 Atl. 557, and cases there cited.

The suit the General Electric Company had defended was brought by McDuffee, as trustee, and the latter, in his testimony in response to an inquiry by the counsel for the Electric Company, by whom the option was taken, had said:

"At present, I hold the patent as trustee for others, and, besides this legal title, I also own an equitable interest in it."

Moreover, in reporting the taking of this option to the company the day after it was taken, counsel wrote:

"Mr. McDuffee has just come to my office in connection with a renewal of our compromise negotiations, and the letter which I inclose is his present offer. * * * Mr. McDuffee says he must have $17,500 for himself and associates and * * * the further $2,500 for compensating his counsel."

When therefore the electric company took the option from McDuffee as trustee, which provided:

"I will give your company, the General Electric Company, an option until June 9th to acquire all right, title and interest in all letters patent upon which suits have been brought by me, * * * and also the control of said

suits and all rights of action under said patents * * * for the sum of $20,000"

—it knew it was contracting, not with the owners of the patent, but with their trustee, and the fact that he was a trustee was notice to them of his trust and its limited character, which was "in trust to have and hold the same without the power to sell, incumber or otherwise dispose of said patent," etc. Such being the case, and the cestuis que trustent not having ratified such attempted sale, it is clear the purchaser was entitled to no decree to affect their interest. But this the court has done by its decree. While conceding that specific performance cannot be decreed for the entire patent, it has in practical effect struck down the trust by decreeing that McDuffee convey one-third of the patent with the same force and effect as though his one-third of it was unshackled by the trust. As noted, McDuffee was decreed to convey "an undivided one-third part of the entire right, title, and interest, both legal and equitable, of, in, and to said letters patent." The practical effect of this would be that the General Electric Company would be free to make, use, vend, and license under this patent without accountability to McDuffee's co-owners.

Whatever its remedies against McDuffee may be, and without prejudice to such rights and remedies, we are clear the decree complained of must be reversed, with directions to dismiss the cross-bill.

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## HILDRETH v. BEE CANDY MFG. CO.

(Circuit Court, W. D. Texas, San Antonio Division. June 9, 1908.)

No. 158.

PATENTS—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

A bill for infringement of a patent, which makes profert of the patent, is not demurrable because it gives only a general description of the patented device.

In Equity. On demurrer to bill for an injunction and account against the defendant for profits and damages as an infringer of patent No. 832,384, owned by the complainant, who claims to be the first inventor of certain new and useful improvements in candy pulling machines.

Henry Terrell, Aubrey & King, and Wm. A. Macleod, for complainant.

C. L. Bates and Leo Tarleton, for defendant.

MAXEY, District Judge. To the bill filed by the complainant the defendant has interposed several grounds of demurrer. The following was the only one insisted upon in the argument, and it alone will be considered:

"And for further ground of demurrer defendant says that plaintiff has not in said bill described the pretended patented design therein alleged to be infringed by defendant, and said bill gives defendant no notice of the charge he is required to meet."

After alleging that the complainant was the original inventor of "certain new and useful improvements in candy pulling machines," and describing the patent by number and date of issuance, the bill proceeds as follows:

"Said letters patent did grant unto your orator, the said Herbert L. Hildreth, his heirs and assigns, for the term of 17 years from the 2d day of October, 1906, the exclusive right to make, use, and vend the said invention throughout the United States and the territories thereof, as by the said letters patent, or a duly certified copy thereof, ready here in court to be produced and of which profert is hereby made, will fully and at large appear."

In view of the allegation of profert made by the complainant of his patent, is the general description of the patented improvement sufficient? While the allegation is somewhat vague and indefinite, yet, tested by the authorities in patent cases, it seems to be sufficient upon demurrer. Thus, in the case of Chinnock v. Paterson, P. & S. Co. (C. C.) 110 Fed. 201, where the description was scarcely as definite as in the present bill, it was said by Judge Gray:

"The bill contains no other description of the patent in suit, or of the particular process of the alleged invention for which the letters patent were granted. It is the duty of complainant in his bill to so describe the invention patented that the court may understand its nature and character. In the absence of such description, however, profert may be made of the letters patent, and such profert will take the place of specific allegations descriptive of the invention. Such a reference to the letters patent as is made in this bill is the usual substitute for specifically setting out the invention claimed, and for the purposes of demurrer the more technical practice of profert and the craving of oyer is unnecessary."

See, also, Post v. Richards Hardware Co. (C. C.) 25 Fed. 905; American Bell Tel. Co. v. Southern Tel. Co. (C. C.) 34 Fed. 803; Dickerson v. Greene (C. C.) 53 Fed. 247; Enterprise Manufacturing Co. v. Snow (C. C.) 67 Fed. 235; Heaton-Peninsular Button-Fastener Co. v. Schlochtmeyer (C. C.) 69 Fed. 592; Fowler v. City of New York, 121 Fed. 747, 58 C. C. A. 113; Morton Trust Co. v. American Car & Foundry Co. (C. C.) 121 Fed. 132; 1 Beach, Mod. Eq. Prac. § 98, note 2.

In Germain v. Wilgus, 67 Fed. 597, 14 C. C. A. 561, it was held, following the language of the syllabus, that the word "profert," as now used, does not necessarily imply that the recorded instrument pleaded is annexed to the bill, or actually produced to the court, and it may in fact be retained in complainant's own custody. See, also, 16 Enc. Pl. & Pr. p. 1082, note 1.

In addition to what has already been said, it may be observed that the descriptive allegations of the bill follow substantially the forms prescribed by text writers. 2 Bates, Fed. Eq. Proc. pp. 1189–1205; 2 Beach, Mod. Eq. Prac. pp. 1274–1281.

The demurrers are not well taken, and they should be overruled. Ordered accordingly.

## In re W. W. MILLS CO.

(District Court, E. D. North Carolina. April 27, 1908.)

1. CORPORATIONS—REPRESENTATION OF CORPORATION BY OFFICERS—POWER TO TRANSFER PROPERTY.

The secretary of a corporation as such has no authority to assign securities owned by the corporation as collateral security for a past indebtedness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1668.]

2. BANKRUPTCY—VOIDABLE "PREFERENCE."

A transfer of property by a corporation as security for a past indebtedness, within four months prior to its bankruptcy, when it was insolvent and the creditor had reason to believe it to be insolvent, is voidable as a preference under Bankr. Act 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), even though such transfer was made in ratification of an unauthorized transfer made by an officer of the corporation before the four months period.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

3. SAME—KNOWLEDGE OF CREDITOR.

A creditor to whom a transfer was made had reasonable cause to believe that a preference was intended, within the meaning of Bankr. Act 1898, c 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), if he had knowledge of facts which would put a prudent man on inquiry, and such inquiry would have shown that the transfer was preferential in its effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 256.]

4. SAME—CONVEYANCES AS SECURITY—INSOLVENCY OF DEBTOR.

A transfer by way of mortgage or pledge given to secure an antecedent debt within four months prior to the debtor's bankruptcy and when he is insolvent is void, although the creditor did not know nor have reasonable cause to believe he was then insolvent.

5. CORPORATIONS—ACCOMMODATION PAPER—CONSIDERATION.

A corporation which subsequently became bankrupt was the owner of practically all of the stock of a railroad company, and at the instance of a creditor of the corporation the directors of the railroad company caused a note and a mortgage on its property to be executed to the president of the corporation by whom it was indorsed to the creditor as security for the past indebtedness of the corporation. *Held*, that such note was without consideration and unenforceable, either by the payee or the creditor, which was not a bona fide purchaser.

6. FRAUDULENT CONVEYANCES—CONSIDERATION.

A pledge by the president of a bankrupt corporation, while personally insolvent, of stocks owned by him to a creditor of the corporation as security for its past indebtedness, *held* invalid as against his creditors for want of consideration, except as to indebtedness of the corporation on which he was individually liable.

7. BANKS AND BANKING—LIEN ON STOCK—INDEBTEDNESS OF STOCKHOLDER.

A banking corporation chartered by the state of North Carolina by special act purchased a note given by one of its stockholders to a third party, and secured by a pledge of his stock as collateral. Subsequently the corporation purchased the stock from the pledgor at an agreed valuation. *Held*, that Pub. Laws N. C. 1903, p. 469, c. 275, giving corporations organized thereunder a lien upon their stock for the indebtedness of a stockholder, did not apply to such corporation, and that it had no lien on the proceeds of the pledged stock in excess of that required to pay the

secured note for other indebtedness on which the stockholder was bound as indorser.

[Ed. Note.—Liens of banks on stock, see note to Northern Pac. Ry. Co. v Tynan, 56 C. C. A. 179.]

8. BANKRUPTCY—VOIDABLE PREFERENCES.

A corporation deposited sight drafts on third parties in a bank for collection under an agreement that they were to be credited to its account, and, if not paid, were to be taken up by it as cash items. *Held*, that the taking up of such unpaid drafts, although when the corporation was insolvent and within four months prior to its bankruptcy, did not constitute voidable preferences.

9. SAME—"PREFERENCE."

The payment to a bank by an insolvent corporation within four months prior to its bankruptcy, and at a time when the bank had reasonable cause to believe it to be insolvent, of notes in favor of the corporation which it had discounted at the bank and indorsed, or of notes given by it to third parties and discounted by the bank constituted voidable preferences given to the bank which it was required to return under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), as amended in 1903, by Act Feb. 5, 1903, c. 487 § 12, 32 Stat. 799 (U. S. Comp. St. Supp. 1907, p. 1030), before it could prove a claim against the bankrupt estate.

In Bankruptcy. On review of decision of referee.

Robt. Strong and Jas. E. Shepherd, for bankrupt.
Jno. W. Hinsdale, for trustee.

PURNELL, District Judge. After many tedious and patient hearings, as evidenced by the voluminous record filed, the referee filed the following report, to which exceptions were filed, and the cause set down for hearing and heard accordingly:

A creditors' petition was filed against the W. W. Mills Company, a North Carolina corporation, upon which it was on November 25, 1904, adjudicated a bankrupt, and the case was duly referred to the referee. Thereupon, on December 19, 1904, the said bankrupt filed its schedules in bankruptcy, showing an aggregate indebtedness of $68,528.71, of which $46,314.40 was owing to the Carolina Trust Company, a North Carolina corporation, hereinafter called the "Trust Company," and alleged to be secured by collaterals. According to said schedules, no other creditor of the bankrupt held any security for his claim. Thereafter the Trust Company filed its proof and its amended proof of secured claim against the said bankrupt, alleging an indebtedness in the aggregate sum of $45,502.93, all of which it alleged to be secured by collaterals furnished by W. W. Mills individually. The said Trust Company thus voluntarily appeared in this court, and submitted itself to the jurisdiction with respect to all matters and questions connected with its said claim and the securities, which it set forth in said proof; its appearance being general in its character. On May 11, 1905, W. L. Watson, Esq., the trustee of the bankrupt, filed objections to the said proof of claim and the securities therein mentioned. Thereupon, on May 19, 1905, the Trust Company filed an answer, asking that its claim with the securities therein set forth be allowed. The bankrupt and other witnesses were examined at length before the referee, both before and after the filing of said objection. All of them were cross-examined by the Trust Company. Under the authority of Loveland on Bankruptcy, p. 630, and Brandenburg on Bankruptcy, p. 532, all of the testimony so taken is considered by the referee in passing upon the objections and in determining the rights of the respective parties, and accompanies this report. Being of the opinion that it is the duty of the referee to examine and decide all the questions raised by the said objections to the proof of claims and to the securities set forth by the Trust Company, the referee has carefully considered

all of said matters and questions, seriatim, and makes his findings of fact, his conclusion of law, and his orders in respect thereto.

The first objection is to the note for $6,800 executed by the Mills Company to the Trust Company on January 20, 1904, and indorsed by W. W. Mills and R. D. Godwin, in that there was no consideration therefor. The referee finds from the evidence as a fact that there was a valuable and adequate consideration for said note, in that it was given in renewal for a note of the same amount, and by the same parties which had been previously discounted by the Trust Company. This objection is therefore overruled.

The second objection is "that, when the said bankrupt paid to the Carolina Trust Company the $3,000 which it received from J. R. Franklin, the bankrupt directed it to be appropriated and applied to the payment of its overdraft in the Carolina Trust Company, which amounted to $1,490, said overdraft being represented by the bankrupt's unpaid check on the Carolina Trust Company for $1,490, which was drawn to take up the following unpaid drafts drawn by the bankrupt upon the following parties and for the following amounts and discounted by the Carolina Trust Company. [Here follows a list of the drafts, etc.]" This objection will be considered in connection with a part of the tenth exception, to wit, that the assignment by the Mills Company to the Trust Company, within four months of the filing of the petition in bankruptcy, of the notes and mortgage of J. R. Franklin for $13,000, the proceeds of which is referred above, as collateral security on the antecedent debt of the Mills Company, was a fraudulent preference; the Trust Company knowing or having reasonable ground to believe that the Mills Company was then insolvent.

The referee finds the following facts: On or before May 20, 1904, the Mills Company was the owner of notes amounting to $13,000 of one J. R. Franklin, secured by mortgage, and was indebted to the Trust Company in a sum exceeding $45,000. R. D. Godwin was the secretary of the Mills Company, having the usual powers of secretary and also having charge of the conduct of its current business; but with no power to pledge, hypothecate, or assign its property to secure antecedent debts. On May 20, 1904, he undertook of his own motion, and without the knowledge or consent of the president or board of directors of the Mills Company, to assign the said Franklin notes and mortgage to the Trust Company, as he testified, simply to make the showing of assets by the Mills Company, but, as claimed by the Trust Company, to secure the general past indebtedness of the Mills Company to it. The burden of proof being upon the Trust Company to show this transfer and its purpose, the referee holds that it has failed to prove by a preponderance of testimony that the said Godwin undertook to make this assignment of such collateral security. But, if this fact should be found otherwise, the referee finds the further fact that said Godwin had no authority, express or implied, to make the assignment of said notes and mortgage to the Trust Company for this purpose, and that the Mills Company never held him out as possessing such authority; that he had never before undertaken to make an assignment of its property for the purpose of securing its pre-existing indebtedness, and that he acted in the premises without the knowledge or consent of the president or the board of directors of the company. See Thompson on Corporations, §§ 4697, 4716, 4717, 4722; 2 Cook on Corporations, 717, 719. And, when W. W. Mills, the president of the company, was soon thereafter informed of this transaction by Godwin, he expressed his dissatisfaction therewith. On June 20, 1904, the Mills Company, by its president, W. W. Mills, and its secretary, R. D. Godwin, at the instance of the Trust Company, did make an assignment of said notes and mortgage to the Trust Company as collateral security to the general past indebtedness of the Mills Company to the Trust Company. This was within the four months before the filing of the creditors' petition against the Mills Company, and at a time the company was insolvent, and when the Trust Company knew or had reasonable ground to believe it to be insolvent. The referee holds, under the evidence, that this second assignment was not a ratification of the first invalid and inoperative act of the secretary; but that it was an independent transaction as of the date that it took place. There is another reason why this assignment could not be regarded as a ratification of Godwin's invalid act. It is a general principle of law that there can be

no ratification without a knowledge of the transaction to be ratified. It appears in evidence, and the referee finds, that W. W. Mills had been informed by Godwin that he had not attempted to assign the mortgage for the purpose of securing past indebtedness. Mills, therefore, did not know that there had been any assignment or attempted assignment for this purpose, and therefore, in making the assignment of June 20th, he cannot be supposed to ratify something of which he was ignorant. The referee also holds that, even had it been a ratification or such invalid or void assignment by the secretary, it does not relate back so as to antedate the four months immediately preceding the filing of the petition. This under the authority of In re Kansas Mfg. Co., Fed. Cas. No. 7,610, 9 N. B. R. 76, and Brandenburg on Bankruptcy, 597, where it is said: "A deed executed without authority by an officer of a corporation more than four months before the bankruptcy, but ratified within that period, must be considered in the light of the situation when ratified." It is clear that the effect of this assignment was to enable the Trust Company to obtain a greater percentage of its debts than the other general creditors of the bankrupt, and that at the time it was made, to wit, June 20, 1904, the Trust Company had reasonable cause to know that the Mills Company was insolvent and bankrupt. The referee further holds, therefore, that the assignment of June 20, 1904, which for the purpose of this inquiry must be regarded as of its date, was made in order to secure a pre-existing indebtedness of the Mills Company to the Trust Company.

The principal question of fact which controls in this matter is whether at that date the Trust Company knew, or had reasonable ground to believe, that the Mills Company was insolvent (there being no doubt that it was then actually insolvent). The testimony upon this question discloses many facts which, considered together, compel the conclusion adverse to the Trust Company.

(1) The evidence is overwhelming that the Mills Company was insolvent as far back as the spring of 1904. W. W. Mills, C. N. Goodno, and R. D. Godwin all so testify; and there is no credible evidence to the contrary. The Trust Company held a large quantity of securities upon the bankrupt's indebtedness to it, which had been furnished by W. W. Mills personally. While these securities assured the payment of the debts for which they were pledged, they did not affect the question of the solvency of the Mills Company; as an application of such securities to the payment of said debt would not extinguish the liability of the Mills Company, but would simply transfer them to the person whose securities had been thus used for its benefit, constituting him, pro tanto, its creditors in the place of the Trust Company.

(2) W. W. Mills, who was always the president of the Mills Company, and who was practically the owner of its stock, had been president of the Trust Company, and one of the directors of the Trust Company from its organization till the 15th day of January, 1904, when he was forced to resign the presidency, but he remained a director of said company until in August, 1904. By means of this dual position he absorbed for the benefit of the Mills Company assets of the Trust Company amounting to over 45 per cent. of its capital stock. Being the principal stockholder of the Trust Company, he virtually controlled its fortunes and management, and so arranged it that the Mills Company was permitted to borrow by discounts and overdrafts over $26,000 while he was the president of both companies. This appears from the schedules in bankruptcy and from the whole testimony, and it does not seem to be disputed by any one.

(3) On January 15, 1904, the said W. W. Mills, still controlling a large proportion of the capital stock of the said trust company, resigned as president, and his brother, John A. Mills, was elected to succeed him. Under the management of the latter officer the Mills Company's indebtedness was increased until it amounted to $46,596.93 as shown by the Trust Company's amended proof of claim. He testified that it amounted to above $60,000 on June 1st.

(4) Many of the notes held by the Trust Company in June, 1904, were debts of long standing, which the Trust Company had been unable after persistent and earnest efforts to collect.

(5) On the 18th day of January, 1904, the Trust Company's board of directors passed a very stringent resolution pointed mainly at W. W. Mills and

his company, which was so offensive to W. W. Mills that he retired from the meeting. This resolution was suggested by the tremendous indebtedness of the company and of W. W. Mills personally, who owed it $60,781.22, as shown by his schedule in bankruptcy, a part of the latter sum upon his indorsement of some of the Mills Company's debts. This condition seriously embarrassed the Trust Company, and justified the resolution.

(6) Soon after the passage of the resolution, W. W. Mills—not the Mills Company—assigned to the Trust Company collaterals which, while they to a certain extent relieved the situation so far as the bank was concerned, did not change the financial condition of the Mills Company.

(7) No other creditors of the Mills Company held any security for his debt, as appears from its schedule in bankruptcy.

(8) The Trust Company was persistent in its demand that the Mills Company should pay an overdraft which on January 1, 1904, amounted to $10,138.88, over 10 per cent. of the capital stock of the Trust Company. On April 6, 1904, it amounted to the sum of $13,623.12, and it was continuous, though reduced from time to time, until August 15, 1904.

(9) It thus appears that nearly one-half of the capital stock of the Trust Company, by the mismanagement of W. W. Mills while president of the Trust Company, and during the incumbency of his brother, his successor in office, had been vested in precarious claims against the Mills Company

(10) The directors of the Trust Company were greatly alarmed about this overdraft and the condition and the amount of other claims against the Mills Company.

(11) The situation was frequently discussed in the meetings of the directors of the Trust Company.

(12) John A. Mills, who was president of the Trust Company when the assignment of the Franklin notes and mortgage were made, and who acted for the bank in said assignment, knew that the Mills Company was insolvent at the time. His direct and positive testimony to this effect given upon a former examination when he was subject to cross-examination by the Trust Company, is not overborne by his subsequent modification, made after an interview with one of the Trust Company's officers and counsel, and with no explanation as to how his memory had been refreshed. He suggested that, when he testified that the Mills Company was insolvent, he meant that it was only embarrassed. although he testified that he knew the difference between "insolvency" and "embarrassment"; that embarrassment as applied to the Mills Company meant that it was involved in difficulties concerning money matters, incumbered with debt, beset with urgent claims and demands; that it could not meet its pecuniary obligations; that, if he had $10,000 worth of property and had a note of $25,000 to pay and did not meet this note when it became due, he would be embarrassed. He further testified that, when he said "if Mills could arrange matters and get time he might pay out," he had reference to his being able to turn what he had into money, and also that he would have to make money to pay out with. In view of this and other testimony of this witness to the same effect, the referee is of the opinion that the credibility and the convincing effect of his first statement were not shaken by his subsequent modification.

(13) On the ——— day of August, 1904, William Hayes, the then cashier of the Trust Company, at the request of John A. Mills, its president, made an examination of the Mills Company, and reported to him that "it was $40,000 to the good." This examination consumed one hour. In it he estimated all the bills appearing on the books at their face value, including $40,000 of old debts contracted while he was with W. W. Mills in the lumber business before the Mills Company was formed, and which W. W. Mills transferred to the Mills Company in part payment of his subscription to stock, and which remained on the books uncollected and uncollectible until he made the examination. He also, as he testified, left out of his calculation $20.000 of indebtedness of the Mills Company of which he then had knowledge. John A. Mills testified that "there was something on his mind that even this report did not relieve; that he had apprehensions that were not relieved by Hayes' report; that he felt that, if he was forced, there might be some trouble, and there was talk about pressing some claims; that if the securities could not

be managed as he thought best, and if he was pushed on anything, he would go into bankruptcy." This was all with reference to the W. W. Mills Company about whose financial condition alone Hayes made his examination and report. Hayes' examination was the only one which the Trust Company made or caused to be made into the affairs of the Mills Company.

(14) The effort of the Trust Company to absorb practically all the available assets of the Mills Company, and W. W. Mills upon its claims against the Mills Company, the solicitude, experienced by the Trust Company in respect to its said claim, is illustrated by the obtaining from W. W Mills on the train by Allen J. Ruffin, Esq., the then president of the Trust Company, of an order to turn over to the Trust Company $20,000 of the securities of the Mills Company, which order was signed by W. W. Mills in consequence of rough talk by said Ruffin, and which order was not thereafter enforced, because it was recognized that a compliance with it would have caused an immediate collapse of the Mills Company. The referee is of the opinion that this incident reflects something upon the relations of the parties and of the estimate of the Trust Company as to the precarious condition of their claims, and of the financial condition of the Mills Company.

(15) Hayes, cashier of the Trust Company, was familiar with the affairs of the Mills Company. He had constant access to its books. He knew as much about its affairs as Godwin and Goodno, the bookkeeper, as testified by him. He knew of its large indebtedness, a great portion of which was to his company. He knew of the incessant demands made upon it for money and securities with which it was unable to comply He knew of the overdraft and of the company's inability to meet it. He knew that W. W. Mills was obliged to come to its relief with nearly the whole of his private fortune. He knew that the Mills Company was insolvent. He had reasonable ground to believe it to be so. And his knowledge is to be imputed to his principal.

(16) The conclusion to which the referee has come as to the knowledge and reasonable grounds to belief of the Mills Company's insolvency is strengthened by the fact that the Trust Company produced none of its officers as witnesses in its behalf. It did examine William Hayes, an ex-officer, but not until after its president had made a trip to Gulfport, Miss., for the sole purpose of having him sigh a letter which the president dictated, and which could have no other purpose than that committing Hayes to the facts set forth in that letter, which is in evidence.

It is said in Loveland on Bankruptcy, at page 577: "It is not necessary that the creditor knows or even actually believes that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that, when the party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and if the party under such circumstances omits to inquire, and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained." In Re Jacobs, 1 Am. Bankr. Rep. 518, 99 Fed. 539, 39 C. C. A. 647, it was held: "A creditor to whom a transfer is made has reasonable cause to believe a preference was intended, if he has knowledge of facts and circumstances which would put a prudent man upon inquiry, and if by such inquiry he could have ascertained the fact that the debtor's financial condition was such that the transfer was preferential in its effect." In Hackney v. Raymond Bros., 10 Am. Bankr. Rep. 214, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675, it was held: "In determining this question it was not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might be fairly expected to disclose." In Des Moines Saving Bank v. Morgan Jewelry Co., 12 Am. Bankr. Rep. 781, 123 Iowa, 432, 99 N. W. 121, it is held: "A reasonable cause to believe that a preference was intended within the meaning of the bankruptcy act involves reasonable cause to believe that insolvency as a matter of fact

exists." The referee is of the opinion that the circumstances surrounding the Mills Company, of which the Trust Company had knowledge, were sufficient to put it upon inquiry. The referee is of the opinion that the perfunctory examination of the W. W. Mills Company was not such an examination into the affairs of this company as the exigencies of the case demanded. The books and records were open to it for inspection. These books showed the assets of the company, which consisted only of bills receivable. The value of the bills receivable might have been ascertained with little trouble. It also showed approximately the indebtedness of the company aided by the knowledge of the Trust Company as to the amount of the indebtedness of the Mills Company to itself. It might with reasonable accuracy have ascertained the total amount of this indebtedness. A proper investigation would have disclosed the fact that its indebtedness exceeded the value of its assets (excluding of course W. W. Mills' personal securities held by the Trust Company), and that the latter amounted to but a small percentage of its indebtedness. A proper inquiry, therefore, would have demonstrated the insolvency of the company. The referee holds that the Trust Company is chargeable with notice of what examination would have shown.

The referee finds, upon a careful review of the whole evidence, that the Trust Company on June 20, 1904, when the Franklin notes and mortgage were for the first time duly pledged as collateral security to the Trust Company, upon antecedent debts, knew, or had reasonable grounds to believe, that the Mills Company was insolvent, and that a preference was thereby intended.

The referee further holds that, where a mortgage or pledge is made to secure an antecedent debt within four months before the filing of a petition in bankruptcy against him, it is not necessary that the creditors should know, or have reasonable ground to believe, that the debtor was then insolvent; a different rule applying to such a case from that which governs when there is an absolute payment of a pre-existing debt. This proposition has been distinctly held by the Circuit Court of Appeals in the Fourth Circuit in the case of Farmers' Bank v. Carr & Co., 11 Am. Bankr. Rep. 733, 127 Fed. 690, 62 C. C. A. 446. The headnote of this case is: "A mortgage made within the four months period, in good faith, to secure a present loan is valid, but cannot be sustained as a security for antecedent debt although the mortgagee believes the mortgagor solvent." The same court in Pollock v. Jones, 10 Am. Bankr. Rep. 616, 124 Fed. 163, 61 C. C. A. 555, affirmed the decision of the district judge. He held the mortgage invalid in a case where a creditor made proof of claim with security in the bankruptcy court, thus submitting himself to its jurisdiction, finding as a fact that the mortgage had been given by Jones to Pollock to secure a pre-existing debt within the four-months period, when Jones was insolvent, and that there was no ground to believe Pollock knew that Jones was insolvent at the time the mortgage was executed. The Circuit Court of Appeals in its opinion, delivered by Judge Simonton, discusses the case of McNair v. McIntyre, 7 Am. Bankr. Rep. 638, 113 Fed. 113, 51 C. C. A. 89: "The facts found in that case were that when the mortgage of Sanderlin, who afterwards became a bankrupt, was executed, it was intended in good faith, neither Sanderlin nor his mortgagee having any knowledge that he was insolvent. Nor is there anything in the record showing that Sanderlin was insolvent." In Farmers' Bank v. Carr, supra, the court said, upon the authority of McNair v. McIntyre: "But the fact that neither the debtor nor the creditor knew or had reason to know that the debtor was in failing circumstances or insolvent must be made to appear clearly and without question." In Re Hill, 15 Am. Bankr. Rep. 499, 140 Fed. 984, it was held: "Where the evidence is clear that the bankrupt in giving a mortgage within the four months period intended thereby to give a preference to the mortgagee, and thus hinder, delay, and defraud creditors, the mortgage is null and void under section 67e." In Re Pease, 12 Am. Bankr. Rep. 66, 129 Fed. 446, it was held: "A chattel mortgage executed by the debtor within the four months period to secure a present loan to be used in part payment of claims of certain of his creditors, of which fact the mortgagee had knowledge or reason to believe it, is an act of bankruptcy under section 3c, subd. 1, and the surety is void under section 67e." Following these controlling decisions, the referee feels obliged to hold that, even if the Trust Company did not know or have reasonable ground to believe the Mills Company to be insolvent, still

the pledge of the Franklin notes and mortgage was invalid; and that, if this were not so, still it was incumbent on the Trust Company "to make it appear clearly and without question" that it did not have this knowledge or these grounds of belief. This the Trust Company has utterly failed to do. The referee directs that the said proof of claim be stricken out and expunged until the said moneys so received as a fraudulent preference by the Trust Company be restored to the trustee, as hereinbefore directed.

The third exception is that there was no consideration for the note of $10,067 given by the Mills Company to the Trust Company on April 11, 1904. The evidence shows that this note was an independent obligation of the Mills Company. It was given at the time of the draft on the Proximity Manufacturing Company for the same amount. This matter will be hereinafter considered. The referee finds that there was no consideration for this note. There was no extension of credit. There was nothing of value upon which the note was based. It was evidently given as a part of the Proximity transaction and as a security for the overdraft, which the testimony shows, and the referee finds, was paid afterwards. The referee is of the opinion that this note no longer constitutes an obligation of the Mills Company, and that it should be stricken from the said proof of claim, and it is so ordered.

The fourth exception is that the Mills Company is not liable on the draft for $10,000 drawn by W. W. Mills on the Cullen Construction Company on June 6, 1904. The referee finds from the evidence that this draft was not drawn or indorsed by the W. W Mills Company, but by William Hayes, cashier of the Carolina Trust Company, upon telegraphic instructions of W. W. Mills to the said Hayes; and that the amount of the draft was placed to the account of the W. W. Mills Company (less the regular bank discount) in the Carolina Trust Company, and that the same was credited in this manner by the Trust Company in reducing the overdraft of this account, and this at the direction of W. W Mills. The draft was drawn on June 4, 1904, and accepted by the Cullen Construction Company on June 6, 1904. The referee finds, therefore, that the final payment of this draft to the Carolina Trust Company within the four months of the filing of the petition of creditors, in bankruptcy, was not a preferential payment to the Carolina Trust Company, as contemplated by the bankruptcy act, as the estate of the W. W. Mills Company had theretofore received the amount of said draft from said Trust Company. This exception is therefore overruled.

The fifth exception is that the Trust Company has no title whatever to the two unsecured notes and two notes and mortgage given by S. H. Kefauver to the W. W. Mills Company; that the said notes and mortgage were never assigned and transferred, and, if they were assigned and transferred, it was without authority, and, if assigned and transferred, they were assigned as collateral security to the overdraft of the W. W. Mills Company upon the Trust Company, which has since been paid in full, so that they are now the property of the bankrupt's estate. The referee finds as facts that the Mills Company was the owner of the two promissory notes for $1,500, each executed by S. H. Kefauver, secured by mortgage on certain personal property; that on or about or in May, 1904, R. D. Godwin, the secretary of the Mills Company, undertook to assign the said notes as collateral security to the overdraft to the Trust Company of the Mills Company; that he had no authority, express or implied, to make this pledge; and that the said overdraft of the Mills Company has since been paid in full. The trustee has collected a portion of said notes. The referee is of the opinion that the trustee has the right to retain the same, and that the Trust Company has no interest in the same. It is so ordered, and the proof of claim will be amended by striking out therefrom the said notes and mortgage as a security

The sixth exception is that the Trust Company has no title to the claim of the W. W. Mills Company against the Proximity Manufacturing Company for $10,068 or any of the sum; that the pretended assignment of said claim by draft on the Proximity Manufacturing Company was without effect, and that it has never been accepted by the Proximity Company; that the said note was assigned, if assigned at all, as collateral security to the overdraft of the W. W Mills Company upon the Carolina Trust Company, which has since been paid in full, so that the claim is now the property of the bankrupt estate, and the said draft and accompanying note for same should be surrendered.

The Mills Company in its schedule in bankruptcy sets forth a claim against the Proximity Company of Greensboro, N. C., for $20,880.94. On the 1st day of December, 1903, the Mills Company was indebted to the Trust Company in the sum of $3,744.97 by way of overdraft. This overdraft had been of long standing. On the 1st of January, 1904, it amounted to $10,138.84. On the 6th day of April, 1904, it had run up to $13,623.12. The overdraft had given the Trust Company much concern and anxiety. It was apprehending a visit from a state bank examiner, and was very solicitous that the overdraft should be paid or secured. It was very earnest in its efforts to induce the Mills Company to arrange the matter. This company finally, on the 11th day of April, 1904, gave the Trust Company a draft on the Proximity Manufacturing Company, for $10,068.39, being very nearly the exact amount of the overdraft at that time. The draft was never presented, nor was it ever accepted by the Proximity Manufacturing Company, which always denied the supposed claim of the Mills Company. W. W. Mills, who directed the drawing of said draft, testified from personal knowledge that the draft was drawn for the purpose of paying or securing the overdraft, and for no other purpose. Upon direct examination R. D. Godwin stated the same to be the facts in the premises; but, after being interviewed by an officer and attorney of the Trust Company, he changed his testimony, without showing how his memory had been refreshed. More reliance should be placed upon his first statement than on his last. Both John A. Mills and William Hayes testified that the said draft was given as collateral security upon the general indebtedness of the Mills Company to the Trust Company, and not to secure the said overdraft only, but they simply give their understanding in the matter without testifying to what was said at the time the draft was drawn and delivered. They state conclusions rather than facts. They do not speak from personal knowledge. Upon the whole evidence, the referee finds that the draft was given to be applied in liquidation of the overdraft. But this draft was not to be paid, as was distinctly understood at the time in a written notice from the Mills Company to the Trust Company, until July 11, 1904, and that it was to be held under a condition of further instructions from the Mills Company. July 11, 1904, was within the four months of the filing of the petition in bankruptcy. The referee further finds from the testimony that the overdraft was afterwards paid by the proceeds of the discount of a draft on the Cullen Construction Company is entitled to the return and cancellation of the Proximity draft. It appeared that the Mills Company had not demanded the return of the overdraft or its cancellation, but the referee is of the opinion, and so holds, that this did not authorize the Trust Company to retain the draft or to apply its proceeds upon the general indebtedness of the Trust Company. There is no evidence that the Trust Company ever attempted to collect this draft or to collect any part of the claim of the Mills Company against the Proximity Manufacturing Company, which claim the latter company had always denied. There is no evidence that the said draft had even been presented to the Proximity Manufacturing Company, and it appeared that the draft had never been accepted by the latter company. The referee's conclusion is that there was no equitable assignment of any part of the claims of the Mills Company against the Proximity Manufacturing Company by the drawing of the said draft, and that the said claim belongs to the trustee in bankruptcy. It is therefore ordered that the proof of claim be amended accordingly.

The seventh exception is as follows: "That the note and mortgage made on the 10th day of February, 1904, by the Montgomery Railway Company to W. W. Mills, and indorsed by him to the Carolina Trust Company, were made without authority and are of no effect. That the said W. W. Mills was insolvent when he undertook, without consideration, to indorse this note to the Carolina Trust Company. That said indorsement was void as to his creditors, for that, being insolvent, he did not retain property amply sufficient and available to pay his creditors. Furthermore, the said Montgomery Railway Company was not indebted to said W. W. Mills in any amount when the said note and mortgage were executed, as the said Carolina Trust Company well knew."

The evidence of W. W. Mills in regard to the Montgomery Railway note and mortgage, under the direct examination of counsel for the trustee, was as follows:

"Q. Please state the facts about the note of the Montgomery Railway Company, made payable to you on the 15th day of February, 1904, and indorsed by you to the Carolina Trust Company, which note was secured by deed of trust of same date as note of the railroad.

"A. The note was made to me for the purpose of securing any account that the Mills Company had, and I acted more as trustee in the matter than anything else.

"Q. Had you given to the Montgomery Railroad Company anything of value as money, or other thing as consideration of that note as executed by you? (Objection. Objection overruled. Exception.)

"A. No, sir.

"Q. Will you state the facts and circumstances that occasioned the making of this note to you and all about it? (Objection. Objection overruled. Exception.)

"A. The Carolina Trust Company asked the Mills Company to put up collateral for their loans, and the Mills Company owned most of the stock of the railroad company, and this was a part of their assets for which they could give collateral. They owned all of the stock except a share or two.

"Q. At whose suggestion did you make the note?

"A. It was made at the suggestion of the directors of the bank.

"Q. Besides the Mills Company, who owned stock in the Montgomery Railroad Company?

"A. I owned a share, Mr. Hayes a share, and Godwin a share.

"Q. Who were the board of directors?

"A. Hayes, Godwin, and myself.

"Q. Who prepared the note and mortgage that was executed?

"A. Mr. Strong.

"Q. Was he attorney for the Montgomery Railroad Company?

"A. No, sir; he acted for the Montgomery Railroad Company. He did it more as accommodation than anything else, as I understood it.

"Q. Was he acting for the Carolina Trust Company as their attorney?

"A. Yes; he was their attorney at the time.

"Q. In drawing that paper was he acting as attorney for the Carolina Trust Company or attorney for the Montgomery Railroad Company?

"A. I could not answer that question because the paper was submitted to the directors after it was drawn. He did not pass on that paper.

"Q. To any transactions of getting this security for the Trust Company and in preparing the paper, can you state whether or not he was acting for the Trust Company? (Objected to because the question has already been asked and answered. Objection sustained. Exception.)

"A. I can't say of my own knowledge that Mr. Strong was instructed by the Carolina Trust Company.

"Q. Perhaps I may be able to refresh your recollection. Don't you remember on some former examination of the Mills case you stated you thought he represented the Trust Company in that transaction? What do you think about it now?

"A. I think that now.

"Q. Is that your impression now?

"A. Well, what I think, of course, would be my impression. (Objection by counsel for the Carolina Trust Company to the preceding question and answer. Objection overruled. Exception.)

"Q. To what directors was the paper submitted?

"A. To the board of directors of the Carolina Trust Company.

"Q. They were executed in the form in which they were drawn by Mr. Strong?

"A. They were executed like they were drawn, not like they were originally drawn. I think they were originally drawn as personal property. They were first drawn for Mrs. Mills and myself to sign. Then I told Mr. Strong it was a corporation, that we had to have a corporation in order to haul the freight out, and it was organized and made a corporation on that account. Then he drew up the next papers.

"Q. Did you originate the plan under which this note was to be drawn or executed by the Montgomery Railroad Company to you and you indorse it to the Trust Company?

"A. I can't say that I did. Mr. Strong and I together talked the matter over as to how it was to be made to convey it as a collateral.

"Q. State the circumstances and facts about it.

"A. He said that the Montgomery Railroad Company could not make a mortgage to secure a debt of the Mills Company in any other way, as he saw it. That is my recollection. They were to make me a note, and I was to take their note and indorse it, and deposit it with the Trust Company as collateral.

"Q. So that the Trust Company never gave any consideration to the Montgomery Railroad Company for their note of mortgage? (Objection. Objection overruled. Exception.)

"A. No, sir.

"Q. To what debt was the Montgomery Railroad's note and mortgage transferred as security? (Objection. Objection overruled. Exception.)

"A. Any and all debts of the Mills Company."

John W. Hinsdale, Esq., attorney for the trustee makes the following statement: "The trustee admits that Mr. Strong did not know at the time that he drew the mortgage, or at the time the papers were received as collateral, whether or not the Montgomery Railroad Company owed Mr. Mills." The respondents objected in apt time to the admission of any of the testimony in reference to the Montgomery mortgage as irrelevant to this proceeding and moves to strike out all of the testimony. Motion denied. Exception.

The referee finds the following facts: On the 15th day of February, 1904, the Montgomery Railroad Company, a North Carolina corporation, which was owned entirely by the W W. Mills Company, with the exception of three shares of its capital stock, undertook upon the suggestion of the directors of the Carolina Trust Company, to execute a note for $10,000, secured by a mortgage on all of its property, to W. W. Mills, and it was with the understanding with Mills, which was immediately carried out, that the said note should be indorsed by him to the Carolina Trust Company as collateral security upon the pre-existing indebtedness of the said Mills Company to the Trust Company. The papers were drawn by the attorney and director of the Trust Company, who suggested the legal form of the papers which were drawn. It is a fact which appears in evidence that the note and mortgage was called for by the directors of the Carolina Trust Company, and was finally passed upon and accepted by them. It appears as a fact in evidence that on the day the note and mortgage were executed by the Montgomery Railway Company that William Hayes, cashier of the Trust Company, who was a stockholder and director of the said Montgomery Railroad Company and its secretary, resigned as such secretary, and did not participate in the meeting. A new secretary acted at the meeting when the note and mortgage was executed. The note and mortgage was afterwards indorsed by Mills to the Trust Company as collateral security upon the Mills Company's pre-existing indebtedness, as stated above. There were only three stockholders of the Montgomery Railroad Company—W. W. Mills, R. D. Godwin, and William Hayes, the last two owning but one share each. Mills swears, as appears in the evidence, that in taking the note and mortgage in his name, and indorsing it over, that he acted more as trustee in the matter for the Trust Company than anything else. And it appears in the evidence, quoted in this finding of facts for clearness, that he was advised that the Montgomery Railroad Company could not make a mortgage to secure a debt of the Mills Company in any other way. There was no meeting of the stockholders of the Montgomery Railway Company, but there was a special meeting of the directors for the purpose of authorizing the execution of the note and mortgage. No notice of this meeting was given to William Hayes, one of the directors, and he did not attend said meeting. The property of the Montgomery Railway Company was afterwards, on or about the 14th day of December, 1904, sold by the Carolina Trust Company for $939.45 over and above a prior mortgage upon the same for $3,927.50 and costs, in favor of one H. A. Page. Upon the foregoing facts, the referee holds that the note of the Montgomery Railway Company to W. W. Mills, being without consideration, was unenforceable in his hands, and that the Trust

Company took the note with knowledge of its want of consideration; that it was not a purchaser for value without notice, as it is attached with knowledge of the facts, and it paid no present consideration to either W. W. Mills or the Railway Company for his indorsement; that, therefore, the note and mortgage were unenforceable in the hands of the Trust Company. The referee also holds that the said note and mortgage were invalid, for the reason that they were executed without authority; because the special meeting of the directors for the purpose of authorizing the execution of the note and mortgage was held without any notice being given to William Hayes, one of the three directors, and he was not present at the meeting; and, further, because there was no meeting of the stockholders to authorize a mortgage upon the Montgomery Railway Company's entire property. It is ordered that the proof of claims be amended by striking out the note and mortgage of the Montgomery Railway Company as a security therein.

The eighth exception is as follows: "That the assignment of $80,000 of stock owned by W. W. Mills in the Raleigh & Cape Fear Railway Company, on the 15th day of February, 1904, for the purpose of securing the indebtedness of W. W. Mills Company to the Carolina Trust Company is invalid and of no effect, for that the said W. W. Mills was insolvent at the time, and did not retain property amply sufficient and available to pay his creditors." The referee finds the following facts: W. W. Mills on February 18, 1904, was the owner of $80,000 of the capital stock of the Raleigh & Cape Fear Railway Company. On that day he executed to the Trust Company the following instrument: "North Carolina, Wake County. I hereby pledge, assign and convey to the Carolina Trust Co., for the purpose of securing any and all notes, discounts, demands and obligations of the W. W. Mills Co., a corporation, and the Biscoe Lumber Co., a corporation, which said Trust Company may now hold or hereafter hold or acquire in $80,000, face value of my stock in the R. & C. Ry. Co., certificate numbers being as follows: 91, 88, 89, 90, 92, and 93, and I hereby authorize and empower said Trust Co., to apply the stock hereby hypothecated to the notes, discounts, demands or obligations herein mentioned, or to any or all of them from time to time, to such proposition, lots or parcels as the said Trust Company may see fit. The said stock to be held or realized upon by said Trust Co., by the terms of notes, discounts, demands or obligations now existing, or which may hereafter exist, and held by said Trust Co., or the said Biscoe and Mills Cos., or mine. [Signed] W. W. Mills. [Seal.] Stock indorsed and attached this Feb. 15th, 1904. [Signed] H. F. Smith, Witness." This paper had never been registered. The certificate of stock for $80,000 was indorsed by W. W. Mills to the Carolina Trust Company. When this paper was executed, the said W. W. Mills was heavily in debt, and he did not then retain property amply sufficient and available to pay his creditors. The referee finds as a conclusion of law that the said instrument was a pledge of the said stock, and not a mortgage, and that it did not require registration; that the said instrument is valid against the creditors of W. W. Mills in so far as it attempted to pledge the said stock as collateral security to the debts of the Mills Company and the Biscoe Lumber Company, upon which he was bound. It is accordingly ordered that the said proof of secured claim be amended by striking out this stock as a collateral security on the indebtedness of the W. W. Mills Co. and the Biscoe Lumber Company, other than that upon which W. W. Mills was bound.

The ninth exception is as follows: "That the Carolina Trust Company has no lien, under chapter 275, p. 469, Pub. Laws N. C. 1903, upon the stock of W. W. Mills in the Carolina Trust Company, being described in the said proof of claim as 'about 140 shares of stock of the said Carolina Trust Company' in the name of W. W. Mills or upon any other stock of said company by him, and that the same was the individual property of said W. W. Mills and belonged to his estate for the benefit of his general creditors." The referee finds the following facts: W. W. Mills was the owner of 145 shares of the capital stock of the Trust Company of the par value of $100 each. In addition to these shares, the said W. W. Mills was the owner of 40 shares of said stock, which was pledged to the National Bank of Raleigh, N. C., 50 shares of said stock which was pledged to the Raleigh Savings Bank of Raleigh, N. C., 50 shares of said capital stock which was pledged to W. C.

Douglas. 200 shares to the Chatham Savings Bank, to secure a note for $6,000. The said Trust Company purchased said note, and thus subrogated to the lien on said stock which was held by said Chatham Savings Bank as security upon the said note. On the 26th day of July, 1904, W. W. Mills agreed with the Trust Company to sell his stock to said company at a price to be fixed by arbitrators and on the 9th day of August, 1904, the arbitrators made an award appraising the stock at $75 a share. Accordingly the Trust Company on the 9th day of August, 1904, purchased from the said Mills 200 shares of stock at the aggregate price of $15,000, which it now holds to be applied under the direction of this court. Copies of the submission and award are set forth in the Trust Company's amended proof of secured claim filed herein. The Trust Company claims a right to apply the proceeds of this stock and of the other stock held by Mills in the Trust Company, under the supposed statutory lien to the indebtedness set forth in its proof of claim herein, upon which W. W. Mills is liable. This claim is made under chapter 275, p. 469, Pub. Laws N. C. 1903. The referee holds that the contract of said bills of sale of his stock to the Trust Company, the submission to arbitration, and the award of the arbitrators fixing the price at which said stock should be sold are valid and binding upon all the parties; that the price of the said stock must be paid in cash. The Trust Company was chartered by a private act of the General Assembly of North Carolina (chapter 65, p. 80, Priv. Laws 1895). Under this act its stockholders had the untrammeled right to dispose of their stock without let or hindrance. The Legislature of 1903 enacted chapter 275, p. 469, Pub. Laws 1903, for the regulation of certain corporations formed thereunder. The referee is of the opinion that this statute does not apply to the Trust Company, and, if it does, it is invalid as interfering with the right of disposition which is inherent in the right of ownership, and which is secured to every stockholder by his contract of subscription with the company. Such a law would impair the obligation of the contract, and as such is inhibited by the Constitution of the United States. The referee therefore holds that the Trust Company had no statutory lien under the said act of the General Assembly of North Carolina. But it does have a lien to the amount of its debt and interest on such portion of said stock as it received from the Chatham Savings Bank to secure the note to the said Chatham Savings Bank, upon which it is pledged as collateral. It is therefore ordered that the said proof of claim of the Carolina Trust Company be amended by striking therefrom the said stock as collateral security upon all claims, except the note which the Trust Company purchased from the Chatham Savings Bank.

The ninth exception. This exception embraces a great many items, the large majority of which relate to a series of discounts and corresponding payments made by and to the Trust Company in respect to sight drafts drawn by the Mills Company on third persons, the proceeds of which went to the credit of the Mills Company in its account with the Trust Company, with the understanding that, if the said drafts should not be paid, they should at once be taken up by drawer as cash items. The result of this series of transactions to the extent of $286.50 overdraft of the Mills Company on 11th day of August, 1904, which was paid on or before the 19th day of August, 1904, as appears from the statement of the account furnished by the Trust Company. The referee has already found that at that time the Mills Company was insolvent and the Trust Company knew or had reasonable ground to believe it to be so. Nevertheless, the referee holds that the payment of this overdraft in this manner did not constitute a fraudulent preference, because the overdraft should be treated as a cash item; it having been agreed between the parties that these honored sight drafts should be paid immediately upon their return. The referee concludes that the payment of drafts as appears by the testimony does not constitute a fraudulent preference under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418).

There are, however, a number of items in said exception which stand upon different footing from the payment of the discount sight drafts which were returned dishonored. The following are the items referred to:

(1) The assignment by the Mills Company of the Franklin notes and mortgage. This has been heretofore considered and held to have constituted a fraudulent preference.

(2) The receipt and appropriation on September 22, 1904, of $3,000, the proceeds of Franklin mortgage and notes to the payment of certain overdrafts and other antecedent indebtedness.

(3) The receipt on December 3, 1904, of 140 of W. W. Mills shares of stock in the Trust Company. It has not been applied to any indebtedness. There has been no agreement or consent of the said Mills that it should be so applied.

But, if it should be found otherwise, the transaction comes within the ban of the bankruptcy law as being a fraudulent preference. At the time of the transaction the said W. W. Mills was hopelessly insolvent, as was known to the Trust Company, or as it had good reason to so believe; the effect of the preference being to enable the Trust Company to receive a larger percentage of its claim than other creditors of the same class. The proceeds of its sale are now held by the Trust Company, claiming the right to apply them in any of the Mills Company's liabilities upon which W. W. Mills is indorser. The referee concludes that said bank stocks should be stricken from the proof of claim as a security for any debt mentioned therein, and it is so ordered.

(9) The payment on June 20, 1904, of the note of the Mills Company for $400 which had been previously discounted by the Trust Company, stands upon a different footing from the series of transactions connected with the dishonored sight drafts above referred to. This was a fraudulent preference, because it was the payment of an antecedent debt by an insolvent person, the creditor. The Trust Company knowing or having reasonable ground to believe it to be such, and the purpose and effect of the transaction being to enable the Trust Company to receive a larger percentage of its debt of $400 than other creditors of the bankrupt of the same class, it is ordered that the Trust Company shall pay to the trustee the sum of $400, with interest, and that, unless this be done, the Trust Company's proof of secured claims be stricken out and expunged.

(13) The payment on July 1, 1904, by the Mills Company of the note of W. W. Mills for $425 in favor of the Mills Company and indorsed by said company and discounted on April 13, 1904, by Trust Company. This note constituted an ordinary pre-existing indebtedness of the Mills Company to the Trust Company, which could not be paid by the former company except in violation of the provisions of the bankruptcy act.

The referee finds that the Mills Company was insolvent on July 1, 1904, and that the Trust Company knew, or had reasonable ground to believe, it to be insolvent at that time, and that the effect of the payment was to enable the Trust Company to receive a larger percentage of its debts than other creditors of the Mills Company of the same class. The referee therefore holds that this payment was a fraudulent preference. It is therefore ordered that the Trust Company pay to the trustee of the Mills Company the sum of $425, with interest from April 13, 1904, and, that unless this be done, proof of preferred claim be stricken out and expunged.

(15) The payment on July 7, 1904, by the Mills Company to the Trust Company of the following notes which had been discounted by the Trust Company at the dates of the respective notes: Note of Mills Company to Z. P. Wright for $126.72; note of Mills Company to J. R. Franklin for $323; note of Mills Company to American Planing Mills for $108.21. Each of these notes constituted a pre-existing indebtedness of the Mills Company to the Trust Company. The referee makes the same finding of fact in respect to each of these notes as is made in reference to the note described in 13 above. He therefore concludes that the payment of these notes constituted a fraudulent preference. It is therefore ordered that the Trust Company pay the trustee the several sums of $126.72, $323.00, and $108.21, and interest on same from the 7th day of July, 1904, and that, unless this be done, the said company's proof of preferred claim be expunged.

(17) The payment on July 11, 1904, by the Mills Company to the Trust Company of the note of the Mills Company to K. B. Johnson for $230, dated May 7, 1904, and discounted on that day by the Trust Company. This and its indorsement by the Mills Company constituted a pre-existing indebtedness of that company to the Trust Company. That the referee makes the same findings of facts in respect to this note as he made in reference to the note in

13 above. The referee holds that the payment of this note constituted a fraudulent preference. It is ordered that the Trust Company pay to the trustee $230, with interest from June 11, 1904, and that, unless the same be done, the said proof of preferred claim be stricken out and expunged.

The foregoing report, together with the voluminous testimony filed therewith, have been carefully examined, and it is evident the findings of fact are supported by ample proof, competent testimony. Hence the findings of fact are in all respects confirmed. The conclusions of law are upon authority and are hereby confirmed, as are the orders contained in the report in all respects. The whole report evidences a patient hearing on the part of the referee and a proper solution of the difficult questions involved, as it does a faithful, painstaking, energetic discharge of duty by the trustee. Both officers are entitled to the highest commendation.

The report is adopted and confirmed.

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## THE JASON.

(District Court, S. D. New York. May 22, 1908.)

1. SHIPPING—GENERAL AVERAGE CONTRIBUTION ON ACCOUNT OF SALVAGE—NEGLIGENT STRANDING OF VESSEL.

A steamer sailing from Cienfuegos for New York, on her fourth trip from such port during the same season and under the same command, stranded on the first night out in calm weather on Sambo Head a low lying rock several miles northward of the course she had taken on the previous voyages. The master used a British chart which was incorrect and contained a caution that its accuracy was not to be relied on, as no regular survey of the coast had been made. A more nearly correct chart had been made by the United States Coast Survey which could have been obtained, but the master made no inquiry. The vessel had proceeded for more than an hour before stranding over shoals and near charted reefs, which a vigilant lookout should have observed. *Held* that, in the absence of any reasonable explanation of the unusual position of the vessel, the stranding must be charged to her negligent navigation, and that she was not entitled to recover contribution in general average from the cargo owners on account of salvage expenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 602.]

2. SAME—SUIT IN GENERAL AVERAGE BY CARGO OWNER—EFFECT OF HARTER ACT.

Where a portion of a vessel's cargo was jettisoned on account of her stranding solely by reason of her negligent navigation, while section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) exempts the vessel and owners from liability to the cargo owner in tort for his loss, it does not affect the right of the cargo owner to maintain a suit against the vessel for a general average contribution in consequences of such loss.

3. SAME—SALVAGE—ADJUSTMENT IN GENERAL AVERAGE.

After a vessel had been stranded through negligent navigation, the owner contracted for her salvage, agreeing to pay a certain per cent. of her salved value, the agreement not extending to the cargo. After the vessel and greater part of the cargo had been brought safely into port, the cargo owners settled independently with the salvors, paying a smaller per cent. of the salved value than that paid by the shipowner. *Held*, that the latter payment was properly a salvage payment, made for the benefit of all interests, and that under the American law, and section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St.

1901, p. 2946]), in a suit by the cargo owners to enforce against the vessel, a general average contribution on account of cargo jettisoned, the shipowner was entitled to have the salvage payments made by the respective parties taken into the general average adjustment although not entitled to an affirmative recovery of any balance which might be due him on such adjustment.

[Ed. Note.—General average, see notes to Pacific Mail S. S. Co. v. New York, H. & R. Mining Co., 20 C. C. A. 357; The Santa Anna, 84 C. C. A. 316.]

In Admiralty. Suit and cross-libel for general average.

On July 29, 1904, the Norwegian steamship Jason, under charter to the Ward Line, left Cienfuegos for New York, laden with about 12,000 bags of sugar and some general cargo. She sailed early in the afternoon, with fine weather and the moon in the last quarter. She encountered neither storm nor fog, nor were her navigators aware of any unusual or dangerous conditions until shortly before 4 a. m. of July 30th, when she stranded on Sambo Cambeso, or Sambo Head, a low lying rock about seven miles northwest of Dry Shingle Reef. The Jason under the same command had been in and out of Cienfuegos Harbor three times during the year 1904 and before July. Her master used for purposes of navigation a British admiralty chart, purchased in New York. On this chart, and also upon the charts of the United States Coast and Geodetic Survey, Dry Shingle is placed in north latitude 21 degrees 26¾ minutes. A chart had been published by the Hydrographic Office of the United States Navy in March, 1904, placing Dry Shingle in north latitude 21 degrees 22¼ minutes, and it is apparently conceded that the new position is more nearly correct than the old. The chart used on the Jason has printed upon it: "The coasts of the Island of Cuba, and especially the south coast, not having been regularly surveyed, the mariner is cautioned not to place too much dependence on this chart." And where Dry Shingle is indicated is printed the legend: "Dry Shingle reported to extend further south, 1883."

The Jason having passed out of Cienfuegos Harbor, set a course south 25 degrees west magnetic, and maintained it for 39 miles from Xagua Light. Having run this distance by 6:35 p. m., the course was changed to south 80 degrees west magnetic, and so held until just before the stranding, and when it was too late by any change of course to escape disaster. This course by the the chart in use would have carried the Jason approximately 10 miles to the southward of Dry Shingle Reef, and at least 14 miles to the southward of Sambo Head. Accepting the latest chart as correct, however, the course in question would have brought her within 5 or 6 miles of Dry Shingle and about 10 miles of Sambo Head. The distance run on the westerly course before stranding was between 70 and 75 miles, and, in order to go ashore, the Jason in running that distance had to get out of her course at least 10 miles, and had passed through 11 or 12 miles of shoals and reefs to the northward of Dry Shingle before she finally fetched up. The captain went to his berth at 11:30 p. m., and was not called until stranding was unavoidable. When breakers were seen ahead, or nearly so, the wheel was ordered astarboard, and, when the vessel was fast, she was heading by compass W. by S. ½ S. There is no evidence as to the exact amount that she swung under her starboard wheel further than that she swung "very little." After midnight there were only the second officer and two men on deck, and the lookout had gone to call the watch shortly before the stranding; but how long before that he left his post does not appear. On the same day that the Jason went ashore a passing steamer took her first officer back to Cienfuegos, whence her condition was cabled to New York. The owners' agent, with consent of all parties in interest, agreed with the Merritt & Chapman Derrick & Wrecking Company that their tug Premier, then lying at Kingston, Jamaica, should go forthwith to investigate the Jason's situation and report what could be done, this for the agreed price of $1,000. The Premier performed this duty, and reported from Cienfuegos after viewing the Jason. The owners' agent being then unable to communicate speedily with the cargo owners agreed on behalf of the hull that the Merritt Company should salve the Jason for 40 per cent. of the salved value. No agreement was made with respect to the

cargo. While the steamer lay on the reef about a sixth of her sugar cargo was jettisoned. When the Premier returned the task of releasing the Jason from her position proved considerably easier than was anticipated the weather remaining unexpectedly favorable; and she was finally taken under convoy to New York and discharged most of her cargo uninjured. The owners and underwriters of the major portion of the cargo made an independent settlement with the salvors for approximately 25 per cent. of salved value. The usual average bonds having been given and an adjustment having been made at the instance of the hull owners they bring the original libel herein, alleging that the stranding was without negligence or fault on the part of the Jason, that all salvage expenses are to be considered as having been incurred for the common benefit in one continuous salving operation, and demanding upon an adjustment of accounts that Arbuckle Bros, as owners of the major portion of the salved sugar pay in general average $5,061.24.

The cross-libel brought by Arbuckle Bros. against the shipowners alleged that the stranding and consequent damages were solely caused by the incompetency of the Jason's master, the defective condition of her compasses, and faulty and negligent navigation; and it further asserts that salvage expenses are not the subject of adjustment in general average, so that excluding the payments and losses of the shipowners by reason of the negligent navigation aforesaid, and excluding also the salvage payments of all parties, there results a general average contribution arising principally from jettisoned cargo due to Arbuckle Bros. in the amount of $3,482.76.

Harrington Putnam, for the Jason.
Lawrence Kneeland, for Arbuckle Bros.

HOUGH, District Judge (after stating the facts as above). If the Jason stranded through negligent navigation, or by reason of the defects of construction, equipment, or fitting alleged in the cross libel and the answer to the original suit, the shipowners' action must be dismissed. There is, I think, no evidence justifying the belief that the ship's compass was so defective as to be the proximate cause of disaster, or that the master was incompetent, or that the ship herself was unseaworthy. The question then remains whether the stranding was due to negligent or careless navigation.

The fact that she did go ashore in calm weather, and on a frequented route which she had already traveled several times under the same command, puts on the original libelants the burden of showing sufficient of the attending circumstances to warrant the inference that she stranded without fault. The Nicanor (C. C.) 44 Fed. 509. That burden I do not think the original libelants have successfully borne. The chart by which their master navigated bore on its face a warning of unreliability, and was at once a suggestion to careful mariners of extreme caution while using it, and of the necessity of getting better charts if by inquiry they could be obtained. Four months before this accident a better chart was obtainable, but no inquiry was made, while a comparison of the courses steered by the Jason on leaving Cienfuegos on previous occasions shows a variation of method irreconcileable with care. In January and April, 1904, she had gone, according to her own testimony, much further south before turning west, yet varied her westerly course without any apparent reason. In June, 1904, she pursued, according to her master, a course which would have taken her directly over Dry Shingle, yet nothing happened, and the reef was not even observed. This last course could not have been steered as testified to, but its statement casts serious doubt on

the accuracy of the master's calculation. Further, it seems quite incredible, if a proper lookout was maintained on the night of July 29th–30th, that the vessel could have proceeded for more than an hour over shoals and near charted reefs and through water of necessarily lighter color than the deep sea without any of these phenomena being observed in probable time to avert disaster. Yet, considering the course sworn to, the heading of the ship on taking the ground, and the charted position of the dangers to navigation, warnings must have presented themselves and been unobserved by the Jason's crew. In a case such as this it is incumbent on the shipowners at least to suggest some reasonable explanation of the unusual. But one suggestion is made, viz., that by a northerly current the Jason was set at least 10 miles out of her course in traveling not over 75 miles. But no such current ordinarily exists in this region. It does occur after a severe northerly storm, because the water, having been blown away from the south coast of Cuba, flows back when the pressure is removed; yet in proceeding southerly 39 miles the Jason made her full speed by the land, which is irreconcilable with the strong current asserted; and, finally, there is absolutely no evidence of the necessary antecedent northerly storm. It is for the libelants to show at least the strong probability of this current and excuse their master's ignorance of it. They have failed to show such probability, and the presumption, therefore, remains that it was negligent to go ashore in calm and clear weather. This finding of fact compels the dismissal of the original libel, under The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130.

The cross-libel is filed on the theory that the decision just cited intended to and did leave the law of general average unaffected by the Harter act. Act Feb. 13, 1893, c. 105, 27 Stat. 445, § 3 (U. S. Comp. St. 1901, p. 2496). The court did recognize the Harter act as relieving the shipowner (under certain circumstances) from "liability for the negligence of his servants," but denied that it conferred upon him any new or affirmative right of recovery in general average or otherwise against the owners of cargo lost or damaged by such negligence. The statute was declared to be a shield against one particular form of attack by shippers; i. e., a claim in tort for negligence, or in contract for breach of the agreement for safe carriage. But the Supreme Court did not hold that the fault or tort or negligence was extinguished by the statute. On the contrary, it approved the words of Jessel, M. R., in a case involving the same train of thought—"it [the statute] does not make [the shipowners'] acts right if they were previously wrongful"—and expressly disapproved the language of this court in saying (82 Fed. 474–477):

> "In such cases (i. e., where due diligence has been observed) faults in the navigation or management of the ship are no longer by construction of law faults of the owner, and the ship and her owner are now no more liable to the cargo owner for damages therefrom than the latter is liable to the shipowner for the resulting damages to the ship. Both are alike strangers to the fault."

Cross-libelants' interpretation, therefore, of this leading case leaves a cargo owner to do just what he could have done before the Harter act—i. e., seek contribution in general average even from a tort-feasor

—but what before that statute he never did do, because he then had a larger remedy, and could recover in solido for the wrong done him. But neither before nor after that act could the negligent shipowner advance as a defense or set-off any claim of contribution to himself. He could not do this before the act, because (1) in the form of action then used he had no technical opportunity; and (2) if action in general average had been resorted to by some ill-advised shipper, the same tort would have prevented the negligent ship recovering even a partial solatium for what was her own fault, nor could he do this after the act because the statute had not extinguished nor excused the original negligence. It did no more than prevent the assertion of a particular form of liability—i. e., that based on the tort, but made no change in the always existing (but not used) liability to contribute to a sacrificial expense beneficial to the wrongdoer among others—such sacrificial expense being the basis of a sort or kind of action entirely different from that arising on the tort itself. It is obviously true that the ground of recovery, the cause of action in general average, is wholly different from that in any suit to recover damages for negligence; the reason of the former being the benefit conferred by libelant on respondent, and of the latter the wrong done by respondent to libelant.

An examination, however, of the original record in The Strathdon (D. C.) 94 Fed. 206, affirmed 101 Fed. 603, 41 C. C. A. 515, shows that this view of the statute was advanced in that case and supported by the same arguments adduced here. The District Court in the case cited clearly held that in an action substantially like the one at bar any recovery by way of general average would, like complete restitution by action for negligence, be based on "a nonexistent legal wrong" (page 210 of 94 Fed.); i. e., nonexistent because extinguished by the Harter act. That court held that, because the Harter act had extinguished the tort and disabled a cargo owner to assert the same as the cause of action, the same extinguishment had enabled the shipowner to have his claim considered in general average. I find it difficult to perceive any difference between this statement and that of this court (above quoted) that shipowner and cargo owner since the Harter act "are alike strangers to the fault." Yet the Circuit Court of Appeals, although deciding the Strathdon on the ground that there was no fault whatever in the shipowner, expressly approved the reasoning of the District Court in words too plain to be disregarded, even though such approval was not necessary to the decision of the case as finally disposed of. It must therefore be held here, not only that the cross-libelants can maintain their suit for a general average contribution, but that the principle of adjustment must be the same as if the Jason's stranding had been due solely to vis major and the ship free from any fault at all; or, in other words, the effect of the decision in the Strathdon is to blot out the fact of negligence when the action is promoted by an innocent libelant and leave it as a bar to any suit begun by the tort-feasor. The figures revealed by the pleadings seem to show that if the salvage payments made by the owners of the Jason and Arbuckle Bros., respectively, be regarded as expenditures for common benefit and allowable in general average, the adjustment will re-

sult in a balance in favor of the Jason, and it therefore becomes necessary to consider the nature of salvage payments or awards in relation to such adjustment.

Whether salvage shall be considered in general average under the exact circumstances here shown is confessedly a new question. The average bond produced requires that the losses and expenses shall be stated and apportioned "in accordance with the established usages and laws in similar cases," but this does not much advance the discussion, for neither in reported cases nor in the evidence of the experts produced is there found any identical instance. It is, however, shown by the testimony that the long-established custom of American adjusters is to treat the expense of a continuous salvage operation as a charge distributable over the several interests. The language of the witnesses leaves no doubt of the principle as understood by them, but their instances, gleaned from long and varied experience, show no closer application of it than a redistribution of one award over interests whose values had been more accurately ascertained by the adjusters than had been done in the legal proceedings wherein the award was given. The work of Mr. Dixon on Marine Insurance and Salvage, published in 1862, may, I think, be relied on as showing the established practice of New York adjusters, and he lays it down as a general principle (page 102) that, "where ship and cargo are saved together, the total salvage is apportioned upon the ship and cargo according to their respective values." This usage is in accordance with the law; for, "when a vessel is accidentally stranded in the course of her voyage and by labor and expense she is set afloat and completes her voyage with the cargo aboard, the expense incurred for that voyage, as it produced benefit for all, so it shall be a charge upon all according to the rates apportioning general average" (McAndrews v. Thatcher, 3 Wall. 347, 18 L. Ed. 155), expressly approving Bedford Commercial Assurance Co. v. Parker, 2 Pick. (Mass.) 7, 13 Am. Dec. 388, and Phillips on Insurance, § 1340, which are to the same effect. Cf. The Congress, 1 Biss. 42, Fed. Cas. No. 3,099. The nature of salvage in this regard is compendiously stated by Brown, D. J., in International Navigation Co. v. Atlantic Mutual Ins. Co. (D. C.) 100 Fed. 312, affirmed 108 Fed. 987, 48 C. C. A. 181, certiorari denied 181 U. S. 623, 21 Sup. Ct. 926, 45 L. Ed. 1033:

"Whatever the ship or owner is obliged to pay under such a decree [for salvage] * * * being a charge and lien upon the ship, is as much an appropriation of the ship pro tanto to the common safety, to her hurt, detriment, and damage, as the cutting away of her masts would be, or a jettison of goods for the same purpose."

There can be no doubt that from the time the Premier went to work until the Jason arrived under convoy at New York with her salved cargo on board there went on a continuous service of the kind ordinarily called salvage, and such successful service benefited both hull and cargo. If the result of this operation had been a suit affecting all interested, and one decree had been entered awarding the same percentage of recovery against the several values found or agreed upon in the action, there can be no doubt but that such award would by

American law and the practice of New York adjusters have been carried into any adjustment had, even though the values had been varied by further or better information.

But it is urged here that the payments made should all be excluded because (1) they (or at least the moneys paid by the hull owners) are not properly salvage—i. e., amounts recoverable under the maritime law for services rendered voluntarily and not under contract—or because (2) the parties in interest having made their own several bargains (a) at different rates, and (b) at different times, there was no sacrifice for common interest and no equitable reason exists for opening or changing each man's bargain made in self-interest alone. It is suggested in Carver on Carriage by Sea (4th Ed.) § 394, that salvage "in the strict sense" as above defined is not within the principle of general average. This I believe to be contrary to the American decisions, but the present argument varies the claim to meet our law, and insists that private contracts will not support a true salvage recovery. The argument which makes a distinction between salvage and services in the nature thereof is very artificial at best; but to assert that salvage depends for its existence on the nature of the agreement, whether express or implied, on land or at sea, by virtue of which the work is entered on, is too refined to be sound. The nature of the service, its recognition by maritime law, and the remedies for its enforcement are identical whether or not there be any agreement other than that implied by going to the assistance of the ship in peril, provided only that the reward be dependent on success and obtainable only out of the rescued property. See a "salvage contract" considered in The Alert (D. C.) 56 Fed. 721, where, if any distinction such as here suggested had existed, it would most appropriately have been made. The service to the Jason and her cargo was salvage as that term is used in the American cases cited and many others.

It is, however, true that not "all salvage charges are to be deemed a general average." Peters v. Warren Ins. Co., 1 Story, 463, Fed. Cas. No. 11,034. It is only when the expense is incurred for the benefit of all concerned that such is the case, and the contention of the cargo owners accordingly is that neither what they paid the Merritt Company nor what the owners of the Jason so paid was for common benefit. On this point the time of payment or agreement must be immaterial. Whether several persons pay or promise to pay at one time or another is of itself no evidence to show or disprove a community of interest.

As to the remaining part of cross-libelants' argument, I am convinced that the fact of the shippers having after the peril made a settlement better than the owners could make a bargain beforehand is a point rather specious than sound. If the owners' agent had made an entire contract with the salvors to rescue both cargo and ship for a definite sum, then in so far as that contract was reasonable such reasonable "disbursement (thereunder) in so far as it was a disbursement for the salvation of the whole adventure from a common imminent peril may properly be charged to general average." Ocean S. S. Co. v. Anderson, L. R. 10 App. Cas. 107. The contract the ship's agent did make was really this: The Merritt Company was to get 40 per

cent. of the salved value of the vessel, and whatever the court or agreement might allow on the salved value of the cargo; but the company was to salve both vessel and cargo. The agreement was one. The compensation only was not fully agreed on. It must be found that this agreement was reasonable considering the time of year and probability of hurricanes, the dangerous nature of the coast and the likelihood of loss of cargo by melting. The truth is that a high charge was made for the hull because it seemed unlikely that there would be much cargo left. It was not the cargo owner that made the original and essential bargain. It was the ship's agent; but the cargo owner ratified that bargain, and united in sacrificing something for the common benefit when he paid money to the salvors. It seems to me, therefore, that this salvage expense, however or whenever liquidated, was something done for common benefit, and therefore should under American law be brought into the general average adjustment. The cases of salvage awards at rates differing in the same decree as against hull and cargo (The Velox, L. R. 1906, Prob. 263; The Lahaina [D. C.] 19 Fed. 923; The Cyclone [D. C.] 16 Fed. 486) do not in my view militate against this conclusion. The test in general average is not what it was worth to each interest to procure its own salvation. That is no more to the point than the fact that some shippers of goods may prefer them to be lost rather than saved. The test is whether there was in law a voluntary sacrifice for the common benefit, and the moment salvage is paid or agreed to be paid on goods saved with the vessel such sacrifice exists. No shipper is compelled to take his goods. He may permit them to be sold by the salvors; but, if he elects to take his goods and pay the salvage and signs an average bond, he is by his own act entitled and subject to contribution for all the sacrifices which in a legal sense were voluntarily made before any separation of interests took place. Taking, therefore, into consideration the respective contributions of hull owners and shippers towards salvage expenses, it appears to me that no balance is due to Arbuckle Bros. If counsel think my computation in error in this regard, a reference may be had, if the amount is not agreed upon. While believing that under the decision in The Strathdon, supra, there can be no adjustment in general average without taking into consideration the sacrifices of these negligent shipowners, it is impossible that such advances can be used further than to defeat the otherwise valid claims of the shippers. The hull owners can have no affirmative recovery in any form of action. The cross-libel is therefore also dismissed.

Both dismissals will be without costs.

PENNELL et al. v. UNITED STATES.

THE WINOOSKI.

(District Court, D. Maine. March 30, 1908.)

No. 20.

1. COLLISION—STEAM AND SAILING VESSELS—EXCESSIVE SPEED OF STEAMER IN FOG.

Under rules 20 and 21 of the navigation rules of 1864, which required a steam vessel to keep out of the way of a sailing vessel and to go at a moderate speed in a fog, and the rule of decision requiring a steam vessel to proceed at such reduced speed in a fog as to be able to reverse her engines and come to a standstill before colliding with a vessel which she ought to see, the United States gunboat Winooski, proceeding at night in a dense fog 35 or 40 miles off the coast of Nova Scotia, and in the track of vessels on the way to or from Halifax, at a speed of seven knots an hour, was going at an excessive speed, and was in fault for a collision with a brig not shown to have taken any action to embarrass the steamer in the performance of her duty or to have failed in any way to duly apprise the steamer of her approach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 170.

Collision rules—Speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

2. SAME—SPEED OF SAILING VESSEL—EVIDENCE.

A speed on the part of the brig of 3 or even 3½ knots an hour, which was barely sufficient to give her steerageway, was not excessive, and evidence that her speed did not exceed that rate is entitled to credence, in the absence of any entry in the log of the steamer, which was very complete and full in giving the details of the disaster, indicating that the brig was going at excessive speed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 171.

Collision rules—Speed of sailing vessels in fog, see note to The Mount Hope, 29 C. C. A. 368.]

3. SAME—LIGHTS—EVIDENCE.

Direct and positive evidence from the brig that her lights were properly lighted and set 45 minutes before the collision is sufficient to establish the fact that they were burning at the time of collision, when corroborated by the log of the steamer, kept by the acting master, stating that the brig's lights were reported and were seen by him immediately before the collision, as against the testimony of persons from the steamer that they were not burning when they went on board the brig after the collision, which was of such force as to throw her substantially on her beam ends.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 123.]

4. SAME—LOOKOUT—FOG SIGNALS.

Evidence considered, and *held* to show that the brig had a proper lookout, that he was sounding the fog horn at shorter intervals than required by the rules, that his failure to hear the fog whistle of the Winooski was not a fault and was immaterial, as it was heard by the mate in charge, and that the brig was in no way chargeable with fault contributing to the collision and could not have avoided it after hearing the whistle, but that it was due solely to the excessive speed of the gunboat.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 151.]

5 SAME—SUIT FOR COLLISION—EVIDENCE.

Where one of two vessels in collision charges the other with faults, which if the charges are true would have been obvious, the fact that her own log, written at the time, makes no mention of them, is significant and tends to discredit her claim.

In Admiralty.

Bird & Bradley and Benj. Thompson, for libelants.
Robert T. Whitehouse, U. S. Atty.

HALE, District Judge. This suit is begun by a petition brought by virtue of a special act of Congress of February 24, 1905, 33 Stat. 810, c. 777, which refers the subject-matter to the examination and adjudication of the District Court of the United States for the District of Maine, and provides that the practice shall be in accordance with the rules of practice and procedure in admiralty.

The suit is to recover damages arising from the loss of the hermaphrodite brig Olive Francis of Machiasport, Me., by collision with the United States gunboat Winooski on the 30th day of July, 1866, 45 minutes after midnight.

The Olive Francis was an hermaphrodite brig, 110 feet long, and of the burden of $293^{23}/_{95}$ tons. At the time of the collision, she was proceeding in ballast from Boston to Glace Bay, Cape Breton, for a cargo of coal. About noon on Sunday, July 29th, she tacked ship off the harbor of Halifax, Nova Scotia, with all sails set except her studding sails. The wind was southwesterly and was light and baffling. Just before dark, a thick fog set in. Her royal was then taken in, and she proceeded closehauled, with her starboard tacks aboard, until the time of the collision.

The gunboat was a side-wheel steamer, 250 to 275 feet long, and of 974 tons burden, carrying 10 guns. She was proceeding along the Nova Scotia coast on a voyage westward, having left the Gut of Canso on the morning of July 29th. At the time of the collision, the sea was smooth, there was a thick fog, and the wind was from south to southwest. The petitioners contend that the collision arose from the great speed of the steamer and lack of proper efforts on her part to avoid the brig. The government contends that the rate of speed of the steamer was prudent and safe, in view of the skill and care exercised and of the precautions taken in navigating her, and in view of the reciprocal precautions required by law from other vessels. It contends, further, that the collision was caused: First, by the excessive speed of the brig; second, from the fact that the brig did not have proper lights; third, that she did not have a sufficient lookout; fourth, that she did not sound fog signals; fifth, that, upon hearing the whistle of the gunboat, she did not give some special signal to warn the steamer; and that she was also in fault for putting her helm hard astarboard.

1. Was the gunboat going at a moderate speed?

The navigation rules of 1864 were in force at the time of the collision. The following rules have a bearing upon the questions now before the court:

"Rule 20. If two vessels one of which is a sailing vessel and the other a steam vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

"Rule 21. Every steam vessel when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop her engines; and every steam vessel shall, when in a fog, go at a moderate speed."

"Rule 23. Where by rules 17, 19, 20 and 22 one of two vessels shall keep

out of the way, the other shall keep her course, subject to the qualifications of rule 24."

Rule 24 relates to special circumstances, rendering a departure from the rules necessary in order to avoid immediate danger.

More than 40 years have elapsed since the events happened which form the subject-matter of this controversy. The able proctors on both sides have shown great care and ability in placing before the court all the testimony that can be obtained after the lapse of so long a time and the death of many of the participants. Upon the question of speed, the evidence is quite extended and somewhat contradictory. The testimony of Rear Admiral Casey is important and persuasive, especially when taken in connection with the log. Admiral Casey was the navigator and acting executive officer of the gunboat. He is a mariner and a naval officer of great experience and ability. He testifies frankly and with great detail. He went below just after midnight. After evident reflection and with care, he fixes the speed at that time at "not much over seven knots. I say seven knots." He testifies, further, that from the practice of the ship the speed throughout the hour from 12 to 1 o'clock would be the same. He admits that the approved practice and principles of seamanship and steam navigation require that, under the conditions of sea and weather at the time of the collision, he should slow the ship to a speed that would make her readily manageable. His opinion is that six or seven knots would be a very good speed; that such speed gives good command of a ship in a fog, so that she will answer her helm and keep out of the way of other vessels; that he regarded it as good seamanship to keep the Winooski under the conditions that she was at the time of the collision and at the rate of speed at which she was proceeding; that at such rate she would answer her helm better than when going at three or four knots. But he says that, when running in for the shore, as when approaching Machias Harbor, he would keep her at three or four knots an hour, so that her headway could be stopped quickly. And he admits that she would have steerage way at three or four knots, although "sluggish." He regards seven knots as a proper speed in a dense fog, although he says the gunboat could be stopped more quickly at three or four knots, but could not change her course so quickly as if going faster. His testimony is important with reference to the force of the blow when the gunboat struck, and shows that she must have been going at great speed. He says it was like striking a reef, and that it never occurred to him that she had collided with a vessel. There is testimony from another source that the shock from the collision was as if the vessel had "struck a rock." The effect of the blow on the hull of the brig substantiates the fact that the gunboat was proceeding at a high rate of speed. The blow was at about right angles. It listed the brig over three feet. It was "right into her eight or ten feet." A careful examination of the log confirms the evidence relative to speed. The steam log indicates that the gunboat maintained a substantially uniform rate of speed of nine knots an hour, on July 29th from 11 a. m. to 11 p. m. At the latter hour the order was given and recorded to slow to twelve revolutions, or to a little more

than half speed. And I do not find from the deck log or the steam log that after 11 o'clock there had been any change in conditions affecting the speed. Admiral Casey was, I think, correct in fixing the rate of speed at "seven knots at least." I cannot escape the conclusion that this was her speed at the time of collision.

In Palmer v. Merchants' etc., Co. (D. C.) 154 Fed. 683, I have lately had occasion to consider some of the later decisions in the matter of speed in a fog. In the case at bar the question arises under the navigation rules adopted by Congress in 1864. Under those rules, however, the question is not materially different from that which arises under the present rules. Indeed, before 1864, the law in regard to speed in a fog was well determined in this country under the rules laid down by Judge Sprague and other eminent authorities on maritime law. And, before the statute of Victoria 25 and 26, in the early days of steam navigation, there are well-considered decisions in England on this subject, recognizing the necessity for steam vessels to proceed at a moderate speed in a fog or in dark and rainy weather. From the statute of Victoria, Congress drew much of the maritime legislation of 1864.

Under rule 21 of the statute of 1864, The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687, is a leading authority. In that case, in speaking for the Supreme Court, Mr. Justice Blatchford said:

"It is contended for the steamer that she was not guilty of any neglect in going at the rate of speed found. Her full rate of speed was between 13 and 14 knots an hour. When she first overhauled the schooner, her speed was between 6 and 7 knots an hour, and she kept up the latter speed until she reversed her engines on suddenly sighting the schooner in the fog, about 500 feet away. * * * The steamer was bound to keep out of the way of the schooner, and the burden rests upon her to show a sufficient reason for not doing so. She must be held wholly responsible, unless she shows a fault on the part of the schooner which contributed to the collision, or that it was due to unavoidable accident."

While the same rules were in force, there are numerous decisions on this question. In The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148, a case of collision between steam and sail occurring in 1869 about 200 miles off Sandy Hook, seven knots in a dense fog is held to be immoderate speed. In this circuit, in The Monticello, 1 Holmes, 7, Fed. Cas. No. 3,971, a case of collision in 1870 on the open sea 30 or 40 miles from Cape Lookout, Judge Shepley held the steamer's speed of 8 miles (less than seven knots) to be excessive. In that case he said that the "speed should be more moderate according as the fog is more dense." In The Eleanora, Fed. Cas. No. 4,335, Judge Blatchford's language is to the same effect. I have had occasion in other cases to cite The Colorado, 91 U. S. 692, 23 L. Ed. 379, a case of collision between steam and sail in 1869 on Lake Huron, where Mr. Justice Clifford holds that, in a fog, "slow speed is indispensable, and that the courts require very slow speed, just sufficient to subject the vessel to the command of her helm." He adopts substantially the English rule that a steam vessel is going at an immoderate speed if she is going at such speed to make it "dangerous to any craft which she ought to have seen and might have seen." He held a rate of five or six miles

an hour an excessive speed. The following cases in point were decided under the rules of 1864: The City of Gautemala, 8 Ben. 521, Fed. Cas. No. 2,747; The Hansa, 5 Ben. 501, Fed. Cas. No. 6,037; The Louisiana, 2 Ben. 371, Fed. Cas. No. 8,537; The Franconia, 4 Ben. 181, Fed. Cas. No. 5,049; The City of Panama, 5 Sawyer, 63, Fed. Cas. No. 2,764; The D. S. Gregory, Fed. Cas. Nos. 4,099, 4,103; The Leo, 11 Blatch. 225, Fed. Cas. No. 8,254; The Alberta (D. C.) 23 Fed. 807; The Luray (D. C.) 24 Fed. 751; The Blackstone, 1 Lowell, 488, Fed. Cas. No. 1,473.

It is interesting to trace the earlier cases prior to the law of 1864: Newton v. Stebbins (1850) 10 How. 586, 13 L. Ed. 551; McCready v. Goldsmith (1855) 18 How. 89, 15 L. Ed. 288; New York v. Rae (1856) 18 How. 223, 15 L. Ed. 359; Rogers v. St. Charles (1856) 19 How. 108, 15 L. Ed. 563; The City of New York, Fed. Cas. No. 2,759; The Northern Indiana (1853) Fed. Cas. No. 10,320.

In The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, in speaking for the Supreme Court, Mr. Justice Brown says:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, providing such approaching vessel is herself going at the moderate speed required by law."

In The Chattahoochee, 173 U. S. 540, 548, 19 Sup. Ct. 491, 43 L. Ed. 801, Mr. Justice Brown further explains the rule which he had followed in The Umbria, supra, and says:

"While sailing vessels have the right of way as against steamers, they are bound not to embarrass the latter either by changing their course or by such rate of speed as will prevent the latter from avoiding them."

Mr. Justice Brown thus indicates the reason for stating the rule as he did in the case of The Umbria. The doctrine of the courts is that the speed of a steamer must be judged by all the circumstances of the case; that the action of the approaching vessel may be one of the vital circumstances. She must not embarrass the steamer either by changing her course or by changing her speed or by proceeding at such speed that the steamer will not be able to avoid her, even if such steamer is under perfect control and proceeding at a moderate rate of speed.

In The Louisburg, 75 Fed. 424, 21 C. C. A. 424, Judge Webb said:

"The familiar principle of law is that the sailing vessel is to keep her course, and that the steamer is to keep clear. As has been stated by the respondent here, the duty of the steamer is imposed upon her upon the condition that the sailing vessel complies with what is required of her. In other words, the sailing vessel must not, by any action on her part, interfere with, embarrass, and defeat the steamer in the employment of proper means to perform her duty."

In that case, Judge Webb held that a speed of seven knots an hour in a dense fog at a point off the coast of Nova Scotia in a somewhat frequented part of the high seas was excessive.

The learned proctor for the government has argued with great force and ability that even the strictest construction of the rules of naviga-

tion relating to speed does not require a steamer to lie to or anchor; that moderate speed does not mean no speed at all; that such steamer is not required to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger; and that the obligations to slacken speed, and if necessary to stop and reverse, do not become operative until those in charge of the steamer know that they are approaching another vessel. In support of his contention, he cites The Leland (D. C.) 19 Fed. 771, The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620, and other cases. But these cases are not inconsistent with the rules laid down in the cases which I have cited. The doctrine of maritime courts is that a steamer in a fog must not run at such speed as to prevent her from reversing her engines and coming to a standstill before she shall collide with a vessel which she ought to have seen. This doctrine is well stated by Judge Wallace in The Etruria, 147 Fed. 216, 77 C. C. A. 442.

In the case at bar, as in The Nacoochee, supra, and The Umbria, supra, the duty is imposed upon the steamer by law to keep clear of the sailing vessel. The burden of proof is upon her to show fault upon the part of the brig, or to show that the collision was due to inevitable accident. There is some dispute as to the location on the high seas where the vessels came together. It appears that the brig made her last tack, previous to the collision, off Halifax Harbor, just before the fog shut in, about noon Sunday, July 29th, and that she proceeded, with her starboard tacks aboard, closehauled, until the time of the collision. In the light baffling wind her course could not have been steady, and it is impossible to determine at precisely what point she had arrived at midnight. The learned proctor for the government contends with great earnestness that she must have been at a much greater distance from the coast than is admitted by the petitioners; but from all the evidence I am persuaded that the conclusion of the petitioners is not far out of the way, and that she was about 35 or 40 miles off the coast of Nova Scotia.

The place where the two vessels came together was not in one of the great paths of commerce, but it was in a place frequented by vessels going to and from the Gut of Canso and ports to the eastward. It was also in the path of vessels proceeding to and from Halifax. In such a place, in my opinion, a speed of 7 knots an hour in a dense fog is not moderate speed. Indeed, I must find that the admitted speed of $6^6/_{11}$ knots an hour, under all the circumstances, was not a moderate speed in a dense fog.

I have no doubt that the opinion expressed by Admiral Casey that seven knots is a proper speed in a dense fog is the opinion shared by many other mariners of great ability and experience. Courts have often commented upon the fact that masters of steamers are prone to lay great stress upon the necessity of keeping a steamer going at a high rate of speed in order that she may answer her helm quickly, but it is impossible for courts to overlook a plain breach of the written law that steamers in a fog must proceed at such reduced speed as to be able to reverse their engines and come to a standstill before colliding with a vessel which they ought to have seen. In The Cambridge, 2 Lowell, 21, Fed. Cas. No. 2,334, Judge Lowell comments up-

on the fact that the doctrine of courts must prevail over the learning of mariners.

The learned proctor for the government has cited The Colorado, supra, and The Alberta, supra, and insists that a steam vessel is under the duty only of adopting such rate of speed as would place her headway under such ready command that she can be stopped within such distance as other vessels can be seen by her, under the assumption that such other vessels will do their duty in apprising her of their proximity. These cases would have great force if there were a different state of facts in the case at bar. But the whole testimony convinces me that no action of the brig defeated the gunboat in the employment of proper means of performing her duty. I cannot find that the brig failed in any way to apprise the gunboat of her approach.

I find, then, that the gunboat was in fault, in that she was not going at a moderate speed in the fog, and I am of the opinion that the immoderate speed of the gunboat in the fog was the cause of bringing the vessels into such a position when they first came in sight of each other that it was impossible to prevent a collision, and that thus her speed in the fog was the initial cause of the collision.

2. Was the brig going at a moderate speed in the fog?

There was a light baffling wind, about a 3-knot breeze. Sometimes the brig's sails were full, and sometimes they were flapping. The whole testimony induces the belief in my mind that, while her speed varied with a baffling wind, the brig was not proceeding at any time at a speed materially above 3 knots; certainly not at a greater speed than 3½ knots. The testimony shows, too, that this speed was only sufficient to give her steerage way. The evidence is that, when the fog set in, the royal of the brig was taken in, that the brig then proceeded with little more than steerage way, and at the time of the collision she was going at "3 knots an hour." Neither of the logs upon the gunboat ascribes immoderate speed upon the part of the brig as the cause of the collision.

In The Etruria, supra, in drawing the opinion for the Court of Appeals of the Second Circuit, Judge Wallace, under similar circumstances, held that the absence of any entry in the log was a "suspicious circumstance."

In The Richmond (D. C.) 114 Fed. 208, Judge Waddill held that the claim that the collision was due to the failure of the schooner to show proper lights was materially weakened by the fact that the omission was not mentioned in the steamer's log.

It may further be said, with reference to the omission in the steamer's log in this case, that the log is very complete and full, and the court cannot escape the conclusion that, while the log recites in detail so many things in regard to all the matters relating to the disaster, it would not have been likely to remain silent about so material a circumstance as the fact that the brig was going at an immoderate rate of speed.

I cannot conclude that, under the circumstances, a speed of 3 knots, or even of 3½ knots, an hour was an immoderate speed. In the case of Palmer v. Merchants' etc., Co., supra, I have considered many

cases in which courts have distinctly held 4 knots an hour to be moderate speed under circumstances similar to those in the case at bar.

In The Nacoochee, supra, the Supreme Court held that a speed of four miles an hour off Cape May was not excessive speed. The Supreme Court reversed the court below in holding the sailing vessel at fault for excessive speed and for other causes. The Colorado, 91 U. S. 692, 23 L. Ed. 379; The Vedamore (D. C.) 131 Fed. 154; The Furnessia (D. C.) 137 Fed. 955.

I find therefore that the schooner was not proceeding at an immoderate speed in a fog, and was not in fault.

3. The government accuses the brig of fault in failing to have lights properly set and burning at the time of the collision.

The government's contention that there were no lights is based upon the testimony that when Admiral Casey came on board the brig he saw no lights, that when Bennett rowed around the brig he saw no lights, and that after the collision lanterns were found aboard with the lights out. Against this we have the distinct, affirmative testimony that the lights were properly lighted and set at 12 o'clock, and there is a presumption that such condition existed at the time of the collision; there being no testimony to the contrary. The court must consider the fact that the collision was attended with such force that it would be likely to put out the lights, that when the lanterns were found without lights the brig was listed over, her jib boom was under water, and she must have been substantially upon her beam ends, so that the testimony as to the absence of lights at this time is not very persuasive. The deck log of the Winooski shows that, from midnight to 4 a. m., it was kept by James Van Buskirk, the acting master, who is since deceased. The entry immediately after midnight is as follows:

"July 30. At sea. From midnight to 4 a. m. Cloudy weather and thick fog. Blew the whistle every five minutes. At 12:45 lookout reported a light right ahead. Saw it and immediately rung two bells; ordered the helm hard aport and rung three bells. Before anything more could be done we struck. Called away the first and second cutters which left the ship inside of five minutes and got all the persons from the wreck, which proved to be the brig Olive Francis, Captain Small of Machias, Me. Stayed by her during the watch. Took on board Captain F. A. Small, Mrs. Small, the two Misses Small, Mate George A. Hewitt, and Mrs. Hewitt, Second Mate Charles Wood, four men and steward. All saved."

It is evident, then, from the log, that at 12:45 the lookout reported a light upon the brig, and that the acting master, Van Buskirk, "saw it." The court must come to the conclusion that the testimony to which I have referred as to the lights being out is not persuasive as against the affirmative testimony that there were lights, and against the evidence of the log of the gunboat that the lookout reported a light, and that the acting master saw it. In my opinion, there is not sufficient testimony to convict the brig of fault in that she did not have her regulation lights set and properly burning at the time of the collision.

4. The government accuses the brig of fault in failing to have a sufficient lookout.

The second mate, Wood, was in charge of the deck during the watch when the collision occurred. He was standing in the waist of the brig. At this point he could observe both the lookout and the man at the

wheel, and could give his orders to both. He heard the steam whistle of the gunboat at 12:45 just before the vessels came together, but did not hear any whistle before that time. Whether or not he was in a proper location on the brig for the navigating officer it is unnecessary to inquire, for if he had been in a different place he could not have prevented the disaster. The seaman who was stationed at the lookout has not been found, and is not produced. There is affirmative testimony, however, that he was walking the forecastle deck when the first mate went below at midnight; that he was standing on the topgallant forecastle attending to his duty. The second mate testified that the lookout "was walking across the topgallant forecastle back and forth, across the forecastle, and from the forward house to the eyes of the topgallant forecastle, back and forth, across and back. That was his round. At the time of the whistle of the gunboat he had been walking back and forth, and when he would walk back and forth he would look, and I would do the same, out to leeward." The second mate says that he called the attention of the lookout to the whistle of the steamer at 12:45, and the lookout said he had not heard it. Under certain circumstances such a failure to hear the whistle might be a cause for condemning the brig; but, clearly, under the testimony, the brig should not be condemned for this fact alone. The staysail was between the lookout and the gunboat. The wind was blowing from the lookout to the gunboat. He had just been blowing his horn at the time the steamer's whistle blew. It is impossible to believe that, if he had heard it, the collision would have been averted, for the second mate heard it, and, if anything could have been done to avert the catastrophe, it was his duty to give such orders as were necessary. But the vessels came together so soon after the whistle was heard that it was too late to avert the peril. It is impossible to tell in seconds precisely how much time elapsed between the sounding of the gunboat's whistle and the collision. Estimates of time during moments of peril are unsatisfactory; but from the whole evidence I must come to the conclusion that there was not time after the hearing of the steamer's whistle to avert the collision, and that the failure of the lookout to hear the last whistle did not affect the result. The answer itself assumes that this time must have been very short, for it says that, when the steamer blew the last blast of her whistle, she was so near the port side of the brig that the second mate "did not have time to give any order to the wheelsman to change the course of said brig before the collision occurred."

It is true that the lookout had the further duty of blowing the horn, but that does not render him an improper lookout, as the courts have frequently held. The evidence shows that at 12:45 the whistle of the Winooski was heard by the second mate. Nothing further could have been done if the lookout forward had also heard it. There is testimony that the whistle of the steamer sounded oftener than every five minutes, but from the whole evidence I must come to the conclusion that the log states the matter correctly that the whistle blew every five minutes. At the rate of speed at which the steamer was proceeding I cannot find that there was fault upon the part of the lookout for not hearing a fog signal which was blown five minutes before the collision. The learned proctor for the petitioners has plotted upon a map the posi-

tion of the vessels five minutes before the collision, and it appears that, at the rate of speed at which the gunboat was going, she must have been at that time 3,860 feet from the brig. I have already quoted from the deck log of the gunboat. Neither that nor the steam log make any mention of the want of lookout on the brig, nor do they allege any lack of vigilance on the part of the brig when the collision occurred. On the question of moderate speed of the brig, I have already referred to the fact that there was an absence of any entry in the log of the gunboat as to the speed of the brig, and have commented upon the effect which, in law, such omission should have.

I find, then, that the brig was not in fault in that she failed to have a sufficient lookout.

5. The government seeks to have the brig condemned in that she did not sound fog signals.

Rule 15 of the rules of 1864 provides that:

"Sail vessels under weigh shall sound a fog horn at intervals of not more than five minutes."

Until the rules of 1885 the use of a fog horn sounded by the breath at proper intervals was a compliance with the regulations and usage of seamen. The Bolivia, 49 Fed. 170, 1 C. C. A. 221; The Pennsylvania, supra; The Hansa, supra.

The evidence shows that a mouth fog horn was used upon the Olive Francis, and that it was blown during the watch prior to the collision from 8 p. m. to midnight at intervals of at least one minute and a half. There is affirmative testimony that during the watch in which the collision occurred, from midnight to 12:45 in the morning, the horn was blown at intervals of one minute. When Mrs. Jewett, the wife of the mate, went below and turned in at 8 o'clock, the fog horn was blowing, as she testifies, and continued to be blown. She testifies that she did not sleep after her husband turned in shortly after midnight, and that during that time she heard the fog horn blowing, and was unable to sleep because of its sound. This evidence is uncontradicted. There is testimony that the fog horn was not heard upon the steamer, but the testimony is of an unsatisfactory character. Even if it were not heard upon the gunboat, that fact is of little consequence agains the affirmative testimony from the brig. The noise of the engines and paddle wheels of the gunboat and the water thrown up by her bows against a nearly head wind at the speed at which she was going, would account for the failure to hear the fog horn. The Niagara (D. C.) 77 Fed. 330; The Fulda (D. C.) 52 Fed. 400. As against the affirmative testimony on the part of the brig, the negative testimony of the steamer does not induce the belief in my mind that there was any fault upon the part of the brig in relation to the matter of the fog horn. Here, again, the logs of the gunboat are silent. They allege no failure on the part of the brig to sound her fog horn. The courts have frequently said that, in the absence of affirmative proof, the improbability that a sailing vessel would have been guilty of such a fault should be persuasive to the court. The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620; The John Fleming (D. C.)

149 Fed. 904; The Metamora, 144 Fed. 936, 75 C. C. A. 576; Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376.

6. The government urges that the brig was at fault after hearing the whistle of the gunboat in not giving some special signal to warn the gunboat, and in putting her helm hard astarboard.

At the time of the collision in 1866, there was no rule requiring special signals. The testimony seems to me clearly to show that after the vessels came in sight there was no time for a signal. It is true that the testimony is very unsatisfactory relating to the exact time in seconds which elapsed after the two vessels came in sight of each other and before they came together; but it seems clear to me that there was no time to light a torch or to make any adequate signal, and I cannot hold that the brig was at fault for not giving some special signal.

The contention that the helm of the brig was starboarded before the collision is based upon the fact that the helm was found at hard astarboard after the collision. I do not think this testimony alone should be sufficient to convict the brig of this fault. The force of the collision was great. The blow was given upon the port side of the brig and at substantially right angles. This blow would drive the brig sideways to starboard. The hull of the brig being thus driven to starboard, the resistance of the water against the rudder would have been likely to have carried the rudder to port. I am of the opinion that any change made after the whistle of the gunboat was heard was a change made in extremis, and after the brig was brought in imminent peril by the fault of the steamer. After a careful examination of the testimony, I find that nothing done by the brig could have avoided the collision or could have materially decreased the injury. The City of Paris, 9 Wall. 634, 19 L. Ed. 751; The Louisburg, supra; The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637; The Chattahoochee, supra.

7. The government alleges that the collision was due to inevitable accident.

I have already found that the initial cause of the collision was the immoderate speed of the gunboat. It seems, then, unnecessary to find affirmatively with reference to the matter of inevitable accident. Upon this question the respondent has the burden of proving that the collision resulted from a cause which, in the exercise of ordinary prudence, human skill and foresight could not have prevented. Courts have invariably held that a steamer going at an immoderate speed in a fog on a dark night or thick weather cannot be heard to say that the collision was the result of inevitable accident. In view of my finding upon the first point discussed in this opinion, it is unnecessary to pursue further the subject of inevitable accident.

In conclusion, then, I find that the steamer's immoderate speed was the sole, direct, and immediate cause of the collision. I find, further, that the brig was without fault.

A decree may be entered for the petitioners. An assessor may be appointed to report the amount of the petitioners' damages.

PENNELL et al. v. UNITED STATES.

THE WINOOSKI.

(District Court, D. Maine. June 22, 1908.)

No. 20.

1. COLLISION—DAMAGES—VALUE OF PROPERTY.
Evidence as to the value of a vessel and her equipment at the time she was sunk in collision considered.
2. SAME—DAMAGES RECOVERABLE—UNEARNED FREIGHT.
Unearned freight under a charter cannot be allowed to a vessel sunk in collision as damages, unless facts are shown from which the court can estimate the net freight with reasonable certainty.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 282.]
3. UNITED STATES—CLAIMS AGAINST—INTEREST.
In view of the general rule that interest is not recoverable against the United States, and the statute prohibiting the allowance of interest against it by the Court of Claims, interest cannot be allowed by a court of admiralty on a claim for damages for the sinking of a vessel in collision by a United States gunboat, referred to such court by a special act of Congress, unless such act expressly authorizes it, and a provision that the proceedings, including "the measurement of damages," shall be the same as in other admiralty cases, cannot be considered such express authority.

In Admiralty. On certain questions relating to damages.

Bird & Bradley and Benj. Thompson, for petitioners.
Robert T. Whitehouse, for the United States.

HALE, District Judge. In a former opinion (162 Fed. 64) this court has held that the government steamer was in fault, and has ordered that a decree be entered for the petitioners.

At the request of the learned proctors for both parties, I have consented to pass upon certain questions relating to the damages.

1. What was the market value of the brig Olive Frances at the time of her loss on July 30, 1866?

The testimony shows that the Olive Frances was a hermaphrodite brig 110 feet long, 27 feet in width, 14 feet draft, and of a burden of $293^{23}/_{95}$ tons. She was built at East Machias, Me., in the season of 1864–1865, of mixed woods, with copper and iron fastenings. She was metaled and copper bottomed in August, 1865, classed at Lloyd's A 1½. From the testimony of one of her mates, Charles A. Wood, it appears that she was built chiefly of hard and soft pine, with spruce floorings, hardwood outer planking, and hackmatack knees; that her sails consisted of flying jib, outer jib and jib, fore staysail, foresail, fore topsail, topgallant sail and royal, main staysail, middle staysail, main topmast staysail, mainsail, gaff topsail, and three studding sails. It appears that this suit of sails had been in use from the time of her launching in 1865. In addition to these sails, she had a partial suit of sails which was about six months old. She had the usual tackle, apparel, and furniture, and some surplus rigging. The whole testimony shows that her hull and rigging were well kept up and were in good condition at the time of the collision.

There has been much conflicting testimony as to her value. I admitted certain testimony de bene upon the question of her value. But, in coming to my conclusion, I do not find it necessary to consider any of this evidence. I base my decision as to her value entirely upon the unchallenged testimony offered, and quite largely upon the testimony offered in behalf of the government.

Upon such evidence and on full consideration of the case I find her value at the time of the loss to have been $25,000.

2. I find the value of the ballast on board of her at the time of the loss to be $100.

3. What was the value of the provisions on board at the time of the loss?

The mates testified that she was fully supplied with provisions for the voyage. Capt. Humphrey, a shipmaster of great experience, has testified that it would require about $35 per week to provision the crew and passengers, and that it would take from six weeks to two months to perform the voyage upon which she had entered. She had been upon her voyage, however, about five days, and had, therefore, consumed a portion of the provisions. After deducting what she must have consumed, I estimate the value of her provisions at the time of her loss to have been $250.

4. Are the petitioners entitled to unearned freight for the voyage?

The testimony shows that, pursuant to a charter, the brig was proceeding to Glace Bay, on the island of Cape Breton, to procure a load of coal to deliver at Bath, Me. The evidence touching the charter is vague. It does not appear whether the charter was for the voyage, or for the season; nor how much was to be paid for the carriage of the coal per ton; nor the cost of completing the voyage; nor the wages of the crew; nor other expenses which it would be necessary to incur in order to earn freight. There are, therefore, before me no elements from which the net freight can be estimated. The court would be left to pure guessing as to what the unearned freight would have been.

Under the decisions of the federal courts a claim for unearned freight for the voyage might be allowed, if there had been sufficient proof to establish affirmatively what it would have been; but the elements to which I have referred are all wanting.

The Supreme Court has considered the claim of future profits of an unexpired charter in The Umbria, 166 U. S. 404, 423, 17 Sup. Ct. 610, 41 L. Ed. 1053. In the case of The Hope and Freddie L. Porter (D. C.) 5 Fed. 822, Judge Fox went to the fullest extent which the law permits in the allowance of pending freight. His decision was confirmed in The Freddie L. Porter (C. C.) 8 Fed. 170. But in the case before me there is not sufficient evidence to satisfactorily and affirmatively prove this claim. The claim for unearned freight is disallowed.

5. Petitioners seek to recover interest from the date of the collision on the value of the property lost.

They base their claim for interest upon the provisions of Act Feb. 24, 1905, c. 777, 33 Stat. p. 810. That act is as follows:

"That the claims of the owners and officers of the brig Olive Frances, of Machiasport, Maine, and others on board said brig, for damages and losses

sustained by reason of collision of the United States gunboat Winooski with said brig, on July thirtieth, Anno Domini eighteen hundred and sixty-six, be, and the same are hereby, referred for examination and adjudication to the District Court of the United States for the District of Maine; that said parties, or such of them as shall choose to join therein, may, at any time within twelve months from the final passage of this act, file in said court, a petition, which thereafter may be amended at the discretion of the court in the same way that other pleadings in said court are amendable, which petition shall set forth all the material facts upon which the said parties jointly or severally rely in support of their said claims; and the court shall thereupon order such notice to be given to the United States, or to its representatives, and such further proceedings to be had as to answers or other pleadings in said case as it shall deem proper; that in regard to the trial or hearing of said cause the same rules and modes of proceedings as to evidence, mode of trial, liability for damage, and measurement of damages, and otherwise, including the right of appeal, shall apply as in other causes of admiralty between individual owners of colliding vessels, and shall also be determined upon such legal or equitable principles as shall be applicable thereto; that said claims shall not be barred by any statute of limitations; and should it on the said trial or final hearing be determined that anything is due to the said parties, the said court shall render judgment therefor against the United States for the amounts so found to be due to them jointly or severally and certify the same to the Secretary of the Treasury of the United States for payment; and the sum necessary to pay the same is hereby appropriated out of any moneys in the treasury not otherwise appropriated."

It is argued that interest ought to be allowed upon this claim in this court by reason of the following provision of the above act:

"In regard to the trial or hearing of said cause the same rules and modes of proceedings as to evidence, mode of trial, liability for damage, the measurement of damages, and otherwise, including the right of appeal, shall apply as in other causes of admiralty between individual owners of colliding vessels, and shall also be determined upon such legal or equitable principles as shall be applicable thereto."

The learned proctor for the petitioners urges with zeal and learning that under the act this case is to be heard and determined upon the principles of an admiralty court; that interest is recognized as a part of the damages in courts of admiralty; that the principles of admiralty law call for complete restitution where the libelant is deprived of his property, as in the case at bar; that there can be no restitutio in integrum unless interest is allowed. In his comprehensive brief upon the subject, the learned counsel suggests that:

"Should the court allow merely the value of the vessel at the time of the collision in July, 1866, and refuse interest, it is tantamount to the allowance of interest at the rate of 2.4 per cent. upon its value for 41⅔ years (the period which has elapsed since the loss of the vessel), without any allowance of the principal sum, while the government meantime has had the use of the moneys."

He cites The Rabboni, 53 Fed. 948, 952, where, in the Circuit Court, Judge Putnam said:

"When not more than the value of the vessel and pending freight is given, interest should justly be added to give complete restitution."

It should further be said in reference to the case just cited that, while the appellate court reversed the decree in part, it substantially confirmed the opinion of the court below in reference to interest. Numerous other cases are cited where the same principle is applied. Mary J. Vaughan, Fed. Cas. No. 9217; The Alexandria, 10 Ben. 101, Fed.

Cas. No. 178; The America, 11 Blatch. 485, Fed. Cas. No. 285; The Reno, 134 Fed. 556, 67 C. C. A. 479; Union Trust Co. v. Smith, Id.

The question of the allowance of interest against the government has often arisen in suits in the Court of Claims; and in the Revised Statutes of the United States is found the following provision, in Rev. St. § 1091 (U. S. Comp. St. 1901, p. 747):

"No interest shall be allowed on any claim up to the time of rendition of judgment thereon by Court of Claims unless upon contract expressly stipulating for the payment of interest."

Tillson v. United States, 100 U. S. 43, 25 L. Ed. 543; Harvey v. United States, 113 U. S. 243, 5 Sup. Ct. 465, 28 L. Ed. 987; U. S. ex rel. Angarica v. Bayard, 127 U. S. 251, 8 Sup. Ct. 1156, 32 L. Ed. 159.

But the matter has not been confined to the decisions in suits which have arisen in the Court of Claims. As a general principle, it has become the established rule of the Supreme Court that interest is not allowed on claims against the government, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief passed by Congress on special application. The only recognized exceptions to this rule are where the government stipulates to pay interest, and where interest is given expressly by act of Congress, either by the name of interest or under that of damages.

In Watts v. United States, 129 Fed. 222, 226, the District Court of the Southern District of New York passed upon a claim of interest against the government in a case which arose upon a special act providing that the claim of the owners of the British steamship Foscolia, destroyed through collision with a naval vessel, "may be submitted to the United States District Court for the Southern District of New York, under and in compliance with the rules of said court sitting as a court of admiralty." Interest had been disallowed by a commissioner; and, in passing on the exceptions to the commissioner's report, the court said:

"It is contended that the disallowance of interest is unjust and excludes the libelants from a full recovery of the damages sustained. Such appears to be the fact. Without interest, the recovery is only partial; but it is too well established to admit of argument that the government is not liable for interest on damage claims, in the absence of an express statutory provision or stipulation covering it. Bunton v. U. S. (C. C.) 62 Fed. 171; U. S. v. Sherman, 98 U. S. 565, 25 L. Ed. 235; Tillson v. U. S., 100 U. S. 43, 25 L. Ed. 543; Harvey v. U. S., 113 U. S. 243, 5 Sup. Ct. 465, 28 L. Ed. 987; Angarica v. Bayard, 127 U. S. 256, 8 Sup. Ct. 1156, 32 L. Ed. 159; U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336.

"Formerly Congress adjudicated upon private claims against the government, through its committees; but the great and increasing volume of claims necessitated some other method of providing for their investigation, and the Court of Claims was established for such purpose. * * *

"The claimants here, while conceding that, if the matter had been referred by Congress to the Court of Claims, interest would not be recoverable, urge that, as it has been sent to an admiralty court, which ordinarily allows interest as part of the damages, interest should be granted. The question turns upon the intention of Congress. It would seem that, under the authorities cited, interest is not allowable unless expressly provided for, and, there being

a complete absence of any allusion to interest in the act under which the action has been tried here, it should not be granted."

In the case at bar there is no allusion to interest in the statute under which the suit is brought, unless such reference may be found in the language which I have pointed out. After a careful study of the matter, I am constrained to hold that the intention of Congress was to prescribe merely that the case should be conducted as an admiralty case in an admiralty court, not as a common-law case in a common-law court, and that in the admiralty court it should be tried upon well-settled legal and equitable principles. In my opinion the statute cannot fairly be construed to show an express intention of Congress to allow interest upon this claim against the United States. The language of the act is not "an express statutory provision covering interest." It is not sufficient to authorize an allowance of interest. If, under the law, I could regard the allowance of interest as a matter of judicial discretion, the suggestions which I have quoted from the learned counsel for the petitioners would have great weight, and would strongly tend to persuade me to allow some interest. But the law precludes me from the exercise of discretion in the allowance of interest as a part of the damages in this case; and Congress has not made such express declaration upon the subject as to override the well-settled law of the federal courts.

The claim for interest is disallowed.

All other questions relating to the accounting and all other matters of damages are referred to William H. Gulliver, Esq., whom I appoint assessor in this case.

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## In re LOLL.

(District Court, D. Connecticut. June 10, 1908.)

No. 1,952.

BANKRUPTCY—ADVERSE CLAIM TO PROPERTY—ESTOPPEL.

To establish an effective estoppel, there must have been a situation where positive and clear loss has followed the acts complained of; and the fact that at a meeting of creditors of a bankrupt where a composition was under consideration one having title to certain property then in the possession of the trustee which he could have enforced kept silence in respect to his right will not estop him to assert the same after the composition has been rejected.

In Bankruptcy. On petition for review of decision of Referee Newton.

Henry T. King and G. L. King, for the trustee.

A. B. Aubrey, for Grady & Co.

PLATT, District Judge. Upon the facts in this case it is clear that Grady & Co. could have taken the bicycles in question from an attaching creditor prior to bankruptcy. At the oral hearing this was practically admitted, and disposes of pretty much all that the referee decided.

The point pressed is that the actions of Grady & Co. since bankruptcy began have placed them in a position whereby they are estopped from asserting the title which they might have formerly enforced. Estoppels are not favored, as this court has frequently said. It is imperative that, in order to properly apply the principle, there must be a situation where positive and clear loss has followed the acts complained against.

Mr. Grady was present at two creditors' meetings, and favored a settlement. At the March 3, 1908, meeting an offer of composition at 30 per cent. was filed, and Mr. Grady, for his firm, deposited a check for $250 to help carry the matter through. He kept still about the bicycles sent by his company, which were then in the bankrupt's store uncrated. They were worth $172. His unsecured balance was $51.36. The composition offer was withdrawn on March 9, 1908, and on March 13, 1908, Grady & Co. claimed the bicycles in dispute.

We will assume that he remained silent about his right to take the bicycles intentionally. I cannot see how his silence harmed the creditors. The estate now, minus the bicycles, will only pay 10 per cent. The creditors had a chance when the offer of composition was open to get 30 per cent. They deliberately threw away the cake which was offered to them, and now, in a state of hunger which is the result of their own poor judgment, ask to have the cake wiped off, and put back in their mouths.

I think that the referee acted with excellent judgment in the entire matter, and that his order with regard to the bicycles should be executed forthwith.

## UNITED STATES v. SARGENT.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1908.)

No. 2,699.

1. UNITED STATES—CLAIMS—INTEREST.
Under the express provisions of Rev. St. § 1091 (U. S. Comp. St. 1901, p. 747), interest is not recoverable against the United States on unpaid accounts or claims, in the absence of a stipulation to pay interest, or a statute allowing it.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, United States, § 93.]

2. EMINENT DOMAIN—TAKING LAND—NATURE OF PROCEEDING.
A proceeding by the United States for the condemnation of land for public use, and for the assessment and payment of damages therefor, is not a proceeding to collect an account or claim against the United States, but an adversary proceeding instituted by the United States against landowners for the taking thereof.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 3.]

3. SAME—EXERCISE OF RIGHT.
The exercise of a right of eminent domain is a prerogative of sovereignty, but is subject to the constitutional provision requiring payment of "just compensation."
[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 1, 2, 171.]

4. SAME—INTEREST ON AWARD.
Act Cong. Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), authorizes condemnation of land for public use by the United States, and section 2 declares that the practice, pleadings, forms, and modes of proceeding shall conform to the practice, pleadings, forms, and proceedings existing in courts of record in like cases in the state. Rev. Laws Minn. 1905, § 2534, declares that on payment of damages, with costs and interest, if any, in condemnation proceedings, the petitioner may take possession, etc., and section 2535 declares that all such damages, whether assessed by commissioners or on appeal, shall bear interest from the time of filing the commissioners' report. *Held*, that an order in proceedings in the United States District Court for the District of Minnesota, confirming a report of commissioners in condemnation proceedings by the United States, properly awarded interest on the damages assessed for the land taken from the date of the commissioners' report.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 397–399½.]

Philips, District Judge, dissenting.

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

Charles H. Daues (Charles C. Houpt, on the brief), for the United States.

Luther C. Harris, for defendant in error.

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

ADAMS, Circuit Judge. The United States by authority of Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), instituted proceedings in the court below to condemn certain real es-

tate situate in Duluth, Minn., for a post-office site. Section 2 of the Act provides that:

"The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform as near as may be to the practice, pleadings, forms and proceedings existing at the time in like cases of the courts of record of the state within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

The Revised Laws of Minnesota of 1905, relating to the subject of eminent domain, provide, first, for a petition by the state or corporation authorized to take private property for public use, describing the property, giving the names of the owners, and praying for the appointment of commissioners to appraise the damages occasioned by the taking (section 2524); second, for a hearing of the petition after due notice and for the appointment of "three disinterested commissioners * * * to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking" (section 2526); third, for qualifying the commissioners, hearing by them touching the matters submitted to them, and that "they shall make a separate assessment and award of the damages which in their judgment will result to each of the owners of such land by reason of such taking and within thirty days after making such assessment and award report the same to the court under their hands" (section 2527); fourth, for filing of the commissioners' report in the clerk's office, notice to the petitioner of such filing, and payment by the petitioner of the fees and disbursements of the commissioners (section 2528); fifth, for the payment or tender of payment of the damages awarded by the commissioners at any time after the notice provided for in section 2528 shall be delivered to the petitioner; sixth, for an appeal from the award of the commissioners to the court either by the owner of the lands taken or by the petitioner; seventh, for a hearing of the appeal by the court after the framing of the issues either by jury or by the court and for the reassessment of the damages "as justice may require" (section 2533). Then follow the three following sections:

"Sec. 2534. Judgment shall be entered upon the verdict or decision, fixing the amount of damages payable to the several parties concerned, and the terms and conditions of the taking. Upon payment of said damages, with costs and interest, if any, the petitioner shall be permitted to take possession of the premises, and appropriate the same to the public uses for which they were taken, subject to the provisions of such judgment; and until reversed or modified in a direct proceeding begun for that purpose, said judgment shall be binding upon the petitioner and all other parties thereto, and upon their respective successors and assigns.

"Sec. 2535. All damages allowed under this chapter, whether by the commissioners or upon appeal, shall bear interest from the time of the filing of the commissioners' report. If the award be not paid within sixty days after such filing, or, in case of an appeal within the like period, after final judgment thereon, the court, on motion of the owner of the land, shall vacate the award and dismiss the proceeding as against such land.

"Sec. 2536. Upon the determination of all appeals taken in said proceeding, and the payment of all damages, interest, and costs awarded or recovered therein, and when there has been no appeal from the report of the commissioners, and more than thirty days have expired since the service upon all the parties to said proceeding of the notice referred to in Sec. 2528, and payment has been made of all damages and interest allowed by said commissioners, the court, upon motion of the petitioner, shall enter a final decree es-

tablishing the rights of said petitioner in the whole or any part of the lands so taken."

On June 1, 1907, upon due proceedings taken, three commissioners were appointed by the court below to ascertain and report the amount of damages which would be sustained by the several owners of the land sought to be taken in this case. On June 12, 1907, the commissioners reported, fixing the damages to be paid the owners at the sum of $17,500. On July 1, 1907, a stipulation was filed by the parties consenting to a confirmation, of the award of the commissioners. On August 17, 1907, upon the presentation of a form of order for the consideration of the court, the attorney for the owners demanded that interest be added to the amount awarded by the commissioners from the date of the filing of their report until the date when payment of the damages should be made. This demand was resisted by the attorney of the United States. Afterwards, on August 19, 1907, the court entered an order confirming the report of the commissioners, and providing, over the objection and exception of the United States:

"That the United States of America do pay into this court the sum of $17,500.00 and interest on said sum at the rate of six per cent. per annum from said 12th day of June, A. D., 1907, up to and including the date on which said sum is paid into the registry of this court [for the owners]."

On this exception, and this alone, the United States prosecuted error, and in brief and argument of counsel the only ground urged is that the court below should not have ordered the United States to pay interest on the amount of the award. To this, therefore, we will confine our attention.

It is well settled that, in the absence of a stipulation to pay interest or a statute allowing interest, none can be recovered against the United States upon unpaid accounts or claims. Section 1091, Rev. St. U. S. (U. S. Comp. St. 1901, p. 747); Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752); Tillson v. United States, 100 U. S. 43, 25 L. Ed. 543; Angarioa v. Bayard, 127 U. S. 251, 260, 8 Sup. Ct. 1156, 32 L. Ed. 159; Baxter v. United States, 2 C. C. A. 411, 51 Fed. 671. It is upon or in analogy with this principle that the United States contends that interest upon the amount of the award in this case should not have been allowed. We are unable to agree with this contention. There is a great difference between the assertion of a claim or account against the United States by a person who possesses it and a proceeding of this kind instituted by the United States. This proceeding, instead of one to collect an account or claim against the United States, is an adversary proceeding instituted by the United States against owners of land to take it from them. The landowners are not plaintiffs prosecuting claims, but defendants resisting a proceeding to deprive them of what is theirs until a condition precedent is fulfilled. Mason City R. R. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629. The exercise of the right of eminent domain is a prerogative of sovereignty in this country, but it is subject to the condition imposed by the Constitution of paying "just compensation therefor."

Congress has directed the courts of the United States to the laws of the state wherein the land lies for a method of determining what is

"just compensation" in a case like this. Reference to the laws of Minnesota, where the land in question is situate, already epitomized, discloses that a board of commissioners is in the first instance to appraise the damages occasioned by the taking and report the same to the court in which proceedings for condemnation were instituted, and that an appeal may be taken from the award of the commissioners to the court. As is well known and as is illustrated in this case, a further appeal may follow. Considerable time may elapse after the commissioners fix the value of the land before it is ultimately paid for. They can only fix it as of the time they act. They cannot say what it will be at any indefinite time in the future. The value may for many reasons change, and the rental value may be materially affected by the tenure of the owner rendered uncertain by possible protracted litigation. Considerations like these doubtless prompted the Legislature of the state to provide that the amount of the award should bear interest until paid as the best and fairest available method of providing against the possible consequences just suggested. Without holding that the requirement for payment of interest is one of the "modes of proceeding" which, by section 2 of the act of August 1, 1888, is made compulsory upon the courts of the United States, we are satisfied to conform to it as a palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making "just compensation" for the land as it stands, at the time of taking. "The time of taking" under the Minnesota statute, supra, is when payment is made for it. "Just compensation" as of that time must be made. Monongahela Navigation Co. v. United States, 148 U. S. 324, 341, 13 Sup. Ct. 622, 37 L. Ed. 463. It is better, when possible, to act in harmony rather than in conflict with the established policy of a state.

By Act March 3, 1875, c. 166, 18 Stat. 506, Congress authorized the taking possession of lands rendered necessary by the prosecution of certain improvements upon the Wisconsin and Fox rivers "after first having paid or secured to be paid the value thereof which may have been ascertained in the mode provided by the laws of the state wherein such property lies." The same act provided for compensating owners of adjacent lands for injuries sustained by them by overflows occasioned by improvements already made and provided that such compensation should "be ascertained in like manner" that is, in the manner provided by the laws of the state. The statute of Wisconsin provided that such compensation should be ascertained according to the method prescribed for acquiring title to lands by railroad companies; that is, in harmony with the general principles governing the exercise of the right of eminent domain. In proceedings instituted by the United States in the state courts of Wisconsin under this act, the rule laid down was that, where lands were permanently overflowed, they should be treated as lands absolutely taken, and that the compensation to be paid therefor was the value of such lands when overflowed with interest thereon from the time of the overflow. Jones, Adm'r, v. United States, 48 Wis. 385, 389, 4 N. W. 519; Sweaney v. United States, 62 Wis. 396, 401, 22 N. W. 609; Velte v. United States, 76 Wis. 278, 284, 45 N. W. 119. The Jones Case was taken by writ of error to the Supreme Court of the

United States (United States v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015), where the judgment below was affirmed. While the opinion makes no reference to the measure of damages adopted by the Wisconsin courts, the rule declared on that subject was nevertheless before the Supreme Court, and no fault was found with it. These last-mentioned cases afford the nearest discoverable analogy to the case under consideration, and reinforce the conclusion reached.

The judgment is affirmed.

PHILIPS, District Judge (dissenting). Considerations of public interest impel me to dissent. Viewed merely in the light of the small pecuniary amount involved in the individual case, it might be said the government could have well forborne this appeal. But the principle concerned is of vast practical importance. The constant recurring necessity of the general government to invoke the power of eminent domain demands that the departments of justice and treasury in instituting condemnation proceedings should definitely understand whether or not the government is to be subjected to the notions of the Legislature of the state, in which the land to be taken for public use is situated, as to what is the measure of the just compensation to be paid to the owner.

The commissioners in this case assessed the value of the land at $17,500. When the Circuit Court convened to pass upon the question of affirmance or rejection, on suggestion of the condemnee, the court added to that assessment interest at the rate of 6 per cent. per annum from the date of the report until the assessment should be paid. This was done by the Circuit Court because the statute of Minnesota so directed. The obligatory force of that statute upon the government of the United States was sought to be justified by the provisions of Act Cong. Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), which are as follows:

"That in every case in which the Secretary of the Treasury or any other officer of the government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so, and the United States Circuit or District Courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the department of justice.

"Sec. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

For the purpose of securing lands for post-office sites, as for other public use, the right to exercise the power of eminent domain inheres in the government of the United States as an independent sovereign. It is superior to the right of the individual owner of the land, because the exercise of this right is indispensable to the proper support and protection of the government. Boom v. Patterson, 98 U. S. 403, 25

L. Ed. 206; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; Chappell v. U. S., 160 U. S. 499, 510, 16 Sup. Ct. 397, 40 L. Ed. 510. This power of the government is in no wise dependent upon state authority; nor can the state condition its exercise in any degree. The only condition imposed by the federal Constitution is that the private property of the citizen shall not be taken without "just compensation." Congress may prescribe the manner of procedure in the ascertainment of the compensation to be awarded. The second section of the act of 1888, supra, was but the carrying over to the proceedings in condemnation cases the identical provision found in section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), known as "the conformity act." On well-settled rules it must receive the same construction and applicability as had been given to said section 914. As said by Judge Wallace, in Carlisle v. Cooper, 64 Fed. 472, 475, 12 C. C. A. 235. "As its phraseology is industriously copied from the former act, the same meaning must be given to it"—which has ever been construed and applied by the federal courts as merely modal. In Nudd et al. v. Burrows, 91 U. S. 426, 441, 23 L. Ed. 286, Mr. Justice Swayne said:

"The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the federal and state courts of the same locality. * * * The identity required is to be in 'the practice, pleadings and forms and modes of proceedings.'"

Again, in Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 300, 301, 23 L. Ed. 898, the same justice again said:

"The conformity is required to be 'as near as may be'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose. It devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which in their judgment would unwisely incumber the administration of the law or tend to defeat the ends of justice in their tribunals."

Mr. Justice Matthews, in Phelps v. Oakes, 117 U. S. 236, 238, 6 Sup. Ct. 714, 29 L. Ed. 888, declined to accede to the contention that the statute of Missouri, which declared that in the action of ejectment every tenant of the property summoned in the action shall give notice thereof to the landlord or agent, under penalty of forfeiting the value of three years' rent, and that the person from or through whom the defendant claims the premises may, on motion, be made a codefendant, should be followed in the federal courts. He then adverted to said section 914, and reaffirmed the statement in Indianapolis & St. Louis R. R. Co., 93 U. S. 301, 23 L. Ed. 898, to the effect that the federal courts would reject any subordinate provision in state statutes which, in their judgment, would unwisely incumber the administration of the law or tend to defeat the ends of justice in their tribunals.

In Luxton v. North River Bridge Co., 147 U. S. 337, 338, 13 Sup. Ct. 356, 357, 37 L. Ed. 194, which was a condemnation proceeding, the property owner sought to sustain an appeal from the appointment of commissioners by the court, as permitted under the Code of New Jer-

sey, where the proceeding was had. Mr. Justice Gray, in rejecting the appeal at that stage of the proceeding, said:

"This direction that the proceedings in the Circuit Court of the United States shall 'conform as nearly as may be to the practice in the courts of the state,' must, of course, like the corresponding direction as to practice, pleadings, and procedure in section 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of Congress."

In Carlisle v. Cooper, 64 Fed. 472, 12 C. C. A. 235, the Secretary of the Treasury instituted proceedings in the United States Circuit Court for the condemnation of certain real estate for governmental purposes under said statute of 1888. Commissioners were appointed in accordance with the local statute of the state of New York, who made their report assessing the value of the property to be taken, and, it appearing that the money in the hands of the Secretary of the Treasury appropriated by Congress for the acquisition of the property was insufficient to satisfy the award reported, thereupon the government discontinued the proceeding. In dismissing the proceedings, the court adjudged certain taxable costs against the government to be paid out of any funds in the treasury department available for such purpose, and also a fee of $1,000 to the defendant's attorney. These allowances were made by the court in conformity with the Code of Civil Procedure of the state prescribed in condemnation proceedings. This was sought to be sustained by the defendant therein under the provision of said section 2 of the act of 1888. This contention was rejected by the Court of Appeals of the Second Circuit as not within the contemplation of Congress in adopting the conformity act.

In High Bridge Lumber Company v. U. S., 69 Fed. 320, 16 C. C. A. 460, the United States proceeded, under the act of 1888, to condemn certain lands for a lock and dam on the Kentucky river. The property owner insisted that in estimating the damages the commissioners appointed should take into consideration the consequential damages to contiguous land not taken as would result from the construction of the works, such damages being permissible under the state statute, when the land was sought to be appropriated for railroad purposes. It was held that the damages were to be assessed according to the common-law rule, which does not recognize such consequential damages. Judge Lurton, who delivered the opinion of the court, inter alia, said:

"The provision in the act of Congress heretofore cited, requiring condemnation proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted, has no application to a condemnation for river improvement purposes instituted by the United States other than to require that the practice and proceeding shall, 'as near as may be,' be in accordance with like causes in the courts of record of the state within which such Circuit or District Court is held. It is not to be conceived that Congress intended that a legislative requirement, giving to an owner consequential damages when his land was sought to be appropriated by a railroad company, should have application when the United States undertakes to condemn land necessary for the improvement and navigation. The right of eminent domain is a common-law right inherent in every sovereignty, unless denied by its fundamental law. It is a right which exists in the federal government, and may be exercised by it within the states, so far as necessary to the enjoyment of the powers conferred

upon it by the Constitution. Congress may create a special tribunal for condemnation purposes, adopt the tribunals of the state, or authorize purely common-law proceedings in the courts of the United States. In the absence of direction by Congress, as to the tribunal or mode of procedure, an action at common law will lie in the name of the United States in the district in which the land to be condemned lies."

Notwithstanding the enabling act of 1888, authorizing the representative of the government to adopt the commission plan as it exists in the States for the ascertainment of the amount of damages to be awarded to the property owner, it is merely modal and directory. The government may proceed in its own courts at common law, with the right of trial by jury. Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Ft. Leavenworth Rd. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264; Luxton v. North River Bridge Co., 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194; Chappell v. U. S., 81 Fed. 766, loc. cit. 26 C. C. A. 600; Chappell v. U. S., 160 U. S. 499, 510, 16 Sup. Ct. 397, 40 L. Ed. 510. And this latter course is frequently pursued by the government in condemnation proceedings. Had it adopted the common-law course of procedure in this instance, would it have been bound by any requirements of the Minnesota statute as to what the judgment should contain, or when interest on the award of damages should attach? In the proceeding at common law before a jury the verdict of the jury assessing the amount of the damages would not become effective until the same should be affirmed by the judgment of the court, and interest would not attach until after judgment of condemnation, conformably to section 966, Rev. St. (U. S. Comp. St. 1901, p. 700). It could not have been in the contemplation of Congress, in adopting the conformity act of 1888, that the government should thereby become amenable to the payment of any interest anterior to the rendition of judgment, which a state Legislature might adopt in the admeasurement of the just compensation to be awarded to the property owner, different from what it would be under the common-law procedure. The authority of the Secretary of War to pay for the property of the owner is conferred by section 4872, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3376), which declares that:

"The Secretary of War is authorized and required to pay to the several owner or owners respectively, the appraised value of the several pieces or parcels of real estate as specified in the appraisement of any such courts or to pay into any of such courts by deposit as hereinbefore provided, the appraised value; and the sum necessary for such purpose may be taken from any moneys appropriated for the purpose of national cemeteries."

In Luxton v. North River Bridge Company, 147 U. S. 337, 341, 13 Sup. Ct. 356, 358, 37 L. Ed. 194, Mr. Justice Gray, speaking of certain provisions of the New Jersey statute in condemnation proceedings, said:

"The provisions of the statute of the state in this particular being inapplicable, and the act of Congress containing no special direction on the subject, the only reasonable conclusion is that the report of the commissioners appointed by the Circuit Court of the United States must be returned to the court which appointed them, be made matter of record therein, and be subject to be confirmed or set aside by that court. And if a trial by jury should be had, by way of appeal from the assessment of the commissioners, it must likewise be in the same court. The case throughout, from the application of the corporation for the appointment of commissioners to assess damages to the

owner of the land proposed to be taken, until judgment upon the award of the commissioners, or upon the verdict of a jury, assessing those damages, remains in the Circuit Court of the United States and under its supervision and control."

Indeed, it is an entire misconception of the law that the Legislature of any state, as against the United States, can fix any admeasurement of the just compensation to be awarded to the owner of the property. Mr. Justice Brewer, in Monongahela Navigation Co. v. U. S., 148 U. S. 312, loc. cit. 13 Sup. Ct. 622, 37 L. Ed. 463, speaking of the Act of Congress in question there, said:

"By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The Legislature may determine what private property is needed for public purposes. That is a question of a political and legislative character; but, when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In Charles River Bridge v. Warren Bridge, 11 Pet. 420, 571, 9 L. Ed. 773, 938, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the Legislature) provide that the new company shall pay annually to the college, in behalf of the old one, £100. By this provision it appears that the Legislature has undertaken to do what a jury of the country only could constitutionally do—assess the amount of compensation to which the complainants are entitled.' "

The majority opinion in effect concedes that the Minnesota statute is not obligatory upon the United States Circuit Court in respect of the matter here in contestation, for it says:

"Without holding that the requirement for payment of interest is one of the 'modes of proceeding' which, by section 2 of the act of August 1, 1888, is made compulsory upon the courts of the United States, we are satisfied to conform to it as a palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making 'just compensation' for the land as it stands at the time of taking. * * * It is better, when possible, to act in harmony rather than in conflict with the established policy of a state."

As already shown, the established policy of the state in the matter of fixing the just compensation to the owner is entirely subordinate to the right and the manner of procedure by the government in the exercise of its superior right of eminent domain. This being so, the conclusion of the majority opinion that the allowance of interest under the Minnesota statute is to be followed, because it is "a palpably fair and reasonable method of making just compensation," can rest alone upon the proposition that it is a judicial question for the court. If so, the allowance of the interest adjudged is in conflict with what the Supreme Court of the United States has held in Shoemaker v. U. S., 147 U. S. 284, 321, 13 Sup. Ct. 361, 37 L. Ed. 170. In that case the condemnee claimed interest from the initiation of the proceedings until the money was paid into court. Of this, the court said:

"The argument shows that the interest claimed was for the time that elapsed between the initiation of the proceedings and the payment of the money into court. The vice of this contention is in the assumption that the

lands were actually condemned and withdrawn from the possession of their owners by the mere filing of the map. Interest accrues either by agreement of the debtor to allow it for the use of money, or, in the nature of damages, by reason of the failure of the debtor to pay the principal when due. Of course, neither ground for such a demand can be found in the present case. No agreement to pay the interest demanded is pointed to, and no failure to pay the amount assessed took place. That amount was not fixed and ascertained till the confirmation of the report. Then some of those entitled to the assessments accepted their money, the plaintiffs in error declined to accept, and the amounts assessed in their favor were paid into court, which must be deemed equivalent to payment.

"It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to the condemnation proceedings. But the owner was in receipt of the rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority."

It is no answer to this to say that the case at bar is to be differentiated from the Shoemaker Case, in that the condemnee there demanded interest from the date of the institution of the proceedings. The kernel of the ruling of the Supreme Court is that the reason for disallowing any interest anterior to the judgment of condemnation is that the "amount was not fixed and ascertained until the confirmation of the report," and that the retention of the possession of the property by the condemnee is equivalent to the interest. As already shown, the Secretary of the Treasury is to pay the amount ascertained by the judgment of the court to be the appraised value, and that the money appropriated therefor is in the treasury, ready to be paid. Until the judgment of condemnation, the government is not required to pay anything, as the obligation to pay and the right to take and enter upon the property and the right of the property owner to demand payment are correlative and contemporaneous. Until that time the possession and enjoyment of the property remain with the owner, and, in contemplation of general common law, until judgment of condemnation there can be no default on the part of the government as the basis for imposing interest. In the absence of the requirement of the Minnesota statute, attaching interest from the date of the report of the commissioners, it never would have occurred to any court, in rendering judgment of condemnation, to have added as part of the compensation for the property the interest in question; but the court, according to the customary practice, would have rendered judgment of confirmation of the award made by the commissioners, which would have borne interest only from that date until payment by the government. Up to the time of confirmation of the award by the judgment of the court the government could have discontinued the proceeding; and in such case it would not have been liable for the interest imposed by the court.

In my opinion, the judgment of the Circuit Court is contrary to law, and should be reversed, and the case remanded, with directions.

AMERICAN SHEET & TIN PLATE CO. v. URBANSKI et al.

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

No. 40.

1. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES TO SERVANT—PROXIMATE CAUSE OF INJURY.

Plaintiff, while employed in defendant's tin plate mill, was injured by the overturning upon him of a small carriage or "buggy," loaded with plates, which was being drawn over the brick floor of the mill by two other workmen, close behind plaintiff where he stood at work at a shearing bench. The evidence tended to show that one of the wheels of the buggy ran into a hole or depression in the floor, and that the man having hold of the handle was turning it from side to side, while the other was pushing behind, in an effort to raise the wheel from the hole, when it was overturned. *Held*, that under such circumstances the defective condition of the floor, and not the movement of the workman in the effort to extricate the wheel, was the proximate cause of the injury, the said movement being the natural and to be expected consequence of the dropping of the wheel into the depression, and that under such evidence the question of proximate cause was for the jury.

2. SAME—RISKS ASSUMED BY SERVANT.

The question whether plaintiff assumed the risk arising from the defective floor, assuming it to have been defective, was one for the jury, under evidence showing that he was a minor and inexperienced and his own testimony that while he knew of the defective condition of the pavement he did not know and had not been warned that any such accident as that causing his injury was likely to result therefrom.

[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. Hennessey, 38 C. C. A. 314.]

3. SAME.

Risks due to the negligence of the master are not to be included among the ordinary risks of the employment assumed by the servant, and in order to relieve the master from liability for an injury resulting from his neglect of any of the primary duties owing from him to the servant it must be made affirmatively to appear, not only that the situation so brought about was apprehended by the servant, but also that the particular danger arising therefrom was appreciated by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574–600.]

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

David A. Reed, for plaintiff in error.

George O. Calder, for defendants in error.

Before MOODY, Circuit Justice, and DALLAS and GRAY, Circuit Judges.

GRAY, Circuit Judge. This was an action to recover compensation for personal injuries by Frank Urbanski, an infant (hereinafter called the plaintiff), by his father and next friend, Michael Urbanski, and by the father in his own right, per quod servitium amisit, against the plaintiff in error (hereinafter called the defendant). The Circuit Court had jurisdiction by reason of diversity of citizenship.

The plaintiff had been employed in the tin plate mill of the defendant about two weeks, as helper to a workman who was called a shearsman. They worked at a bench containing shears for clipping the sides of the plates, after they came from the roller, the man being on one side and the plaintiff on the other, whose duty it was to remove the clippings from the bench to a pile on the floor, to assist about the shears generally, and to help to load small carriages, called "buggies," used to transport plates to and from the shears. There were a number of these shears in the same room with the one at which the plaintiff was working. At the time of the accident, the plaintiff was working on one side of the shears and the shearsman on the other, the man and boy thus facing each other, with the bench and shears between them. To the right side of the plaintiff was a belt, while on his left a bench and pile of the scrap iron or clippings, which it was his duty to remove from the bench as the plates were clipped. Back of him, and about ten feet away, was another bench and shears, being No. 10 in a row of such machines, that at which the plaintiff was working being No. 11. The floor of the room, including the space between the shear benches, was paved with brick. At the time of the accident, and while the plaintiff was in the position described, a buggy, with a load of black plate, was being hauled by the shearsman of No. 10 machine, from a pile of iron about eight feet distant from and to the back of the plaintiff, over said brick pavement to No. 10 shears. When the loaded buggy had gone a little distance and was directly opposite the boy, who was engaged at his work at the shears, with his back to the buggy, and about three feet away from the same, one of its wheels went into a hole or depression in the brick pavement, which caused the buggy to stop and the shearsman, who had hold of the tongue, commenced to work the same from side to side, while his helper pushed, in order to move the buggy on its way. Almost immediately, the buggy was overturned, and with its load of black plate, weighing about 1,500 pounds, fell upon the plaintiff and caused the injuries complained of.

The plaintiff testified that he did not know of the approach of the buggy, that he did not receive any warning of its coming, and that he never knew of any other buggy overturning, although there was other testimony tending to show that they had upset before on the same pavement. It was averred in the declaration that these injuries were sustained by reason of the negligence and carelessness of the defendant, in not providing a reasonably safe place in which to work, and in maintaining and using a carriage or buggy for the transportation of metal sheets or plates, so defective in construction as to be liable, when loaded, to upset by reason of its lack of stability; in other words, that the place in which the plaintiff was required to work by defendant, was not reasonably safe, by reason of the defects in the brick pavement between the No. 10 and No. 11 machines, over which such a buggy, loaded with metal plates, was required to be hauled with its unstable load. There was no testimony to contradict that of the plaintiff, that he had never been warned or cautioned as to any danger likely to arise from these passing buggies when so loaded. The testimony as to the condi-

tion of the pavement, and the instability of the buggies, when loaded, was conflicting. The plaintiff describes the pavement as being in exceedingly bad condition. He says that some of the bricks were up and some of them away down; that the holes were such that in one of them he had caught his foot and had difficulty in extricating it; that he had seen the buggy wheels go down into some of these holes or depressions, so that they would have to be pried out by a crowbar. Other witnesses spoke in a general way of the pavement being defective. The superintendent of the mill and others testified that it was in good condition.

The case was submitted to the jury, with a charge from the learned trial judge, and a verdict was rendered in favor of the plaintiff. Defendant's motion for judgment non obstante veredicto upon the whole record, was refused by the court, and the writ of error thereupon sued out by defendant brings before us, upon exceptions duly taken, the whole record, real and statutory. The assignments of error covered the refusal by the court below of the following requests and motion of the defendant:

First. That under all the pleadings in evidence in this case, the verdict must be for the defendant.

Second. That under all the evidence in the case, the risk to the plaintiff, of the irregularities of the surface of the floor of the mill, was a risk assumed by the plaintiff, and the verdict must be for the defendant.

Third. Motion for judgment for defendant, non obstante veredicto, upon the whole record.

Though the record shows that exceptions were taken to certain portions of the charge of the court, no assignments of error have been made thereon. We think, however, the charge as a whole was exceedingly fair to the defendant. The only questions are those raised by the first assignment of error:

1. It is contended that it is manifest from the testimony that the alleged negligence of the plaintiff in error was not the efficient cause of the accident. In support of this contention, we are referred to the testimony of the two witnesses who were working with the buggy that upset, and another who witnessed the falling thereof. This testimony was to the effect that, when the buggy wheel rolled into the depression in the pavement, the buggy and its load did not at once upset, but that the upsetting occurred after a workman, who had the handle, commenced to move the same from side to side, pulling, while his assistant was pushing, in order to get the buggy started out of the depression; defendant's contention being that it was the effort made to get the wheel of the buggy out of this depression, by moving the handle violently from side to side, while pulling, that caused the load to topple and the buggy to upset. Or, in the words of counsel, "that for all that the hole in the floor had to do with this accident, the buggy might have remained upright forever," and that it was this alleged careless handling of the buggy, without waiting for the proffered assistance of another workman who was approaching, that caused the accident, and this alleged carelessness being that of a fellow workman, no recovery could be had by the plaintiff.

Undoubtedly the burden of proof was upon the plaintiff to show that the negligence complained of was the proximate cause of the injury. The question of proximate cause is likely to lead us into undue refinements and subtlety of disquisition, if we do not guard ourselves therefrom, by taking a common sense view point from which to consider the happenings of ordinary and everyday life. The varying circumstances of each particular case make it difficult, if not impossible, to lay down any general rule, or establish any test, by which the legal proximate cause of an event may be distinguished from the remote cause that is outside of legal cognizance.

Mr. Justice Strong, in delivering the opinion of the Supreme Court in the case of Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256 makes the following observations, which are pertinent and helpful in this connection:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

* * * * * * * * * *

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it.

* * * * * * * * * *

"In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Aided by those reflections, does it not seem clear that the chain of sequence is continuous and uninterrupted from the alleged negligence, in allowing these holes in the pavement to exist, to the upsetting of the buggy and the consequent injuries to the plaintiff? The suggested independent causation by the effort to extricate the buggy from the depression into which its hind wheel had rolled, was not independent causation in any proper sense, but a natural and to be expected consequence of the wheel rolling into the hole or depression in the pavement. There is nothing in the evidence to show that this effort was not a

natural one to be made under the circumstances, and such as it was, it was clearly occasioned by the alleged defect in the pavement, which was therefore, in a juridical sense, the efficient and proximate, and not the remote, cause of the accident. If, therefore, it should be determined by the jury that the existence of such defect in the pavement was due to the negligence of the defendant, the liability of the defendant is established, unless the risk occasioned thereby was one of the risks of the employment assumed by the plaintiff.

As we have said, the question of proximate cause depends so much on the facts and circumstances of the particular case, that it is hardly worth while to discuss those that have been cited by counsel, though most of them have been read and considered. Some notice, however, should be taken of the judgment of this court in the case of Kelly v. Jutte & Foley Co., 104 Fed. 955, 44 C. C. A. 274, cited and relied upon by the plaintiff in error. The Jutte & Foley Company, the defendant, being engaged in the construction of a bridge, employed Kelly, the plaintiff, to do certain work in and about that construction. Among the appliances to be used by the defendant in the work of construction, was a movable or shore derrick, the parts of which were in process of being put together. The carpenters engaged in this work had nearly completed it, but before the derrick had been fully made ready, they were interrupted in their work, and called away temporarily. Everything had been done, except boring holes in the cap log, upon which it was to rest, and inserting the proper bolts therein to hold it in place. These bolts, however, were at hand, and one of the carpenters was about to go for the augur to bore the holes, when the work was interrupted. This man told his foreman, who was a fellow servant with the plaintiff, that the cap log had not been made fast, and particularly called attention to the fact that this would render any present use of the derrick unsafe. Yet the engineer, early in the afternoon, started the engine and attempted to operate the derrick, with a full bucket attached. As the bucket could not be raised, the engineer was told by the foreman to increase the supply of steam. This was done, and the unfastened cap log was forced out of place. The derrick fell and its boom struck Kelly, who was seriously hurt. The contention was made on behalf of the plaintiff, that the defendant was negligent in providing an unsafe appliance with which the plaintiff was to work, inasmuch as his derrick was not properly fastened to the cap log. It was held by this court that the efficient cause of the accident was not the fact that, under the circumstances, the derrick was not bolted to the cap log, but the negligence of the foreman, plaintiff's fellow servant, in operating the derrick, with knowledge that it was not ready for use. It is obvious how different the facts in that case were from those in the case before us. The defendant was guilty of no negligence at all. The derrick was not intended to be used in its then condition. Skillful men were being employed in putting it together, and had not yet completed their task. The act of the foreman, who, with full knowledge, operated the derrick in this incomplete state, was not only an independent cause, but the sole legal cause, of the accident which ensued. Judge Dallas, in delivering the opinion of this court, among other things, said:

"The derrick was, it is true, set in motion when it ought not to have been, but that was done by a fellow servant; and this quite separate and distinct default, not the absence of the bolts from the cap log, was the proximate cause of Kelly's injury. 'In order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been forseen in the light of attending circumstances;' and obviously the harm which Kelly suffered was not the natural and probable consequence of the interruption of the work of the carpenters, and one which ought to have been foreseen as likely to flow from it. It resulted from 'a new cause, and a sufficient cause'—the premature and forced operation of the engine; and for that act the appellee was not, under any possible aspect of the case, responsible."

We think this language clearly distinguishes that case from the present one, and supplies, as nearly as is practicable, a test for determining what is or what is not a proximate cause in a juridical sense. In the case before us, there is no question as to the responsibility of the defendant for the use of the floor of his mill in its alleged defective condition, if defective it was, by the man who was hauling the buggy, nor that this man was doing what was to be expected of him under the circumstances. There was, therefore, testimony tending to show a perfect chain of causation connecting defendant's act with the injury done to the plaintiff. In such a case as this, the question of proximate cause is one for the jury.

2. The other contention of the defendant is that, admitting the floor to have been in bad condition, as testified to by the plaintiff, his own testimony shows that he appreciated and assumed the risk arising therefrom. Though it is perfectly well settled that one who enters the employment of another assumes the ordinary and obvious risks of that employment, and such latent and extraordinary risks as to which he has been informed, and with reference to which he is assumed to have made his contract of service, it is often difficult to apply that law, as we have before said in regard to the doctrine of proximate cause, to the facts of a particular case.

It may be remarked in passing, that risks due to the negligence of the master, are not to be included among the ordinary risks of the employment assumed by the servant. In order that the master may be relieved from liability in such cases, it must be made affirmatively to appear, not only that the situation brought about by neglect of any of the primary duties owing by the master to the servant, is apprehended by the latter, but also that the particular danger arising therefrom is appreciated by him. That the uneven and defective condition of the pavement, if it existed, was known to the plaintiff, he himself admits, but he also testifies that he was not aware of any danger likely to arise therefrom to himself, nor was he warned or cautioned in that respect by any one. There was evidence tending to show that this special danger arising from the unevenness of the pavement, had made itself manifest on several occasions prior to the plaintiff's employment, by the upsetting of the buggy, with its load, when rolling into a depression in the floor of the mill. In addition to this, the jury were warranted, in coming to a determination as to the assumption of risk, in considering the plaintiff's youth and inexperience, as bearing upon the question

of his appreciation of the danger. We do not think the state of the evidence, as disclosed by the record, would have warranted the court below in withdrawing this question from the consideration of the jury. This question, as well as that of the proximate cause and the primary negligence of the defendant, were all questions, in the state of the case as disclosed by the record, peculiarly for the determination of the jury.

The judgment below is therefore affirmed.

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## ATWELL v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1908.)

No. 636.

1. GRAND JURY—OATH—NATURE OF PROVISIONS.
   The oath of a grand juror requires him (a) diligently to inquire and true presentment make of all such matters and things as are given him in charge; (b) to present no one for envy, hatred, or malice; (c) to leave no one unpresented for fear, favor, or affection, reward, or hope of reward; (d) the United States' counsel, his fellows', and his own to keep secret. *Held*, that the first three subdivisions of the oath are mandatory, but that the fourth is not.

2. SAME—SECRECY.
   The policy of the law does not require a grand juror to keep the evidence adduced in a grand jury room secret after the presentment and indictment has been found and made public, accused has been apprehended, and the grand jury finally discharged.

3. CONTEMPT—FEDERAL COURT—JURISDICTION—STATUTES.
   The common-law power of federal courts to enforce their mandates by contempt proceedings is restricted by Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), declaring that such power shall not extend to any cases except misbehavior of any person in the presence of the court or so near as to obstruct the administration of justice, misbehavior of any of the officers of the court in their official transactions, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of such courts.

4. SAME—PROCEEDINGS OF GRAND JURY—DISCLOSURE.
   Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), authorizes punishment for contempt by federal courts where there has been disobedience or resistance by any juror of any lawful writ, process, order, rule, decree, or command of the courts. *Held*, that a grand juror was not subject to punishment for contempt for disclosing proceedings in the grand jury room after the grand jury had been discharged.

In Error to the District Court of the United States for the Western District of North Carolina, at Charlotte.

For opinion of the court below, see 140 Fed. 368.

William P. Bynum, Jr., and Charles A. Moore (Moore & Rollins, Burwell & Cansler, Thomas Settle, and J. E. Alexander, on the brief), for plaintiff in error.

A. E. Holton, U. S. Atty. (A. L. Coble, Asst. U. S. Atty., on the brief), for defendant in error.

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

DAYTON, District Judge. At the April term, 1905, at Statesville, in the Western district of North Carolina, a grand jury was regularly impaneled and sworn, and by it an indictment was presented against the Old Nick Williams Company, Incorporated, engaged in the business of rectifier of distilled spirits, N. G. Williams, and D. E. Kennedy, charging the violation of certain provisions of the revenue laws of the United States. This indictment was indorsed on its face as having been found upon the testimony of R. B. Sams and W. R. Stackleather. The plaintiff in error, Atwell, was a member of this grand jury, and to him was administered the usual oath, obligating him, among other things:

"The United States' counsel, your fellows', and your own you shall keep secret."

This indictment was transferred, at this same April term, from Statesville to Charlotte, there to be tried at the June term following, and this grand jury was discharged, and this term at Statesville adjourned. Capias issued, and the personal defendants were arrested and gave bail for their appearance. When the case came on for trial at the June term the attorneys for the defendants, having determined to file a plea in abatement to said indictment on the ground that there was no evidence before the grand jury upon which to base the same, caused a subpœna to be issued against Atwell and other grand jurors to appear as witnesses on behalf of the defendants. In obedience to this subpœna Atwell appeared in Charlotte about two months after his discharge as a grand juror, and in the office of counsel for defendants disclosed to such counsel in substance the statements made before the grand jury by the witnesses Sams and Stackleather. This disclosure was made after counsel there present had assured him that it was his duty, in the interest of justice, so to do. Counsel for the defendants thereupon prepared an affidavit, setting forth the statement of such evidence made by Atwell to them, and asked him to swear thereto; but, a doubt arising in his mind as to the propriety on his part of such action, he sought the United States district attorney and asked him as to his right and duty in the premises. The district attorney advised him that he was uncertain as to the law governing the case and as to whether or not he would be guilty of illegal or improper conduct in making such affidavit. Thereupon Atwell refused positively to make the affidavit.

These facts coming to the attention of the court, on June 19, 1905, a rule was awarded against Atwell, among others, requiring him to appear on day stated and show cause why he should not be attached for contempt. Atwell appeared, answered, denying that the court had jurisdiction, or that his action in the premises constituted either contempt or misconduct, and denied that his disclosure was that of "the United States' counsel, his fellows', or his own," or that it was made for any other reason than because "he believed that he had a right to do so, and that the ends of justice required that he should make such statement," as he was aware that the defendants had been arrested and admitted to bail, that the case was then to be tried, and that the witnesses Sams and Stackleather were at the time present

to testify. Upon this answer and the facts as above substantially set forth the court below found Atwell guilty of contempt, made the rule absolute and entered judgment that he should pay to the United States a fine of $50 and the costs of the proceeding. To this judgment Atwell has sued out this writ of error.

It seems to us that a determination of the unusual, if not new and novel, questions involved in this proceeding, may be aided by a careful analysis of the oath administered to this grand juror. This oath required him (a) diligently to inquire and true presentment make of all such matters and things as were given him in charge; (b) to present no one for envy, hatred, or malice; (c) to leave no one unpresented for fear, favor, or affection, reward, or hope of reward; (d) the United States' counsel, his fellows', and his own to keep secret. It may well be said that the first three obligations of this oath relate to the positive duty required of the grand juror, while the latter relates to and defines the rule of conduct to be followed by him in the discharge of these positive duties. The first three are demanded by direct mandate of the law; the latter only by its policy, and solely in order that the first three may be the more thoroughly and effectively performed. The first three obligations are absolutely required by the law, to be laid by oath upon the conscience of the juror; the latter may be omitted, as in some courts is done, and supplied by instructions given by the court.

It seems clear to us that no indictment in any court could, having been once found, be quashed on the sole ground that the grand jurors, or any of them, had disclosed the government's counsel or the proceedings had in the grand jury room. On the contrary, an extreme case, at least, can be conceived, where a deliberate conspiracy on the part of a sufficient number of jurors to indict, not because of good cause shown, but to fulfill the dictates of malice and ill will, carried into effect by the presentation of a true bill, would be sufficient to quash. Such a case, it is true, in practical experience, could hardly occur; but if it should occur, and the evidence of it was positive and indisputable, it seems to us the duty of the court in the premises would be clear. It is clear, too, that the jurors cannot violate the first three obligations without great wrong being done to justice and society. If they do, to a degree, law is impotent and society is threatened with anarchy. This degree is increased just in proportion as the violation of these three obligations becomes persistent and general. On the other hand, it is readily to be perceived that grand jurors may fully comply with the first three obligations and violate the fourth in very many cases, without practical injury to society. Therefore we incline to draw a distinction between the fourth obligation of this oath, dictated by the policy of the law, and the first three, expressly required by the mandate of the law itself.

With this distinction in view, it becomes important to ascertain the reason for this policy of the law—when the reason for it begins, and when it ends. The reason of the law is the life of the law, and this in a much stronger sense is true as to its policy. When once the reason for a policy to be pursued no longer exists, certainly the requirement to pursue that policy ends. It would not be required of grand jurors,

we think, by any possible sound course of reasoning, after indictment found, trial and conviction had, judgment rendered, and penalty suffered, to refrain from ever discussing or mentioning to any one the testimony adduced on the trial, solely because it had been first adduced before them in the grand jury room. To what extent, then, does the policy of the law require this secrecy to be maintained? In general terms it may be answered: To the full extent necessary to fulfill the ends of justice, and no further. Very certain it is that it should be maintained during the sittings and deliberations of the grand jury; for its sole province is to make a preliminary and ex parte investigation, to ascertain if probable cause for presentment be found. This could easily be impeded by persons fearing indictment, causing themselves or others in collusion with them to be summoned to appear before that body to present their defense. Certain it is that it may well be extended to indefinite secrecy as to the discussions and vote of the individual members of the jury; for it is well that, when a citizen assumes this high and responsible duty, he may do so with the full assurance that the law will not allow him to be subjected to the malice and consequent injury growing out of his neighbor's knowledge that he had advocated or voted for a presentment against him. It may be conceded that policy demands that this secrecy be maintained until the finding is made public and the accused is in custody, in order that the government may not be in any way impeded in bringing the accused to a speedy trial.

But does this policy require secrecy as to the evidence adduced before the grand jury after such jury has made its presentment and indictment, publication thereof has been made, the grand jury finally discharged, and the defendant is in custody? We think not; because another principle of the law's policy intervenes. It is certainly the policy of the law that one accused of crime shall have every opportunity to prove his innocence; and so tender of human life and liberty is it that it throws around the accused every presumption of innocence until his guilt before the bar is clearly shown. It furnishes him counsel if he is indigent. It compels the attendance of his witnesses. It is true that it makes him criminally liable if he attempts to suborn the government witnesses, to spirit them away from the trial, or by any improper or corrupt means seeks to impede the course of justice, just as it would make so liable any prosecuting officer or government agent seeking to secure conviction by like means; but, while it does this, its policy demands that the accused shall have the fairest and fullest opportunity to make clear his innocence. To this end it directs that the names of the witnesses upon whose evidence it is found be indorsed upon the presentment, and that a copy with this indorsement shall be furnished him in advance of trial if he demands it. Will any one say that he is prevented from inquiry as to what these witnesses had or would testify against him, if such inquiry be without resort to corrupt and illegal practices? Cannot the district attorney himself, who has been before the grand jury and heard the evidence adduced before it, or has that body's notes taken at the time, so inform him or his counsel as to this testimony if he so desires? What reason, therefore, can exist why the grand jurors, under such conditions, should be

bound to secrecy? We can see none; and for these reasons we hold this fourth obligation of the grand juror's oath to require secrecy only so long as the policy of the law requires, and that that policy does not require it, so far as the evidence adduced before the grand jury is concerned, after presentment and indictment found, made public, and custody of the accused had, and the grand jury finally discharged.

But, independent of these considerations, we must consider this case, in view of section 725 of the Revised Statutes (U. S. Comp. St. 1901, p. 583), which provides:

"The said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of said courts."

While courts are vested by common law with inherent powers to protect themselves and enforce their mandates, there can be no question that this power may be limited by legislative authority, and it cannot be further questioned that this act of Congress has limited this power in federal courts to a greater extent than it has been limited by any other government where the common law prevails. While this is true, it must be conceded by all that this power cannot be absolutely destroyed without making the mandate of the courts mere idle and meaningless fulminations to be ridiculed and not respected. Mr. Justice Johnson, in Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242, while substantially deciding that the power to punish by contempt may be limited by legislation, has nevertheless very pertinently said:

"The idea is Utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger. No one is so visionary as to dispute the assertion that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences, if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment. But, if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbors' rights."

The wisdom of these enunciations of sound morals and correct legal principles is accentuated with redoubled force under the conditions which exist to-day. The exercise of this discretion and power by the courts is not designed for evil, but for good; not for oppression, but for protection. Very frequently those who complain the loudest against its exercise are ultimately benefited the most. Men, inflamed by passion, are frequently not capable of rightly judging of their own conduct or of foreseeing the consequences thereof. In such cases the restraining power on the part of judges, acting under solemn obligations to do "equal right to the poor and to the rich," chastened and humbled by the sense of the weighty responsibilities laid upon them, may save such persons from liability to civil and criminal actions, calculated to bring to them ruin and loss of liberty. While these things are true, we, as judges, must never fail to remember the restraints which hedge about this discretion. The contempt proceeding must be regarded as in its nature of a criminal character, and the accused must be entitled to all reasonable doubt arising from the facts alleged to constitute the contempt. He is guaranteed the right to appeal, and he may by the executive power be pardoned. This statute has been construed, and the limitations placed upon this power by it have been very clearly defined, by Mr. Justice Field in Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205, wherein he says:

"The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited by Act Cong. March 2, 1831, c. 99, 4 Stat. 487. The act in terms applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt; but that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempt may be inflicted. It limits the power of these courts in this respect to three classes of cases: (1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) where there has been misbehavior of any officer of the courts in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."

In the case before us Atwell could be held liable as a juror only under the terms of the third paragraph above set forth, and only then, it seems to us, upon the assumption that, having been once a juror, he remains always such; for it is undisputed that he did not make his disclosure at Charlotte until two months after he had been finally discharged from service as grand juror at Statesville. We cannot convince ourselves that this assumption is sound. On the contrary, there are several reasons to hold otherwise. A grand jury is only impanel-

ed to make preliminary investigations of those things committed to its charge. These investigations require, in ordinary practice, but a few days each term to complete. The members are then discharged, and by the terms of section 812, Rev. St. (U. S. Comp. St. 1901, p. 627), as modified by Act June 30, 1879, c. 52, § 2, 21 Stat. 43 (U. S. Comp. St. 1901, p. 624), a juror who has thus served a term should not be allowed to serve again until after the lapse of one year. But if the oath should be held to require perpetual secrecy on the part of such juror, and even if he might subject himself to prosecution for perjury because of its violation, he is nevertheless shielded, we think, from the power of the court to attach him for contempt so soon as the court has discharged him from further service.

We can well understand how a trial judge, who is charged with the responsibility of securing a fair and impartial enforcement of the law, should be exceedingly anxious to use all means within his power to prevent the slightest interference with the administration of justice on the part of any one who may show a disposition to unduly oppress the citizen, or, on the other hand, through sympathy or a misguided notion as to his duty, attempt to do any thing calculated to hinder or embarrass the court in the due administration of justice. We fully appreciate that the learned judge before whom the matters involved in this case were pending felt that he was charged with a grave duty to protect the proper administration of the law, and that the matter had his closest scrutiny. The questions involved were, however, as we have indicated, almost wholly new, and, while we have felt constrained to dissent from his judgment, we have been led to do so only after a long and earnest consideration.

The judgment of the court below must be reversed, and the case remanded, with directions to discharge the rule.

Reversed.

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## NEW YORK LIFE INS. CO. v. RANKIN.

(Circuit Court of Appeals, Eighth Circuit. May 25, 1908.)

No. 2,581.

1. ACTION—JOINDER OF CAUSES—PLEADING—PETITION—SINGLE RIGHT OF RECOVERY DIFFERENTLY STATED IN DISTINCT COUNTS—INCONSISTENCY—MISSOURI STATUTE.

Under the reformed system of pleading in the state of Missouri, a cause of action upon a policy of insurance and a cause of action upon a compromise agreement respecting the claim under the policy may be joined in distinct counts of the same petition, where the counts are not inconsistent in matter of fact, and it appears therefrom that the plaintiff asserts but a single right of recovery, which is so stated and described in the two counts as to enable him to recover upon the policy or the compromise agreement, as one or the other may prove to be the true basis and measure of his right.

2. EVIDENCE—UNACCEPTED OFFERS OF COMPROMISE INADMISSIBLE.

Unaccepted offers to compromise claims or to purchase peace are inadmissible in evidence at the trial of controversies over the claims to which

they appertain, and should not be permitted to affect the rights of the parties or to influence the results of the trials.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 745–753.]

3. SAME—DECLARATIONS OF ATTORNEY—WHEN ADMISSIBLE AGAINST CLIENT—PERSONAL OPINION—LOOSE CONVERSATION.

The declarations of the general solicitor of an insurance company are inadmissible against the company, both when they are merely the expression of his personal opinion and when they relate to features of the company's business having no necessary connection with the duties of its law officer, and respecting which it is not otherwise shown that he is authorized to make admissions on its behalf.

4. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—PLAIN ERROR NOT ASSIGNED.

While errors not assigned in conformity with the rule on that subject will not ordinarily be considered, a plain error may be noticed, when justice requires it, though it be not so assigned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2968–2982.]

5. SAME—CURING ERROR—EVIDENCE ERRONEOUSLY ADMITTED SHOULD BE PLAINLY WITHDRAWN.

When evidence is erroneously admitted in circumstances when it is calculated to affect the determination of other questions than the one in respect of which it is admitted, the error is not cured by the mere elimination of that question; and, to cure the error, the court should plainly inform the jury that such evidence is entirely withdrawn from their consideration.

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

6. WITNESSES—CROSS-EXAMINATION—FALSE ASSUMPTION OF FACTS.

In the cross-examination of a witness, it is not permissible to assume as true a damaging state of facts, without any reason to believe that there is a foundation of truth for it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 987.]

(Syllabus by the Court.)

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

Edward O'Bryan and Frederick N. Judson (John F. Green, on the brief), for plaintiff in error.

Frederick H. Bacon, for defendant in error.

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

VAN DEVANTER, Circuit Judge. March 15, 1898, the New York Life Insurance Company issued a policy upon the life of George A. Kimmel, of Arkansas City, Kan., whereby, in consideration of certain premiums to be paid to it, the company agreed to pay to Edna E. Kimmel, a sister of the insured, the sum of $5,000 and an additional sum equal to the total premiums received, if the insured should die before March 15, 1918. July 30, 1898, the insured disappeared. March 9, 1903, the sister assigned the policy to Lucien E. Wood, as receiver of the First National Bank of Niles, Mich., who was succeeded in that position by George C. Rankin. After the disappearance the sister and the assignee paid the premiums as they fell due, including the one for the year beginning March 15, 1903. March 22, 1904, the receiver, as

assignee of the policy, commenced an action against the insurance company; the petition being in two counts. The first count declared upon the policy in the usual way, alleging that the insured died on or about August 1, 1898. The second count, after stating the issuance of the policy, its terms, and the payment of the premiums, declared upon a compromise agreement by stating that the insured disappeared on or about August 1, 1898; that differences thereafter arose between the parties respecting the death of the insured and the liability of the defendant under the policy, the plaintiff claiming that the insured was dead, and had died about the time of his disappearance, and the defendant claiming that the death was not established; that on March 1, 1904, "by way of a full settlement, satisfaction, and compromise," the parties agreed that the death of the insured would be arbitrarily assumed to have occurred on March 1, 1904, and that, upon the delivery to the defendant of certain releases, it would forthwith pay to the plaintiff $5,987.71 in full satisfaction of the latter's claim under the policy; that the releases so required were duly procured and delivered to the defendant; and that it had then refused to pay the sum so agreed upon or any part thereof. The first count concluded with a prayer for a judgment for $7,736, the amount of the policy and the premiums received; and the second concluded with a prayer for a judgment for $5,987.71, the sum agreed upon in the alleged compromise. In its answer the defendant admitted the issuance of the policy, denied all the other allegations of the petition, and alleged that, if any such compromise agreement was made, it was procured by fraud, in this: that for the purpose of inducing the defendant to enter into such an agreement the assignee of the policy had presented to the defendant a large number of affidavits and so-called proofs of death, which contained many false statements as to the circumstances in which the insured disappeared, and as to his financial condition, character, business, and social habits, and from which there was fraudulently omitted many facts and circumstances tending to show that he was not dead, but had absconded and concealed himself to escape exposure and punishment for crimes which he had committed; that the defendant was deceived by, and made to rely upon, these false and fraudulent affidavits and so-called proofs of death; and that it would not have entered into any such agreement, except for the fraud so perpetrated and practiced upon it. In his reply the plaintiff denied the new matter contained in the answer, and alleged that the affidavits and proofs therein referred to had been presented to the defendant in August, 1900, and remained with it thereafter; that when they were presented the defendant was requested not to assume that they were conclusive, but to make an independent investigation; that the defendant had reasonable opportunity and ample time to investigate the facts; and that in entering into such compromise agreement it acted with full knowledge of them and without any concealment or fraud on the part of the plaintiff or his predecessors in interest. The trial resulted in a verdict and judgment for the plaintiff upon the first count, and the defendant prosecutes this writ of error.

The first ruling brought to our attention is the denial, at the beginning of the trial, of a motion by the defendant to require the plaintiff

to elect upon which of the two counts in the petition he would proceed; the contention being that they were inconsistent. There was no error in this. The two counts were not inconsistent in matter of fact, because all that was alleged in either could be proven without disproving anything alleged in the other. This is frankly conceded; but it is urged that they were inconsistent in matter of law, because a right to recover upon the policy under the first count could not coexist with a right to recover upon the compromise agreement under the second count. It is true that the two rights could not coexist; but the petition, rightly interpreted, did not assert the contrary, but only that the plaintiff had a right of recovery—a single right, which was so stated and described in the two counts as to enable him to recover upon the policy or the compromise agreement, as the one or the other might prove to be the true basis and measure of his right. Assuming that this was done in good faith and not without reasonable cause—and at the beginning of the trial such an assumption could have been reasonably indulged—it was not only unobjectionable, but sanctioned by common-law procedure and by the settled practice in the courts of Missouri and other states under the reformed Code. 1 Chitty, Pleadings (16th Am. Ed.) *424 et seq.; Little v. Blunt, 13 Pick. (Mass.) 473, 476; Bliss, Code Pleading (3d Ed.) § 120; 1 Bates, Code Pleading (1908 Ed.) 495; Thompson v. Minford, 11 How. Prac. (N. Y.) 273; Birdseye v. Smith, 32 Barb. (N. Y.) 217; Brownell v. Pacific R. R. Co., 47 Mo. 239, 243; Brinkman v. Hunter, 73 Mo. 172, 178, 39 Am. Rep. 492; Rinard v. Omaha, etc., Co., 164 Mo. 270, 284, 64 S. W. 124; Roberts v. Quincy, etc., Co., 43 Mo. App. 287.

The next matter which claims our attention relates to rulings permitting the plaintiff's attorney, when testifying as a witness, to give in detail the conversations and correspondence had between himself and the defendant's general solicitor, before the suit was commenced, in the course of an unsuccessful attempt to effect a compromise agreement. Part of his testimony, which is said to have been particularly objectionable, was as follows:

"I spoke to Mr. Hubbell (meaning defendant's general solicitor) about the efforts that had been made by the Pinkertons (meaning a search for the insured made at the instance of his relatives by the Pinkerton Detective Agency), and he stated to me that the New York Life Insurance Company had a detective department which was as far ahead of the Pinkertons as daylight was ahead of darkness. He made that statement to me on several occasions, and he further said that, the company having offices and agents in every part of the civilized world, it was impossible for a man to escape."

The witness being the plaintiff's sole attorney, his testimony was given in narrative form, and not in response to questions propounded in the usual way, where there is better opportunity to prevent the statement of what is inadmissible. When the testimony just quoted was given, the defendant asked that it be stricken out as being only a conversation between counsel, and as not tending to prove anything material; but the court ruled that it was admissible as bearing upon the defendant's facilities for ascertaining the facts and upon whether or not it had been deceived, and this, although it was also objected:

"The difficulty is that he is putting the cart before the horse. He is putting in testimony at length, which has no relevancy until he proves that there was an agreement."

The admission of the correspondence was objected to on the ground that it did not tend to show a compromise agreement, but simply steps in a futile negotiation; and in that connection the defendant requested that the letters be offered together, rather than separately, in order that the court might better rule upon the objection, but the witness was permitted to offer and to introduce separately such of the letters as he wished to present. The other letters were then called out upon his cross-examination. The entire correspondence, even when considered in the light of the witness' narration of the conversations, demonstrated that the attempt to effect a compromise had been unsuccessful, and that, in legal contemplation, the effort to prove an effective agreement of that character had been without any reasonable justification. Accordingly the court afterwards directed a verdict for the defendant upon the second count, but at no time were the jury instructed to disregard the evidence of such conversations and correspondence, or informed that it had no bearing upon the questions arising under the first count. Upon the principal of these questions—that is, whether the insured was dead or alive when the action was commenced—there was evidence which required that it be submitted to the jury in conformity with the decisions in Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086, Fidelity Mutual Life Ass'n v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922, and Northwestern Mutual Life Ins. Co. v. Stevens, 18 C. C. A. 107, 71 Fed. 258; but as this evidence was indirect, gave rise to conflicting inferences, and was nearly balanced, there is reasonable ground for believing that the jury may have permitted matters which otherwise would have been regarded as unsubstantial to turn the scale. Part of the evidence related to an extended, but unsuccessful, search for the insured made on behalf of his relatives by the Pinkerton Detective Agency, and to a search made by the defendant, which was also unsuccessful, according to the plaintiff's evidence; and in that connection the court charged the jury that they could properly take into consideration, as bearing upon the question of life or death, "unsuccessful efforts made, if any, to ascertain the missing man's whereabouts."

As respects the correspondence, it may be conceded that the court did not commit any reversible error in permitting the plaintiff to offer and to introduce separately such of the letters as he wished to present, and that when, upon the introduction of the other letters, it was demonstrated that the attempt to effect a compromise had been unsuccessful, and that the effort to prove an effective agreement of that character had been without any reasonable justification, the defendant, if concerned lest the evidence of the futile negotiation might operate prejudicially against it, should have requested the court to strike out this evidence and to direct the jury to disregard it; but the fact remains that the plaintiff succeeded in getting it before the jury when, in fairness to the defendant, it plainly ought not to have been presented, and when, if offered in the manner requested by the defendant, it probably

would not have been admitted. In other words, the plaintiff succeeded in getting before the jury evidence that the defendant had been willing, for the sake of effecting a compromise, to assume the death of the insured, and that its general solicitor had favored a compromise, although the plaintiff's attorney knew, or should have known, that such evidence was wholly inadmissible; for, as was well said by Judge Sanborn, in speaking for this court, in Moffit-West Drug Co. v. Byrd, 34 C. C. A. 351, 352, 92 Fed. 290:

"It is the policy of the law to favor the settlement of disputes, to foster compromises, and to promote peace. If every offer to buy peace could be used as evidence against him who presents it, many settlements would be prevented, and unnecessary litigation would be produced and prolonged. For this reason unaccepted offers to compromise claims or to purchase peace are inadmissible in evidence at the trial of controversies over the claims to which they appertain, and should not be permitted to affect the rights of the parties, or to influence the results of the trials."

As respects the evidence of conversations before quoted, we entertain no doubt that it was both inadmissible and calculated to cause the jury to give undue weight to the fact, which some of the evidence tended to show, that the defendant had made an unsuccessful effort to ascertain the missing man's whereabouts. It was inadmissible, because what was said by the defendant's general solicitor was not the statement or admission of any distinct fact, but was at most the expression of a personal opinion, which was in no wise binding upon the defendant (Fidelity & Casualty Co. v. Haines, 49 C. C. A. 379, 111 Fed. 337; Insurance Co. v. Mahone, 21 Wall. 152, 157, 22 L. Ed. 593; Ohio & M. Ry. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 184, 32 N. E. 831, 19 L. R. A. 733; Boston & M. R. R. Co. v. Ordway, 140 Mass. 510, 5 N. E. 627), and because it was a loose conversation concerning features of the defendant's business which had no necessary connection with the duties of its law officer, and respecting which it was not otherwise shown that he had any authority to make admissions on its behalf (Stone v. Bank of Commerce, 174 U. S. 412, 421, 19 Sup. Ct. 747, 43 L. Ed. 1028; Ohio & M. Ry. Co. v. Levy, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20; Horseshoe Mining Co. v. Miners' Ore Sampling Co., 77 C. C. A. 213, 147 Fed. 517; Pickert v. Hair, 146 Mass. 1, 5, 15 N. E. 79; Watson v. King, 3 Man., G. & S. 608; Petch v. Lyon, 9 Adol. & E. [N. S.] 147; Doe v. Richards, 2 Car. & K. N. P. 216).

Objection is made to our consideration of the question arising upon the admission of evidence of these conversations, because error is not separately assigned thereon with the particularity required by rule 11 of the rules of this court. Ordinarily the objection would not be without considerable merit; but as one of the assignments was intended to present the question, and as the rule contemplates that, when justice requires it, we may notice a plain error, though not assigned (see United States v. Tennessee, etc., Co., 176 U. S. 242, 256, 20 Sup. Ct. 370, 44 L. Ed. 452; United States v. Bernays [C. C. A.] 158 Fed. 792), we conceive it to be our duty, in view of the circumstances in which the evidence was presented, as before recited, to notice the error in its admission.

It is also urged that the error, if any, was cured when a verdict for the defendant was directed upon the second count. But we cannot so say. As before indicated, the jury were not instructed to disregard this evidence, or informed that it had no bearing upon the questions arising upon the first count. The court's remark respecting the purpose for which it was held admissible was apparently addressed to counsel, and the jury were not instructed that they could not consider it for any other purpose. It was of such a nature that it was calculated to affect them, in passing upon the question of the life or death of the insured, particularly as the evidence legitimately bearing thereon was so nearly balanced. And while the defendant might have requested that it be plainly withdrawn from the jury, after the basis assigned by the court for its admission had disappeared, that was not necessary; for it was inadmissible even on that basis, and was duly objected to when admitted. In these circumstances, to have cured the error, the court should have plainly informed the jury that this evidence was entirely withdrawn from their consideration. Washington Gaslight Co. v. Lansden, 172 U. S. 534, 554, 19 Sup. Ct. 296, 43 L. Ed. 543; Swift & Co. v. Johnson, 71 C. C. A. 619, 624, 138 Fed. 867, 872, 1 L. R. A. (N. S.) 1161.

Error is assigned upon the exclusion of several questions propounded to one Tillotson, a witness for the plaintiff, upon his cross-examination. The witness was a detective, had been in charge of the search for the insured made by the Pinkerton Detective Agency, and testified, upon his direct examination, to the character, extent, and details of the search, and to various clews which had been followed up in the effort to unravel the disappearance of the insured and to ascertain whether he was living or dead. As bearing upon the thoroughness of the search, and the weight which should be accorded to the fact that it had been unsuccessful, the defendant sought by the questions which were excluded to show that the detective agency had not been advised of certain questionable conduct and transactions of the insured, knowledge of which might have been of material advantage to it in making the search. A reasonable cross-examination along that line would have been clearly permissible; but the questions propounded and excluded were all subject to the objection that they assumed as true a damaging state of facts which was nothing less than an inexcusable exaggeration of what the evidence produced up to that time, and subsequently, tended to show. In short, there was no reason to believe that there was a foundation of truth for what was so assumed. In that form, the questions were rightly excluded. 3 Wigmore, Ev. p. 2344.

Error is also assigned upon the refusal of two instructions tendered by the defendant, but these require but brief mention. One might well have been given; but, as all that was of substance therein was incorporated in the charge as given, its refusal was not error. The other was properly refused, because it declared in terms that the insured, at the time of his disappearance, "was a criminal" and had indicated "that he was afraid of exposure and prosecution," when under the evidence these were matters of fact to be determined by the jury.

Other questions are discussed by counsel; but they are not proper-

ly presented by the assignments of error, and are not such as otherwise need to be noticed.

For the error before pointed out, the judgment is reversed, with a direction to grant a new trial.

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## In re WEST SIDE PAPER CO.

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

No. 45.

BANKRUPTCY—LIENS—DISTRAINT BY LANDLORD FOR RENT—"LIEN OBTAINED THROUGH LEGAL PROCEEDINGS."

All goods on demised premises, by the common law, or the statutory law of Pennsylvania, may be considered as under a quasi pledge to the landlord, which gives superiority to the specific lien acquired by a distraint. Such a lien is not one obtained through legal proceedings within Bankr. Act. July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), and is not divested by the bankruptcy of the tenant within four months thereafter, and the same rule applies where the bankrupt was a subtenant, admitted to the premises by the lessee without the landlord's consent.

Petition for Review of Decree of the District Court of the United States for the Eastern District of Pennsylvania.

John G. Johnson, for petitioner.

Charles Sinkler, for appellee.

Before MOODY, Circuit Justice, and DALLAS and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is a petition of Francis G. Gallagher, landlord, for review of the decree of the United States District Court for the Eastern District of Pennsylvania, in bankruptcy, affirming the order made by a referee in bankruptcy in a matter as hereinafter stated:

On October 27, 1905, a lease was entered into between the petitioner and a certain McAlpine & Son, of a paper mill in the city of Philadelphia. Though said lease conferred on the lessees no power to assign said lease, or sublet said premises, the said lessees permitted the West Side Paper Company to occupy the premises. To this no assent was given by the lessor. On the 27th day of November, 1906, the petitioner, as landlord, distrained on the goods, chattels and merchandise upon the demised premises for six months' rent in arrear, amounting to $3,000. On the 28th day of November, 1906, the said West Side Paper Company was, upon petition filed the same day, adjudged a bankrupt by the United States District Court for the Eastern District of Pennsylvania, in bankruptcy. Under said adjudication, the following proceedings were had:

Said cause was duly referred to a referee in bankruptcy. On the 30th day of November, 1906, on petition, said referee made an order, restraining the said landlord from further proceedings under his distraint against the property on the premises, until further order of the court. Thereafter, the receiver appointed by the district court in said cause sold the goods, chattels and merchandise distrained upon

by petitioner, landlord as aforesaid, and realized therefrom the net sum of $2,056.68, after deducting expenses of sale.

The petitioner then claimed before the referee that said sum should be paid over to him as the proceeds of the goods on which he had distrained, as aforesaid, and on the 20th day of March, 1907, the referee made an order refusing the claim of said landlord for said sum. On the 25th day of March, 1907, a petition of review of said order was filed in the said District Court in said cause, and on the 10th day of February, 1908, the court entered a decree affirming the order of the referee, whereupon the present petition to this court, for a review of said decree in matter of law, has been filed. The petitioner contends that the court has erred in holding that the distraint upon the goods and merchandise found on the demised premises, having been made within four months of the filing of the petition in bankruptcy, is invalid, by reason of the provisions of section 67f of the bankruptcy act of July 1, 1898 (chapter 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]). That section provides as follows:

"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 part of the estate of the bankrupt," etc.

The question thus raised has been ably argued by the counsel for the trustee, in support of the finding of the referee and the decree of the court below affirming the same. We think, however, there was error therein.

Distress for rent in arrear, is one of the most ancient, as well as "one of the most efficient of the landlord's remedies for the collection of rent." It is in most of our states, as it was at common law, a right sui generis, belonging to the landlord whenever the relation of landlord and tenant existed. It appears to have been abolished in a few of the states, and in most of them its exercise has been regulated by statute. Its essential characteristics are, however, for the most part the same as existed at common law. In Pennsylvania, as at common law, the distress warrant issues directly from the landlord to his bailiff, who, if he happens to be a constable, is no less the agent and bailiff of the landlord than if he were a private person. The state law provides that, after the goods have been distrained, or levied upon, unless the same be replevied by the plaintiff within five days, the landlord may apply to the sheriff of the county, or to a constable, who is required to take proceedings for the sale of the said goods, or so much thereof as may be required for the satisfaction of the rent. In other respects, the right of the landlord remains for the most part as it was at common law. The right to distrain or levy upon all the goods upon the demised premises, whether those of the tenant or of a stranger, arises the moment the relation of landlord and tenant is established. It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant. It was originally in the nature of a property right in the reditus or return from the land,

reserved to the landlord. No suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right. It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure; of which the right to abate a nuisance, under certain circumstances, and the right to distrain cattle damage feasant, are examples.

While there is no specific lien, except on the goods actually distrained under the landlord's warrant, all the goods on the demised premises are to be considered as being under a quasi pledge, which gives superiority to the specific lien established by the distraint. Such a lien is in no sense "obtained through legal proceedings." Nor is it within the spirit of the bankrupt law in this regard, as evidenced by other provisions thereof, as well as that of 67f, above quoted.

In re Kerby Dennis Co., 95 Fed. 116, 36 C. C. A. 677, where a statute of a state created a lien in favor of employés performing labor in the manufacture of lumber, and provided that the debt or claim shall not remain a lien on the product, unless a statement thereof is filed within thirty days, and action begun within three months, it was held by the Circuit Court of Appeals for the Seventh Circuit, that the holders of such liens, perfected according to the statute against the estate of the employer in bankruptcy, are entitled to payment in full out of the proceeds of the property affected, in preference to claims for labor of the same kind which have not been preserved as the statute directs, although both classes of claims are equally within the description of claims for "wages," as to which the bankruptcy act declares that they shall "have priority and be paid in full out of bankrupt estates." Bankruptcy Law, § 64b. In its opinion, the court says:

"It is insisted, however, that the bankruptcy act does not preserve these liens. It is said that to hold them valid, would be in antagonism to subdivision 'f' of section 67 of the act. * * * But it is to be observed that the lien in the case before us was not obtained through 'legal proceedings.' It is a creature of the statute, arising from, and immediately upon, the performance of labor. The legal proceedings contemplated by the statute do not create a lien, but enforce a lien already existing. * * * It is thus clear to us, that the design of Congress was to protect all liens, whether arising by contract or by statute, and only to avoid those which are in fraud of the act, and those which have been secured by, and arise from, legal proceedings within the limited time specified before the bankruptcy."

In Austin v. O'Reilly, 2 Woods, 670, Fed. Cas. No. 665, there was a petition to the Circuit Court to review and revise an order of the District Court of the United States for the Southern District of Mississippi, sitting in bankruptcy, in which order the District Court had held that:

"In Mississippi a landlord is not entitled to preference for rent in a fund arising from the sale, by the tenant's assignee in bankruptcy, of personal property found on the demised premises; since, under the Mississippi statute, a landlord has no lien until he seizes the property, and since the claim does not come within any of the preferences created by the bankrupt act."

In an interesting opinion, in which he discusses the legal character of the landlord's right, both at common law and under such a state

statute as that of Mississippi, requiring an attachment to be issued by a court to perfect the landlord's lien, Mr. Justice Bradley, sitting in circuit, proceeds as follows:

"In some states, it is provided that, instead of making the distress himself, the landlord must procure a warrant from a magistrate or court, to be executed by an officer. But this regulation of the mode of exercising his right does not affect the nature of the right itself.

"It is common to call the right a lien, and yet it is not strictly such; for it does not attach to any specific article of property. The tenant, if a farmer, may, in due course of business, sell produce or cattle or other things; and if a merchant, he may in the same manner sell merchandise; and the sales, if made in good faith, will be valid, and the property sold will be free from the landlord's right of distress, if removed from the demised premises, and, in most states, without such removal. But if the sale be made for the purpose of depriving the landlord of his right, he may, by the English statutes and by the statutes of most states, follow the property within a reasonable time after its removal. Now if the landlord's rights were a strict lien, no valid sales could be made at all. Still, being commonly called a lien, and being a peculiar right in the nature of a lien, which is greatly relied on as an essential condition of all leases, and the subversion of which would work great injustice, and would in the end operate prejudicially to the interests both of the tenants and their creditors, by inducing landlords to require onerous conditions for their security, the Supreme Court of the United States, and most of the district and circuit courts, have regarded it as fairly to be classed as a lien within the true intent and meaning of the bankrupt act, and have allowed the landlord a priority over the general creditors to the extent of the goods subject to his right of distress. This right of the landlord has been regarded as peculiarly entitled to priority when by statute an execution creditor of the tenant is prohibited from removing the goods until he has paid the landlord's rent, or a reasonable amount (generally a year's rent), which may have accrued. Thus in Longstreth v. Pennock, 20 Wall. (U. S.) 575, 22 L. Ed. 451, the Supreme Court places special emphasis on this fact.

"In Mississippi, it is true, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent; but when the attachment is sued out, his rights are the same in effect as those of the landlord at common law. That they are founded on and grow out of those rights is evident from the fact that he is not compelled to pursue his claim to judgment like other creditors. The attachment in his case is in the nature of an execution; or, more properly speaking, of a distress. He has the same right of priority over execution creditors, and the same right to prevent the removal of goods and to follow goods clandestinely removed, which exists in England and most of the other states."

In the case at bar, the landlord had exercised his right of distress before the filing of the petition in bankruptcy. The goods were distrained, as goods on the premises leased to McAlpine & Son, his tenants. His right was created by the contract of lease between him and McAlpine & Son, more than four months before the petition in bankruptcy, in behalf of the West Side Paper Company, which he had never recognized as his tenant. His lien arose out of the relationship of landlord and tenant between him and the McAlpines, and was not "obtained by legal proceedings," within the meaning of the bankrupt act.

The facts, therefore, of the case at bar, are stronger in favor of the landlord's right than are those of the cases just cited. The right of the petitioner to the whole of the fund realized by the receiver's sale of the goods and merchandise on the demised premises, and which

were distrained by the said petitioner on his landlord's warrant, prior to the filing of the petition in bankruptcy, must be sustained, and the decree of the court below is hereby reversed.

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NORFOLK & W. RY. CO. v. GARDNER, Sheriff.

(Circuit Court of Appeals, Fourth Circuit. May 9, 1908.)

No. 784.

1. COURTS—UNITED STATES CIRCUIT COURT OF APPEALS—APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY.
   Rule 11 of the Circuit Courts of Appeals (150 Fed. xxvii, 79 C. C. A. xxvii), requiring assignments of error to set out separately and particularly each error asserted and intended to be urged, is for the purpose of facilitating the business of the court, and must be observed.

2. TRIAL—DIRECTION OF VERDICT—DISCRETION OF COURT.
   The direction of a verdict is discretionary with the trial judge.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 401.]

3. MASTER AND SERVANT—INJURY TO SERVANT—RUNNING RAILROAD TRAIN BACKWARD AT NIGHT.
   The running of a railroad train at night a distance of 84 miles backward, with no headlight to light the track in front of it, subjects the trainmen to extra and unusual hazard, and requires from the railroad company at whose orders it is done a degree of care and caution to keep the track free from obstructions commensurate with such extra risk.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 264–275.]

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Martinsburg.

Cleon Moore and Marshall McCormick (Theodore W. Reath, on brief), for plaintiff in error.

M. J. Fulton and D. C. O'Flaherty (Joseph W. Cox and F. L. Bushong, on brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and PURNELL and WADDILL, District Judges.

PURNELL, District Judge. On the 15th day of March, 1907, appellee commenced his action by the issuance of a writ of summons from the circuit court of Jefferson county, W. Va., for damages in the sum of $10,000, and at March rules filed a declaration. This suit or action was duly removed to the Circuit Court of the United States for the Northern District of West Virginia and tried therein. There was a motion to remand, which motion was overruled, and the cause tried before a jury, and verdict in favor of the plaintiff for the sum of $5,000. A motion in arrest of judgment and motion for new trial were made by defendant below, appellee here. The court overruled these motions and entered judgment in favor of the plaintiff, and defendant appealed, assigning the following errors:

"(1) The verdict is contrary to the law and the evidence. (2) Because of the errors happening on, in, and by the rulings of the court during the progress of the case. (3) Because of the misdirection of the court in the instructions given by it to the plaintiff. (4) Because of the refusal of the court to instruct

the jury on behalf of the defendant in the form in which the instructions were presented to the court, and also because of its amendments, alteration, and modification of certain of the instructions asked for by the defendant, and particularly because of its refusal to give instruction 5, to the effect that if the giving of the clearance card by Scott, the local operator, to Hendrickson, the engineman, was the proximate cause of the injury, the plaintiff could not recover. (5) Because of the refusal of the court on the motion of the defendant to direct a verdict in favor of the defendant company. (6) There are other matters apparent upon the face of the record which the defendant company relies upon in support of its motion to set aside the verdict of the jury and in arrest of judgment."

The several motions aforesaid, including one made in apt time to direct a verdict in favor of the defendant, were overruled by the court, to which action on the part of the court defendant excepted and tendered 13 bills of exception, numbered from 1 to 13, consecutively, which bills of exception were allowed, signed, sealed, and made a part of the record, and defendant sued out this writ of error.

The court might dispose of this case under its rules, if strictly enforced, without passing upon the merits of the controversy. These rules are reasonable, plainly stated, and must be followed by counsel bringing causes to this court by appeal or writ of error. They are made for this purpose and with this view, and must be enforced. "Rule 11, Assignment of Error" (150 Fed. xxvii, 79 C. C. A. xxvii), provides:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of error shall have been filed. When the error alleged is to the admission or rejection of evidence the assignment of error shall quote the full substance of the evidence rejected or admitted. When the error alleged is to the charge of the court the assignment of errors shall set out the part referred to totidem verbis whether it be to instructions given or instructions refused. Such assignment of errors shall form part of the record and be printed with it. 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 option may notice a plain error not assigned."

Assignments 2, 3, and 6 are not in conformity with this rule, and may be disregarded; but, notwithstanding these imperfections, we have carefully considered the same and are of opinion that they are without merit.

The fifth assignment of error is based on a misconception of the law. The presiding judge in a United States court may direct a verdict when in his judgment such direction meets the ends of justice; but he cannot be compelled to do so. He is primarily responsible for the result of litigation before him. As said by this court in Huntt v. McNamee, 141 Fed. 294, 72 C. C. A. 441, the courts of the United States have always exercised the right to control the disposition of causes pending before them whenever the allegations of the pleadings or the evidence introduced in support thereof has failed to make out a case. Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780. Fair-minded men could, as appears from the record, draw more than one reasonable

conclusion from the testimony. In the latter quoted case of Pleasants v. Fant the court says, after discussing the duty or right of the trial judge:

"But, as was said by this court in the case of Improvement Company v. Munson, 14 Wall. 448, 20 L. Ed. 867, recent decisions of high authority have established a more reasonable rule that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed. It is the duty of the court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse or passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper on these issues and rejecting all else, by instructing them in the rules of law by which that evidence is to be examined and applied, and, finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law."

Of these duties it appears the trial judge had a clear conception and discharged them in an eminently proper way. To set aside a verdict is a matter of discretion vested in the judge, subject to review in some cases; but he cannot be compelled to exercise the discretion to direct a verdict any more than he can to set aside a verdict. Verdicts are not as a rule subjects of review in an appellate court.

Considering the fourth assignment of error, it seems that Hendrickson, an engineman, as he is called, was operating under orders a somewhat unusual train, made up of two engines and a caboose running backward, and running thus for a distance of 84 miles at night. He could not use the usual strong headlight, as he was running backwards and had no light on the tender, except an ordinary lantern, which tended rather to obstruct his view of the track for any distance. It is contended by counsel for appellant this was not an unusual train on the Norfolk & Western Railway, nor on some other roads; but we cannot agree with counsel in this respect. At night running backwards without a headlight for a distance of 84 miles at a speed of about 18 miles an hour presents a case of extrahazardous risk to any reasonable mind; and the company so operating the same assumes the burden of the exercise of the degree of care and caution commensurate with the extra hazards to which the servant is exposed, and in determining the question of negligence the entire facts and circumstances must be taken into consideration. The question of fellow servant does not arise. The engineman was operating under orders he was required to obey, issued by the train dispatcher, whose duty it was to direct the movements of the trains, and, among other things, to know the movements of every train on the road. We cannot assume that Hendrickson was not required to obey orders. To have refused to have done so would have brought him in direct conflict with the orders of his superiors, and perhaps subjected him to dismissal. The part of the charge intended to be covered by the fourth assignment of error is the following, granted at plaintiff's request:

"It was the duty of the defendant company towards an employé engaged in the running and operating of its train under its direction to use ordinary care to keep its tracks in reasonably safe condition and free from obstruc-

tion with which trains running under such orders might collide, and if the jury find that the defendant ordered the plaintiff's intestate to run and operate his train in an unusual manner, and in a manner which increased the perils of the plaintiff's intestate by making it more difficult for him to discover and protect himself against possible obstructions upon its track, then the degree of care requisite on the part of the defendant to keep its track free from obstructions was increased, and the plaintiff's intestate had a right to expect and believe that the defendant would discharge its duty in this respect; and if the defendant failed to do so, and such failure caused the collision which resulted in the death of the plaintiff's intestate, then they should find for the plaintiff."

This charge was eminently just and fair to the parties litigant and safeguarded the rights of both. On examination of the entire record we find no error; hence the judgment is affirmed.

Affirmed.

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## BALTIMORE REFRIGERATING & HEATING CO. OF BALTIMORE CITY v. WETZEL et al.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1908.)

No. 777.

1. CONTRACTS—WRITTEN CONTRACT—ALTERATION BY PAROL.
   A written contract cannot be changed after its execution by a parol agreement, unless in exceptional cases and upon a valuable consideration.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1123.]

2. SALES—ACTION FOR PRICE—EVIDENCE—RELEVANCY—PAROL EVIDENCE TO VARY CONTRACT.
   In an action to recover the price of machinery sold under a written contract, evidence offered by defendant to show that the machinery failed to comply with a warranty contained in a prior contract between the parties, which had been fully executed, on the claim that such warranty had been incorporated in the second contract by parol agreement made after its execution, *held* properly excluded as irrelevant to the issues.

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

Robert H. Smith and George Whitelock (David Fowler, on brief), for plaintiff in error.

W. Calvin Chestnut and Charles Markell, Jr. (Gans & Haman, on brief), for defendants in error.

Before PRITCHARD, Circuit Judge, and PURNELL and DAYTON, District Judges.

PURNELL, District Judge. Suit was instituted by plaintiffs below, trading as the Wetzel Mechanical Stoker Company, against the Baltimore Refrigerating & Heating Company, a corporation, to recover the sum of $5,591.50, with interest, being the contract price for eight mechanical stokers sold and erected by the plaintiffs for the defendant under a written contract. The declaration contains the common counts, and a special count setting up the written contract in August, 1906, to erect the stokers, and alleging that the stokers had been erected and installed in accordance with the contract, and that the defendant had failed and refused to make any payments. The defendant pleaded the

general issue, and also a special plea, alleging that the stokers in question are an infringement of a patent. This last defense was abandoned at the trial, and no evidence offered to support it.

The plaintiffs below (defendants in error here) reside at Trenton, N. J., and are engaged in the business of manufacturing and erecting a certain mechanical stoker for feeding coal into furnaces. The stoker manufactured by them, known as the "Wetzel mechanical stoker," is a patented device. The plaintiff in error was familiar with the Wetzel mechanical stoker, and had in use four of these stokers (or two double stokers, as they were formerly described), erected under a contract of November 2, 1905. The contract for the erection of the eight stokers is contained in the written contract, dated August 4, 1906, by which the Wetzel Mechanical Stoker Company agreed to erect and install the eight stokers for $5,864, payable in the installments therein provided, together with a contemporaneous paper, dated August 9, 1906, signed by the Wetzel Mechanical Stoker Company subsequently to the signing of the contract dated August 4th, but prior to the execution of the contract by the refrigerating company. The formal written agreement, dated August 4th (but not actually executed by the refrigerating company until August 9th), and a letter of August 9th, constitute the contract.

In the course of the trial two defenses were suggested: (1) An effort was made by the defendant to establish by parol evidence certain warranties which are not contained in the written contract under which the eight stokers were erected, but were contained in the contract of November 2, 1905, under which the previous Wetzel mechanical stokers had been erected and were claimed by the defendant to have been incorporated in the present contract by oral agreement subsequent to the written contract. (2) The defendant offered evidence to show that the eight stokers in question did not comply with the provision of the written contract that "the metal is distributed in such a way that the air space will range from forty per cent. to seventy per cent. (40% to 70%), and will give sufficient supply of air, at the same time not permitting the sifting of any unconsumed coal or carbon to the ash pit. It was asserted by a number of witnesses for the defendant that coal did sift through to the ash pit, to a great loss of the defendant. At the conclusion of the case, with all of this testimony before them, the jury found a verdict for the plaintiff for the full amount claimed, with interest.

There were 17 assignments of error presented for review of certain rulings of the court on questions of evidence, and the action of the court in granting the plaintiffs' three prayers, and their motion to strike out testimony, and refusing the defendant's first prayer, and the defendant's motion to exclude testimony. A number of these assignments of error involve the same legal questions, which this court must of necessity eliminate. The jury returned a verdict in favor of plaintiffs below, defendants in error here, for the contract price, and upon such verdict the court entered judgment for the contract price, $5,591.50. The contract was an entire contract. Though the price was to be paid in installments, the whole price was to be paid for the work to be done,

i. e., installing the stokers. There was no other consideration for the contract.

Although it is contended in the brief of plaintiff in error that a written agreement may be changed after its execution by a parol agreement, as a general proposition of law this is against the weight of authority. It certainly cannot be done, except in exceptional cases upon valuable consideration, and the parties to the contract seemed to recognize this basic principle of law. There was no consideration for this alleged agreement to incorporate in the contract the guaranties of the former contract of 1905, and according to Fentress' own testimony Wetzel promised to reduce this postconstructed agreement to writing, which was never done. It was, therefore, no part of the contract of 1906, and could not be so considered in connection therewith. It had nothing to do with the case. The contract of 1906 was a complete, entire contract. There was no reference in it to the former contract as a part thereof. This former contract had been completed, and the stokers installed, used, and paid for. This was a separate and distinct transaction from the contract of 1906.

The second, third, and seventh assignments of error relate to the refusal of the trial judge to admit testimony or evidence of the 1905 contract and other evidence and testimony offered concerning the warranties in said contract. In this there was no error. This covers several of the assignments of error, which it is not deemed necessary to notice in detail. The same question is attempted to be raised by the eleventh assignment of error, and by plaintiffs' motion to strike out testimony, which is the subject of the seventeenth assignment of error, all of which assignments of error are overruled, and the rulings of the trial judge thereon affirmed, for the reasons hereinbefore stated.

The eighth exception is as follows:

"'Q. What was the condition of the boilers under which he put the last stokers? A. Those boilers were new. I have been in cold storage and operating machinery for the past ten years. I am familiar with the operation of machinery like that at the Baltimore Refrigerating & Heating Company. My knowledge was acquired by practical experience, and I understand it absolutely.' Thereupon counsel for the defendant asked the witness the following question: 'Q. Will you tell us whether or not your experience in machinery and so on will enable you to or enables you to state whether or not these stokers produced the results which you say these guaranties call for?' But counsel for the plaintiffs objected to the said question being put, or to any answer being given thereto by the witness, and the court sustained the objection, to which ruling of the court the defendant by its counsel prayed leave to except, and that the court would sign and seal this its second bill of exceptions, which is accordingly done this 17th day of June, 1907."

The guaranties referred to were not in the contract sued on, as has been said, and all testimony in reference thereto was incompetent, impertinent, and improper; hence this was properly ruled out. This assignment of error is therefore overruled, and the ruling of the court affirmed.

What is called the sixth bill of exceptions, after several pages of correspondence, telegrams, etc., concludes as follows, and it is presumed this constitutes the gist of the exception:

"'Q. (Mr. Whitelock). Don't give the conversation with Mr. Fentress. You had an interview with Mr. Fentress, had you? A. Yes; of course, as chief engineer I would have to consult with the head of the concern, and that is what I am trying to say, that I consulted with the superior. Q. What was the result of that? A. I told Mr. Fentress—' But counsel for plaintiffs objected to witness being permitted to answer the question by testifying to any conversation between himself and Mr. Fentress, and the court sustained the objection, to which defendant, through its counsel, excepted in due form, which exception was allowed by the court."

It is difficult to arrive at a satisfactory reason for this exception, to the ruling out of a conversation between Hearn, an employé, and Fentress, vice president, of plaintiff in error corporation, and no sufficient reason is given why it was admissible. All this testimony referred to matters in relation to the guaranties, which, as we have seen, were not incorporated into the contract of 1906; hence all testimony relating thereto was incompetent and was properly excluded. This exception is overruled, and the ruling of the Circuit Court thereon affirmed.

The ninth bill of exceptions, referring to and making the previous bills of exception a part of this bill of exception, then proceeds:

"The witness Geo. W. Wright testified as follows: 'There is, of course, the labor lost, due to rehandling or sifting coal, which according to the fire room pay roll would amount to about the expense of two men per twenty-four hours, two men to the watch, and that would be directly chargeable, I think, to the operation of the stokers. About $1.75 for each man per day would be say $500 for four months, and it would run at that rate for the whole period, provided we were running that many boilers. The stokers have not been running without repair.' Thereupon the counsel for the defendant proposed to prove by the witness the extent and cost of the repairs to the said stokers, of which the witness testified that a separate account had been kept; but counsel for the plaintiffs objected to the evidence, and the court sustained the objection, to which ruling the defendant excepted."

This testimony was properly excluded. It was no part of the contract, related to no issue properly arising on the pleadings, and the ruling of the court is affirmed.

The exceptions to the granting of plaintiffs' prayers 1, 2, and 3 and defendant's first and second motions to exclude testimony present in a different form exceptions already overruled, which may be said with equal force of defendant's prayers 1 and 2 for instruction, made the basis of exceptions, all of which exceptions are overruled, and the ruling of the court thereon affirmed.

Affirmed.

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## DUNKERSON et al. v. GOLDBERG.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1908.)

No. 2,704.

1. TRUSTS—DEED—CONSTRUCTION—ESTATE CONVEYED.

A deed conveyed certain land to F. in trust to and for the sole and separate use of a wife for life, remainder to the husband and his heirs, forever. *Held*, that the deed created an equitable estate in the wife and an equitable remainder in the husband after the termination of the wife's life estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 183–187.]

2. EXECUTION—PROPERTY SUBJECT—EQUITABLE VESTED REMAINDER.
Under Rev. St. Mo. 1845, c. 61, § 14 (Rev. St. Mo. 1855, c. 63, § 17), an equitable vested remainder after the termination of a life estate created by a trust deed was subject to sale on execution against the remainderman.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 91.]

3. EJECTMENT—LEGAL TITLE.
Plaintiffs cannot recover in ejectment without proving a legal title.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 16–29.]

4. TRUSTS—CONVEYANCE BY TRUSTEE—EFFECT.
Certain land was conveyed by a warranty deed to F. in trust for the use of a wife for life, remainder to the husband and his heirs. The equitable remainder in the husband having been sold on execution against him, F. by quitclaim deed conveyed the property to M. in trust to and for the separate use, control, and benefit of the wife and her heirs, free from any control, debt, liability, or judgment against her husband, with power on the wife's written request to sell, mortgage, or lease, etc. *Held*, that the deed to M. vested in the grantee only such title as F. had, and left the land subject in the hands of M. to all the equities attaching to it in the hands of F., including the rights of the purchaser at the execution sale.

5. SAME—CONSTRUCTIVE TRUSTS.
Such quitclaim deed purported to deal only with the interest of the wife, leaving the equitable remainder in favor of the husband and his grantees as originally created, and hence no constructive trust which could not be executed by the statute of uses was thereby created in favor of the latter.

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

George B. Webster (Joseph P. Wagner and George A. Cunningham, on the brief), for plaintiffs in error.

Henry W. Allen (John D. Johnson, on the brief), for defendant in error.

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

ADAMS, Circuit Judge. This was a suit in ejectment to recover possession of a lot of ground in the city of St. Louis, Mo. A jury was waived, and the cause tried to the court on facts practically undisputed. Judgment was rendered in favor of the defendant, from which the plaintiff prosecutes error.

In 1852 James Reilley, being then the owner of the lot in controversy, sold and conveyed it by warranty deed to one Du Bouffay Fremon "in trust to and for the sole and separate use of Harriette Hunt, wife of Daniel B. Hunt, during her natural life, and after her death to and for the use and benefit of said Daniel B. Hunt and his heirs, forever." The deed contained the following clause:

"And the said second party [the trustee], his heirs and assigns, shall at the written request of said Daniel B. and Harriette Hunt sell and convey the real estate hereinbefore described, or any part thereof, by good and proper deed of conveyance in fee simple, or shall mortgage the same, or give a deed of trust thereon, to such person or persons and for such sum or sums of money as the said Daniel B. and Harriette Hunt shall desire."

In 1855 the right, title, and interest of Mr. Hunt was sold on execution to satisfy a judgment theretofore duly rendered in a court of record against him, and the same was conveyed by a sheriff's deed, duly executed, acknowledged, and recorded in the proper registration office, to Thomas Culley, under whom plaintiffs below (plaintiffs in error here) claim title. In 1857 Fremon, the trustee, acting upon the written request of Daniel B. and Harriette Hunt, executed and delivered to James Mugan a deed of which the following is a copy:

"This deed, made on the 18th day of July, 1857, by and between Du Bouffay Fremon (trustee of Harriette Hunt, who is the wife of Daniel B. Hunt), of the city of San Antonio, state of Texas, party of the first part, and James Mugan, of the city and county of St. Louis, state of Missouri, party of the second part, witnesseth: That the said party of the first part in consideration of the sum of one dollar to him paid by the said party of the second part, receipt of which is hereby acknowledged, does by these presents remise, release, and forever quitclaim unto the said party of the second part, in trust to and for the sole and separate use, control, and benefit of Harriette Hunt, wife of Daniel B. Hunt, both of the city and county of St. Louis, state of Missouri, and her heirs, free from any control, debt, liability, or judgment against her said husband, with power upon the written request of the said Harriette to lease, mortgage or sell the following town lot or parcel of ground. * * * To have and to hold the same, with all the rights, immunities, privileges, and appurtenances thereunto belonging, unto the said party of the second part, and his heirs and assigns, forever, in trust to and for the sole use and benefit of Harriette Hunt, wife of Daniel B. Hunt, and her heirs, free from any control, debt, liability, or judgment against her said husband, with power upon the written request of the said Harriette to lease, mortgage, or sell the same."

Daniel B. Hunt died some time before 1887. In that year Mrs. Hunt conveyed the lot to Jacob Hecht; from whom the defendant now in possession deraigns title, and she died in 1898.

The Reilley deed of 1852 created an equitable life estate in Mrs. Hunt and an equitable vested remainder after the termination of the life estate in Mr. Hunt. This remainder was subject to sale under the execution issued on the judgment against Hunt in 1855 (Rev. St. Mo. 1845, c. 61, § 14; Rev. St. Mo. 1855, c. 63, § 17), and was sold to Culley, through whom plaintiffs claim. This sale, and the sheriff's deed made pursuant thereto, and subsequent deeds shown in evidence, transferred all of Hunt's equitable estate, which was the remainder in fee after the termination of the particular estate of Mrs. Hunt, to plaintiffs. Morgan v. Bouse, 53 Mo. 219; White v. McPheeters, 75 Mo. 286; Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83; Block v. Morrison, 112 Mo. 343, 20 S. W. 340. Defendant asserts no title to the land in question, and concededly has none which would stand against an equitable action by plaintiffs. His only contention is that plaintiffs show no legal title, and that in the absence of such title they cannot recover in ejectment. The legal conclusion just stated cannot be controverted. If plaintiffs have no legal title, they cannot recover in this action. Have they not a legal title?

It is contended by the defendant that the deed of 1857 from Fremon, the original trustee, to Mugan, conveyed the legal title to the latter in trust for the sole use of Mrs. Hunt, and thereby destroyed the legal title theretofore held by Fremon in trust for Mr. Hunt, or at best constituted Mugan a constructive trustee for Mr. Hunt's interest. We think this is incorrect. The conveyance from Fremon to Mu-

gan was only by a quitclaim deed. It vested in the grantee only such title as the grantor had, and left the lot conveyed subject, in the hands of the grantee, to all the equities attaching to it in the hands of the grantor. Mann v. Best, 62 Mo. 491; Stoffel v. Schroeder, 62 Mo. 147; Schradski v. Albright, 93 Mo. 42, 5 S. W. 807. No trust is ever permitted to fail for want of a trustee. Accordingly, if the deed from Fremon to Mugan was intended to convey the whole title to the lot, it conveyed the same subject to the trust under which Fremon held it. At that time he held it in trust for Culley, the purchaser and owner of record of the vested remainder originally belonging to Mr. Hunt. Whatever might have been the effect of a deed like that, if made to Mugan while the interests of Mr. and Mrs. Hunt remained as originally granted, a conveyance even with their consent could not operate to destroy the trust created by operation of law in favor of the purchaser of Mr. Hunt's interest at the execution sale. The law permitting that interest to be sold on execution will not allow it to be destroyed by the same act. It thus appears that Mugan, by the deed of 1857, took the legal title to the lot in question, subject to the trust originally created in his grantor.

But it is said that the deed to Mugan was itself a breach of trust, inasmuch as it purported to create a trust in Harriette Hunt and her heirs to the lot in fee simple absolute, and that it created at best only a constructive trust in favor of Hunt's grantees, and that the statute of uses does not execute a constructive trust of that kind. It may be conceded that the statute of uses does not execute a constructive trust. This principle alone is what defendant relies upon to defeat recovery in this action and compel plaintiffs to resort to an equitable action to secure possession of their land. The mandate of the law is as effectual to create or continue a trust as the agreement of the parties, and even if Fremon's deed to Mugan was intended to cut out Mr. Hunt's grantees, and vest the trust property exclusively in Mrs. Hunt and her heirs, it was, in view of the law governing the effect of a quitclaim deed, ineffectual to accomplish that intent.

A critical examination of the Mugan deed, however, fails to convince us that any attempt was thereby made to cut out the estate by remainder, or that the deed, when properly construed, has that effect. Before it was made Mr. Hunt's interest had passed by operation of law to Culley, and Fremon held the legal title in trust for Culley so far as that interest was concerned. The interest so disposed of was beyond the control of either or both Mr. or Mrs. Hunt. Their request for a conveyance of that interest could not, within the true meaning of the original deed, operate to require its conveyance by the trust in contravention of Culley's rights. It cannot, therefore, be presumed that Mr. and Mrs. Hunt and Fremon would intend to do the futile thing of attempting to destroy those rights. On the contrary, we think their deed is fairly susceptible of a construction which recognizes and respects them. Notwithstanding the fact that Fremon was trustee of Mr. as well as Mrs. Hunt, he limits his capacity of action in the deed to Mugan to Mrs. Hunt's interest exclusively. He says:

"This deed, made on the 18th day of July, 1857, by and between Du Bouffay Fremon, trustee of Harriette Hunt, who is the wife of Daniel B. Hunt," wit-

nesseth that he "does by these presents remise, release, and forever quitclaim unto * * * James Mugan * * * the lot in controversy, * * * in trust for the sole and separate use, control and benefit of Harriette Hunt, wife of Daniel B. Hunt * * * and her heirs, free from any control, debt, liability, or judgment against her said husband."

The subject of the deed was Mrs. Hunt's interest only. Fremon undertook to act as trustee for her only, and the obvious purport of the deed, in view of the fact, then constructively, if not actually, known by all, that Mr. Hunt's interest had been disposed of by sale under execution, was to save Mrs. Hunt's life estate, which was all she had, from liability for the debts of her husband and to free it from his control. At that time no married woman's statutory separate estate existed in Missouri, and the rights of the husband in his wife's real estate, unless curtailed by agreement, were fixed by common-law principles. It results from the foregoing that in any contingency the trust in favor of Mr. Hunt and his grantees remained as originally created. If the parties intended by the quitclaim deed of 1857 to cut out the interest of Mr. Hunt's grantees, the deed was ineffectual to accomplish that intent. It passed the title to Mugan, charged with the same trust as before, and no constructive trust was thereby created. If the quitclaim deed of 1857 was intended to transfer only the life estate of Mrs. Hunt, the legal title remained, held in trust by Fremon for the use of Mr. Hunt or his grantees after the termination of the life estate. Whichever of these views may be taken, at the expiration of Mrs. Hunt's life estate, occasioned by her death in 1898, either Mugan or Fremon held the legal title to the lot in question in trust for the grantees of Mr. Hunt, and the statute of uses executed the dry trust in such grantees, and thereby vested in them the legal title in fee simple. Rev. St. Mo. 1889, § 8833; Rev. St. Mo. 1899, § 4589 (Ann. St. Mo. 1906, p. 2493).

There is some controversy as to whether all of the plaintiffs in any event are entitled to recover in this action; but it is conceded that some of them may recover certain undivided interests in the event a legal, as distinguished from an equitable, title is found to exist. This will be properly worked out at the next trial. The court erred in rendering a judgment for the defendant.

It must be reversed, and the cause remanded for a new trial. It is so ordered.

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## WEST v. W. A. McLAUGHLIN & CO.'S TRUSTEE.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1908.)

No. 1,072.

1. BANKRUPTCY—COURT OF BANKRUPTCY—POWER TO VACATE ORDERS.

While it would be an abuse of discretion for a District Court to set aside an order allowing or rejecting a claim in bankruptcy and grant a rehearing for the sole purpose of extending the time within which an appeal may be taken as fixed by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), yet such an order, like other orders, is within the control of the court, and may in its sound discretion be set aside for good cause shown, even after the expiration of the time allowed for appeal.

2. SAME—CLAIM FOR MONEY RECEIVED—BANKRUPT AS BROKER—BURDEN OF PROOF.

Where the bankrupt was a stockbroker, and it was shown without dispute that a claimant paid him a sum of money with which to purchase certain stocks, the burden rested upon the bankrupt as agent, or on his trustee, who stood in his place, to account for such money; otherwise, claimant was entitled to the allowance of his claim as for money received to his use.

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

Edward A. Barnes, for appellant.

George B. Perry, for appellee.

Before LURTON and RICHARDS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The appellant proved and filed a claim for $5,000 for money had and received from him by the bankrupt. Objection to the claim was made by the trustee, and upon the testimony heard before the referee the latter disallowed it. On the 23d day of July, 1907, the District Court affirmed the order of the referee, and the judge, having at once left upon a vacation trip, was not, for over 10 days, within reach of appellant's counsel, who desired to take steps for an appeal. No reason is disclosed by the record for not taking other available steps for that purpose; but on the 13th day of September, 1907, appellant filed a petition for a rehearing. The court granted that relief, and after further discussion in a second opinion the district judge again and somewhat more at length stated his reasons for adhering to the judgment affirming the referee's order disallowing the claim. The order of the District Court again affirming the referee was entered on the 30th day of October, 1907.

The appellee has moved for the dismissal of the appeal. Section 25a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) provides:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the territories, in the following cases, to wit: (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 five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

One purpose which runs through the act is to require the prompt and expeditious winding up of estates, and the provision just copied was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it, we cannot accept as accurate or sustainable the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the statute, and go beyond the bounds of a proper discretion; but we do not doubt that an order disallowing a claim, as well as other

orders, is within the control of the court making it, and that the court may, in the exercise of a sound judicial discretion, set it aside, even after the expiration of 10 days. This court, in the case of In re Ives, 113 Fed. 911, 51 C. C. A. 541, so decided upon a kindred proposition and fully stated the reasons for the rule. The record shows that it was not a mere purpose to evade section 25a that induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only re-examined the questions involved, but more elaborately stated his views thereon. The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him. Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied.

The bankrupt did a brokerage business in the city of Detroit. He was employed by the appellant as agent to purchase 350 shares of the stock of the Virginia Coal, Iron & Coke Company, and the debt attempted to be proved was for money paid to the bankrupt on account of that purchase. In the proof of debt which constituted appellant's pleading, nothing was said to indicate that the transaction was one of gaming. The testimony does not show that it was ever intended or supposed by appellant to have been such, and in our judgment the case did not properly turn upon whether or not the transaction was one of wagering, although the referee and the court below seem to have proceeded upon the theory that it did. The evidence, indeed, took a somewhat wider range, but the appellant's real contention was that the stock was never in fact bought by the bankrupt, and that the report of the latter that such purchase had been made was not true, but had been falsely made for the purpose of inducing the appellant to make the payments which constitute the basis of the claim. Nor did the bankrupt himself claim ever to have dealt with appellant on a wagering or "bucket shop" basis. In his testimony he says:

"I claimed to be a legitimate house. I never gave Mr. West to understand that when I received an order for stocks and reported it as filled that I had not actually bought the stock that I reported as bought. I always told him that I bought it. Mr. West never had any reason from me to my knowledge to suppose that when he placed an order with me and I reported it as filled that it was treated as a bucket-shop deal."

The referee, in rejecting the claim, said:

"To my mind it is hard to arrive at a balance between the diverse testimony given in this case. On the one hand, I am not thoroughly convinced that McLaughlin carried on a business which in every respect, as a broker business, was above reproach; nor, on the other hand, am I convinced that there is sufficient testimony to show that his dealings were those of a bucket shop. When a party comes in, as does Mr. West in this case, after a party has gone into bankruptcy, I am convinced, no matter what might be the case before the adjudication, that the strictest kind of proof should be presented on his part to make out his claim. I am mindful of what Mr. Barnes says as to shifting of the burden of proof, and in business I can understand, as in Swineford, supra, that the plaintiff might be in such a position that the burden of proof would be shifted so that the defendant would have to show his business transaction. But we have a different condition of affairs here. The

trustee comes in and takes possession of this property as he finds it. He has only the books and papers which he finds in his possession, and I do not think that it is his place to make an affirmative proof that the allegations made by the plaintiff are not true. Taking into consideration the testimony as presented to me, and the relative situation of the parties, and the condition of affairs at the time of the adjudication of bankrupt, I do not think that Mr. West has made out his case, and my finding, therefore, is that his claim should be denied."

Not only did the referee think that appellant should be required to adduce "the strictest kind of proof," but he added this statement:

"If the claimant and his attorney desire to appeal the case, they will have 10 days from this date, on *paying all costs incurred before the referee.*"

We have italicized the unusual intimations contained in this statement, which seem to cover inadmissible additions to what is required under General Orders, in Bankruptcy No. 27 in exercising the right there given to obtain a review by the judge of an order of the referee. However, the matter was taken before the district judge upon a petition for a review, and he affirmed the order of the referee, stating his views both as to the law and the facts in a written opinion, and it is urged that his conclusions as to the facts should have controlling weight on appeal. In Dodge v. Norlin, 133 Fed., at page 371, 66 C. C. A., at page 433, the Circuit Court of Appeals of the Eighth Circuit said:

"Where the court below has considered a question and made a finding on conflicting evidence, its conclusion is presumptively correct, and it should not be disturbed unless it is reasonably clear that a serious mistake has been made in the consideration of the facts or an obvious error has intervened in the application of the law. Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 943, 52 C. C. A. 559, 563."

We will deal for the present with the proposition suggested in the last clause of what was thus stated in that case. The question of law lying at the root of what we are to determine is as to where lay the burden of proof. The referee, as we have seen, based his ruling upon the idea that appellant, under the circumstances, must establish his claim by "the strictest kind of proof." The court below held that:

"The burden is on the claimant to establish his case by a preponderance of evidence, and that the presumption of law is against the commission of the fraud charged."

The question is whether this proposition is correct as applied to this case. The general rule is very clearly stated in 1 Phillips on Evidence, *812, *813, in this language:

"Where one party charges another with a culpable omission or breach of duty, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice not to presume that a person acted illegally till the contrary is proved."

But at least one exception to this general rule is well established. An agent must execute with fidelity the duties of his trust. He must make true and accurate reports of what he does, and must render a true account of what he did with money intrusted to him for investment or disbursement. Am. & Eng. Encyc. of Law, pp. 1058, 1071, 1086; 4 Am. & Eng. Encyc. of Law, 968. In this case it is agreed upon all hands that

the money was paid to the bankrupt for the purpose already indicated. In such a case the Supreme Judicial Court of Massachusetts, in its opinion in Lonergan v. Peck, 136 Mass. 364, said:

"The delivery of the moneys being undisputed, the burden of proof was on the defendant to show that he had honestly made transactions in the purchase and sale of stocks as ordered."

The case of Peterson v. Poignard, decided by the Kentucky Court of Appeals, and reported in 8 B. Mon. 309, was one which arose out of transactions between a principal and his agent. After pointing out certain suspicious facts and the neglect of the agent to perform the duty of keeping a precise and accurate account of all transactions pertaining to the agency, the court, at page 310, said:

"His competency to do this is well established, and it cannot be doubted that he was well aware of its importance and necessity. His failure authorizes unfavorable inferences, and subjects him now, when called on for an account, to a heavy burthen of suspicion as well as of proof."

We have no doubt of the correctness of these views, and particularly as they were expressed by the Supreme Judicial Court of Massachusetts.

Another consideration should not be overlooked. The facts as to any purchase made by an agent pursuant to instructions are peculiarly within his knowledge. When, as here, he is a competent witness in behalf of the trustee, it is naturally very much easier for him to show and testify to the facts as to what he had done than it would be for the principal, who was not an actual participant in the transaction. These considerations bring the case within the reach of another elementary principle, which is stated by Best, in section 274 of his Principles of Evidence, in this language:

"It has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is supposed to be cognizant."

This rule is also laid down in Greenleaf on Evidence, § 79, and was approved by the Supreme Court in Rome, etc., R. R. Co. v. United States, 139 U. S. 568, 11 Sup. Ct. 638, 35 L. Ed. 266.

The testimony leaves no doubt that the money was paid to the bankrupt for the purpose of buying the 350 shares of stock in the Virginia, etc., Company; and, this being true, we think the court below proceeded upon an erroneous theory of the principles of law upon which the case was to be tried and determined. The trustee represented the bankrupt, stood in his shoes, and the burden of proof rested upon him, precisely as it would have rested upon the bankrupt, had there been no adjudication, and it devolved upon appellee to show that the purchase had in fact been made by the bankrupt in order to defeat the claim. If the purchase had not been made, the bankrupt held the $5,000 for appellant's use, and as money which, in equity and good conscience, he ought not to retain. The burden was not upon the creditor to show that there was no actual purchase of stock, and it was error to disallow and reject the claim upon the contrary assumption.

We do not question the general proposition, so often announced by

appellate tribunals, where a case turns upon an issue of fact, particularly where the testimony is contradictory, and where there may be advantages in seeing or knowing the witnesses and hearing them testify, that the appellate court will presume that the findings of fact by the lower court were correct, though this is always with the qualification that such findings do not appear to be clearly against the weight of the testimony. Ohio Valley Bank v. Mack, 163 Fed. 155.

But, apart even from this rule, we do not find in the testimony the "flat contradictions" which the court below thought had developed. On the contrary, upon the essential facts of payment of the money by the bankrupt and his failure to actually buy the stock, we think there is no real or substantial contradiction. We think it is clear from even the bankrupt's testimony that the stock was not bought at all, and that he only treated it as a case where it was supposed to have been bought by the Odell Commission Company.

But, without pursuing the subject further, we conclude, for the reasons suggested, that the judgment must be reversed, with directions to the court below to allow the claim of appellant as an unsecured demand against the bankrupt's estate. Appellant is also entitled to his costs.

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## BEACH v. NEVINS.

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

No. 15.

EVIDENCE—PAROL—TO SHOW CONDITION.

In an action on a promissory note, evidence was admissible on the part of defendant that the note was delivered to the plaintiff upon an oral agreement that it should not become operative, but should be returned on the same day, unless plaintiff should secure and deliver to defendant certain stock of a corporation for which it was to be in payment, and that the stock was not so delivered. Such evidence did not tend to contradict or vary the note, but to show that its delivery was conditional, and that it never became an operative instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1929–1944.]

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

M. W. Acheson, Jr., for plaintiff in error.

S. S. Mehard, for defendant in error.

Before MOODY, Circuit Justice, and DALLAS and GRAY, Circuit Judges.

GRAY, Circuit Judge. The material facts, as disclosed by the record brought up by the writ of error in this case, are as follows:

The appellant and plaintiff below, a citizen and resident of the state of New Jersey, was duly appointed, by the Court of Chancery of the state of New Jersey, a receiver of the International Mercantile Agency, a corporation of that state, and by the order of said court was clothed

with power and authority (not here disputed) to demand, sue for, collect and receive all the goods and chattels, rights and credits, moneys, effects, choses in action, bills, notes, and property of every description of the said corporation, and to institute at law or in equity all necessary legal proceedings for the recovery of the same. Suit was brought by the plaintiff, as such receiver, against the defendant, Lewis H. Nevins, a citizen of the state of Pennsylvania. The cause of action, as set out in the statement of claim, is, that on August 26, 1903, the said defendant made and executed his promissory note, to his own order, for $5,000, payable January 1, 1904; that the said defendant thereupon indorsed in blank the said note and delivered the same, for value received and (of course) before maturity, to the said International Mercantile Agency; that said note was duly presented for payment, and payment thereof refused by the defendant, and that since the plaintiff's appointment as receiver, as aforesaid, he had made demand upon the defendant, who refused, and ever since has refused, to pay the said note, or any part thereof. The affidavit of defense sets forth, and there is evidence tending to show, that on the 26th day of August, 1903, the date of said note, there was a transaction in the city of New York, between the defendant and one Ross M. Turner, at that time secretary of the said International Mercantile Agency, in which, after certain representations made by said Turner as to the condition of said company and the value of its stock, it was agreed that if defendant would make the aforesaid note for $5,000 and give the same into the said Turner's possession, as secretary of the said company, he, Turner, would endeavor to get for the defendant 50 shares of the stock of said company, and deliver the same to the defendant on that same day, August 26, 1903, and that he would either deliver to the said defendant the certificates for the said 50 shares of said stock, or return him the said note on the evening of that same day, at the Hotel Victoria, in the city of New York; that, relying upon this stipulation that the said stock should be delivered or said note returned to the defendant on that same day, defendant executed and indorsed said note and delivered the same into the possession of the said Ross M. Turner.

It is admitted that the certificate for said stock was not delivered to the defendant on the said 26th day of August, nor until after the 18th day of September following, when the same was mailed by the said Turner from New York to the defendant, in Kittanning, Pa. The letter inclosing said stock was received by defendant, Nevins, October 2d, and returned to Mr. Turner in a letter dated that day, stating that it had been promised to be delivered to him at the Hotel Victoria on August 26th, the day of the purchase of the stock. On October 12th, this stock was remailed to the defendant by the president of the company, and on October 14th was again returned by the defendant, with the statement that it was so returned, "your company having failed to fulfill its part of the agreement made with me at the time I conditionally gave my note for the same, in not delivering the stock at the time specified." There was also evidence tending to show that at the time of the transaction in question, August 26, 1903, cotemporaneously with the signing, endorsing and delivery of the note sued upon to Turner, as secretary of

the said company, defendant signed a subscription contract in the following form:

"International Mercantile Agency, New York Life Building, 346–348 Broadway.

"Know all men by these presents, that I, Lewis H. Nevins, of the city of Kittanning, in the state of Pa., do hereby subscribe for fifty shares of stock of the common capital stock of the International Mercantile Agency, at $100 per share, amounting to $5,000. And I do hereby agree to pay within ——— from date of subscription the sum of five thousand dollars, being full amount of said shares.

"In witness whereof, I have hereunto set my hand and seal at New York the 26th day of August, one thousand nine hundred and three.

"Louis H. Nevins.

"Signed, sealed and delivered in the presence of T. M. Underhill."

Written on back: "Hotel Victoria."

There was also evidence tending to show certain representations made by Turner, as secretary of the company, at the time of the transaction above recited, as an inducement to the defendant to subscribe for said stock; these representations being to the effect that the company was in a prosperous condition, that the stock was worth and was selling for 25 per cent. above par, and the offer was made to obtain, as a special favor, if possible, 50 shares at par, and that within a few months thereafter, and shortly after the attempted delivery of the stock, the company was insolvent and its affairs placed in the hands of a receiver, as above stated.

This testimony, as well as the testimony in regard to the conditions alleged to have been attached to the transaction at the time of the delivery of the note, was admitted over the objection of the plaintiff. A request was also made for peremptory instructions on behalf of the plaintiff, which was refused by the court, and the case submitted to the jury. The court charged the jury that the case was submitted to them upon a single issue, viz., whether or not the note was conditionally or unconditionally issued to the agent of the International Mercantile Agency. The learned judge withdrew from the jury the consideration of any question as to false or fraudulent representations made by the agents of the company to the defendant, knowing them to be false or fraudulent at the time, stating that no such evidence had been adduced. There was a verdict for the defendant, and judgment duly entered thereon.

The various assignments of error to the charge of the court and to the admission of testimony, resolve themselves into the single question, whether the evidence offered by defendant and admitted by the court, as to the alleged understanding between defendant and the secretary of the company at the time of the delivery of the note, should not have been excluded upon the ground that it was an attempt to contradict, alter or vary a written instrument by parol. The position of the learned counsel for the plaintiff in error is, that the evidence of a cotemporaneous oral agreement, that the stock was to be delivered at a certain time and place, in default whereof the note was to be returned to the defendant, changed the written subscription contract, and that the testimony on that account should have been excluded, and the plaintiff's point for binding instructions have been affirmed. Further,

that in any view, plaintiff was entitled to an affirmance of his point, that if the jury found that the defendant did execute and deliver the unconditional written stock subscription contract, they should disregard the testimony as to the alleged cotemporaneous oral agreement.

We do not think the two writings, that of the subscription contract and that of the note, can be thus considered. The suit in the court below, brought by the plaintiff in error, was upon the written contract of the note, and the cotemporaneous oral agreement was applicable to it, as tending to prove a conditional delivery of the same. But, even though the making and delivery of the subscription contract and the making and delivery of the note be considered parts of one and the same transaction, the condition sought to be proved, with reference to the delivery of the note, if proved to the satisfaction of the jury, made the whole contract a conditional one. As we have said, the contract here sued on is the promissory note, the legal obligation attaching to which is sought to be enforced. The plaintiff had only need in the first instance to produce and prove the note as the note of the defendant, in order to make out his prima facie case. We think, however, the evidence tending to show a cotemporaneous understanding and agreement, upon which the note was executed and delivered, was properly admitted for the consideration of the jury, and that they were properly instructed by the court below that, if this evidence proved to their satisfaction that the making and delivery of the note was conditional, and that the condition had not been performed, the defendant was entitled to a verdict. To so hold, does not contravene the general rule against contradicting or varying the terms of a written contract by parol testimony. What was the intent of the parties as to the written contract becoming operative, may in such a case be inquired into, and evidence considered, tending to show that in accordance with that intent, it never did become operative; that its obligation was nonexistent.

In Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563, suit had been brought upon a promissory note for $10,000. The defense relied on was testimony tending to show that it was understood at the time the paper was signed or agreed upon, that it was to be of no effect, unless, upon consultation with one or both of two named persons, the defendants were assured that the proceeding was lawful, and that an attachment for the full amount of certain claims could be enforced. It was with reference to error assigned as to the admission of such testimony, that Mr. Justice Miller, in delivering the opinion of the Supreme Court, said:

"We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter. The present case is almost identical in its circumstances with that of Pym v. Campbell, in the Court of Queen's Bench, 6 El. & Bl. 370, 373. The defendants in that case had signed an agreement for the purchase of an interest in an invention, which the evidence showed was executed with

the understanding that it should not be a bargain until a certain engineer, who was to be consulted, should approve of the invention. There was a verdict for the defendants, which was sustained, and the following language was used by Erle, J., on discharging the rule to show cause: 'I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show that it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. * * * If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.'"

The cases of Davis v. Jones, 17 C. B. 625, Wallis v. Littell, 11 C. B. (N. S.) 369, Wilson v. Powers, 131 Mass. 539, and Pawling v. U. S., 4 Cranch (U. S.) 219, 2 L. Ed. 601, were cited and quoted from to the same effect.

The principle thus clearly enunciated, we think is applicable to the present case, and the judgment below is therefore affirmed.

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## HOME ST. RY. CO. et al. v. CITY OF LINCOLN.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1908.)

No. 2,573.

1. EQUITY—DECREE—ESTOPPEL TO REVIEW.
   A complainant who causes a decree in his favor to be executed according to a possible interpretation of it, accepts the benefits thereof, and acquiesces therein for six years, disentitles himself to call in question the correctness of the decree or the interpretation so put upon it.

2. SAME—CORRECTION AFTER TERM.
   A Circuit Court of the United States is without authority to correct a judicial error in one of its decrees upon simple motion or petition after the term at which the decree was entered.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1025.]

3. SAME—BILL OF REVIEW—TIME FOR BRINGING.
   A bill of review for error of law apparent on the face of the record may be brought after the term at which the decree sought to be corrected was entered, but not after the time allowed by statute for taking an appeal therefrom.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1101–1106.]

4. SAME—BILL OF REVIEW—PROCESS.
   A bill of review is not considered as a continuance of the former bill, but as in the nature of an original bill, and an appearance thereto is enforced in the same manner as to an original bill.

5. SAME—MODIFICATION UPON BILL OF REVIEW WITHOUT ISSUANCE OF PROCESS OR APPEARANCE OF DEFENDANTS IS VOID.
   Where no process is issued on a bill of review, and the defendants do not waive process by appearance or otherwise, a decree rendered thereon, which so alters the decree sought to be corrected as to give it an effect against the defendants which it did not have before, is wholly unauthorized and void.

(Syllabus by the Court.)

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

Charles S. Allen (Paul F. Clark, on the brief), for appellants.

Roscoe Pound (F. M. Hall and F. H. Woods, on the brief), for appellee.

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

VAN DEVANTER, Circuit Judge. This is an appeal from an order confirming a sale made under what is styled in the record a "supplemental foreclosure decree." The objection made to confirming the sale was that the supplemental decree was wholly unauthorized and void, in the circumstances in which it was rendered. The facts necessary to an understanding of the question so presented are these: On October 11, 1893, in a suit then pending in the Circuit Court of the United States for the District of Nebraska, the purpose of which was to foreclose a mortgage given by the Home Street Railway Company, a Nebraska corporation, to the Fidelity Loan & Trust Company, an Iowa corporation, as trustee for the holders of certain bonds, William G. Clark was appointed receiver of the mortgaged property, consisting of certain street railway properties, rights, and franchises in the city of Lincoln, Neb., some or all of which had been acquired by the mortgagor from former corporate owners. After the receiver had qualified and had taken possession, the city of Lincoln by leave of the court filed in the suit its petition of intervention, wherein it asserted a prior lien upon all of the mortgaged property, rights, and franchises, by reason of special paving taxes theretofore levied against the same while it was in the hands of the former owners, and sought to enforce the lien by a foreclosure and sale. The petition particularly enumerated the tracks or lines of road then constructed, and the connection in which the words "rights" and "franchises" were used therein indicated that the lien asserted and the relief sought were intended to embrace the right and franchise of the railway company to construct and operate other tracks and lines of road in other parts of the city. The lien was asserted under a provision in the act of March 25, 1887 (Laws Neb. 1887, p. 271, c. 11, § 77), which reads as follows:

"Special taxes for the purpose of paying the costs of any such paving, repaving, macadamizing, or repairing of any such street railway may be levied upon the track including the ties, iron, roadbed and right of way, side tracks and appurtenances, including buildings, and real estate belonging to any such company or person, and used for the purpose of such street railway business, all as one property, or upon such part of such tracks, appurtenances, and property as may be within the district paved, repaved, macadamized, or repaired, or any part thereof, and shall be a lien until satisfied."

On May 19, 1899, a decree was rendered upon the petition of intervention declaring the special taxes, which then amounted, with penalty and interest, to $46,015.68, a prior lien upon "all the property and franchises of the defendant Home Street Railway Company, as one entire property," and ordering, unless the amount so ascertained, with interest and costs, should be paid within 20 days, that "all and singular

the properties, rights of defendant Home Street Railway Company, mentioned in the bill and cross-bill of complaint (petition of intervention) in this cause, and hereinafter described, or as much thereof as may be sufficient," be sold; that the master execute to the purchaser a deed "of said properties, rights, and franchises"; and that the purchaser "of said properties, rights, and franchises" be put in possession thereof. The decree then proceeded:

"The description, extent, location and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the cross-bill (petition of intervention), bill, and inventory of property in hands of the receiver of the court, herein filed, are as follows: 'The track, ties, iron, roadbed, and right of way' along certain designated streets, being the constructed tracks or lines of road, 'and all other property, of whatever kind, whether particularly described or not and whereever situated, belonging to said defendant Home Street Railway Company, part of or belonging to its street railway or part of its equipment.'"

As is said in the brief of the appellee, "this portion of the decree omits all reference to the franchises." Pursuant to this decree a sale was had of the property so authorized to be sold, the city being the purchaser, and on October 25, 1899, an order was entered confirming the sale and ascertaining that there was a balance of $41,046.83 due to the city. On November 20, 1905, more than six years after the proceedings just recited, the city filed in the cause a so-called supplemental bill, wherein, in addition to reciting the prior proceedings, it was said of the original decree of May 19, 1899:

"That while the said city of Lincoln under and by virtue of the terms of said decree was given a first and prior lien upon all of the property, rights, right of way, franchise, and franchises of the Home Street Railway Company, as one entire property, yet, when said decree came to providing what property should be sold, it only provided for the sale of the right of way, franchise, and franchises in and to certain designated streets, on which said defendant had constructed a street railway, and did not authorize and direct the sale of all the property of every description and kind, including the right of way, franchise, and franchises in and to the streets on which no road had been constructed, but limited the right of way and franchise to the streets on and along which track had been laid, and a street railway had been built or constructed; whereas said decree should have provided for the sale of all the track, ties, iron, roadbed, together with all the right of way, franchise, and franchises, that the Home Street Railway Company had in and to, along and across, any and all of the various streets of the city of Lincoln, and your cross-complainant alleges the fact to be that said decree should now be modified and corrected in this particular, and a supplemental decree should be entered authorizing the sale of all of the property on which the city of Lincoln was given a first and prior lien."

The prayer of this bill was that the original decree "be corrected, changed, and so modified as to authorize the sale under said decree of any and all interest of every description and kind, including the rights and right of way, the franchise and franchises, of the Home Street Railway Company in and to any and all of the" streets in the city of Lincoln. There was no prayer for process, and no subpœna was issued on the bill. Nor was any rule entered or served requiring any one to answer the bill or to otherwise show cause why the relief sought therein should not be granted. But before the bill was filed the solicitors for the city transmitted a copy of it, with a notice of the time when

leave to file it would be asked, to the solicitor who had represented the Home Street Railway Company in the prior proceedings—who was also its president—and he acknowledged receipt thereof. In its title the bill named the Home Street Railway Company, the Fidelity Loan & Trust Company, and William G. Clark, receiver, as defendants. None of these entered an appearance to the bill, or otherwise waived the issuance or service of process thereon.

On January 20, 1906, without any hearing upon the part of defendants, a decree was entered in conformity with the prayer of the supplemental bill. This decree was not granted by the judge who granted the original; nor does it purport to have been granted because the original was not entered in conformity with the court's directions given at the time, or because of any obvious clerical error therein. Indeed, it is conceded that the original decree, as signed and retained among the files, discloses that, as it was drawn up by the solicitors for the city, the portion thereof containing a particular description of the property authorized to be sold thereunder specifically included "all right and franchise of the Home Street Railway Company, and of its component consolidated companies, * * * (the former owners), to construct or operate street railways on any and all of the streets of said city of Lincoln," and that before it was signed these words, as well as the words "right and franchise" elsewhere occurring in that portion, were all stricken out. Why corresponding changes were not made in the earlier portions, containing general language respecting "rights" and "franchises," does not appear, save as there is reason for believing that it was probably thought that such general language was restrained and limited by the words "and hereinafter described" and by the more specific description to which they obviously refer; and it is important to observe, in this connection, that the original decree contained no reservation of any question relating to the claim of the city that its lien and right to a sale included what was embraced in the descriptive words which were stricken out before the decree was signed.

A sale was had under the supplemental decree and was reported to the court. Thereafter the defendants filed objections to a confirmation of that sale upon the ground that the supplemental decree was wholly unauthorized and void, because the court was without jurisdiction of the subject-matter, in that its authority to grant the relief sought by the so-called supplemental bill had terminated long before that bill was filed, and because the court was without jurisdiction of the persons of the defendants, in that they had not been brought before it by any process and had not submitted to its jurisdiction by appearance or otherwise. On January 23, 1907, their objections were overruled and an order was entered confirming the sale. They then severally appealed.

So far as is disclosed by this record, no action of any kind was had in the principal suit of the Fidelity Loan & Trust Company against the railway company after the entry of the original decree on the city's petition of intervention; and it seems to be conceded that the prosecution of that suit was then practically suspended or abandoned, but that

it was never actually dismissed, and the receiver was never discharged. This statement of the case makes it plain, as we think, that the supplemental decree was wholly unauthorized and void, and that the objections to a confirmation of the sale had thereunder should have been sustained. The reasons which sustain this conclusion, briefly stated, are these:

1. Whether or not the terms of the statute and the proceedings of the city authorities thereunder were such as to give the city a lien as comprehensive as was asserted in its petition of intervention was necessarily one of the questions presented for decision at the final hearing upon that petition, and the original decree, when read in the light of familiar rules of interpretation, shows that the lien was held not to be so comprehensive. That decree was not interlocutory, but final, and, if the city felt aggrieved by the rejection of part of its claim, it should have seasonably invoked the corrective authority of the Circuit Court or the revisory authority of this court; but, instead, it caused the decree to be executed in conformity with its provisions, as we interpret them, and then acquiesced therein for a period of more than six years. This, without more, disentitled it to question the correctness of the decree or of the interpretation so put upon it. Albright v. Oyster, 9 C. C. A. 173, 60 Fed. 644; Chase v. Driver, 34 C. C. A. 668, 674, 92 Fed. 780, 786; Bronson v. Schulten, 104 U. S. 410, 418, 26 L. Ed. 797.

2. If that decree did not accord to the city all the relief to which it was entitled upon its petition of intervention, it was because the court erred in the decision of some question of law or fact arising upon the final hearing thereon, and not because there was some obvious clerical error in the decree, or because it did not conform to the court's directions given at the time it was pronounced. The character of the error, if any, was therefore such that the Circuit Court was without authority to correct it, upon a simple motion or petition presented after the expiration of the term at which the decree was entered. Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467; McMicken v. Perin, 18 How. 507, 511, 15 L. Ed. 504; Brooks v. Railroad Co., 102 U. S. 107, 26 L. Ed. 91; Bronson v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797; Phillips v. Negley, 117 U. S. 665, 672, 674, 6 Sup. Ct. 901, 29 L. Ed. 1013; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 224, 10 Sup. Ct. 736, 34 L. Ed. 541, 543; Hickman v. Fort Scott, 141 U. S. 415, 12 Sup. Ct. 9, 35 L. Ed. 775; Wetmore v. Karrick, 205 U. S. 141, 151, et seq., 27 Sup. Ct. 434, 51 L. Ed. 745; Patch v. Wabash Railroad Co., 207 U. S. 277, 281, 28 Sup. Ct. 80, 52 L. Ed. 204; Elder v. Richmond Gold & Silver Min. Co., 7 C. C. A. 354, 358, 58 Fed. 536, 540; United States ex rel. Fisher v. Williams, 14 C. C. A. 440, 67 Fed. 384; City of Manning v. German Ins. Co., 46 C. C. A. 144, 107 Fed. 52.

3. The so-called supplemental bill was not in fact such, but was in substance and form a pure bill of review for error of law apparent upon the face of the record, save that it ought to have contained a prayer for process. Such a bill may be brought after the term at which the decree sought to be corrected was entered, but not after the time allowed by statute for taking an appeal therefrom. The time limited

for taking an appeal in this instance was six months, but the bill of review was not brought within that time, nor until several years had elapsed. It came too late. Thomas v. Harvie's Heirs, 10 Wheat. 146, 6 L. Ed. 287; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 227, 10 Sup. Ct. 736, 34 L. Ed. 541, 543; Reed v. Stanley, 38 C. C. A. 331, 97 Fed. 521; Chamberlin v. Peoria, etc., Co., 55 C. C. A. 54, 118 Fed. 32; Cocke v. Copenhaver, 61 C. C. A. 211, 126 Fed. 145; Atlantic Trust Co. v. Dana, 62 C. C. A. 657, 670, 128 Fed. 209, 222; In re Holmes, 73 C. C. A. 491, 142 Fed. 391.

4. A bill of review is not considered as a continuance of the former bill, but as in the nature of an original bill. It prays for process, and an appearance to it is enforced in the same manner as to an original bill. Story, Eq. Pl. (9th Ed.) §§ 383, 403; 2 Dan. Ch. Pr. (6th Am. Ed.) *1575; 3 Dan. Ch. Pr. (6th Am. Ed.) *2065; 2 Hoff. Ch. Pr. 10; Lube, Eq. Pl. (Rapalje Ed.) § 283; Fletcher, Eq. Pl. §§ 919, 934, 941; Curtis, Eq. Prec. (4th Ed.) 124; 2 Bates, Fed. Eq. Pro. § 711, page 764; 1 Foster, Fed. Pr. § 356; Cole v. Miller, 32 Miss. 89, 101; Webb v. Pell, 1 Paige (N. Y.) 564; Heermans v. Montague (Va.) 20 S. E. 899, 902. Here there was no prayer for process, either regular or summary, and none was issued or served. Nor did the defendants enter an appearance to the bill or otherwise waive process thereon. In short, by a new proceeding, essentially ex parte, the original decree, entered and executed more than six years before, was so altered as to give it an effect against the defendants which it did not have before and to take from them what was not intended to be taken when it was rendered. In this there was fatal error. With the expiration of the terms at which the original decree was rendered and the sale thereunder was confirmed, the court lost jurisdiction of the persons of the defendants for all purposes connected with the city's intervention, and that jurisdiction could not be regained, save by lawful process or by their voluntary appearance. Brooks v. Railroad Co. and Wetmore v. Karrick, supra. Had they been brought before the court, they would have been entitled to be heard against the rendition of an altered and enlarged decree against them, and could have availed themselves, for that purpose, of the matters stated in the three paragraphs preceding this. That right could not be cut off by such a proceeding as is here shown without violating the fundamental principles of due process of law. Wetmore v. Karrick, supra.

Other questions were discussed by counsel, but their consideration becomes unnecessary, in the view which we take of those here mentioned.

It follows that the order confirming the sale under the supplemental decree must be reversed, with a direction that the sale be disaffirmed because of the invalidity of that decree; and it is so ordered.

## EMBRY et al. v. BENNETT et al.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1908.)

No. 1,774.

1. BANKRUPTCY—FUND HELD BY BANKRUPT AS GUARDIAN—SET-OFF.
The money expended by a father, who is solvent, for the support and education of his sons, or given to them, either before or after their majority, with no agreement or apparent expectation that it will be repaid, is not chargeable against a fund held by him as their guardian in favor of his creditors in bankruptcy, and the sons are entitled to interest on such fund from the time of its receipt by him.

2. SAME—CONTESTED CLAIMS—NECESSITY OF FORMAL OBJECTIONS.
Where the amount of claims filed against the estate of a bankrupt as secured claims was in dispute from the first, and so understood by all parties, it was not necessary that written objections should be filed to entitle the trustee or other creditors to contest their allowance for the full amount claimed.

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

Emmet Puryear, for appellants.

J. A. Sullivan, for appellees.

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

RICHARDS, Circuit Judge. This is an appeal from the orders of the District Court on a petition to review the findings of the referee. On April 27, 1905, an involuntary petition in bankruptcy was filed against Thomas P. Embry, of Boyle county, Ky., and on August 10, 1905, he was adjudged a bankrupt. Embry was a farmer, and a cattle and mule broker. He was a widower, with two sons. The unsecured claims allowed by the referee against him amounted to $17,791.31. The contention here is with respect to certain unsecured claims presented by his sons, and with respect to the extent of their secured claims as the wards of their father, the bankrupt. They claim that the bankrupt received from the executor of their grandfather, William L. Reed, on April 20, 1897, the sum of $11,011.90, bequeathed them by him, and afterwards, on July 18, 1898, the further sum of $165.80, being the balance due them from said estate, and afterwards, on August 11, 1901, the further sum of $770.20, due them as heirs of their mother, Mary R. Embry, the daughter of William L. Reed.

The elder of these two sons, W. Reed Embry, was born October 8, 1877, and became of age in 1898. The younger, Jesse W. Embry, was born July 21, 1882, and became of age in 1903. It seems that the two sons were supported and educated by their father, receiving their collegiate education, for the most part, at Center College, Danville, Ky. Their expenses, including tuition, board in private families, and incidentals, were paid by the bankrupt. It is estimated that between $300 and $400 annually, for each of the young men, was thus expended. It is also estimated that the interest on the money held by the bankrupt, as guardian, would, for each of the sons, approximate this amount.

Accordingly the court below, after careful consideration, reached the conclusion that the sums paid by the bankrupt for the support and education of the sons would just about offset what he owed them for the interest due on the sums held by him for them as guardian. Thus the court below conceded that the wards were entitled to interest on the sums held for them by the bankrupt from the time the latter received them; but it offset against this the amounts the father had paid for their support and education. We think in the latter respect it erred. These two boys were the only children. Their grandfather had left them altogether about $12,000. Their father, at the time they approached maturity, owned two good farms in Kentucky, and outside of that had a business in cattle and mules which was fairly profitable. His credit at the banks seemed to be good, so that he was able to borrow about $15,000 or $20,000 for current use. His failure was apparently brought about by an unfortunate partnership, and by indorsements made for a brother. We think, under the circumstances, that he had a right to support and maintain these children without charging such expenses against the estate they had received from their grandfather. Davis v. Richards, 58 S. W. 477, 22 Ky. Law Rep. 590; Hedges v. Hedges, 73 S. W. 1112, 24 Ky. Law Rep. 2220; Harper v. Payne, 73 S. W. 1123, 24 Ky. Law Rep. 2301. He was not regarded, nor did he regard himself, as a bankrupt or in failing circumstances. He kept no account of his sons' expenditures, and manifested no purpose to charge them as credits on his account as guardian. It was not necessary, nor, as we think, even proper, under the circumstances, for him to charge up against his sons every dollar he gave them, and thus reduce the small estate they had received from their mother's father. He had a right to pay their way until they became old enough to pay it themselves, keeping the money their grandfather left them as a nest egg to be used when needed. Accordingly we hold that the estate of the wards should not be charged with the sums which the bankrupt paid out for his sons' support and education, or as gifts, either before they became of age or after; and we also hold that these wards should be credited with interest upon the sums the bankrupt was charged with, as guardian, from the date he received such amounts.

We agree with the court below that it was not necessary to file a written objection to the alleged secured claims of the bankrupt's sons. It is clear that the precise amount of these claims was in dispute from the first, there being a question as to credits, and a question as to interest, and this was known to every one concerned. Respecting the matter of credits, we agree with the court below that the bankrupt is entitled to a credit of $4,000 on account of the Danville house and lot. We think the house and lot was worth $4,000 at the time it was accepted by W. Reed Embry as a credit. It is true the bankrupt had only paid $3,100 for it, $1,910 in a cottage and $1,225 in money. The cash ($1,225) was undoubtedly the money of the bankrupt. He borrowed it. But there is some doubt as to where the money came from to pay for the cottage. It is sufficiently certain, however, that the bankrupt bought and held this property as his own. Whether he should turn it over to his son Reed as a credit, and what he should receive for

it on account, if he did, was a question between him and Reed. He thought it was worth $4,000, and he put that consideration in the deed; and, while Reed "kicked" at the amount, we think he took the property at that price, and hold that he should be charged with it at that amount.

After the original claim of the Embry boys was filed, on March 8, 1906, W. Reed Embry filed an additional claim for the sum of $1,005, and Jesse W. Embry for $1,115. These were for the proceeds of certain live stock given by relatives, but raised and sold, and the proceeds used by the bankrupt. The referee allowed a portion of these unsecured claims, to Reed $880, and to Jesse $675, but the court below, on the petition for review, rejected them utterly. We think in this the court did right. The claims were evidently an afterthought, and under the view of the law we take were not supported by proper testimony.

To resume: The wards should be allowed interest from the time when the bankrupt received the property bequeathed them by their grandfather; they should not be charged with the sums expended by their father to support and educate them, or given them by way of gifts, either before or since maturity; and the Danville house and lot should be charged against W. Reed Embry at $4,000.

Judgment reversed, and case remanded, with instructions to recast the accounts in accordance with this opinion.

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## HECKENDORN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,396 (1,925).

1. CUSTOMS DUTIES—EXPORT DUTY—WOOD PULP.

In the form of a license fee for the privilege of cutting pulp wood on public lands in the province of Quebec, a certain sum is collected on what is consumed in manufacture within Canada and a greater sum on what is exported. *Held*, that in its essential nature this is the imposition of an export duty equal to the difference between the two sums, and is therefore within the purview of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 393, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1671), providing a countervailing duty on wood pulp when "any country or dependency shall impose an export duty on pulp wood exported to the United States."

2. SAME—CONSTRUCTION OF FOREIGN LAW.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 393, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1671), prescribing a countervailing duty on wood pulp imported from a "country or dependency" imposing "an export duty on pulp wood exported to the United States," customs officers are not required to pass upon questions of foreign constitutional or statutory construction, to determine whether such export duty was authorized. They are justified if they find correctly that what in fact was an export duty was acted upon by taxing officers throughout the country of exportation as fully as if imposed by unquestionable authority.

3. COURTS—NEW CASE IN ANOTHER CIRCUIT—INDEPENDENT CONSIDERATION.

An appellant is entitled to the independent consideration and judgment of a Circuit Court of Appeals in one circuit, though the question presented has been adversely decided by another Circuit Court of Appeals.

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

The decree of the Circuit Court affirmed the decision of the Board of General Appraisers, which upheld the ruling of the collector of customs that certain wood pulp imported by appellant was subject to an additional or countervailing duty at the rate of 25 cents for each cord of wood from which the pulp was made.

Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 393, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1671), imposes duty on wood pulp as follows:

"Mechanically ground wood pulp, one-twelfth of one cent per pound, dry weight; chemical wood pulp, unbleached, one-sixth of one cent per pound, dry weight: Provided, that if any country or dependency shall impose an export duty on pulp wood exported to the United States, the amount of such export duty shall be added, as an additional duty, to the duties herein imposed upon wood pulp, when imported from such country or dependency."

The pulp was manufactured in the province of Ontario, Dominion of Canada, from wood cut on public (crown) lands in the province of Quebec.

Certain British and Canadian statutes were proved. The British Parliament, by the British North America Act (chapter 3, St. 30–31 Vict.) gave to the Parliament of Canada exclusive legislative authority with respect to "(1) the public debt and property; (2) the regulation of trade and commerce; (3) the raising of money by any mode or system of taxation."

By the same act the respective provincial Legislatures were given power over "(2) direct taxation within the province in order to the raising of revenue for provincial purposes; * * * (5) management and sale of public lands belonging to the province, and of the timber and wood thereon; * * * (9) shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of revenue for provincial, local, or municipal purposes."

The Dominion Parliament has not imposed, in name or in effect, an export duty on pulp wood. By chapter 17, St. 60–61 Vict., the Dominion Parliament has authorized the Governor in council, under certain circumstances, to declare an export duty on pulp wood. This authority has not been exercised.

The Quebec Legislature (chapter 6, tit. 4, Rev. St.) has provided as follows:

"The commissioner of crown lands, or any officer or agent under him authorized to that effect, may grant licenses to cut timber on the ungranted lands of the crown, at such rates, and subject to such conditions, regulations and restrictions as may, from time to time, be established by the Lieutenant Governor in council, and of which notice shall be given in the Quebec Official Gazette."

Under this authority the following stumpage tariff was adopted:

"All wood goods cut in virtue of a license are subject to the following charges: * * * Pulp wood per cord of 128 cubic feet, * * * 65 cents, with a reduction of 25 cents per cord on timber manufactured into paper pulp in the Dominion of Canada."

In the record it is stipulated "that by virtue of such regulation all pulp wood cut on the crown lands in the province of Quebec under a license from the commissioner of crown lands of the province, or any officer or agent under him authorized to that effect, is subject to a charge of 65 cents per cord with a reduction of 25 cents per cord on timber manufactured into paper pulp in the Dominion of Canada."

The parties agree that no export duty, in name or in effect, is levied on pulp wood cut on private lands in the province of Quebec, or on pulp wood cut on either public or private lands in the province of Ontario.

Everit Brown (Henry J. Cookinham, on the brief), for importer.

John A. Kemp, Solicitor of Customs (Henry K. Butterfield, U. S. Atty., on the brief), for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). The questions propounded by appellant have been decided adversely to his contentions by the Circuit Court for the Northern District of New York

and by the Court of Appeals for the Second Circuit. Myers v. U. S. (C. C.) 140 Fed. 648; Id., 144 Fed. 1021, 73 C. C. A. 596. But appellant is right in claiming that he is entitled to our independent consideration and judgment.

1. In the form of a license fee for the privilege of cutting pulp wood on public lands in the province of Quebec 40 cents a cord is collected on what is consumed in manufacture within the Dominion of Canada and 65 cents a cord on what is exported. Looking beyond form, we find that a tax of 25 cents a cord is imposed on all pulp wood cut on public lands in the province of Quebec which at any point is taken beyond the boundaries of the Dominion of Canada. In its essential nature this is an export duty.

2. For the purposes of the case we may concede, without inquiry, that appellant is right in saying that the countervailing duty on wood pulp provided for in the tariff act of the United States can properly be levied only on wood pulp that is imported directly from the very country or dependency that imposes the export duty on pulp wood. From this point the argument for reversal proceeds thus, in substance: Either the Dominion of Canada or the province of Ontario must be taken as the country or dependency from which the wood pulp in question was imported. If the Dominion of Canada, the countervailing duty cannot lawfully be exacted from appellant because the Dominion has not imposed any export duty on pulp wood. The case is the same with the province of Ontario. In regard to the legislation of the province of Quebec, which is made the excuse for demanding the countervailing duty, that province was not empowered by the Kingdom of Great Britain or by the Dominion of Canada to impose export duties or to pass any act which should have effect in the province of Ontario or anywhere in the Dominion outside of Quebec's own territorial limits.

The answer, we think, is that the customs officers of the United States were not required, by appellant's protest, to pass upon questions of English or Canadian constitutional or statutory construction. Their action was justified if they found correctly that what in fact was a duty upon exportations from the Dominion of Canada was acted upon by taxing officers throughout the Dominion as fully as if it were imposed by what appellant would admit was unquestionable authority; and no other finding would be in consonance with the record.

The decree is affirmed.

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## BALTIMORE & O. R. CO. v. KANGAS.

(Circuit Court of Appeals, Sixth Circuit. June 26, 1908.)

No. 1,789.

MASTER AND SERVANT—ACTIONS FOR DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE—DEGREE OF CARE REQUIRED—INSTRUCTIONS.

The charge of the court, in an action to recover for the death of an employé, on the subject of contributory negligence which would defeat a recovery, construed and taken as a whole, *held* to state the correct rule that the degree of care required from the decedent was that which might reasonably be expected under the circumstances from a person of ordinary prudence, and not as depending on his own intelligence and understanding.

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

J. P. Wilson, for plaintiff in error.
Allen M. Cox, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The intestate was employed by the defendant below on its docks at Fairport, Ohio. On July 19, 1905, he was engaged in cleaning (what is called "trimming") the tracks on its docks, when he was struck, run over, and killed by an engine engaged in handling cars. In the action brought by his administrator to recover for his alleged wrongful death, the questions whether the railroad company was negligent, and whether, as alleged in the defense, the intestate was on his part guilty of contributory negligence, were submitted to the jury, and a judgment was rendered. We are satisfied, from an examination of the record, that there was a conflict of evidence upon these two questions, and we think they were properly submitted.

The defendant contends the court erred in charging the jury upon the matter of contributory negligence. We understand the law to be, what the defendant claims, that the inquiry should be, not what degree of care the "intelligence and understanding" of the decedent would have enabled him to exercise under the existing circumstances, but what amount of care might, under such circumstances, be reasonably expected of an ordinarily prudent person. 5 Thompson's Com. on Neg. 5330; Georgia Cotton Oil Company v. Jackson, 112 Ga. 620, 37 S. E. 873. But we do not think the court charged the jury differently. When the court reached the question of contributory negligence—that is, the question of negligence as applied to the decedent—it said that the latter—

"owed it to himself and to others, whose conduct might result in injury to him, to exercise ordinary care for his own safety, and that ordinary care has precisely the same definition when applied to him, and is to have precisely the same sort of application, as it receives when it is applied to the railroad company, namely: Did he at that time act with the kind of care for his own safety which men of ordinary prudence are accustomed to exercise under the same or similar circumstances? If he was not at that time in the exercise of that kind of care for his own safety, and the failure on his part to exercise that kind of care contributed to bring about this result to himself, then his administrator cannot recover, no matter what may have been the negligence of the defendant."

This is a perfectly plain and clear statement of the law as we understand it to be. The trouble grows out of a somewhat elaborate application in the charge of the rule; the court saying:

"Now, in considering whether or not this man was exercising ordinary care for his own safety, you will consider the experience that he had had in connection with these tracks, the experience that he had had in connection with railroads and with work on tracks, what knowledge he had respecting the probable movements of this locomotive, and, in general, all of those circumstances which would operate upon the minds of men of ordinary prudence who were engaged in working about a railroad track. What would have been the conduct, under the circumstances of that particular case, of men of ordinary prudence, possessed of the knowledge and experience and intelligence (but of ordinary prudence, remember) of this man? If what he did or what he did not do was not opposed to or at variance with the conduct of men of

ordinary prudence under similar circumstances, then this man was not guilty of contributory negligence."

The phraseology of the charge, "men of ordinary prudence," as qualified by the following words, "possessed of the knowledge and experience and intelligence (but of ordinary prudence, remember) of this man," is somewhat involved; but we think the meaning is clearly that of the prior portion of the charge. This is shown by the immediate repetition of the general rule stated plainly as before, namely:

"If what he did or what he did not do was not opposed to or at variance with the conduct of men of ordinary prudence under similar circumstances, then this man was not guilty of contributory negligence."

Moreover, if the objection had been to the mere phrase we have indicated, the exception should have pointed out the phraseology objected to, so the charge might have been corrected, and thus clarified beyond the possibility of misconstruction.

Judgment affirmed.

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ST. LOUIS & S. F. R. CO. v. DELK.

(Circuit Court of Appeals, Sixth Circuit. June 27, 1908.)

No. 1,747.

On motion to rehear.

For former opinion, see 158 Fed. 931.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. Motion to rehear denied.

RICHARDS, Circuit Judge (dissenting). Although no opinion has been handed down upon the denial of the motion, I think for certain reasons I ought to state the grounds I dissent from it. This case was decided March 3, 1908, and I dissented then, stating my grounds. Subsequently, on May 18, 1908, the Supreme Court of the United States decided the case of St. Louis, Iron Mountain & Southern Ry. v. Taylor, Adm'x, 28 Sup. Ct. 616, 52 L. Ed. ——; Mr. Justice Moody delivering the opinion. In the course of the opinion it became necessary for the court to express its view of the operation and obligation of the safety appliance law, and it stated that, in enacting the law:

"The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body."

This was the view taken by the court below, and I could not do other than dissent from this court reversing the judgment because

of action based on it. I dissent now for the purpose of pointing out that while the case has been sent back to grant a new trial, to be conducted in accordance with the contrary view taken by this court of the effect of the act, seemingly such view is inconsistent with the one announced since by the Supreme Court.

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## THE JOHN H. STARIN.

## THE JAMAICA.

(Circuit Court of Appeals, Second Circuit. May 21, 1908.)

Nos. 225–227.

1. COLLISION—STEAM VESSELS CROSSING—VIOLATION OF RULES.
   A collision in East river in the daytime between the steamer Starin and the ferryboat Jamaica on crossing courses, and a resulting collision between the Starin and a barge made fast to a pier, *held* due to the fault of both steamers; the Starin for not keeping the course and speed as the privileged vessel, as required by article 21 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), and the Jamaica for attempting to cross ahead in violation of articles 21 and 22, and notwithstanding the refusal of the Starin to assent to her signals therefor, three times repeated.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 194, 195.]

2. SAME—RULES—CONSTRUCTION AND EFFECT OF STATUTORY RULES.
   The binding force of the articles of the statutory navigation rules cannot be affected by the pilot rules; but, where there is a conflict, the articles are of superior authority.

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

This cause comes here upon appeals from decrees of the District Court holding both steam vessels in fault for a collision between the ferryboat Jamaica and the steamer John H. Starin, and for a collision immediately ensuing between the latter and the barge McLain made fast to a pier. The opinion of the District Court is found in 145 Fed. 723. It fully sets forth all the facts.

Hyland & Zabriskie, for libelant.

James J. Macklin and La Roy S. Gore, for the Starin.

Clarence B. Smith and Wheeler, Cortes & Haight, for the Jamaica.

Before LACOMBE, WAID, and NOYES, Circuit Judges.

PER CURIAM. We concur with the district judge. The Starin was the privileged vessel, and as such was required to maintain her course and speed. She wholly failed to maintain her course. When the vessels sighted each other she was about 50 feet from the Tenth street buoy and a little on the Brooklyn side of midriver, bound down to round the Battery for her berth on the North river. The collision took place about 100 feet off the line of the New York piers, a little below the Houston Street ferry.

The Jamaica was the burdened vessel, and was required to keep out of the way of the Starin, and to avoid crossing ahead of her if the

circumstances of the case admitted. Act June 7, 1897, c. 4, arts. 21, 22, 30 Stat. 101 (U. S. Comp. St. 1901, p. 2883). We are at a loss to see what circumstances there were which did not admit of her executing such manœuver. Instead of doing so, she persisted in crossing ahead, although, as her own pilot testifies, three successive two-blasts whistles which she blew, indicating thereby a wish to navigate otherwise than in accord with article 22 (The George S. Shultz, 84 Fed. 510, 28 C. C. A. 476; The New York, 86 Fed. 814, 30 C. C. A. 628), were each responded to with a single-blast whistle, which was a distinct refusal to enter into any agreement to modify the requirements of the article.

We do not agree with her counsel in construing pilot rule 2 as allowing the burdened vessel to abrogate article 22, by blowing a signal which indicates an intention to cross ahead, when the circumstances of the case admit of her crossing behind. The latter part of the rule would seem to indicate that it was framed so as not to be in conflict with the articles, and, if it were, the articles, and not the rules, are of superior authority. The John King, 49 Fed. 469, 1 C. C. A. 319.

The decrees are affirmed, with interest and a single bill of costs of this court to the McLain against both appellants.

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## AMERICAN CARAMEL CO. v. THOMAS MILLS & BRO.

(Circuit Court of Appeals, Third Circuit. April 6, 1907.)

No. 36, March Term, 1906.

1. PATENTS—SUIT FOR INFRINGEMENT—SCOPE AND EXTENT OF RELIEF.
   Only under exceptional circumstances will a court, in its decree finding infringement of a patent, provide that the infringing machines shall be delivered up to the complainant to be destroyed.

2. SAME—DAMAGES—FAILURE TO MARK PATENTED ARTICLE.
   Where put in issue, the complainant in a suit for infringement of a patent for a machine is required to prove affirmatively that machines made thereunder were marked as required by Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), or that notice of infringement was given to the defendant, to entitle complainant to recover damages for infringement prior to the filing of the bill.

On Motion to Recall and Amend Mandate.

Augustus B. Stoughton, for the motion.
Henry E. Everding, opposed.

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

ARCHBALD, District Judge. By the opinion heretofore filed the decree of the court below was reversed, with directions to reinstate the bill and grant the relief there prayed for (149 Fed. 743, 79 C. C. A. 449); and, the mandate having gone out in that form, it was of course binding. Our attention is now called to the fact that among the prayers of the bill was one that the infringing machines should

be delivered up to be destroyed, and an order to that effect was accordingly incorporated into the decree which was entered. This was an unusual prayer (American Bell Telephone Co. v. Kitsell [C. C.] 35 Fed. 521), although, of course, not an unwarranted one, if the circumstances called for it (Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768). It was only, however, by inadvertence that it was sanctioned here; and, application having been made to reform the mandate so as to exclude this relief, it will be recalled and corrected accordingly.

An account was also prayed for and allowed, which we are now asked to refuse upon the ground that no proof was made that the complainants ever marked their machines "Patented," or gave notice to the defendants that they were patented, as required by the statute (Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388]); this having been denied and put in issue by the answer. This point is said to have been made in the court below, but was not raised here, the complainants being the appellants, and it naturally passed unnoticed. As a result of a neglect to mark, or to notify the defendants in the absence of it, damages are denied by the statute; the infringement being otherwise presumptively innocent. And, issue being made by the answer, a compliance with the statute is required to be affirmatively shown in order to lay ground for an account (Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426), at least for anything which precedes the filing of the bill (United States Mitis Co. v. Midvale Steel Co. [C. C.] 135 Fed. 103). It is immaterial that in the present instance the complainants neither license nor sell their machines, reserving the benefit of the patent for the advantage of their own business. The fact still remains that without notice, either direct or constructive, the defendants are entitled to be regarded as acting innocently, and so not liable to damages, by the express provision of the statute.

The mandate is therefore recalled, and amended, so as to exclude from the relief to be granted the destruction or delivery up of the infringing machines, or the directing of an account for anything preceding the filing of the bill.

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## UNION MATCH CO. v. DIAMOND MATCH CO.*

(Circuit Court of Appeals, Eighth Circuit. April 17, 1908.)

No. 2,658.

1. PATENTS—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.

Where the claims of a patent specify the elements of a combination, but do not specify the means whereby those elements perform their functions but call for "means" generally, and close with the words "substantially as and for the purpose" described, or specified, or set forth, such words import into the claims the specific means described in the specification, and the claims are limited accordingly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 243.]

2. SAME—CLAIMS FOR FUNCTIONS—MACHINE FOR BOXING MATCHES.

The Palmer, Denmead & Baughman patent, No. 538,535, for a machine for boxing matches, claims 1, 2, 3, and 4, for a combination of means for

*Rehearing denied June 18, 1908.

jarring the matches into parallelism after they drop into the boxes, and claims 23, 24, 26, and 30, for means for temporarily dividing the boxes into compartments while being filled, are not void as for functions of mechanism only, but, read in the light of the specification to which they refer, are for specific means to accomplish defined results. Such claims, however, are limited by the prior art to a narrow construction and a narrow range of equivalents.

3. SAME—IMPROVEMENT PATENTS—EQUIVALENTS.
When the invention of a patent is along the lines of past efforts, which have met with more or less success, and the inventor has made only an improvement in an art already well advanced, the range of equivalents should be reduced accordingly.

4. SAME—INFRINGEMENT—COMBINATION PATENT.
No device can be held to infringe a combination claim of a patent, unless it employs all the elements of it.

5. SAME.
A patent for a described means or mechanism to accomplish a desired end must be limited to the particular means described in the specification, or their clear mechanical equivalents, and does not cover any other mechanical structure which is substantially different in its construction or in its operation.

6. SAME—MACHINE FOR BOXING MATCHES.
The Palmer, Denmead & Baughman patent, No. 538,535, for a machine for boxing matches, claims 1, 2, 3, 4, 23, 24, 26, and 30, are not infringed by the machine of the Wyman patent, No. 736,668, which, while it accomplishes the same results, does so by different means and methods of operation, and, furthermore, does not contain all the elements of such claims or their equivalents.

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

Curtis T. Benedict and John E. Stryker, for appellant.
John R. Nolan, for appellee.

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

ADAMS, Circuit Judge. This was a suit to restrain the alleged infringement of letters patent No. 538,535, granted in 1895 to complainant, the Diamond Match Company, as assignee of the inventors, for new and useful improvements in box-filling machines. The specification shows that the device of the patent was to be used in connection with a match-making machine. It is there said:

"The object of our invention is to enable matches to be successfully placed in boxes by mechanical means directly from the match-making machine."

The manufactured matches, as they fall from the machine which dips, dries, and finishes them, form a continuous supply for the machine of the patent, whose primary object was to successfully place them in the well-known pasteboard boxes of commerce for sale and use. The patent has 37 claims 8 of which only are now in controversy. They are the first, second, third, fourth, twenty-third, twenty-fourth, twenty-sixth, and thirtieth. The first four constitute a group of claims for combination of means for jarring matches into a state of parallelism after they drop into the match boxes from the source of supply, and the last four constitute another group of claims for temporarily

dividing the match boxes into compartments to facilitate the proper deposition of matches therein. These claims are as follows:

"1. In a machine for boxing matches, in combination with a source of supply of the matches to be boxed, a support to hold the box in position to receive the matches from the source of supply, and means for giving the box a to and fro jarring motion, in a direction out of a vertical line, and substantially at right angles to the matches as they are to lie in the box, substantially as and for the purpose specified.

"2. In a machine for boxing matches, in combination with a source of supply of the matches to be boxed, means for passing a box across the path of the matches from such source of supply and a jarring device to give the box a to and fro longitudinal jarring in a direction substantially at right angles to the matches as they are to lie in the box, substantially as and for the purpose shown.

"3. In a machine for boxing matches, in combination with a source of supply of the matches to be boxed, means for passing the boxes across the stream of matches from such source, so that they will be gradually filled, as they pass along, and means for jarring the boxes, while being filled, in a direction out of a vertical line and substantially at right angles to the matches as they are to lie in the filled boxes, substantially as and for the purpose set forth.

"4. In a machine for boxing matches, in combination with a source of supply of the matches to be boxed, means for passing a series of boxes placed close together, across the stream of matches from the source of supply, so that several of the boxes will be receiving matches at a time, and means for giving the boxes, as they pass along, a series of jars in a direction out of a vertical line and at right angles to the matches, as they are to lie in the filled boxes, substantially as and for the purpose described."

"23. In a box-filling machine, in combination with a suitable support over which the boxes are moved. and means for so moving them, a series of removable transverse partitions for each box arranged to divide the space within a box up into several divisions, into which the matches can fall from above the box and a moving carrier carrying such partitions along with the boxes, substantially as and for the purpose specified.

"24. In a box-filling machine, in combination with a suitable support for the boxes, and means for moving the latter along, a series of transverse plates for each box projecting above the level of the box edges, and so situated as to divide the space just above each box into several divisions, and a moving carrier carrying such plates along with the boxes, substantially as and for the purpose shown."

"26. In a box-filling machine, in combination with a suitable support for the boxes to be filled, and means for moving them along, a moving carrier having a series of transverse plates for each box extending down into and above the box, and arranged relatively, so as to divide the space within and just above the box into several divisions, substantially as and for the purpose specified."

"30. In a box-filling machine, in combination with a support for the boxes to be filled, a moving chain of links, each having one or more transverse plates adapted to project down into a box and divide the interior of the latter up into several divisions into which the matches can fall, from a source of supply above the boxes, substantially as and for the purpose specified."

The first group (1, 2, 3, and 4) have the following elements in combination: (1) A source of supply of matches to be placed in boxes; (2) means for passing the boxes to be filled across the path of matches falling from the source of supply, so that they may be gradually filled as they pass along; (3) a support to hold the box or series of boxes in position to receive the matches from the source of supply; (4) means for giving the box or boxes a to and fro, longitudinal, jarring motion, or a series of such motions, in a direction out of a vertical line and substantially at right angles to the matches as they find their bed in the boxes. Broadly speaking, the first group of claims is

for means whereby boxes in their passage across the path of matches falling from a source of supply are jarred to and fro horizontally, or substantially so, in a direction at right angles to the matches as they lie in the boxes; and this is the principle of the invention of these claims.

The second group of claims (23, 24, 26, and 30) embraces as elements (1) a suitable support over which the boxes are moved; (2) means for so moving them; (3) a series of removable, transverse partitions for each box, so arranged as to divide the space within a box into several divisions or compartments into which matches can fall from above the box; (4) a moving carrier, carrying such partitions along with the boxes. This group, generally speaking, is for means to produce a temporary transverse subdivision of the interior of the boxes while being filled, to facilitate the process of filling; and this is the principle of the invention of those claims.

The defenses are: (1) That the claims are functional, and therefore void; (2) that, in view of the prior art, the claims cover aggregations only, and not patentable inventions; (3) that, in view of the prior art, the claims are at best for the specific mechanism described in the specification, and, as so treated, defendant's structure does not infringe.

A valid patent cannot be secured for a function, a mode of operation, or a result, separate from the means or mechanical devices by which the result is accomplished. Fuller v. Yentzer, 94 U. S. 288, 24 L. Ed. 103; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 556, 18 Sup. Ct. 707, 42 L. Ed. 1136. Are the claims in question for functions only, and for that reason unpatentable? We are referred at the end of each of them to the specification for a description of the means employed to accomplish the proposed result. After specifying the elements of the combinations, and referring generally to means for producing the jarring motion of the first group of claims, and for moving the boxes in connection with the series of transverse space-dividing blades of the second group, words of reference to the specification appear: "Substantially as and for the purpose" described, set forth, or specified. These words imported into the claims the specific means described in the specification, and the invention is limited accordingly. Seymour v. Osborne, 11 Wall. 516, 547, 20 L. Ed. 33; Westinghouse v. Boyden Power Brake Co., supra.

By the statutes (sections 4884 and 4888, Rev. St. [U. S. Comp. St. 1901, p. 3381]) the specification and drawings are made a part of the patent, and the patentee is required to file in the Patent Office a written description of his invention and of the manner and process of using it in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains to make or use the same, and in case of a machine he is required to explain the principle thereof and the best mode in which he contemplates applying that principle. This provision of the statute has been interpreted in the case of O'Reilly v. Morse, 15 How. 62, 119, 14 L. Ed. 601, thus:

"Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses

in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes."

It is there held that:

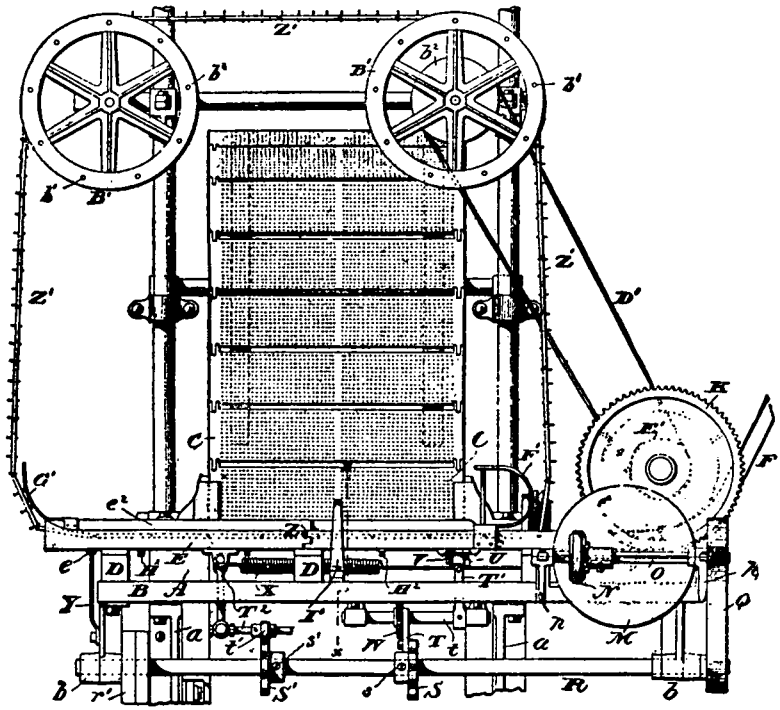
"If this cannot be done by the means he describes, the patent is void; and, if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more."

While the claims of the patent specify the physical elements of the combinations, they do not specify the means whereby those elements perform their intended functions, but call for "means" generally for performing them. By this is not meant, as claimed by defendant's learned counsel, all possible means for accomplishing the result. Such comprehensiveness of claim would not be patentable. Dryfoos v. Wiese, 124 U. S. 32, 37, 8 Sup. Ct. 354, 31 L. Ed. 362. The claims in question by direct terms refer to the specification for the means by which the function, purpose, or object of the invention is to be accomplished, and to that we must look for them.

The means there disclosed for producing the jarring motion of the boxes called for by the first group of claims consists of an endless chain, composed of links about three inches long, the same being about the length of an ordinary pasteboard match box. Each of these links has three fixed transverse cross-bars or blades. This chain is made to operate over two sprocket wheels, situate on a level with each other a few feet apart at the top of the machine, and through a stationary restraining metallic trough underneath, and is kept in motion by power from a main shaft properly geared or belted to one of the sprocket wheels. The sprockets of these wheels, as they revolve, engage with the cross-bars or blades of the endless chain, and propel it around its circuit. Empty uncovered match boxes are fed in constant succession into an upright or curvilinear chute connecting with the trough at one end, and thence are forced into the trough by a feeding-in wheel, and through the entire length of the trough by the cross-bars or blades of the revolving chain engaging with the inner side of the front end of each box. In the progress of the boxes through the trough they pass under a source of supply of finished matches, produced by the match-making machine used in connection with the machine of the patent, which are made to drop into the passing boxes. The trough is made to constantly vibrate longitudinally, by a jarring to and fro motion as it is called, imparted to it by specific means described in the patent, consisting of cams, levers, and springs operated by the shaft below. The motion of the trough is made more efficacious by dividing it into two sections by the employment of a loose tongue and-groove joint, so as to permit of a slight lateral jarring motion of each section separately without disturbing the continuity of the passageway for the boxes in the trough. The jarring of the trough thus produced is imparted to the boxes and the matches contained in them. Thereby they are, while the box is passing through the trough, jarred or shaken into parallelism within the box.

The means for making the temporary transverse subdivision of the

interior of the match boxes to facilitate their filling, referred to generally in the second group of claims, are clearly and specifically shown in the specification to consist of the endless traveling chain with its links, each carrying three thin transverse blades already described, operating in this way: The three blades, as the chain revolves, fall into the interior of each empty box fed successively from the curvilinear chute into the trough by the feeding-in wheel, and remain there while the boxes are carried along through the trough and while they are being filled. One blade serves to pull or propel the box along, and the other two to divide its interior into three compartments or spaces while passing through the trough. Thereby matches which fall into the boxes while passing the source of supply are prevented from criss-crossing or going awry when boxes longer than the length of the match are being filled. When the box reaches the end of the trough the endless chain takes an upward direction, the thin blades are thereby drawn out of the filled box, and leave it properly filled with matches in perfect parallelism. A view of the front elevation of the machine of the patent here produced gives a bird's-eye view of it:



In view of the foregoing, we conclude that the claims in question, read in the light of the specification, disclose definite mechanical means, both for producing the jarring and settling of the matches into parallelism and for making the temporary transverse subdivision of the interior of the match boxes. As a result the contention that the

claims are merely for functions or operative effects of a machine, and not the means for producing them, is untenable and cannot be sustained. On the contrary, they are for specific means to accomplish defined functions or results.

The question whether the claims amount to aggregations, and for that reason are invalid, received only incidental consideration by learned counsel; and, as we find other and more satisfactory grounds for our disposition of the case, we shall proceed to their consideration.

The prior art, to which the invention of this patent belongs or is related, has been most exhaustively presented to us by counsel, for the double purpose of avoiding the claims for want of patentable novelty and to limit the scope of the invention for its effect upon the issue of noninfringement. We may properly start out in the consideration of the prior art with the well-known fact that endless chains or carriers, equipped with fingers, arms, blades, or plates for pushing, pulling, or conveying materials of every sort, have long been generally known and used in mechanical arts. Few fields have been more prolific of invention in recent years than the application of these old and well-recognized instrumentalities to new conditions and new uses. By way of illustrating the general activity in this direction attention is called to the Mantion, Millen & Deourion patent, No. 409,481, the Cook's British patent, No. 18,130, Cook & Howard's German patent, No. 66,557, and the Kittenger patent, No. 377,943. These patents disclose a method of propelling an empty box or series of empty boxes along past a source of supply of matches for filling, quite suggestive of the general method of doing the same thing in the patent in suit. They clearly show that the subject of propelling empty match boxes across a source of supply, to be filled while passing by the use of an endless chain as a propelling mechanism, had challenged the inventive genius for some time before the patentees of complainant's patent entered the field.

In like manner, also, the general process of jarring, shaking, or settling down the contents of packages to adjust them to their place of confinement is a common and well-known process with which every man has long been familiar. How to do this effectively in given cases has been the subject of invention. The "grain separator" of Gordon's patent, No. 36,611, the "grain driver" of Tiernan's patent, No. 205,012, the "package making and filling machine" of Smyser's patents, Nos. 449,275 and 505,888, and other patents to which our attention has been called, disclose industrious attempts at invention on the general subject of the employment of jarring action of any sort, whether vertical, lateral, or horizontal, in the work of fitly settling down substances of one kind or another when put into packages. The "match-making machine" of Donnelly's patent, No. 450,405, and the "match splint bundling machine" of the Hamill, Lentz & Cole patent, No. 490,963, and several other patents called to our attention, disclose devices whereby splints are agitated for the purpose of straightening them and jarred for the purpose of parallelizing them.

Now, coming more nearly to the claims of the patent in suit, we find the Casey, Mantion & Millen patent, No. 418,887, for a "machine for boxing matches," the Lundgren patent, No. 448,445, for a "machine

for filling match boxes," the Peukert patent, No. 386,264, for a "match-making machine," and the two Kittenger patents, Nos. 341,809 and 377,943, for "match-making machines," all of which provide for the jarring of the matches, some at right angles to the matches as they lie, some horizontally, and some vertically, for the general purpose of settling them in proper parallelism with each other in boxes when filled. The subject of means for temporarily partitioning boxes to prevent matches from sluing or crisscrossing in the process of packing them had also received considerable attention by inventors before the patent in suit. The "match splint straightener" of the Jones patent, No. 314,680, the "machine for straightening match splints" of the Wyman patent, No. 322,145, the "match-making machine" of the Peukert patent, No. 386,264, and several other patents in evidence, disclose an appreciation of the advantage of division of spaces in box-filling operations and a resort to different devices for securing it. Without holding that the devices of any of the foregoing patents amount to anticipations of the claims in suit, as to which we express no opinion, it is sufficient for our present purpose to observe that they disclose that many inventors had been engaged in various ways and with varying degrees of success in the effort to accomplish the beneficial results achieved by them.

Complainant's invention, therefore, cannot be classified as a primary one, or the inventors as pioneers in the art to which they devoted attention. On the contrary, we think it clearly appears that their claimed invention concerns improvements made in a well-developed art and accomplished results which are not new, but at best only better than had been accomplished before. In view of this conclusion, complainant is entitled, in determining the issue of infringement or noninfringement presently to be taken up, to a narrow range of equivalents only. The public should be protected against unwarranted monopoly, as much as the inventor against piracy. To accomplish both these ends the patentee is entitled to monopolize the very device of his patent, together with all fair mechanical equivalents thereof. But in determining what are such equivalents the public has a right to demand a careful scrutiny, so that under the pretense of his patent the patentee shall not be allowed to improperly stifle competition and enjoy an unmerited monopoly. When the invention is a primary one, and the inventor a pioneer in a given art, he is worthily entitled to a wide range of mechanical equivalents; but when the invention is along the lines of past efforts, which have met with more or less success, and the inventor has made only an improvement in an art already well advanced, a proper regard to the welfare of the public and of other meritorious inventors requires that the range of equivalents should be reduced accordingly. Miller v. Eagle Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23, 23 Sup. Ct. 521, 47 L. Ed. 689; National Hollow B. B. Co. v. Interchangeable B. B. Co., 45 C. C. A. 544, 106 Fed. 693.

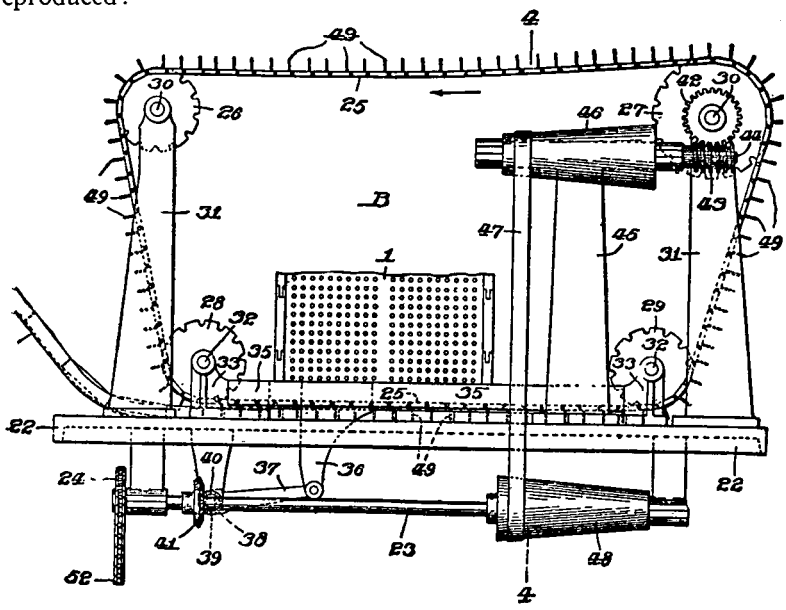
Certain other well-settled principles may appropriately be adverted to before we take up the question of infringement. No device can be held to infringe a combination claim unless it employs all the elements

of it; in other words, the absence of a single essential element of a combination claim in an alleged infringing structure is fatal to the charge of infringement. Cimiotti Unhairing Co. v. Am. Fur Ref. Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100; Brammer Mfg. Co. v. Witte Hardware Co. (C. C. A.) 159 Fed. 726; Portland Gold Mining Co. v. Hermann (C. C. A.) 160 Fed. 91. A patent for described means or mechanism to accomplish a desired end must be limited to the particular means described in the specification or their clear mechanical equivalents, and does not embrace or cover any other mechanical structure which is substantially different in its construction or in its operation. Eames v. Godfrey, 1 Wall. 78, 17 L. Ed. 547; Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; Westinghouse v. Boyden B. B. Co., supra; Bryce Bros. Co. v. National Glass Co., 53 C. C. A. 611, 116 Fed. 186; O. H. Jewell Filter Co. v. Jackson, 72 C. C. A. 304, 140 Fed. 340.

With these principles of law concerning mechanical equivalents, infringement of combination claims, and limitation of means for producing given results in view, we approach the decisive question in the case: Is the defendant an infringer? Presumably it is not. Its device is in substantial conformity to the machine of the Wyman patent, No. 736,668, which was issued to defendant August 18, 1903, after the patent in suit was issued to complainant. Both defendant's patent and its alleged infringing device were intended to accomplish the results sought to be accomplished by the two groups of complainant's patent under consideration. The grant of a patent to defendant to accomplish those results, with complainant's patent presumably in view and under consideration, indicates that the Patent Office considered the means of the former to be different from the means of the latter, and raises a presumption that they are in fact substantially different (Boyd v. Janesville Hay Tool Co., and Kokomo Fence Machine Co. v. Kitselman, supra); and this presumption, we think, is reinforced by the facts of the case. The defendant's structure is differentiated from complainant's, both in that it does not employ all the elements of complainant's combinations in the construction of its device, and in that the structure of defendant does not employ the same means or operate in the same way as complainant's. It fails to disclose the requisite identity of means or of operation. Cimiotti Unhairing Co. v. Am. Fur Ref. Co., supra.

A comparison of the two groups of claims with defendant's device will, we think, substantiate the foregoing statement. The great result to be achieved by the device of the first group was to give the boxes while being filled a jarring to and fro motion out of a vertical line and substantially at right angles with the matches as they were to lie in the boxes when filled. The means acting immediately and directly to accomplish this result consist of jarring the trough through which and while match boxes are passing in the process of being filled. The subsidiary means employed for thus jarring the trough are the projecting ledges on the inside of the upper edges of the sides of the trough, the links of the endless chain resting on the top of the boxes, and the smooth spring plate resting on the bottom of the trough and pressing up against the boxes. By these devices the boxes are press-

ed firmly up against the links which carry them along, the links are pressed firmly up against the projecting ledges on the trough, and thereby the jarring motion given to the trough is imparted to the boxes, and their contents are settled into place as desired. This jarring motion is produced by the action of belt, crank, levers, springs, and cams, connected with the power shaft (not necessary now to be specially considered), operating directly upon the two sections of the trough, connected together by the tongue and groove joint already explained. The front elevation of defendant's device for accomplishing the purposes of the two groups of complainant's claims is here reproduced:




This drawing shows a stationary bed, 22, which supports the boxes while being carried along under a source of supply of matches to be boxed; an endless chain, 25, having laterally projecting blades or plates, which enter the box from above, and four sprocket wheels, 26 and 27 above and 28 and 29 below, around which the chain runs. The two lower sprocket wheels, between which the lower run of the chain extends are mounted on blocks or standards, 33, which are so constructed as to slide slightly right and left on the top of the stationary bed. These blocks or standards are connected together rigidly by a bar, 35. An arm, 36, depends from this bar, and is pivoted to one end of a connecting rod, 37, the other end of which rides on an eccentric keyed on the main shaft. In operation the blocks or standards and their connecting bar are given a lateral motion of not over one-eighth of an inch forward and back on the stationary bed, at the rate of nearly 500 times per minute. This rapid vibratory motion is imparted to the blades projecting from the chain down into the

boxes, and they in turn act directly upon the matches and agitate and stir them into place. Incidently, it is true, this vibratory motion is felt by the boxes themselves; but this is the result of, not the means for, jarring the matches.

Without stopping to consider other differences in the structures of complainant and defendant, we are all of the opinion that complainant's trough, with its equipment for holding fast the boxes to be filled, is an essential element of the invention involved in the first group of claims, and that neither the trough nor its fair mechanical equivalent, determined in the light of the rules governing this case already stated, is found in defendant's structure. Moreover, we are also of opinion that the operation of the two structures is essentially different. The jarring motion of complainant's boxes is produced by the jarring motion of its trough, which is imparted to the boxes firmly clasped within it, while the vibratory motion given to defendant's machine is produced, not by any vibratory motion or jarring given to the trough itself, but by the vibratory motion imparted to the chain and its accompanying blades extending down into the boxes by machinery which actuates the sliding blocks or standards of the sprocket wheels and their connecting bar. We cannot regard the method of operation by which defendant's matches are agitated into position either as the same or as the mechanical equivalent of complainant's method of agitating the boxes themselves and thereby securing the desired parallel position of the matches inside. One is by directly agitating, with the radial blades of an endless chain, the matches themselves when in the box; and the other is by agitating the trough and its inclosed boxes, thereby indirectly agitating the matches themselves and bringing them into a state of parallelism. The two are essentially different methods of operation. One, therefore, cannot and does not infringe the monopoly of the other.

The second group of claims, as we have already seen, is for a combination of the means described in the specification for moving match boxes across the pathway of a source of supply with a series of removable transverse partitions or plates for each box, so situated or arranged as to temporarily divide the space within a box into several divisions while the same is being filled. The principle of the invention of this group is the temporary division of the boxes into three compartments while the process of filling is going on, so as to prevent the sluing or crisscrossing of the matches and to bring them into parallelism. This principle, of course, is not patentable. The means or combination of means for producing it alone are patentable. The specification to which the claims, by employing the language, "substantially as and for the purpose specified," refer for their elucidation, contains the following:

"Into and through said trough [which has already been described] * * * match boxes are passed from a suitable source of supply; the connection with the latter and said trough being a chute, F, that has a downwardly inclined portion, through which the boxes descend by gravity, and a horizontal portion, that is in alignment with the trough, the chute between the inclined and horizontal portions being rounded or curved, as shown. * * * The boxes are moved through the horizontal portion of the chute, into and through the trough or way, E, by means of a feed-wheel, G, that has a series

of radial arms or fingers, g and g, that reach into and pass through the chute, as the wheel revolves, and engage, in succession, the front ends of the boxes on their inner sides, adjacent ones of said arms being spaced a distance apart equal to the length of a box. The feed-wheel, G, is mounted," geared, meshed, etc., in a way there described, to the end that its speed may be changed.

The specification also contains the following:

"The operation of our invention is as follows: Boxes being passed into and down the chute, F, are caught by the feed-wheel, G, and passed, in a continuous procession, end to end, into and through the trough, at such rate of speed, relative to the rate of discharge of matches from the match machine, that a box will be filled in its transit across the field of discharge."

The foregoing, in our opinion, makes the feed-wheel, G, an essential element of the claims of the second group. The working machine of the patent, exhibited for our information, shows this feed-wheel as an important feature of it. It is clearly a part of the means of complainant's patent for moving the empty boxes from their source of supply along the trough where they are filled. This motion along or through the trough initiated by the feed-wheel, G, is made to necessarily coact with the endless chain and its transversely projecting plates to produce the desired result of partitioning the boxes while being filled. Absence of the feed-wheel, G, would destroy the combination of the claims. Defendant's device does not employ this feed-wheel or its mechanical equivalent. For this reason, under the authorities already cited to the effect that the absence of a single substantial element of a combination claim in an alleged infringing device is fatal to the claim of infringement, defendant's device does not infringe the second group of claims of the patent.

Conceding, without admitting, that the shortening of the links of the carrier by defendant, the use of one blade on each link instead of three, the method of connecting the blades to the carrier, and other mechanical contrivances employed by defendant are the fair mechanical equivalents of the device of complainant's patent, and that they all produce the result of temporarily dividing up the box space into partitions, there is yet lacking in the defendant's device the identity of means and the identity of operation of complainant's patent necessary to constitute infringement thereof. An essential element of complainant's combination is not found in defendant's device; and this, without considering the other features of construction, which are claimed by defendant to be materially and substantially different from complainant's construction, is fatal to the charge of infringement.

The decree of the Circuit Court, awarding an injunction and an accounting to complainant, was erroneous, and is accordingly reversed, and the cause is remanded to the Circuit Court, with directions to dismiss the bill.

ROTH et al. v. HARRIS.

(Circuit Court, N. D. New York. May 28, 1908.)

1. PATENTS—INVENTION—ATTACHMENT FOR PIANO PLAYERS.
The Whitmore patent, No. 791,967, for an attachment for piano players, is void for lack of novelty and patentable invention.

2. SAME—INFRINGEMENT.
The Hobart patent, No. 765,240, for a tune sheet attachment for piano players, was not anticipated and discloses invention in respect to the detachable box containing the tune sheet and feed roller. Also, *held* infringed.

In Equity.

Frank v. Briesen (Hans v. Briesen and Arthur v. Briesen, of counsel), for complainants.

Kerr, Page & Cooper, for defendant.

HOLT, District Judge. This is a suit to enjoin the infringement of two letters patent, one granted to Frederick C. Whitmore, on June 6, 1905, No. 791,967, for an attachment for piano players, and the other granted to Adam Hobart, on July 19, 1904, No. 765,240, for tune sheet attachments. Claims 3, 4, and 5 of the Whitmore patent, and claims 1, 2, 3, 4, and 6 of the Hobart patent are alleged to be infringed. The patents in suit relate to certain alleged improvements in tune sheet attachments for self-playing or automatic pianos or similar musical instruments.

Claims 3 and 4 of the Whitmore patent seem to me to contain nothing new. In every art in which, for any purpose, it is desired to feed a band of paper or other material, feed rolls with presser rolls are used to effect the proper frictional engagement of the band with the feed roll. This arrangement is shown in patents for typewriting machines, as the patents to Merritt and to Webb, and for mechanical musical instruments, as in the patents to Welin and Batsdorf and others. The only claim of novelty in the combination described in claim 5 of the Whitmore patent is the use of a separator to prevent the portion of the endless perforated sheet as it revolves, which is not being pressed against the tracker, from being drawn into it by pneumatic action, or otherwise. I think that this claim of a separator is fully anticipated by the patent to Batsdorf. In that patent, there is a separator referred to as a tension frame. It is described by one of the counsel as a two-pronged fork. It is probably true that a solid separator, such as is used in Whitmore's patent, is more efficient; but claim 5 does not claim any particular shape for the separator, and I think that the substitution of a separator broad enough to work well, instead of the wire separator suggested by Batsdorf, does not amount to invention. I think therefore that the complainants are not entitled to recover for an infringement of the Whitmore patent.

The five claims in the Hobart patent relied on all relate to autopneumatic pianos having certain combinations, all of which are old except the detachable box containing the tune sheet and feed roller, arranged so as to be easily detached from the piano. Previous to

Hobart's invention, the box or case containing the tune sheet and the feed roller was attached to the piano frame, and it was inconvenient to change the tune sheet when it was wished to change the music. Hobart's patent provided for placing the feed roller in a box, slidable upon brackets, and easily withdrawn from the piano. The defendant cites several previous patents showing various methods of moving the attachment to the piano containing the feed roller and the tune sheet, so that the tune sheet can be more conveniently changed than if the attachment was permanently fixed in the piano; but most of these arrangements leave the apparatus attached to some extent to the piano, and none of them seems to me to be sufficiently similar to the Hobart device to amount to an anticipation. The device is practically useful and has been commercially successful, and I think that it involves sufficient invention to make a patent issued for it valid. The pianos made by the defendant use substantially the same device, and, in my opinion, there is no doubt that the charge of infringement is sustained. A man named Goolman originally claimed to have made the invention, and made an application for a similar patent in the Patent Office. An interference was declared between Hobart and Goolman. The interference was decided by the examiner in favor of Goolman; but on an appeal subsequently taken to the Board of Examiners in Chief the decision was reversed. This decision was affirmed by the assistant commissioner, and his decision has been affirmed since the argument of this case by the Court of Appeals in the District of Columbia. Goolman was originally a member of the firm doing business as the Automatic Musical Company, and the automatic pianos manufactured by the defendant were made in conformity with Goolman's alleged invention.

My conclusion is that the complainants are not entitled to a decree on the Whitmore patent, but are entitled to a decree on the Hobart patent.

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## WISE v. WILLIAMS et al.

(Circuit Court, S. D. New York. June 2, 1908.)

1. WITNESSES—COMPETENCY—CONVICTION OF CRIME—EFFECT.

Rev. St. § 5392 (U. S. Comp. St. 1901, pp. 3653, 3654), providing that every person convicted of perjury shall thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed, excludes a witness convicted of perjury under the laws of the United States from giving evidence in any United States court, whatever the law of the state where the trial had on the subject may be; but as to all witnesses convicted of crimes other than perjury their competency is determined by the laws of the state where the trial is had, under Act July 6, 1862, 12 Stat. 588, c. 189, declaring that the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law in equity, and in admiralty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 109–113.

Competency in federal courts, following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 602; Hinchman v. Parlin & Orendorff Co., 21 C. C. A. 278.]

2. SAME—FALSE REPORT TO COMPTROLLER.

A witness convicted of making false national bank reports under oath to the Comptroller of the Currency, being a competent witness in the courts of New York, is also a competent witness in the courts of the United States sitting in New York, under Act of July 6, 1862, 12 Stat. 588, c. 189, declaring that the competency of witnesses in the courts of the United States shall conform to the rules of the state in which the court is held.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 109–113.]

3. BANKS AND BANKING—NATIONAL BANKS—DUTY OF RECEIVER.

Where a receiver, on taking possession of the assets of a national bank, found its affairs in confusion and found stock pledged to it as collateral with no definite and certain agreement as to the particulars of the pledge, it was his duty to ascertain and assert fully the obligations and liabilities of the pledgor to the bank and the purpose and extent of the pledge.

4. PLEDGES—EXTENT OF PLEDGE—RENEWAL OF OBLIGATION.

Where certain corporate stock was pledged to a bank to secure a note, the stock was not relieved of the debt evidenced by the note by the fact that the note was subsequently displaced by a renewal note which was invalid as a forgery.

In Equity.

Action to have it declared what lien, if any, the defendant Christopher L. Williams, as receiver of the Fredonia National Bank, has upon 500 shares of the capital stock of the defendant J. H. Bunnell & Co., a corporation, and which shares were owned by plaintiff's intestate, Albert J. Wise, and pledged by him, it is alleged, with said bank as a continuing and collateral security for certain promissory notes upon which said Wise was liable to the bank either as maker or indorser, and other obligations, and to have the amount ascertained and fixed, and to have it declared that such receiver or the bank he represents has no lien thereon whatever, and for a decree awarding the possession of such stock to complainant, and directing a transfer thereof to complainant as such administratrix. This, in general, is the object of this action. The defendant receiver claims a large lien thereon, and that said stock was pledged by Wise in his lifetime for certain debts and obligations due the bank which have not been paid.

Robert H. Griffin, for complainant.

Blandy, Mooney & Shipman, for defendant Williams, as receiver, and the bank.

RAY, District Judge (after stating the facts as above). The shares of stock, 500 shares of the capital stock of J. H. Bunnell & Co., a corporation, were pledged by Wise to the Fredonia National Bank, and held by it when Wise died, and when the bank went into the hands of this receiver. The administratrix claims that this lien was for a specific indebtedness aggregating about $20,000, and that she has discharged same and is entitled to a transfer and delivery of the stock, while the receiver contends that the transfer and pledge to the bank was general and as security for the payment of other debts and claims aggregating now something like $18,000, and which indebtedness, it is conceded, has not been paid. This contention presents a question of fact, and after reading the evidence different jurors or judges might arrive at different conclusions. As the Circuit Court of Appeals is in no way bound or affected by the decision of the lower court, it will serve no good purpose to go over this evidence and give my reasons for having reached the conclusion I have. I am of the opinion, and

hold, that the shares of stock were assigned and pledged as claimed by the receiver, and for the security of the bank generally as to the indebtedness now in controversy.

Objection is made that the evidence of Green, now in state's prison at Auburn, N. Y., serving a sentence pronounced by the District Court of the United States on a plea of "guilty" to counts 1, 2, 3, and 13 of a certain indictment found by a federal grand jury charging Green with "making false entries in reports to the United States Comptroller, verified by the oath of said Frederick R. Green," is incompetent, and that he was and is disqualified by reason of such conviction. The federal statute denominates the offense to which Green pleaded guilty a "misdemeanor." It is the offense of making a false report, not the crime of perjury. The Congress of the United States has said that a person convicted of perjury is incompetent to give evidence. Sections 5392, 5393, Rev. St. (U. S. Comp. St. 1901, pp. 3653, 3654), are as follows:

"Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

"Sec. 5393. Every person who procures another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed."

This, of course, excludes a witness convicted of perjury under the laws of the United States from giving evidence in any United States court, whatever the law of the state where the trial is had on the subject may be. But as to all witnesses convicted of crime other than perjury their competency is determined by the law of the state where the trial is had, viz.:

"The laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity and in admiralty." Act July 6, 1862, c. 189, 12 Stat. 588.

In New York, as Green is a competent witness in any action in the courts of this state, he is a competent witness in any case in the courts of the United States tried in such state, and hence a competent witness in this case. Green is a stockholder in and a creditor of the bank. He is indirectly interested in the event of the action, but he is not a party thereto. Hence he was competent to give the testimony as to conversations and transactions with Wise, complainant's intestate. Potter v. National Bank, 102 U. S. 163, 164, 26 L. Ed. 111; King v. Worthington, 104 U. S. 44, 50, 26 L. Ed. 652; Bradley v. U. S., 104 U. S. 442, 443, 26 L. Ed. 824; Monongahela Nat. Bank v. Jacobus, 109 U. S. 275, 277, 3 Sup. Ct. 219, 27 L. Ed. 935; Snyder v. Fiedler, 139 U. S. 478, 480, 11 Sup. Ct. 583, 35 L. Ed. 218. See very last para-

graph of the opinion in that case. Section 858, Rev. St. U. S. (U. S. Comp. St. 1901, p. 659) as amended by Act June 29, 1906, c. 3608, 34 Stat. 618 (U. S. Comp. St. Supp. 1907, p. 227) now reads:

"The competency of a witness to testify in any civil action shall be determined by the laws of the state or territory in which the court is held."

This is a material change. Section 829, Code Civ. Proc. N. Y., applicable to such cases as this, expressly provides that:

"A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

It seems to be true that the receiver has claimed this stock as pledged for certain debts, which claim he has in part abandoned. This, however, does not militate against the receiver in any way. There is no evidence he has resorted to dishonest practices or made claims in bad faith. When a receiver takes possession of a bank and finds its affairs in a confused condition, stock in its possession and held by it as collateral, with no definite and certain written agreement as to the particulars of the pledge, he would not do his duty unless he should ascertain and assert fully the obligations and liabilities of the pledgor to the bank, the purpose and extent of the pledge, etc. It is not at all surprising that he has made a broader claim than he can, on a trial or in the light of subsequent developments or information, sustain. It is, of course, unfortunate for the receiver, acting in the interest of the creditors, etc., of the bank, that he was compelled to rely largely on the testimony of persons mixed up in shady transactions, one of whom is serving a sentence for criminal misconduct in the management of the affairs of this bank. Testimony from such persons is to be carefully scrutinized and cautiously credited. However, it is not to be disbelieved unless the court is satisfied it is not entitled to any credit. Here there is corroboration.

As to two notes purporting to be signed or indorsed by Wise it is claimed that his signature is a forgery; that is, not his genuine signature. I think this contention correct, and so find; but I do not see how it is material in this case as to the $2,000 note, the original of which was protested. The receiver is not suing the estate on the notes. The question here is: Did Wise owe the bank, or was he liable to the bank, or were others liable to the bank, and did Wise pledge this stock to the bank as security for such indebtedness, and has that indebtedness been discharged and the lien or claim on the collateral released? The receiver found certain notes, etc., with the bank representing this indebtedness. He assumes them to be genuine. He asserts the indebtedness and pledge in this suit, which is brought to have it declared there was no indebtedness of Wise for which this stock was pledged, and says that two notes represent a part of that indebtedness. It is not denied that the indebtedness of Wise existed, that he gave notes for the amounts represented thereby, and that these purport to be renewal notes. It is not shown that the original notes have been paid, or that they were paid by Wise, or some one for him. It is shown that when these notes came due, or one was coming due and the other past due, a certain party representing and acting for the

bank went to Wise, who was very sick, suffering from serious injuries and a serious surgical operation, from which he soon thereafter died, and that business was transacted, and these notes, following that interview, were put in the bank as renewals. Concede that Wise did not personally sign these notes, the signature of which is disputed; concede that he did not authorize any one to sign his name thereto or thereon—the indebtedness of Wise to the bank remains, and the lien remains as to the duly protested $2,000 note. I therefore hold that, the indebtedness appearing and it not being shown it was paid, the lien remains, and the right of the bank to hold the stock remains, as to that note, until it affirmatively appears that the indebtedness of Wise to the bank represented by the original note has been paid or the pledge of the stock otherwise released. As to the $4,500 note the defendant claims that Wise was in fact the maker, that it was an accommodation note made for his benefit and that he had the proceeds, and that protest was immaterial. I do not think the evidence sustains the contention.

Entertaining these views on all the evidence and exhibits, there will be a decree stating the different liabilities for which these shares of stock are pledged and held, excluding the $4,500 note, Exhibit X the amount of principal due and unpaid on each, the amount of interest to date of decree due or accrued on each, the total of each, and also of all, and providing that, on the payment of such sum by the complainant within 20 days of service of a copy of the decree, the shares of stock be transferred and delivered to her. In default of such payment the receiver will be at liberty to dispose of same in accordance with law. The decree will also enjoin the receiver from otherwise disposing of same until the expiration of said 20 days.

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## UNITED STATES v. LAMSON.

(Circuit Court, D. Rhode Island. May 26, 1908.)

No. 2,623.

1. INTERNAL REVENUE — OLEOMARGARINE LAW — VIOLATIONS — ENTRIES IN BOOKS.

   The former revised regulations made by the commissioner of internal revenue in December, 1904, governing the keeping of books and the making of returns by wholesale dealers in oleomargarine, pursuant to Act May 9, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), do not require the entry on the books of the number of packages and pounds of oleomargarine disposed of at any specified time, and the failure to make such entries on the same day or during the same month when the goods are disposed of is not a criminal offense under said section 6.

2. SAME—MONTHLY RETURNS.

   The requirement of such regulations that dealers shall "make monthly returns on form 217 * * * showing in detail the number of packages and the number of pounds of oleomargarine received, * * * also the quantity disposed of with the name and address of each person to whom sold or consigned," does not require a statement in detail of the number of packages and the number of pounds disposed of to each person, and the forms furnished for such returns cannot impose additional requirements to those of the statute or regulations which will have the force

of law, and a failure to comply with which will constitute a criminal offense.

3. SAME—FAILURE TO MAKE BOOK ENTRIES—INDICTMENT.

Upon a reasonable construction of such regulations, the entries required to be made in the books may be made by an agent of the dealer, and an indictment for failure to make such entries should aver that the dealer did not make, and did not cause to be made, such entries.

On Motion to Quash Indictment.

Charles A. Wilson, U. S. Atty., and George H. Huddy, Jr., Asst. U. S. Atty.

Walter H. Barney, for defendant.

BROWN, District Judge. This is an indictment in 24 counts, and is based upon alleged violations of oleomargarine regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in compliance with section 6 of the act of May 9, 1902. Act May 9, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641). The matters referred to in the indictment occurred before the publication of the regulations as revised July, 1907. They therefore fall under the Revision of December, 1904.

There are important differences arising from the omission from the earlier regulations of exact provisions concerning the date of entry of items concerning oleomargarine disposed of. The first 11 counts relate to the omission of entries in a book of the number of packages and pounds of oleomargarine disposed of, and the name and place of business, or residence of the person to whom sold or consigned. The remaining counts relate to a failure to make monthly returns.

The provision which relates to the entries in a book, or on form 217 properly bound, is as follows:

"Every wholesale dealer in oleomargarine is required to enter, on the day when received, in a book (form 61) or on form 217, properly bound, the number of packages and pounds of oleomargarine received, the number of packages and pounds of oleomargarine disposed of, and the name and place of business or residence of each person to whom sold or consigned. (Model blank form furnished by Commissioner of Internal Revenue.)"

It is to be observed that, although the regulations specifically require an entry of oleomargarine received, on the day when received, there is no express provision requiring that the entry of the number of packages and pounds of oleomargarine disposed of shall be made at any particular time. To apply the words "on the day when received" to the number of packages and pounds of oleomargarine disposed of would limit the regulation so that entries of oleomargarine disposed of would be required only when disposed of on the day when received. This is an interpretation so unreasonable that it cannot be adopted; and, even if it were adopted, it would not aid the first 11 counts in the indictment. There is a failure to provide a specific time at which the entry of oleomargarine disposed of shall be made. The following provision is referred to by the United States Attorney as fixing a time:

"All transactions must be entered in the order of time in which they occur, the records as to one day's business being completed before those of the next day are commenced."

To require that the transactions must be entered in the order of time in which they occur is neither in terms nor in substance a requirement that the entry shall be made at the time of the disposal of goods. Books made up in the usual course of business at subsequent dates usually follow the order of time of the transactions, and entries are made in that order, though not on the day of the transaction.

It may be argued that as the entries of goods received are to be made on the day when received, and as the records of one day's business are to be complete before those of the next day are commenced, the records of sales made on that day must be entered on that day; but this does not aid the indictment. Doubtless, in the course of business, there are many days when a wholesale dealer in oleomargarine does not receive goods, but does dispose of goods. Records of sales might be entered at any time during the interval between the different receipts of oleomargarine, without violating the regulations.

Comparing the regulations concerning the entries in books and those concerning monthly returns, I find no requirement from which it follows that entries concerning goods disposed of shall be made upon the books at any particular time. As the returns need not be made until 10 days after the expiration of the month, it would follow that even if the returns were required to be made from the books, as distinguished from other memoranda, they might be made long after the expiration of the month. This defect in the regulation was remedied in the revised regulations of July, 1907, by the insertion after the words, "the number of packages and pounds of oleomargarine disposed of," of the words, "on days sold or removed."

The question before us, therefore, could not arise under the present regulations.

If a regulation is to have the force of law, and to subject the person who violates it to fine and imprisonment, it is very essential that it shall be drawn clearly enough to inform the dealer what he is required to do. Here, however, the question is not of some uncertainty in the choice of language, but of an absolute omission to require the entries of goods disposed of to be made at the time disposed of, or at any other specific time. Assuming that we could, by a most liberal construction, say that the books must be made up before the time of the returns, this would not save the first 11 counts of the indictment, since the indictment is predicated upon a duty to make entries during the month in which the goods are disposed of. In my opinion the first 11 counts of the indictment are erroneously predicated upon a requirement which is not made by the language of the regulations.

The remaining counts, from 12 to 24, inclusive, relate to the monthly returns. The provision is as follows:

"Wholesale dealers in oleomargarine will make monthly returns on form 217 (with inside sheets when needed to complete the detailed statements), showing in detail the number of packages and number of pounds of oleomargarine received direct from manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or consigned. These returns will be rendered on the first day of the month succeeding that for which the return is made, or within ten days thereafter, in duplicate, to the collector, who will forward one copy to the Commissioner of Internal Revenue."

Full compliance with this regulation is made if the wholesale dealer, in addition to the required returns of goods received, shall return the quantity disposed of with the name and address of each person to whom sold or consigned.

The indictment in the twelfth count charges that the defendant "did dispose of a certain number of packages and pounds of oleomargarine, but neglected to make monthly return showing in detail the number of packages and number of pounds disposed of as aforesaid, with the name and address of each person to whom the same was sold or consigned, as required by law." This charge may be true, and yet the defendant not guilty, since the regulation does not require him to return in detail the number of packages and pounds disposed of.

The remaining counts are each and all subject to the objection that they charge a failure to return the number of packages and pounds of oleomargarine disposed of, whereas the requirement is only "the quantity disposed of, with the name and address of each person to whom sold or consigned." Unless form 217 in some way supplements the requirement of the regulation, all of these counts are bad. Form 217, inside page, revised February 12, 1898, contains the following:

"Statement in detail of the quantity of oleomargarine disposed of by ———, wholesale dealer, taxed at ¼¢ per pound, doing business at ——— street," etc.

On this form appear the following headings for entries:

"Date When Sent. By What Manufacturer Produced. Number of Packages. Number of Pounds. To Whom Sent. Designation. Place of Business or Residence. Post Office. County. State."

Upon the back of form 217 is a recapitulation showing among other things the quantity disposed of.

It seems impossible, however, that we should add to the requirements of the regulation, as formulated, matters contained in form 217 which are not specifically set forth in the regulation. If so, it is a criminal offense to fail to state by what manufacturer the oleomargarine disposed of was produced. To make criminal liability depend, not upon the terms of an act of Congress, nor upon the terms of the regulation adopted by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, but upon the terms of a form referred to in this regulation, would go far beyond any decision which has been brought to my attention. The legal requirements upon the wholesale dealer must be found in the statute and in the regulations. So far as the forms go beyond, or differ from the statute or regulation, their provisions must be regarded as directory only. While a regulation may have the force of law, printed headings on a form, additional to the expressed terms of the regulation, do not, in my opinion, have the force of law.

I cannot agree with counsel for the defendant that the returns which are to be made are simply in relation to the books. In the expression, "shall keep such books and render such returns in relation thereto," the term "thereto" does not apply to books, but to the oleomagarine, or to the business of the dealer. Upon a reasonable construction of

the regulations, the entries required can be made by an agent of the dealer, and it seems to me that good criminal pleading would require the allegation that the dealer did not make, and did not cause to be made, the required entries.

As the foregoing objections are in my opinion fatal to the indictment, other objections need not be considered.

Motion to quash granted.

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## In re J. FRANK STANTON CO.

(District Court, D. Connecticut. June 19, 1908.)

No. 1,579.

BANKRUPTCY—LIABILITY OF TRUSTEE FOR RENT—ASSUMPTION OF LEASE.

Where a bankrupt at the time of his bankruptcy was lessee of a large storeroom, half of which he had partitioned off and sublet, and the trustee took possession only of the part occupied by him, which he used while closing out the business, refusing to pay rent for the other half he cannot be held to have assumed the lease, and is liable only for the fair rental value of the part which he occupied.

In Bankruptcy.

Beers & Foster, for petitioning creditor.
Robert H. Gould, for trustee.

PLATT, District Judge. When the trustee came in, he found that the bankrupt had originally leased a large store on Broad street, Bridgeport, for $120 per month, with the privilege of subletting. He had then divided the large store by a partition into two stores, each with entrances and exits upon the street, and had retained one for his own business and found a tenant for the other. The trustee did not need and did not take possession of the subtenant's store. He used the other one for a short time, while closing out the bankrupt stock.

The referee finds as facts that the landlord made no demand for either store, that the trustee has occupied the south store alone, and that he has not assumed the lease. The action of the trustee, in taking possession of the south store alone and refusing to pay rent for both stores, put the landlord where it was his duty to collect the rent for the north store from the party in possession. He could not force the trustee into the bankrupt's shoes against the trustee's will. The referee decided that the trustee should pay as a part of the expense of administration what would be a fair return for the use of the store which he occupied.

This was right, and his decision is affirmed.

## METROPOLITAN TRUST CO. OF CITY OF NEW YORK v. NORTH CAROLINA LUMBER CO. et al.

## AMERICAN BOX CO. et al. v. SAME.

(Circuit Court, E. D. North Carolina. April 13, 1908.)

1. RECEIVERS—DUTIES AND POWERS.
   Receivers are instrumentalities of the court, and are required to be impartial as between the parties litigant, and should have authority from the court, either express or implied, for all of their acts.
2. CORPORATIONS—MORTGAGES — FORECLOSURE — RECEIVERS — RIGHT TO TAKE PART IN LITIGATION—EXCEPTIONS TO MASTER'S REPORT.
   Receivers appointed for the property of a corporation in a suit to foreclose a mortgage thereon have no standing to file exceptions to the report of the master determining the respective rights of the mortgagees and other creditors, nor will such exceptions be entertained when filed in the name of the receivers "and creditors," no creditors being named.

In Equity. On exceptions to report of master.

Day, Bell & Dunn, Jno. W. Hinsdale and Murray Allen, for receivers and creditors.

Womack, Hayes & Pace, for North Carolina Lumber Co.

F. H. Busbee, Jno. Larkin, and T. McIlvaine, for Metropolitan Trust Co.

PURNELL, District Judge. The master after setting forth the different hearings in New York, etc., reports the following findings of fact:

I. That the plaintiff, Metropolitan Trust Company, was at the time of the filing of the bills herein, and now is, a corporation organized under the laws of the state of New York, and has its principal office in said state, and is a citizen thereof, under the laws fixing the jurisdiction of this court.

II. That the defendant the North Carolina Lumber Company is a corporation organized under the laws of the state of North Carolina, having its principal office at Tillery, N. C., in Halifax county, and is a citizen and resident of North Carolina and the Eastern district thereof, under the laws defining the jurisdiction of this court.

III. That the defendants Burgwyn, Leary, and Travis are all residents and citizens of the state of North Carolina, under the laws defining the jurisdiction of this court, the said Burgwyn living in Weldon, N. C., the said Travis in Halifax, N. C., and the said Leary, at the time of the original and amended bills were filed herein, resided at Tillery, Halifax county, in the state of North Carolina, but is now a resident of the state of New York, and that the amount in controversy in this suit largely exceeds $2,000, exclusive of interest and costs.

IV. That the North Carolina Lumber Company on or about the 1st of June, 1893, executed a deed of trust to the Atlantic Trust Company of New York City, in which was conveyed its entire property, real and personal, wherever situate, then owned by it or to be after acquired by it, and its franchise (said deed of trust having been duly registered in said county of Halifax), and securing an issue of 75 bonds of the said company, payable to the bearer or the registered holder thereof, each in the sum of $1,000, payable in gold, on the 1st of June, 1903, with interest at 6 per cent., payable semiannually, in gold, coupons attached, and that 60 of said bonds were sold and delivered to the purchasers thereof, at par, in money, and 15 thereof were hypothecated with creditors for loans of money, and the proceeds of the sales and of the loans used in the purchase of timber land and timber rights and in the operation of the plant, and that H. H. Fries, A. J. McDonald, and A. De Bary, pur-

chasers of 5 bonds each, were both stockholders and directors of the said lumber company.

V. That on or about the 29th of January, 1895, the North Carolina Lumber Company executed a deed of trust or mortgage to the said Atlantic Trust Company, covering its entire property, wherever situate, and such other property as it might thereafter purchase and its franchise (said deed of trust being duly registered in said Halifax county), purporting to secure an issue of 100 bonds of the said company, payable to the bearer, or, if registered, to the registered owner thereof, each in the sum of $1,000, payable in gold, on the 29th of January, 1905, with interest at 6 per cent., payable semiannually in gold, coupons attached, and the said deed of trust containing similar provisions as to right of possession of the property by the lumber company until default, the accumulation of a sinking fund, rights of receivership and foreclosure, and the right of sale of lumber and personal property and unimproved lands as are set forth in a certain deed of trust executed by the said lumber company to the said Atlantic Trust Company in January, 1897, and registered in the register's office of Halifax county, N. C.

VI. That the said bonds and deed of trust described in paragraph V were executed under the following authority, to wit:

(1) A resolution of the stockholders of the company held on November 30, 1894, as follows:

"Resolved, that this company request the holders of its first mortgage bonds to surrender the same to the Atlantic Trust Company of New York, and receive in lieu thereof an equal number of first mortgage coupon bonds for a like amount and payable at the same time, with interest at the rate of 6 per cent. per annum, payable semiannually, to be issued under a like new first mortgage made to secure the payment of 100 first coupon bonds for $1,000 each, and in case all the holders of the present first mortgage bonds so consent and as in fact surrender to the said trustee the said bonds, with all the coupons thereon not yet due, so that the first mortgage now existing can be canceled and satisfied of record.

"Resolved, that the company execute and deliver to the Atlantic Trust Company of New York a new first mortgage on all the property, real and personal, in the same general form as the present mortgage, but with such changes therein in relation to the sale by the company from the time of said mortgage of its unimproved real property within the limits of the town of Tillery as the counsel of the company may advise to secure the payment of 100 first mortgage bonds for $1,000 each, payable at the same time as the present bonds, with interest thereon at the rate of 6 per cent. per annum, payable semiannually, such bonds to be in all respects like the present bonds, save in date of execution and other formal changes consequent on account of the increase in the number of the bonds from 75 to 100, and that this company make and execute such 100 bonds, for $1,000 each, and that the said trust company be requested to certify and deliver to the company the whole of the said new 100 bonds."

(2) A resolution of the board of directors of the lumber company, of date February 25, 1895, as follows: "Resolved, that the Atlantic Trust Company be, and it is hereby, requested to deliver to each of the persons, including this company, who have deposited with it any of the former first mortgage bonds of this company, an equal amount of the new first mortgage bonds of this company, issued under the mortgage dated January 29, 1895."

VII. That under the powers and authority recited in the next above two paragraphs the company executed the bonds and deed of trust of date January, 1895, and delivered 75 of the same to each of the persons who held the 75 bonds of the company under the issue and deed of trust of 1893, who in exchange for the 75 bonds of 1895 surrendered the bonds of 1893, and that the 75 bonds of the issue of 1893 were destroyed and the deed of trust securing the same was canceled and marked "Satisfied" on the registry of said Halifax county, and that 15 of the bonds of the issue of 1895 were sold and delivered to the purchasers thereof, at par, for money.

VIII. That the money derived from the sale of the bonds in part and the hypothecation of others of the issue of 1895 was necessary for the company to improve its property and to operate its plant, and that it was so used.

IX. That on or about the 1st day of January, 1907, Harold H. Fries, president of the North Carolina Lumber Company, with the seal of the company attached, and Fritz Von Bernuth, Jr., secretary of said company, signed and executed 150 bonds, known as the first mortgage bonds of the North Carolina Lumber Company, numbered consecutively 1 to 150, both numbers inclusive, in which the company promised to pay to the holder of each bond, or, in case the bonds should be registered, then to the registered owner, on the 1st of January, 1907, the sum of $1,000 United States gold coin of or equal to the then present standard of weight and fineness of the gold coin of the United States, at the office or agency of the said lumber company in the city of New York, and also interest on the said bonds at the rate of 6 per cent. per annum, payable in gold coin at the same place semiannually on the 1st days of July and January in each year.

X. That at the time of the execution of the bonds of 1897, mentioned in the next preceding paragraph, a deed of trust or mortgage to the said Atlantic Trust Company, known as the first mortgage of the North Carolina Lumber Company, was signed and executed in the name of the said company, with the corporation seal affixed, and by the president and secretary of the said company, in the manner and form following, viz.: "The North Carolina Lumber Company [Seal], "Harold H. Fries, President, Fritz Von Bernuth Jr., Secretary. Atlantic Trust Company, L. V. F. Randolph, President, J. S. Suydam, Secretary"—the purpose being to secure the payment of the said 150 bonds and the interest; that in the said mortgage or deed of trust is embraced all of the property of the said North Carolina Lumber Company, both real and personal, including its franchise, wherever situated, then owned by it, or which might thereafter be acquired by it, all of which property then owned by the company being particularly described in said deed of trust; that said deed of trust was duly registered in Halifax county, N. C., a true and correct copy of which is annexed to the amended bill marked "Exhibit A," and is made a part of this report, the property being fully described therein, which is hereby referred to.

XI. That the said deed of trust on its face provides for the equal and pro rata benefit and security of each and all of the said several persons, partnerships, and corporations who should at any time be and become the lawful owners or holders of the several bonds and interest coupons secured without any preference by reason of priority in the time of the issue or negotiation thereof; and thereupon the Atlantic Trust Company, for itself and its successors, accepted the trusts in said deed of trust provided for by signing, sealing, and acknowledging the same by its president and secretary thereunto duly authorized, as appears by said Exhibit A and the evidence in the case.

XII. That the authority and powers under which the said bonds and deed of trust of January, 1897, were executed by the president and secretary of the North Carolina Lumber Company as set out in paragraphs IX and X of this report were as follows: A resolution by the board of directors, at a meeting held on the 24th of September, 1896, after a discussion of the financial condition of the company, in the following words: "It was also decided, if possible, that the bonds of indebtedness of the company should be raised from $100,000 to $150,000 and that the consent of the various bondholders should be obtained agreeing to same being effected." (2) A subsequent agreement (December 24, 1896) by each and all of the stockholders in writing (H. H. Fries, A. De Bary, and A. J. McDonald, directors as well as stockholders, concurring) to the making of the said deed of trust and the execution of the said bonds; the said agreement being in the following words: "Know all men by these presents, that we, stockholders of the North Carolina Lumber Company, holding the amount of stock set opposite our names hereunder, do hereby waive any notice whatever of a meeting of stockholders of this company for the purpose of passing upon the question of issuing the new first mortgage upon the property of this company, and do hereby consent to the making and delivery by this company of 150 first mortgage bonds, to be numbered from 1 to 150, consecutively, for $1,000, payable in gold coin on January 1, 1907, with interest at 6 per cent. per annum, payable semiannually in gold, and to the execution and delivery of a first mortgage or deed of trust securing said bonds substantially in the form of the mortgage made by this company

to the Atlantic Trust Company, dated January 29, 1895, with sinking fund under said mortgage to begin in the year beginning the 1st day of July, 1897. (The said stockholders' agreement above set out was signed and executed, not in a regular or special meeting of the stockholders, but singly and separately.) (3) An entry made on the regular secretary's book at a meeting of the directors held on the 4th of January, 1897, in the following words: "Proof of new bond of company was submitted, and same was returned to the counsel for further action."

XIII. And thereafter and in pursuance of said action of the directors and consent of stockholders, the bonds and mortgage were prepared by the counsel of the company, to be executed to the Atlantic Trust Company, as trustee, and were, on the 1st day of January, 1897, signed and executed by the president and secretary of the said North Carolina Lumber Company under the seal of the company, and by the duly authorized officials of the said trust company on behalf of said trust company, as is hereinbefore set out in the ninth and tenth findings of fact. That the bonds were only certified in accordance with the terms of said mortgage, and were delivered by the said trust company to the North Carolina Lumber Company in pursuance of a resolution of the board of directors passed on the 28th of January, 1897, which is in the following language:

"New York, Jan. 29th, 1897.

"Mr. J. S. Suydam, Atlantic Trust Company, New York—Dear Sir: Please deliver to bearer all the first mortgage bonds of this company, secured by mortgage dated the 1st day of January, 1897, to the Atlantic Trust Company, and oblige,

"Yours truly, The North Carolina Lumber Company,
"[Signed] Harold H. Fries, Pt.

"I, Fritz Von Bernuth, Jr., Secretary of the North Carolina Lumber Company, do hereby certify that the following is a copy of a resolution of the said the North Carolina Lumber Company, duly passed by its board of directors on January 28, 1897: 'Resolved, that the Atlantic Trust Company be, and it is hereby, requested to deliver to the company all of the first mortgage bonds of this company, secured by mortgage dated January 1, 1897, to wit, 150 bonds, each for the sum of $1,000.'

"[Seal.] [Signed] Fritz Von Bernuth, Jr., Sec.

"Received January 30, 1897, from the Atlantic Trust Company, the bonds Nos. 1–150, inclusive, which the said company is requested by the foregoing resolution to deliver to the North Carolina Lumber Company, and which the North Carolina Lumber Company, by a letter dated January 29, 1897, requested the said trust company to deliver to bearer.

"[Signed] Phillip S. Dean."

XIV. That of the said 150 bonds of the issue of 1897, 70 numbered 1 to 55, and those numbered 71, 72, 73, 74, 75, 81, 82, 83, 84, 85, 86, 87, 88, 89, and 90, were exchanged with the purchasers of the like numbered bonds of 1895, and 20 bonds, numbered 56 to 70, inclusive, and 76 to 80, inclusive, were exchanged with those creditors who held a like amount and of similar numbers of the bonds of 1895 as collateral security for money lent to the company (the said last-mentioned 20 bonds having been afterwards withdrawn from collateral deposit and sold and delivered to purchasers, at par, in money), and 23 were sold and delivered to purchasers, at par, in money, and the remainder, 37 in number, were hypothecated with creditors for loans of money made to the company, and that the bonds of the issue of 1895 were burnt and destroyed, and the deed of trust securing them canceled and satisfied on the registry of said Halifax county, and that the said 150 bonds of the issue of 1897 are now outstanding, and were owned, at the time of the filing of the bill in the case of the Metropolitan Trust Company against the North Carolina Lumber Company, March 22, 1906, by the following named persons, as follows: Twenty-five, numbered 1 to 25, inclusive, to Elizabeth Garnett, London, England; 13, numbered 26, 27, 28, 29, 30, 69, 70, 76, 89, 90, 117, 118, and 119, to A. De Bary, of New York City; 11, numbered 31, 32, 33, 34, 35, 75, 82, 88, 56, 68, and 91, to A. J. McDonald, of New York City; 7, numbered 36, 37, 38, 39, 40, 92, and 93, to J. Calvet & Co., Bordeaux, France; 5, numbered 41, 42, 43, 44, and

45 to Albert Fries, New York City; 6, numbered 46, 123, 124, 125, 126, and 133, to Fritz Von Bernuth, New York City; 2, numbered 72 and 73, to Daniel Schuackenburg, of New York City; 7, numbered 51, 52, 53, 54, 55, 79, and 94, to H. H. Fries, of New York; 20, numbered 47, 48, 49, 50, 51, 71, 101, 102, 103, 104, 105, 57, 58, 59, 60, 61, 62, 63, 64, 65, and 66, to Frederick Pennington, London, England; 1, numbered 67, to L. C. Bierwith, Dover, N. J.; 6, numbered 74, 77, 78, 86, 87, and 100, to Emily Fries, of New York; 5, numbered 80, 81, 95, 96, and 97, to Alice Fries, of New York; 3, numbered 83, 84, and 85, to Fanny Fries, of New York; and 2, 98 and 99, to A. Linden, of New York—and the remainder of the 150 bonds were deposited with the persons herein below named as collateral security for loans made to the company in numbers and amounts as follows: 106, 107, 108, 109, 110, 111, 112, 113, 120, 121, 122, 137, 138, 139, 140, 141, 142, 143, and 144, to A. De Bary, for the loan of $25,600; 114 and 115, to Charles Fries, for a loan of $1,500; 127, 128, and 129, to the New York National Exchange Bank, for a loan of $3,500; 130, 131, and 132, to F. Von Bernuth, for a loan of $3,000; 134, 135, 136, 145, 146, 147, 148, 149, and 150, to Anna M. Gebhardt, for the loan of $9,500; 116, to Albert Fries, for a loan of $2,000.

XV. That the proceeds derived from the proceeds of the sale of the 113 bonds and the money obtained from the loans with the 37 bonds as collateral were received by the company and used for the improvement of its property and the operation of its plant, and were necessary expenditures.

XVI. That no certificate and schedule of preferred debts of the company was filed with the deeds of trust of 1893, 1895, or 1897 at the time of the registration of those deeds of trust in Halifax county, N. C.

XVII. That some of the bonds used by the company as collateral security would sometimes be withdrawn upon the payment of the debts for which they were pledged, and then used again by the company as collateral security on new loans.

XVIII. That in the year 1903 (January) the Atlantic Trust Company and the Metropolitan Trust Company executed an agreement by and through their presidents and trustees, providing for the merger of the Atlantic Trust Company into the Metropolitan Trust Company, that the said agreement was approved by the superintendent of banks of the state of New York, that the said agreement of merger was ratified and approved by the stockholders in regular meeting, and that the agreement and certificates were registered in the office of the clerk of New York county, in New York state, and clerk of Supreme Court of the said state for said county, and were afterwards registered in Halifax county, N. C., a copy of which will be filed with the evidence in this case, marked "Volume 13."

XIX. That at the time of the authorization of said deed of trust of 1897 by the directors of the lumber company, in the manner hereinbefore set out in these findings of fact, a majority of the directors, four out of five, were individually and personally interested therein, in that the same was made to secure bonds held by them and to be acquired by them.

XX. That Harold H. Fries, A. J. McDonald, Fritz Von Bernuth, Jr., and A. De Bary were stockholders and directors of the said lumber company at the time of the issue of the said 150 bonds, and that Treadwell Cleveland, the only other director of the company at that time, was the attorney in fact of F. Pennington, who was a stockholder; the said Fries, McDonald, Von Bernuth, De Bary, and Pennington owning nearly all the stock.

XXI. That the by-laws of the North Carolina Lumber Company require the seal of the company to all instruments requiring a seal by the treasurer (article 23). In the case of his absence, inability, or refusal to act, the directors could authorize some other officer to affix the seal; and it does not appear from the evidence that the seal was affixed by the treasurer to the deed of trust in controversy, or that it was not so affixed, nor that he was absent, unable, or refused to act, so as to empower the directors to designate some other officer, or that they authorized any one else to do so.

XXII. That article 18 of the by-laws of the said lumber company, in force at the time of the execution of the said deed of trust as hereinbefore set out, provides as follows: "All bills, notes, checks, or other negotiable instruments of the company shall be made in the name of the company, and

shall be signed by the treasurer and countersigned by the president, or in his absence or inability to act by the vice president. No promissory note, mortgage, bill of sale, or deed shall be given by the company unless the making thereof be duly and specially authorized by the vote of the directors of the company, duly had at a regular or special meeting of the board of directors, and entered on the minutes of the board. No officers or agents of the company, either singly or together, shall have the power to make any bill, note, or check, or other negotiable instrument, in the name of the company or to bind the company thereby, except as in this article prescribed and provided."

XXIII. That at the time of the execution of the said deed of trust of 1897 the said lumber company was indebted to divers persons other than creditors who held collateral bonds of the company as security for their debts, which indebtedness was unsecured, both by bills payable and in the nature of general indebtedness—general running accounts—and has been continuously in debt, for money borrowed, since that time, independent of the amount represented by the bonds deposited as collateral security, in an increasing yearly amount, although there were times, between 1897 and the time when receivers were appointed for the said company in June, 1905, when the company was free from debt for general merchandise, but at such times would owe for borrowed money, outside of the amounts represented by the bonds on deposit, unsecured, and that said lumber company was embarrassed financially at the time of the execution of the said deed of trust of 1897, and continued to be so embarrassed up to the time of the appointment of receivers in June, 1905, when it was totally insolvent; that no dividends were ever declared or paid on its stock; that it lost money from the beginning of its operations, and its entire property is insufficient and inadequate security for the payment of the outstanding bonds secured by said deed of trust.

XXIV. That the current indebtedness of the lumber company at the time of the execution and delivery of the said bonds, and the mortgage of 1897 securing the same, has long since been paid off, and that all of the present liabilities of the company, outside of the bonds and loans, for which the bonds are collateral, are of recent origin.

XXV. That the said lumber company, under its charter, had and has the power to hold, lease, sell, and mortgage real property to any amount necessary for its purposes.

XXVI. That in the said mortgage of 1897 there was a provision in these words: "Until default shall be made by the company in the payment of the principal or interest of the bonds secured hereby, or any of them, or in respect to any act or covenant herein required by it to be kept or performed, the company shall be suffered and permitted to possess, manage, operate, and enjoy the said property, and each and every part thereof, and shall likewise be suffered and permitted, at all times and from time to time, as the proper management of the business of the company requires, to cut and sell its timber and lumber, and to sell, alter, exchange, add to, remove, and replace any and all materials, supplies, and stores, machinery, tools, implements, fixtures, and all other personal property or chattels, now or hereafter owned by the company and mortgaged hereby, or intended so to be; provided, always, that the security of said bonds shall not be in any wise reduced or impaired. The company shall have the further right, at all times, to grant and convey, wholly freed and discharged from the lien hereof, the whole or any part of its unimproved real estate, embraced within the limits of the town of Tillery, which shall be sold by the said company to any person who may satisfactorily agree with the said company to improve the said real estate by erecting a building or buildings thereon, and shall also have the right, at all times, to grant and convey, wholly freed and discharged from the lien hereof, the whole or any part of its real estate, wherever situated, which shall no longer be useful or necessary in the proper and judicious management of the business and interests of the company for such consideration as it may think best; provided, however, that no such consideration as it may think which shall no longer be useful or necessary in the proper and judicious management of the business and interests of the company, shall be made without the express assent in writing of the trustee, which assent may be given by the trustee upon its receiving a certified copy of a resolution of the board of directors of the com-

pany, advising such conveyance by the company for the reason that such real estate is no longer useful or necessary in the proper and judicious management of the business and interests of the company, and the company is hereby expressly authorized, under its seal, to release from the operation and effect of this mortgage any unimproved real estate embraced within the limits of the town of Tillery, which shall be sold as aforesaid, and also any real estate sold because no longer useful or necessary in the proper and judicious management of the business and interests of the company, or exchanged for other property in good faith; and provided, further, that all property taken in exchange for or purchased with the proceeds of any real estate conveyed as above expressed shall forthwith become and be within the operation of this indenture, and remain so hereafter in the same manner and to the same extent as if the same had been originally conveyed in trust and mortgaged hereby and hereunder, and, further, that the net cash proceeds of such conveyance shall be immediately applied by the company in good faith to the acquisition of additional real estate of not inferior value, or to the erection or enlargment of buildings forming part of the plant of the company, or to the purchase of other material or property necessary for the business of the company."

XXVII. That since the year 1893, and down to the time the said lumber company went into the hands of the receivers, no dividend or dividends were ever declared or paid to the stockholders, and the company continually lost money by its operations.

XXVIII. That after the said mortgage of 1897 was executed as aforesaid the said lumber company acquired certain tracts of land and timber rights and certain real and personal property, and the same became and are subject to the lien of the said mortgage, under the terms thereof. A schedule of the said after-acquired property, together with a description thereof, is annexed to the bill, marked "Exhibit B," and may be taken as hereby repeated.

XXIX. That by the terms and conditions of the said deed of trust of 1897 (as will appear by reference to it) it was provided, covenanted, and agreed that the said lumber company would pay to the several holders of the said bonds and coupons, or, in case the said bonds should be registered, then to the registered owner thereof, the principal and interest mentioned in, and secured by said bonds and coupons respectively as and when the same should respectively become due and become payable according to their tenor; that it would appropriate and set apart, during the year 1897 and each successive year thereafter, until all the bonds secured by said deed of trust should be paid and satisfied, a sum annually equal to 5 per cent. of the par value of all of said bonds which might be outstanding at the time such sums of money were so appropriated and set apart, said sums, together with any increase of the same arising from interest of income, to constitute a sinking fund for the payment of the bonds secured by said mortgage. That by the terms and conditions of said mortgage or deed of trust it was further provided, covenanted, and agreed that if the said lumber company, its successors and assigns, should at any time make default, or refuse, neglect, or omit, for six months after the same shall fall due and be demanded, to pay any semiannual installment of interest, payable upon the bonds or any of them, or should make default, or refuse, neglect, or omit, when the same shall fall due and be demanded, to pay the trustee, personally or by its attorneys or agents, might forthwith enter into and upon, and take possession and control of, all and singular the property and premises, real and personal, thereby mortgaged, including the earnings, income, issues, and profits thereof.

XXX. That by the terms and conditions of said deed of trust of 1897 it was further covenanted and agreed that, in case default should be made by the said lumber company in the performance of the provisions of the said deed of trust, then and in any such case, if the holders of a majority in value of the then outstanding bonds thereby secured should so elect and notify the trustee in writing of such election, the whole principal of all of the bonds secured by said deed of trust and outstanding should forthwith be declared by the trustee to be, and should become, immediately due and payable, although the period limited in said bonds for the payment thereof should not have expired; and thereupon, in any such case, it should be lawful for the trustee, after entry as aforesaid, or without entry upon request

made by the holders of a majority in value of the said bonds outstanding, to proceed to sell at public auction to the highest bidder all and singular the premises and property, real and personal, including the franchises, thereby mortgaged, or expressed or intended so to be, which should be subject to the lien, operation, and effect of said indenture, with the appurtenances, and all benefit and equity of redemption of the said lumber company; and that the trustee, on being requested so to do by the holder or holders of a majority in value of the said bonds outstanding, should take all such lawful steps as might be requisite to protect the rights of the holders of all of the bonds secured by said mortgage. That by the terms and conditions of said mortgage of 1897 it was further covenanted and agreed that, upon the filing of a bill in equity or other commencement of judicial proceedings to enforce the rights of the trustee and of the bondholders under the said mortgage, the trustee should be entitled to the appointment by any court of competent jurisdiction of a receiver or receivers of the mortgaged property, and of the earnings, income, rents, issues, and profits arising therefrom, pending such proceedings, with such powers as the court making such appointment should confer.

XXXI. That default was made in the payment of semiannual installments of interest evidenced by coupons which became due and payable and accruing upon the bonds secured by said mortgage and outstanding as follows, viz.: As set forth in paragraph XI of the bill, and as appeared, also, from the production of the bonds, themselves, in the evidence filed in volume 1 of the reported evidence.

XXXII. That the said lumber company made default in each and every year from 1897 to June, 1905, to appropriate and set apart for the payment of said bonds and coupons the amounts which they were required under the said deed of trust to appropriate and set apart for that purpose, and that all of said defaults have continued up to the time of filing this report, and the interest on the said bonds, evidenced by said coupons, remains wholly unpaid, except as hereinafter to be mentioned. That said coupons, as the same became respectively due, were duly presented at the office of the said lumber company in the city of New York for payment, and payment of the same was refused, except in the following instances, to wit: Two coupons on bonds 114 and 115, the two first coupons, were paid; on four bonds, 52, 53, 54, and 55, three coupons on each were paid; on sixteen bonds, Nos. 26 to 30, inclusive, bonds 69, 70, 76, 89, 90, 98, and 100, inclusive, and bonds 117 to 119, inclusive, had the first five coupons paid on each; thirty bonds, numbered 31 to 35, inclusive, bonds 41 to 45, inclusive, bonds 51, 56, 68, 74, 75, and 77 to 79, inclusive, bonds 82 to 88, inclusive, and bonds 91, 94, and 130 to 132, inclusive, were paid six coupons on each, excepting that coupon No. 8 is missing from bonds 68, 75, 82, 88, and 91; on nine bonds, numbered 72, 73, 80, 81, and 95 to 97, inclusive, and on bonds 128 and 129, seven coupons were paid on each; on fifty-five bonds, 1 to 25, inclusive, 36 to 40, inclusive, 47 to 50, inclusive, 57 to 66, inclusive, 71, 92, 93, 101 to 105, inclusive, and 123 to 125, inclusive, eight coupons on each were paid; on three bonds, numbered 46, 126, and 133, nine coupons were paid on each; on one bond, No. 67, two coupons were paid; and on thirty bonds, numbered 106 to 113, inclusive, 116, 120 to 122, inclusive, 127 and 134 to 150, inclusive, no coupons were paid.

XXXIII. That by reason of default in the payment of such interest, and in the performance of other provisions of said mortgage as aforesaid, the holders of a majority in value of the bonds outstanding, secured by said mortgage, pursuant to the terms and provisions thereof, elected that the principal of all the bonds secured by the said mortgage or deed of trust, and issued thereunder and outstanding, should forthwith be and become due and payable, gave the Metropolitan Trust Company due notice in writing of such election, and duly made demand upon that said trust company, as trustee, as aforesaid, to declare the principal of all the bonds outstanding, secured by said deed of trust or mortgage, to be due and payable, and to proceed to collect both principal and interest of the said bonds by a foreclosure of the said deed of trust or mortgage and a sale of the mortgaged property or otherwise, and generally to protect the rights of the holders of all the bonds secured by said deed of trust or mortgage. That upon receipt of said demand

the Metropolitan Trust Company declared the whole principal of all the bonds secured by said deed of trust to be due and payable, and commenced this action in this court for the foreclosure of the said deed of trust.

XXXIV. That there are no outstanding judgments or incumbrances or rights which constitute liens, legal or equitable, upon the property of the said North Carolina Lumber Company, other than the lien of the said deed of trust, except such amounts as are in this report adjudged to be prior liens under the laws of North Carolina, all of which will appear with particulars in the subsequent finding in reference to the claims of the unsecured creditors, to be filed with this report, and are as follows in amounts: W. B. Dunn, guardian, and W. B. Dunn in his own right, $681.25; H. L. Roebuck, $88.70; Nellie Godfrey, $32.50; Scotland Neck Democrat, $4; and the Norfolk Landmark, $9.

XXXV. That the said 150 bonds are now outstanding in the hands, respectively, of the persons mentioned in paragraph XIV of the facts, or their assignees, or their transferees.

XXXVI. That the premises and property conveyed in the said deed of trust are so situated and circumstanced that a sale would be more advantageous to all in interest, of the plant together, with such timbered land as would be useful in the operation of the company's business in one parcel, and of the other real estate, consisting of agricultural lands, in separate tracts.

Conclusions of Law.

I. That on or about the 31st of January, 1903, the said Atlantic Trust Company was merged with the Metropolitan Trust Company of the City of New York, by agreement of merger duly authorized, and executed by the two corporations in all respects as provided by the laws of the state of New York in such case made and provided, and accordingly, by virtue of said agreement and said laws, the said Atlantic Trust Company of the City of New York merged into and became, and now exists in and under the name of, the Metropolitan Trust Company of the City of New York, and said Metropolitan Trust Company, as successor, is now vested with all the rights, interests, property, and franchises, and was also invested with the same rights, interests, property, and franchises at the time of the filing of the bill in equity of the Metropolitan Trust Company in this case, and is subject to all the duties and liabilities of the said Atlantic Trust Company, and then and there became the trustee of said mortgage as fully, completely, and with the same rights and obligations, thereunder and to the same extent as if it had been by its present corporate name originally named as trustee in said deed of trust and in such name had then assumed the trust therein created, of all of which the said lumber company had due notice.

II. That each and all of the said bonds of the issue of 1897 are good and valid obligations of the said defendant the North Carolina Lumber Company, and each and all are entitled to the benefit of the security given by the said mortgage, share and share alike; principal and accrued interest sharing equally.

III. That there is now, at the time of the filing of this report, due and owing upon the said bonds the sum of $150,000, in gold coin, principal money, with interest on the several parcels thereof.

Upon, or soon after, the filing of the master's report, 30 exceptions were filed, signed by attorneys who underwrite their signatures, "Solicitors for the Receivers and Creditors." Nowhere in the exceptions are the names of the excepting creditors or those represented by the attorneys disclosed. These exceptions begin as follows:

"Come now W. A. Leary, W. H. S. Burgwyn, and E. L. Travis, receivers of the North Carolina Lumber Company, and the general creditors of the North Carolina Lumber Company, who have made themselves parties to the creditors' bill filed in this action, and except to the findings of fact and conclusions of law filed herein by Hon. W. A. Montgomery, standing master in equity, in the following particulars, to wit," etc.

This presents a novel question not raised by counsel, but into which the court deems it a duty to inquire ex mero motu: What right have the receivers to except? They are merely the hand of the court, to hold and manage the property placed in their hands by the court, under the direction of the court, for the preservation thereof for the benefit of the parties litigant, all the parties or those who shall establish the best right thereto. Foster's Federal Practice, Bates' Federal Equity Practice, and authorities cited. They should be impartial—represent no one interest, but all. And nowhere can authority be found—at least this court has found none after diligent search—which authorizes them to enter into litigation between parties touching the property placed in their hands, to be held until the same is distributed by order of the court. A receiver should have authority, express or implied, from the court for all his acts. He is the creature and arm of the court, from which he derives his existence as receiver, and has no authority, except such as he gets from the court. Property in his possession is in custodia legis, and is placed in his possession for conservative administration by the court. The functions of a receiver are twofold: (1) To preserve pendente lite the property and its income taken into custody, which is the subject of litigation, from deterioration, waste, or loss, destruction, or depreciation in value; (2) to administer the property and distribute it or dispose of it according to the rights of the parties to the suit, as ascertained and determined by the decree of the court in the cause. To engage in, sue, and defend in a cause at law or in equity they should obtain permission from the court appointing them. It is not contemplated they should take part in the litigation of the cause in which they are appointed, and have no standing in court for this purpose. He, the receiver, is but the creature of the court, the money or property in his hands is in custodia legis for whoever can make out a title to it. It is the court itself which has the care of the property in dispute, and he is merely the representative of the court, from which he must receive all his authority in the premises. All dealings with the property without such authority are void ab initio. Booth v. Clark, 17 How. 330, 15 L. Ed. 164.

The receivers in this cause asked for no authority to engage in or become parties to this litigation in the manner attempted by the filing of the exceptions herein; hence have no standing in court for this purpose. They were nominal parties to the first bill filed, and it does not appear they were necessary or indispensable parties. They were not parties to the mortgage or mortgages asked to be foreclosed. It is anomalous for a receiver to except to the decision of a master in chancery, the alter ego of the court for the investigation of questions involved in litigation referred to such master. The expression, "and creditors," etc., without disclosing them, does not add force to the exceptions, none of which go to the title of the receivers. The names of these creditors should have been disclosed in the exceptions, and not compel the chancellor to hunt through a voluminous record to ascertain who was meant or intended to be included in the exceptions. The exceptors were represented on the hearing by one of the receiv-

ers, from which several conclusions may be drawn. A careful examination of the record, in connection with these exceptions, discloses the fact that the cause was patiently heard, carefully considered, and properly decided, both as to facts and conclusions of law, and there is no merit in the exceptions, waiving for this purpose only their irregularity; hence the report of the master, both as to findings of fact and conclusions of law, is affirmed.

Let a decree for foreclosure in accordance with the prayer of the bill be entered. It is so ordered.

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## BELYEA v. COOK.

(District Court, N. D. California. April 6, 1908.)

Nos. 13,611, 13,612, 13,613, 13,618, 13,619.

1. SEAMEN—CONTRACT FOR SERVICE—TERMINATION OF VOYAGE.
   Libelants signed in San Francisco for a whaling voyage to the Arctic Ocean on stated lays; the voyage not to exceed 36 months. On the way north the vessel broke a shaft and was obliged to return to San Francisco for repairs, having been away but about a month. *Held*, that the voyage was not terminated on such return, and that the refusal of the master to permit libelants to there leave the vessel, authorized by the shipping articles during the voyage, did not entitle them to treat the contract as rescinded and to recover on a quantum meruit for the remainder of their term of service.

2. INFANTS—CONTRACT BY MINOR—DISAFFIRMANCE.
   Seamen, who were minors when they signed shipping articles, may disaffirm the contract and recover the reasonable value of the services rendered, regardless of the contract terms.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 149–160.]

3. SEAMEN—MISTREATMENT BY MASTER.
   Assaults made by a master upon seamen or their confinement by him in unnecessarily cruel positions are violations of their personal rights for which both the master and vessel are liable in damages.

4. SAME—RIGHTS AND DUTIES AFTER EXPIRATION OF TERM OF SERVICE—ICEBOUND VESSEL.
   Where, at the time of the expiration of the contract term of service of seamen on a whaling voyage to the Arctic Ocean, the vessel was icebound without fault of the master or owners, they were not thereby released from the obligation to perform their ordinary duties as seamen until they could be taken or sent to the port of discharge, and the master was justified in placing them in irons on their refusal to perform such ordinary duties, but they could not be required to resume the business of whaling after the vessel was released, and the confinement in irons of one of them because of his refusal to do so entitled him to damages.

5. ESTOPPEL—RELEASE—INVALIDITY.
   A release signed by a seaman on leaving the vessel while in the Arctic Ocean before her return to the port of discharge, where there was no settlement with him for his services, did not estop him from maintaining an action therefor or from recovering damages for mistreatment by the master.

In Admiralty.

F. R. Wall, for libelants.

H. W. Hutton, for claimants and defendants.

DE HAVEN, District Judge. These actions were consolidated and tried together. All of the libelants, except Bredesen, in March, 1903, shipped on the Bowhead for a whaling voyage in the Arctic and Pacific Oceans, upon stated lays. The voyage was not to exceed 36 months. The libels allege that the Bowhead was not supplied with lime juice or other anti-scorbutics, that the medicine chest was otherwise insufficiently supplied, and that the master failed to give the libelants, during the voyage, their proper share of the food on board the vessel. The vessel sailed on her voyage on or about March 14, 1903, and on April 3d, following, while in the vicinity of Dutch Harbor, broke her shaft and was compelled to return to San Francisco for repairs, where she arrived on April 17th. The libels allege that when the vessel arrived in the port of San Francisco all of the libelants, except Bredesen, elected to rescind their contract of shipment, and, notwithstanding such rescission, the master refused to permit any of the libelants, except Bredesen, to leave the ship. The libelants claim that upon the foregoing facts the shipping articles, which they signed, are not binding upon them, and that they are entitled to recover upon a quantum meruit, for the whole time they performed service on the Bowhead.

The libelants Anderson, Belyea, Muller, Griffith, Castel, and Graugaard, in addition to the matters above stated, base their claim to recover wages, upon quantum meruit, upon the ground that they were minors at the date of their shipment as seamen. Certain of the libelants also claim damages for personal assaults made upon them by the master and other officers of the Bowhead, and also for having been wrongfully placed in irons.

1. The testimony is voluminous and is sharply conflicting on many material questions. It is not my purpose to review the conflicting evidence or do more than state the conclusions which I have reached.

The allegations of the libel which charge that the Bowhead was insufficiently supplied with anti-scorbutics and other medicines, and that libelants did not receive their share of the food on board of the vessel, are not sustained by the evidence, and it is therefore unnecessary to determine whether, if there had been such a breach of the obligations of the vessel, the libelants would have the right to treat the contract of shipment as rescinded.

It is argued that when the Bowhead returned to San Francisco, for repairs, the voyage, for which libelants shipped, was then ended, and that their after service upon said vessel was in the nature of involuntary servitude, for which they are entitled to recover, upon quantum meruit. There is no merit in this contention. The voyage, for which libelants shipped, was not ended when the vessel returned to San Francisco for repairs, and, if it be a fact that the libelants then gave notice of their desire and intention to abandon her, the refusal of the master to permit them to do so does not entitle them to treat the contract as rescinded. The master had the right, in the exercise of a reasonable discretion, to insist upon their remaining on the vessel while she was undergoing repairs, in the harbor of San Francisco. The shipping articles obligated the seamen "not to go out of said vessel, or aboard any other vessel, or be on shore under any pretense whatever, until the aforesaid voyage be ended, and the vessel discharged of her load-

ing, without leave first obtained of the captain or commanding officer on board."

2. Charles S. Anderson, John A. Belyea, and Fred Griffith were minors when they signed the shipping articles, Anderson and Griffith being of the age of 16 years each, and Belyea 17 years and 5 months, and there is nothing in the evidence which would justify the court in holding that they are estopped from asserting their right to disaffirm the contract of shipment and to recover the reasonable value of their services. Burdett v. Williams (D. C.) 30 Fed. 697; The Topaz (D. C.) 44 Fed. 631.

3. The libelant Charles S. Anderson asks for damages on account of alleged personal assaults, made upon him by the master, Cook. The master admits that he assaulted him on one occasion, "stood him up and cuffed his ears slightly for his insolence." I think, however, the evidence not only shows that Anderson was assaulted upon the occasion just referred to, but also at another time, by the master, and while I have no doubt that the degree of punishment inflicted upon him, upon these occasions, is very greatly exaggerated by the libelant, still the assaults were entirely unjustifiable and a violation of his personal rights.

4. The evidence also shows that the master of the Bowhead, on or about the 3d day of June, 1904, at Herschel Island, assaulted the libelant Belyea by kicking him. Belyea was not much injured by the assault, but still the act was unjustifiable and committed in wanton disregard of his personal rights, and for that assault he is entitled to recover.

5. The libelant Carl Faber claims damages on account of various alleged assaults made upon him by the mates and the master, at different times, and he further alleges that on or about June 25, 1903, the master placed iron handcuffs on him and tied him to a stanchion in the main hatch, with his hands behind him, and that while he was thus handcuffed and tied the master struck him in the face with his clenched fist, several times, with great force and violence, and that he was confined in this manner, on bread and water, for a period of two days. The evidence shows that this libelant was, upon two or three occasions, struck and beaten by the mates of the Bowhead; but this does not appear to have been done with the consent of the master, except, perhaps, on one occasion, when the master witnessed the assault. The evidence, however, shows that in March, 1905, the master not only placed him in irons and confined him in the main hatch, but that while thus confined he was tied to a stanchion with a rope, with his hands above his head. The master denies that Faber was tied with his hands above his head, but the testimony of Faber, and other members of the crew, in support of the fact, is in my opinion corroborated by the following entry in the Bowhead's log book, under date of March 5, 1905.

"Sergeant Fitzgerald, of the N. W. M. P. came on board, at request, or on complaint of some of the crew that said Faber was being tortured. Fitzgerald looked at him and said he saw no signs of torture, but said we might give him a more comfortable position. Faber was changed then to a sitting position."

It may be assumed that the master was justified in placing Faber in irons, at that time; but in making him fast to a stanchion, with

his hands above his head, he was guilty of unnecessary cruelty, for which both he and the ship are liable.

6. Certain of the libelants also claim damages on account of their having been put in irons and confined in the engine room and the forehold of the vessel, on March 22, 1906. The Bowhead was at this time lying at Herschel Island, icebound, and my conclusion, from the evidence, is that the master was justified in placing them in irons at that time because of their refusal to perform their ordinary duties as seamen. Although the voyage had been prolonged beyond the period of three years, the libelants were not thereby released from their obligations as seamen, under the circumstances appearing here. It is true that the term of service, named in the shipping articles, expired on March 16, 1905; but at that date the vessel was, without fault of her master or her owners, imprisoned in the ice, and the voyage, for which libelants shipped, was not ended, and they were bound to obey all the lawful orders of the master in and about the vessel while she was thus imprisoned in the ice, under the rule declared in The Belvedere (D. C.) 100 Fed. 498, in which case it was said:

"The terms named in the articles expired on March 8, 1898, but at that date the vessel, without fault of her owners, was imprisoned in the ice. The detention of the libelants from this cause until July, 1898, was an incident to navigation in that latitude, and must be attributed to the act of God, for which the claimants are not liable to respond in damages."

The claim of libelants that they were put in irons, at that time, because they would not promise to whale during the season of 1906, I do not think is sustained by the evidence. The whaling season does not commence, in those waters, before July, and it is not reasonable to suppose that they were put in irons because of their refusal to give a promise that they would engage in that service in the future. It does appear, however, that on June 25, 1906, the libelants, or most of them, addressed to the master a letter in which they protested against the Bowhead proceeding eastward for the purpose of whaling. This protest was placed upon three grounds, one of which was the claim that the term for which they shipped had expired; but in this protest they said:

"We, the crew of the S. W. Bowhead, will do everything prescribed by law, but we emphatically refuse to wood or whale any longer. We, the crew of the S. W. Bowhead, will work the ship, or anything pertaining to the working of said ship, to its port of destination."

This was signed by the libelant James Woodland, but, notwithstanding the promise, on his part, to assist in working the vessel to its port of destination, the master kept him in irons until September 2, 1906, and I think the evidence shows that this was done because that libelant would not promise to assist in whaling; the master being of the opinion that he could rightfully require him to engage in that service.

The imprisonment of Woodland, after June 25, 1906, was, in my opinion, not justifiable. The time for which he shipped had expired, and it was the duty of the master, upon his request, to return with him to San Francisco, or to send him there by some other vessel, as

soon as possible, after the Bowhead was released from the ice. The Belvedere (D. C.) 100 Fed. 498.

7. The libelants Bowen, Walker, and Woodland left the ship, with the consent of her master, at Point Barrow, September 2, 1906. There was no settlement with them at that time, and they have received no compensation for their services, except an advance, and articles from the slop chest.

Faber quit the vessel at Herschel Island, May 28, 1906. There was no settlement with him, and he has received no other compensation, than an advance, and provisions and merchandise furnished him. When quitting the vessel he signed a release, but I do not think this release estops him from maintaining his libel. There was no accounting with him at the time, and nothing was given him in satisfaction of the wrongful treatment which he had received while on the vessel.

My conclusion is:

The libelants Anderson, Belyea, and Griffith are not bound by the shipping articles, signed by them, and are entitled to recover the reasonable value of their services on the Bowhead, during the voyage referred to in the libels, less any sums received by them on account of such services, and the value of all articles of merchandise furnished them during the voyage; and in addition thereto, Anderson and Belyea are each entitled to recover $400 on account of the assaults made upon them by the master of the Bowhead, and costs.

The libelants Woodland, Bowen, Walker, and Faber are entitled to recover the value of their services, for the time they served as seamen, calculated upon the basis of the shipping articles; that is, they are entitled to a proportionate share of the whalebone and oil secured, while they were on the Bowhead, less their proportionate share of the expense of bringing the same to San Francisco, and less, also, advances made to them, and the value of merchandise furnished them during the voyage. And, in addition thereto, the libelants Faber and Woodland are each entitled to recover, on account of the matters stated in the foregoing opinion, the sum of $500, and costs.

In satisfying said judgment, resort will first be had to the stipulation in said actions for the release of the Bowhead, and, if not so satisfied, then execution will issue against the defendant. The cause will be referred to United States Commissioner Brown, to ascertain and report the reasonable value of services of libelants Anderson, Belyea, Griffith, and the value of the services of Woodland, Bowen, Walker, and Faber, in accordance with the terms of their contract of shipment, and the amount received by them on account of such services. The libels will be dismissed as to all of the libelants, except Anderson, Belyea, Griffith, Woodland, Bowen, Walker, and Faber.

Let such a decree be entered.

## UNITED STATES v. LOUISVILLE & N. R. CO.

(District Court, S. D. Alabama. April 9, 1908.)

1. RAILROADS—STATUTORY REGULATIONS—PENALTIES.
An action brought to recover the penalty provided for in the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) is not a criminal case.

2. SAME—EVIDENCE—WEIGHT AND SUFFICIENCY.
The government need not prove its case beyond a reasonable doubt. It is sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.

3. SAME—SAFETY APPLIANCES—AUTOMATIC COUPLERS.
The act requires that cars be equipped with couplers which can be automatically coupled, and which can be uncoupled without the necessity of a person going between the ends of the cars on that side which said person might be.

4. SAME.
The act applies to an empty car which is part of a train moving interstate traffic, as well as to a car which is itself moving such traffic.

(Syllabus by the Court.)

William H. Armbrecht, U. S. Atty., and Ulysses Butler, Sp. Asst. U. S. Atty.

Gregory L. Smith and Joel W. Goldsby, for defendant.

TOULMIN, District Judge (charging jury). This is a case wherein the United States, who are the plaintiffs, sue the Louisville & Nashville Railroad Company, who is defendant, to recover certain penalties which the plaintiffs claim the defendant is liable for by reason of alleged violations of certain provisions of that law passed by the Congress of United States known as the "Safety Appliance Law" (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]). The law under which this suit is brought makes it unlawful for a common carrier, such as it is conceded the Louisville & Nashville Railroad Company is, to haul or permit to be hauled or used on its line any car used in moving interstate traffic not properly equipped with automatic couplers. The defendant pleads not guilty, and the issue is whether or not the defendant is guilty of these various charges, or of any one of them.

The question is, first, whether or not the cars in question, and involved in this case, were moved from Mobile, in this state, to any place in another state of the United States, or from a point outside of this state to Mobile, by the Louisville & Nashville Railroad Company, in a condition that was not such as is provided for by this law. The burden of proof rests upon the United States to satisfy you by clear and sufficient evidence that that fact existed. The United States are not required to prove their case beyond a reasonable doubt. This is not a criminal case. They are not required to satisfy you of the guilt of the defendant beyond a reasonable doubt, but they are to furnish clear and to you satisfactory evidence of all the facts necessary to make out their case. The law requires couplers at both ends of the cars that couple automatically by impact and couplers that may be uncoupled without the necessity of going between the cars. It is necessary, to

comply with the law, that the coupler shall be in operative condition; that is, in a condition to properly perform its functions. The law forbids the use of cars which could not be coupled together automatically by impact by means of the couplers actually used on the cars to be coupled, and the object of the law is to render it unnecessary for a person operating the couplers to go between the ends of the cars to uncouple them. The duty of providing such couplers is imposed upon every carrier engaged in interstate traffic and using on its line a car moving such traffic.

Now, if the United States have satisfied you by evidence, whether it be direct or circumstantial (for the evidence in the case is of both characters)—if all the evidence, I say, both direct and circumstantial, satisfies you that the cars mentioned in the complaint were parts of trains moving interstate traffic in February, 1907, the next question is, were those cars (I refer now to the freight cars spoken of as defectively equipped with couplers) equipped with couplers which were so defective as to be inoperative? As I understand the law, it imposes on the railroad company the duty to find the defects, if any exist, and that it must find them. There is no question of reasonable care and diligence to be exercised by the defendant involved in the case, and hence it is not a matter for your consideration. Indeed, I do not believe any such question is raised in the case. Now let us examine and consider the specific allegations and claims, as set forth and made in the complaint, which contains four counts. There are four separate causes of action alleged and claims made; each claim being for $100, aggregating therefore $400.

The first count is that the defendant hauled on its line of railroad one (its own) car No. 20475, used in the movement of interstate traffic and containing lumber consigned from a point without the state of Missouri to St. Louis, in said state, on or about February 18, 1907, and that defendant hauled said car with said traffic over its line from Mobile, in this state, in a northerly direction; that said car was out of repair and inoperative, in that the chain connecting the lock pin and lock block to the uncoupling lever was missing on the "B" end of the car, and that the car was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man going between the ends of the cars. The witness explained what was meant by the "B" end, meaning the brake end. If you find from the evidence in the case that the allegations of this count of the complaint are established, then your verdict ought to be for the United States for the sum of $100; but, if you are not satisfied from the evidence that these allegations are established, then you ought to find a verdict for the defendant.

The second count is that the defendant hauled on its line of railroad one car, its own No. 25878, being one regularly used in the movement of interstate traffic, but at the particular time was empty, and that at the time said car was a part of a train carrying interstate traffic; that the coupling and uncoupling apparatus of said car was out of repair and inoperative, in that the chain connecting the lock pin or lock block to the uncoupling lever was missing on the "A" end of said

car, thus necessitating a man going between the ends of the cars to couple or uncouple them. Now, if you are reasonably satisfied from the evidence in this case that the United States have established the allegations of this count of the complaint, the substance of which I have just stated to you, then your verdict ought to be for the United States. If you are not so satisfied, then your verdict ought to be in favor of the defendant.

The third count of the complaint is somewhat different from the others—not in principle, but in the facts alleged. The allegations in this count are that the defendant used on its line of railroad a locomotive engine, L. & N. 519, to haul a car A. C. L. No. 22246, containing merchandise consigned from a point in Louisiana to a point in Florida; that on or about February 18, 1907, defendant used said locomotive engine to haul said car with said interstate traffic over its line of railroad when the air pump on said engine was inoperative, and when said engine was not equipped with a power driving-wheel brake and appliances for operating the train brake system. The law provides that it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system. The court charges you that if you find from the evidence that the defendant used on its line of railroad said locomotive engine, and that it was hauling a car containing merchandise consigned from a point in Louisiana to a point in Florida, that it was moving interstate traffic, and if you further find from the evidence that said engine was not equipped with a power driving-wheel brake and appliances for operating the train brake system, then your verdict should be for the United States. If you are not satisfied from the evidence that the defendant was using a locomotive engine moving interstate traffic as alleged, or you are not satisfied that said engine was not equipped with a power driving-wheel brake and appliances for operating the train brake system, then in either case your verdict should be for the defendant under the third count of the complaint.

The fourth count alleges that defendant hauled on its line of railroad one car, its own No. 2452, said car being one regularly used in the movement of interstate traffic and which car was then and there part of a train carrying interstate traffic; that said line of railroad over which said car was hauled is a highway over which interstate traffic is being continually hauled from one state to another in the United States; that the coupling and uncoupling apparatus of the "B" end of said car was out of repair and inoperative, in that the bottom clevis to the chain connecting the lock pin or block to the uncoupling lever was missing on said end of said car, thus necessitating a man going between the ends of the cars to couple or uncouple them. Now, if you find from the evidence that the United States have established the facts alleged in this (fourth) count of the complaint, your verdict ought to be for the United States. If, however, the United States have not established by the evidence and to your reasonable satisfaction the

facts therein alleged, your verdict should be for the defendant under that count.

The sum and substance of the charge, then, is that if the United States have reasonably satisfied you by the evidence in this case that the cars in question were so defective, at the time alleged in the complaint, that they could not be automatically coupled or could not be uncoupled without the necessity of a person going between the ends of the cars on that side of them on which said person may be, then the United States would be entitled to your verdict as to the freight cars, or as to such of them as you may find were so defective, provided you further find that said cars were at the time moving interstate traffic, or parts of a train moving such traffic.

As to the locomotive engine, if the United States have reasonably satisfied you by the evidence that it was at the time alleged moving interstate traffic, and you further find from the evidence that it was not equipped with a power driving-wheel brake and appliances for operating the train brake system, then your verdict ought to be for the United States. If the United States have not reasonably satisfied you by the evidence that their claim against the defendant on their several causes of action set forth in their complaint has been established, then your verdict ought to be for the defendant; or, if you are not so satisfied as to any one of the said claims, then as to that particular claim your verdict ought to be for the defendant.

You are the sole judges of the weight and sufficiency of the evidence, and you will draw your own inferences, and conclusions from that evidence, both positive and circumstantial, as in your judgment you find legitimate and proper, aided as you have been by the arguments of learned counsel in the case.

If you find for the United States under every count of the complaint, your verdict should be rendered under each count, and the form would be: "We, the jury, find the defendant guilty under the first, second, third, and fourth counts of the complaint." If you find a verdict of guilty under some one or more of the counts, and not guilty under all, then the form of your verdict should be: "We, the jury, find the defendant guilty under (naming the counts specifically)."

If your verdict is for the defendant under all the counts, the form should be: "We, the jury, find the defendant not guilty." If your verdict is not guilty as to some, specify them, and guilty as to the other, as explained above. The verdict to be signed by one of your number as foreman.

Verdict in favor of the United States for $400.

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## HOWARD SUPPLY CO. v. CHESAPEAKE & O. RY. CO.

(Circuit Court, S. D. West Virginia. April 14, 1908.)

1. CARRIERS—INTERSTATE COMMERCE—RATES—REVIEW BY INTERSTATE COMMERCE COMMISSION—ACTIONS—CONDITION PRECEDENT.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act Cong. June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1907, p. 902), provides that if, after

hearing on a complaint by shippers, the commission shall determine that any party is entitled to an award of damages for a violation of the act, the commission shall direct payment thereof, and if the carrier does not pay within the time limited in the order the complainant may sue to recover such damages, and in such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. All complaints for the recovery of damages are also required to be filed with the commission within two years after the cause of action accrues, and a petition for the enforcement of an order within one year after the date of the order. *Held*, that an action by an interstate shipper to recover damages for a charge of illegal and excessive rates is not maintainable until after a hearing and award before the Interstate Commerce Commission.

2. SAME—PRIOR DECISION.

Where an interstate rate on railroad ties, duly filed, had never in itself been declared illegal or excessive by the Interstate Commerce Commission, the fact that such rate was higher than the rate charged for rough lumber, and that the commission in another proceeding had determined that rough lumber and railroad ties should take the same classification, was insufficient to entitle a shipper having paid the tie rate to recover the excess over the rate fixed for lumber, without a hearing and an award before the commission.

In Assumpsit.

George J. M. Comas, for plaintiff.
F. B. Enslow, for defendant.

KELLER, District Judge. This is an action of assumpsit by the Howard Supply Company, a corporation, against the Chesapeake & Ohio Railway Company, to recover alleged overcharges of freight on shipments of railroad cross-ties by the plaintiff over the line of defendant from various points in the state of Kentucky to Kenova and Huntington, W. Va., and thence over the Baltimore & Ohio Railroad to Pittsburg and other points in the state of Pennsylvania. The plaintiff bases its right to a recovery on the ground that the rate exacted by the defendant on the cross-ties shipped by the plaintiff was unjust, unreasonable, and discriminatory, and in violation of the interstate commerce acts, in this: That the published schedule rates of the defendant on cross-ties was higher than the rate on rough lumber, when, under the rulings of the Interstate Commerce Commission, cross-ties and rough lumber should be classified alike, and the same rate charged for shipments between the same points. The plaintiff paid the rate exacted by the defendant on the cross-ties shipped by it, and it now seeks to recover the difference between the amount so paid and the published rate on rough lumber. This case was submitted to me upon an agreed statement of facts, with the jurisdiction undetermined and questioned by the defendant.

The facts agreed upon, in so far as it is necessary to state them here, are these: During the period in which the plaintiff made the shipments aforesaid, to wit, from May, 1904, to December 5, 1906, the defendant was owning and operating a railroad and engaged in the business of a common carrier in receiving and transporting over its road interstate shipments, including lumber and railroad cross-ties, from various points between Lexington and Catlettsburg, Ky., into the state of West Virginia, at Huntington and Kenova, at which points

the railway of the defendant connects with the Baltimore & Ohio Railroad. During said period the plaintiff was engaged in the business of buying and dealing in railroad cross-ties, between Lexington and Catlettsburg, Ky., and shipping the same over the railway of the defendant from various points between Lexington and Catlettsburg to Kenova and Huntington, W. Va., and thence over the line of the Baltimore & Ohio Railroad Company to Pittsburg and other points in Pennsylvania The plaintiff during said period shipped 37,100,000 pounds of cross-ties from said points in Kentucky, via Kenova and Huntington, to Pittsburg and other points in Pennsylvania, and paid freight thereon at the rate of 17 cents per 100 pounds. During said period the established rate on sawed lumber, from points on the defendant's line between Lexington and Catlettsburg, Ky., to Pittsburg, Pa., was 14 cents per 100 pounds, of which rate the defendant received 4.71 cents and the Baltimore & Ohio Railroad received 9.29 cents; and during all of said period the established and published rate of the defendant on cross-ties from the said points in Kentucky to Kenova and Huntington was 7 cents per 100 pounds, and the established and published rate thereon of the Baltimore & Ohio Railroad from Kenova and Huntington to Pittsburg and other points in Pennsylvania during said period was 10 cents per 100 pounds. These rates on cross-ties and on lumber were duly established by these two railway companies, and were posted, published, and filed, as required by the interstate commerce acts and the rules of the Interstate Commerce Commission, and these rates were never passed upon or changed by the Interstate Commerce Commission, and they applied to all shippers between said points. The question of the right of the plaintiff or other shippers from Kentucky points to Pittsburg, over the line of defendant and the Baltimore & Ohio Railroad, via Kenova and Huntington, to have cross-ties shipped at the lumber rate of 14 cents per 100 pounds, has never been passed upon or considered by the Interstate Commerce Commission, nor has the rate of 7 cents over the line of defendant plus 10 cents over the line of the Baltimore & Ohio Railroad on ties ever been passed upon or declared unjust or unreasonable by the Interstate Commerce Commission. But the Interstate Commerce Commission did decide, in the case of Thomas J. Reynolds v. Western N. Y. & P. Railroad, 1 Interst. Com. Rep. 685, that rough lumber and railroad ties should be classed alike, and that any charges upon ties greater than that charged for rough lumber between the same points was in that case excessive and unreasonable.

The foregoing being the agreed facts in this case, the defendant contends that this court has not jurisdiction to try and determine the matters of which the plaintiff complains, on the authority of Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, which holds that a shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that commission and promulgated as provided by the act to regulate commerce.

The plaintiff, while admitting the general proposition that, ordinarily, the Circuit Court has no original jurisdiction of a suit at law to recover damages for an alleged overcharge in freight rates until the Interstate Commerce Commission has passed upon the question of the reasonableness of the rates, yet contended that where the question is one of the relative reasonableness of rates, as in this case, and the Interstate Commerce Commission has once passed upon the same relative classification (although not between the same parties), the Circuit Court is vested with jurisdiction to award reparation by way of damages for a relative overcharge. The defendant contended that, while that decision was conclusive as to that case, it did not settle the question as to all cases, and that the schedule of rates demanded and paid in this case, having been established, posted, published, and filed with the Interstate Commerce Commission, constituted the only legal rates to be charged until they should be declared unjust and unreasonable by the Interstate Commerce Commission, and until an award should be made by that body.

In considering the question here presented I am largely controlled by the opinion of the Supreme Court of the United States in the case of Southern Railway Company v. Tift, 206 U. S. 428, 437, 27 Sup. Ct. 709, 51 L. Ed. 1124, 1126, where the court, in distinguishing the jurisdictional question presented in that case, says:

"In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions, in view of our decision in Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, upon a different record than that before us. We are not required to say, however, that because an action at law for damages to recover unreasonable rates, which have been exacted in accordance with the schedule of rates as filed, is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates."

I think Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, 34 Stat. 590 (U. S. Comp. St. Supp. 1907, p. 902), makes it clear that it was the intention of Congress that all parties claiming to be aggrieved by violations of the Interstate Commerce Acts by common carriers must first make application to the commission for an award of damages against the offending carrier, and afterwards apply to the courts for the enforcement of the order of the commission. Section 16 provides in part as follows:

"That if, after hearing on a complaint made as provided in section 13 of this act, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limited in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the

trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this act may be presented within one year."

I entertain no doubt but that a party aggrieved by the enforcement against his protest of a published rate believed by such party to be unreasonable must, as a preliminary to a suit at law for damages, obtain a finding from the Interstate Commerce Commission of the unreasonableness of the rate, and an award of reparation "because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier, and before its change and the establishment of a new one." See Southern Railway Co. v. Tift, 206 U. S. 439, 27 Sup. Ct. 712, 51 L. Ed. 1124. This being my view, it follows that this court has no jurisdiction of this action.

It is therefore ordered that the same be dismissed, without prejudice to the right of the plaintiff to institute any other action or proceeding that it may think proper.

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## UNITED STATES v. HART.

(Circuit Court, N. D. Florida. June 28, 1908.)

1. HOMICIDE—JUSTIFIABLE HOMICIDE—SELF-DEFENSE.

In a prosecution for murder charged to have been committed on a military reservation, if the evidence is such as to satisfy the jury that the defendant was a trespasser on the reservation, and was waiting around with the intent and purpose of bringing on a difficulty with another, and did in fact bring on the difficulty with the person killed, who met his death from a shot fired by defendant, such killing cannot be justified as in self-defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 145–150.]

2. SAME—"MURDER"—KILLING ONE WITH DESIGN TO EFFECT DEATH OF ANOTHER.

If a man shoots at another with the intention of killing him (and such killing if consummated would be murder), and kills a bystander or another, he is guilty of the murder of the person killed, whether the killing of the latter was due to a mistake as to his or her identity, or to recklessness in the aim of the one doing the killing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 23.

For other definitions, see Words and Phrases, vol. 5, pp. 4632–4637; vol. 8, pp. 7726, 7727.]

3. SAME—"MALICE."

Malice, legally speaking, in relation to murder, is a conscious violation of law to the prejudice of another; evil design in general; the dictates of a wicked, depraved, and malignant heart.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 15.

For other definitions, see Words and Phrases, vol. 5, pp. 4298–4304; vol. 8, pp. 7712, 7713.]

Prosecution for Murder. Charge to the jury.

Emmett Wilson, J. E. D. Yonge, and J. R. Landrum, for the United States.

Jones & Pasco, for defendant.

SHEPPARD, District Judge (charging jury): It is the duty of the court to charge you on the law applicable to the facts in this case. Courts of the United States are not inhibited from summing up the facts and reviewing the testimony, but by statute the state courts are prevented from so doing, and this court in this state is disposed to be governed by the state practice, and consequently I will charge you only upon the law of the case.

The indictment against James Hart, the defendant, charges him with the murder of Sergeant Oscar L. Gatlin, on a military reservation, at Ft. Barrancas, Escambia county, Fla. It is charged that said post or fort was then and there and before such time, to wit, on the night of the 11th and the morning of the 12th of January, A. D. 1908, ceded to the United States, and was then and there, and now is, under the exclusive jurisdiction of the United States. This court could not entertain jurisdiction of the offense charged against the defendant, unless it was alleged to have been committed on the reservation or within some fort, arsenal, dockyard, magazine, or some other place, or district, under the exclusive jurisdiction of the United States. If it were not so charged, the offense would not be cognizable under the laws of the United States, and this court would be without jurisdiction to try it. I therefore charge you, as a matter of law, that the instrument executed by the government of the state of Florida which has been produced in evidence in this trial cedes to the United States exclusive jurisdiction over the land and territory contained within the boundaries of the military reservation in which is situated Ft. Barrancas, Fla., but, like the other material facts charged in the indictment, the burden is upon the United States to prove beyond a reasonable doubt that the offense (if any offense was committed) was within the limits of the boundaries set forth in the cession of jurisdiction from the state of Florida to the United States, and used and occupied by the United States as such army reservation. That is a question of fact for you to determine from a consideration of all the evidence, and, if you find that the homicide was not committed within the boundaries covered by or included within the cession, then the offense would not be within the jurisdiction of this court, and, if you should so find, it would be your duty to acquit the defendant. If you are satisfied that Sergeant Gatlin was killed by the defendant at or within a place under the exclusive jurisdiction of the United States, it will next be your duty to inquire into the facts and circumstances of the alleged killing in order to determine the question of the guilt or innocence of the defendant, James Hart.

The crime, as I have already said to you, charged in the indictment is murder; but in your consideration of the entire case you will not be limited or confined to an investigation solely of that offense. The statutes provide that in all criminal cases the defendant may be found

guilty of any offense the commission of which is necessarily contained in that which is charged in the indictment, and you are instructed by the court that the crime of manslaughter is included within the crime of murder. Both of these offenses are defined by the law, and I will read you a definition of both:

"Murder: The Revised Statutes of the United States prescribe a penalty for any person who commits murder within any fort or other place or district of country under the exclusive jurisdiction of the United States: but the statutes do not define the offense of murder. Therefore we must turn to the common law as it existed in England before the Revolution, and has been interpreted since by the courts, for a definition of that crime. It is this: Murder is where a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign, with malice prepense or aforethought express or implied.

"Manslaughter: The offense of manslaughter, as defined by the United States Revised Statutes in section 5341 (U. S. Comp. St. 1901, p. 3628), prescribes that every person who, within any of the places or upon any of the waters described in the section that I first read, to wit, any fort, arsenal, etc. —every person who there unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such person dies, is guilty of the crime of manslaughter."

That is the definition of manslaughter.

You will observe, gentlemen, that the distinction between murder and manslaughter is that in the first malice is present, and in the latter it is absent. It is therefore necessary to give you a technical meaning of the word "malice." Malice is defined as an intent to do injury to another, or a design formed of doing some mischief to another. It is essential that malice be shown in order to make the offense of murder. It may be inferred from the manner of killing. If there was a formed purpose to kill at the time of the shooting, it is sufficient. But malice being an essential element of murder, and in proving malice, like any other fact, the burden is on the government to prove beyond a reasonable doubt.

There is another legal phrase which calls for a definition at the outset, and which is necessary to explain to you in this connection and that is excusable or justifiable homicide. Homicide is excusable when committed by accident or misfortune in legally correcting a child or servant, or in doing any other legal act by lawful means, with usual ordinary care, and without any unlawful intent, or by misfortune, or accident, in heat of passion, upon sudden and sufficient provocation, or in any sudden combat without any dangerous weapons being used, and not done in any unusual manner. Homicide is justifiable when committed in either of the following cases: First, when resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling house in which such person shall be; or, secondly, when committed in lawful defense of such person, or his or her husband, wife, parent, child, master, mistress, or servant, when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and there being imminent danger of such design being accomplished, or when necessarily committed in attempting by lawful means to apprehend any person for any felony committed, or in suppressing any riot, or in lawfully keep-

ing and protecting the public peace. Thus you may see that every homicide is not murder, nor every killing of a human being a crime. It must be determined from the facts and circumstances, first, whether or not the crime has been committed; and, if so, whether the defendant, James Hart, committed the crime. You have seen that murder is where a person of sound mind and discretion unlawfully kills any human being in the peace of the sovereign with malice, prepense, or with aforethought, express or implied. To find that the killing of Sergeant Gatlin was murder, it will devolve upon you to determine from the testimony whether or not the killing was unlawful and with malice aforethought, express or implied.

Manslaughter has been defined to be the killing of another without malice, express or implied, which may be voluntary upon sudden heat, or involuntary in the commission of some lawful act. Any unlawful and willful killing of a human being without malice is manslaughter, and thus defined it includes a negligent killing which is also willful. Manslaughter occupies the middle ground between excusable, or justifiable, homicide on the one hand, and murder on the other.

To constitute murder there must be malice, and malice, you will remember, was an intent to do bodily harm, a formed design, and deliberate intent to kill. It does not necessarily imply any ill will, spite, or hatred towards the individual killed, but includes a case of a depraved, wicked, and malicious mind, and a will deliberately bent on murder, or doing some great bodily harm. It implies premeditation, which is a period of time for prior consideration, but as to the duration of that period the limit cannot be arbitrarily fixed. The time in which to form a design varies as the minds and temperaments of men differ, according to the circumstances in which they may be placed, and an interval of time between the forming of the intent to kill and the execution of such intent sufficiently long for the defendant to be fully conscious of what he intended, is sufficient to support a conviction for murder. Malice, as I have before said, may be inferred from the facts in the case. It may be drawn as an inference from all the evidence that is produced when taken into consideration as a whole. No fact, no matter how small, nor circumstance, no matter how trivial, which bears upon the question of malice, should escape careful consideration by the jury, for instance, the time and place of the deed, and the preparation of the defendant, as well as the use of a deadly weapon; and it is only as a conclusion from these facts and circumstances that malice, if at all, is to be inferred. Therefore, if you find from the evidence beyond a reasonable doubt that James Hart, while in the possession of a sound mind and memory and discretion, within the peace and protection of the government, and with malice aforethought, express or implied, at any time before the finding of an indictment against him, at Ft. Barrancas, Fla., on a government reservation, did unlawfully and feloniously shoot and kill Oscar L. Gatlin, then you should find the defendant guilty of murder. Section 5339, supra.

Section 1 of the act of January 15, 1897 (29 Stat. 487, c. 27 [U. S. Comp. St. 1901, p. 3620]) provides that in all cases where the accused

is found guilty of the crime of murder or of rape, under section 5339 or 5345 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 3627, 3630), the jury may qualify their verdict by adding thereto "without capital punishment," and, whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment and hard labor for life. Section 5339, referred to, is the provision of the Revised Statutes under which the defendant is prosecuted, and I charge you, gentlemen, that under the law just read you may qualify your verdict in this case, if you should find the defendant guilty of murder, by adding thereto "without capital punishment." If you find from the evidence beyond a reasonable doubt that James Hart shot and killed said Oscar L. Gatlin at Ft. Barrancas, Fla., on the government reservation, any time before the bringing of the indictment, and that such killing was neither justifiable or excusable homicide, nor murder, then you may find the said James Hart guilty of manslaughter. If you believe from the evidence beyond a reasonable doubt that the defendant is guilty of murder, you will find him guilty as charged in the indictment. If, however, you find him guilty of manslaughter, your verdict will be: "We, the jury, find the defendant guilty of manslaughter." But, if you find that he is not guilty of either of these offenses, then your verdict will be: "We, the jury, find the defendant not guilty." The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that, if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty.

You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence; and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied with the defendant's guilt, you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in more weighty and important matters relating to your own affairs, you have no reasonable doubt. Courts have found difficulty in defining reasonable doubt. It is perhaps easier to comprehend than to explain. It is never an unreasonable doubt; that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded. It is impossible in the determination of the issue to be absolutely certain. You are only required to decide the question submitted to you upon the strong probabilities of the case, but the probabilities must be so strong as not to exclude all possibility of error, but as to exclude every reasonable doubt.

The government in this case relies partly upon circumstantial evidence. The value of such evidence depends mainly on the conclusive nature of the circumstances relied on to establish the controverted fact. Where circumstances are relied on entirely to justify a convic-

tion, the circumstances must not only be consistent with guilt, but inconsistent with innocence. Just what state of circumstances will amount to proof can never be a matter of general definition. That circumstantial evidence is not only legal evidence and proper to be considered by you but a well-connected train of circumstances is as much conclusive of a fact as the greatest array of direct evidence. The true test always of such evidence is the sufficiency and weight of the evidence to satisfy your minds and consciences to the exclusion of every reasonable doubt of defendant's guilt. Absolute or mathematical certainty is not essential to proof by circumstances; but it is sufficient if the circumstances, with other proof or evidence in the case, produce a moral certainty as to the truth of the charge.

You are the sole and exclusive judges of the credibility of the witnesses and the weight to be given their testimony. If there is a conflict in the testimony, you should reconcile that conflict, if you can, but, if you cannot, then you are at liberty to discard that which you may believe to be unworthy of credit, and believe that which comports best with reason and common sense, and the strong probabilities of the case. When you are considering the testimony and the weight to be given the respective witnesses, you may take into consideration the interest which any witness may have in the case. When a witness has a direct, personal interest in the result of the trial, the temptation may be strong to color or withhold the facts, and you are at liberty to consider the personal interest such witness has in the result of the trial in weighing his testimony, and in determining how far or to what extent it is to be credited, if at all.

Charges requested and given for the government:

(1) The court charges you that if you believe from the evidence that the defendant was a trespasser on the military reservation at Ft. Barrancas, Fla., at the time the deceased was killed, and was waiting around the room of Annie Hart with the intent and purpose of bringing on a difficulty, and, further, that the defendant himself brought on the difficulty with Gatlin, from which deceased met his death from a shot fired by the defendant, the defendant cannot plead self-defense to justify such killing.

(2) The court charges you that if a man shoots at another with the intention of killing him (and such killing, if consummated, would be murder), and kills a bystander or another, he is guilty of the murder of the person killed, and this would be true whether the killing of the latter was due to a mistake as to his or her identity, or recklessness in the aim of one doing the killing.

(3) The court charges you that malice in its popular sense means hatred, ill will; while legally speaking it is the conscious violation of law to the prejudice of another.

It is evil design in general. The dictates of a wicked, depraved, and malignant heart.

## E. I. DUPONT CO. v. JOHN SHIELDS CONST. CO.

(Circuit Court, E. D. Pennsylvania. June 5, 1908.)

No. 29.

SALES—TRANSFER OF TITLE—WAIVER OF DEFAULT IN PAYMENT OF PRICE ON DELIVERY.

Defendant corporation purchased two locomotives from petitioner, to be settled for on delivery by a cash payment and the execution of two notes running 60 and 90 days. The locomotives were delivered, and were used by defendant until a receiver was appointed for it 7 months later, although no settlement was made for them until 5 months after their delivery, when defendant made a cash payment, executed notes for the remainder of the price, and accepted a lease from petitioner, by which the latter was to retain title to the locomotives until full payment. *Held*, that under the law of Pennsylvania the failure to promptly exercise its right to reclaim the property after defendant's default in payment was a waiver of such right, and the title thereupon passed to defendant, leaving it a debtor for the price; that, having no title to the property at the time it was given and accepted, petitioner acquired no rights in the property by the lease, either of ownership or by way of security.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 552–556.]

In Equity. On exceptions to report of referee.

R. W. Archbald, Jr., and L. H. Van Dusen, for exceptions.

R. Stuart Smith, opposed.

J. B. McPHERSON, District Judge. I have read with attention the testimony that was taken by the learned referee (Sydney Young, Esq.), and I agree fully with his findings of fact, which are as follows:

"That on May 10, 1905, Wonham & Magor, agents for the H. K. Porter Company, acknowledged by letter to the John Shields Construction Company an order received from them for two locomotives to be delivered to the John Shields Construction Company, of Quarryville, Pa., and in said letter said in conclusion:

" 'Terms of sale same as last order placed through Philadelphia with the H. K. Porter Company.'

"That the order for these two locomotives was confirmed in a letter addressed to Wonham & Magor under date of May 13, 1905, signed by the John Shields Construction Company, and in the language:

" 'We hereby confirm our verbal order to you of several days ago for two 9x12 "-36" gauge Porter locomotives, to be delivered at Quarryville, Pa., by Pa. R. R.'

"That on May 18, 1905, the H. K. Porter Company sent an invoice to the John Shields Construction Company, in which the terms of the sale were given as follows:

" 'Terms: One-third cash on shipment, one-third 60 days note with 6% interest, and one-third 90 days note with 6% interest.'

"That on May 24, 1905, Wonham & Magor, representing the H. K. Porter Company, wrote the John Shields Construction Company, inclosing a duplicate invoice and bill for the locomotives in question, and said:

" 'In accordance with terms of sale, we would be obliged by your sending us check by return of mail for one-third of the invoice amount, and the balance in 60 and 90 days notes, with interest at 6% added, notes to be from date of shipment, viz., May 18th.'

"That in accordance with the agreement the two locomotives in question were shipped by the H. K. Porter Company to Quarryville, Pa., and were received by the John Shields Construction Company some time in the latter part of May, 1905.

"That the locomotives remained in the possession of the John Shields Construction Company and were used by them on the work they were doing on the Pennsylvania low-grade division from the date they were received up until the date when the John Shields Construction Company went into the hands of a receiver, in December, 1905.

"That no payment was made by the John Shields Construction Company on account of these locomotives until October 16, 1905.

"That from the date of the sale up to October 16, 1905, the H. K. Porter Company and its agents, Wonham & Magor, were diligent and persistent in demanding payment. This is shown by the letters addressed to the John Shields Construction Company by Wonham & Magor under date of June 5, 1905, July 7, 1905, September 5, 1905, and October 12, 1905, and by the H. K. Porter Company under date of July 27, 1905, August 12, 1905, September 20, 1905, and October 4, 1905. (Copies of all the letters referred to will be found in Exhibit A.) The language in the letter of July 7, 1905, referred to above, was in part:

"'As same [settlement] is now long past due, we would appreciate it very much if you would give this matter your immediate attention, sending us cash payment and notes in settlement by return of mail.'

"In the letter of July 27, 1905, referred to above, appears the following:

"'We trust that you will make settlement of this account with Messrs. Wonham & Magor at once and greatly oblige. H. K. P. Co.'

"Again in the letter of September 5, 1905, referred to above:

"'We have asked you a number of times to kindly favor us with a settlement of some character on this order, but, up to the present time, we have had no word from you of any kind. "Pittsburg" state that they must have some definite statement from you. Otherwise, while they regret to very much, they will have to take some action to protect themselves.'

"That there is nothing in the testimony or correspondence to show that the H. K. Porter Company at any time asked for a return of the locomotives, and that the locomotives were at no time after delivery, up to the date when the John Shields Construction Company went into the hands of a receiver, out of the possession or control of the John Shields Construction Company.

"That the witness Lanham, an employé of Wonham & Magor, called upon the John Shields Construction Company on numerous occasions, attempting to make a settlement, and that he was unable to obtain a satisfactory settlement.

"That the witness Stimpson, who was called on behalf of the H. K. Porter Company, stated (page 2), in reply to the question by the counsel for the petitioner:

"'Q. Won't you please tell the referee all that you know of that transaction?

"'A. There was a sale made to them previous to my coming into their employ, two locomotives. The agreement was for payment in part cash, balance in notes, sixty and ninety days.'

"That the witness Stimpson testified that on numerous occasions he saw Mr. Carter, treasurer of the John Shields Construction Company, in attempting to get a settlement from said company. That he did not see John Shields, because, when he called at his office, he was told that Mr. Shields was not in town. That finally, late in September or early in October, 1905, the witness saw John Shields, and (page 4):

"'He spoke of the John Shields Company, was rather proud of the name John Shields (and had good reason to be), and he spoke of their perfect ability to meet their obligations in every way, and I told him I hadn't the slightest doubt that was so, but as we had been six months or so, or several months, without anything on paper, we would like something to protect us, and then he agreed to signing the lease and the notes, and I went and got the notes and he signed them.'

"That said lease was signed by the John Shields Construction Company, John Shields, president, on October 16, 1905. That said lease was in the usual form of car lease, and that it was acknowledged before a notary public on the date of its execution, and that at the time of the execution of said lease (Exhibit D) $1,000 was paid in cash, and two notes of 60 and 90 days, respectively, were given for the remainder.

"That the note mentioned in the car service agreement (above referred to as 'car lease') as 60 day note dated October 15, 1905, due December 15, 1905, for $2,040.70, has been paid.

"That said lease was recorded on January 9, 1906, in the office for the recording of deeds in and for Lancaster county, Pa., in Deed Book B, vol. 18, p. 281 et seq.

"That, although all diligence was used in attempting to collect the money due, there is nothing in the testimony to show that any artifice or fraud was resorted to by the John Shields Construction Company to prevent the representatives of the H. K. Porter Company from seeing the president or any of the other officers of the John Shields Construction Company, and that, although the witness Lanham said that he was going to see the president of the John Shields Construction Company at his residence at Flemington, N. J., there is nothing to show that he made any attempt to see him at any place other than at his office, and that, although he asked the treasurer to sign the notes and car lease, the treasurer informed him that he had not authority to do so.

"That the only testimony to support the contention that there was any agreement to sign a car lease at the time the locomotives were purchased is found in the testimony of the witness Stimpson (page 4), at a conversation which he said took place at the meeting between himself and John Shields late in September or early in October, 1905. He testified as follows:

" 'Q. Did you state to Mr. Shields, Sr., that they were the terms of sale, as you understood them? A. Yes, and I asked him if he would be willing to sign everything—that is, the notes and the car lease—and give me a check. He simply objected to the car lease on the basis of not wanting the name appearing on locomotive; but I told him that was the agreement, the original agreement, and that there was no getting back of it.'

"That this testimony is clearly contradicted by the letters referred to in the earlier part of this report from Wonham & Magor and from the H. K. Porter Company to the John Shields Construction Company. The first letter in which a car lease is mentioned is the letter of September 20, 1905, from the H. K. Porter Company to the John Shields Construction Company, in which they say,

" 'As you are aware, and as explained in our letter of August 12th [which letter is not in evidence], these locomotives were sold to be paid for one-third cash on shipment, one-third 60 days note, and one-third 90 days note, notes dated day of shipment and bearing 6% interest, we retaining ownership of the locomotives until final payment by the usual lease or car trust plan. The lease and notes for these locomotives were sent to you through Mr. F. S. Wonham, in New York, but we have never had the lease returned, nor the notes signed and returned, nor have we received the cash payment which was due on the day of shipment.'

"That, there being contradiction as to whether there was any agreement to execute a car lease at the time the sale was made, the referee feels that he must decide, owing to the fact that the preponderance of evidence shows that no such agreement was made at the time of sale, but that it was an afterthought, that the written evidence, as contained in the letters referred to previously, should be given more credence than the testimony of the witness Stimpson. The referee feels that his view on this point is confirmed by the further fact that the witnesses showed that the H. K. Porter Company had the greatest faith in the financial standing of the John Shields Construction Company, and that only after the numerous delays in payment did they become worried, and then the car lease plan suggested itself, as shown by that portion of the testimony of the witness Stimpson (page 4) which says:

" 'I told him [John Shields] I hadn't the slightest doubt that was so [that the John Shields Construction Company could meet its obligations], but as we had been six months or so, or several months, without anything on paper, we would like something to protect us, and then he agreed to signing the lease and the notes. * * *'

"That on October 24, 1905, the H. K. Porter Company shipped, via the Adams Express Company, four ownership plates, containing the words 'H. K. Porter Co., Owners,' to the John Shields Construction Company, and that

under date of October 26, 1905, the John Shields Construction Company were written a letter by Wonham & Magor, which instructed them to place these ownership plates one on each side of the cab of each of the two locomotives in question; but that the John Shields Construction Company did not receive notice that these plates had been shipped, and the plates were not received by the John Shields Construction Company until after the said company went into the hands of a receiver, and that they were never put on the said locomotives.

"In conclusion, that at the time of the execution of the car lease in question the H. K. Porter Company did not know of the insolvency of the John Shields Construction Company, and that the John Shields Construction Company went into the hands of a receiver in December, 1905."

I also agree with the referee's first conclusion of law, and I adopt his report thereon (which follows immediately) as the opinion of the court:

"The first question which presents itself for the decision of the referee is whether the car lease agreement would have been binding upon the John Shields Construction Company, had the H. K. Porter Company endeavored to enforce the provisions contained in the car lease agreement. In order that it should be binding, the title to the locomotives in question must have been in the H. K. Porter Company at the time the car lease agreement was executed, to wit, on October 16, 1905. The original contract for the locomotives was entered into by the John Shields Construction Company with the H. K. Porter Company on May 16, 1905. By the terms of that contract the locomotives were sold by the H. K. Porter Company to the John Shields Construction Company. According to the terms of sale, a portion of the purchase price was to be paid upon delivery in cash, and the balance by two notes, one a 60-day note, and the other a 90-day note. The locomotives were delivered at once, and were received and used by the John Shields Construction Company up to the time that company went into the hands of a receiver. The car lease agreement, as noted, was not entered into by the Porter and Shields Companies until the 16th of October, 1905, five months after the original sale. During those five months the H. K. Porter Company repeatedly recognized the sale, by demanding payment of the purchase price, as will be noticed from the language of the letter of May 24, 1905, in which the words appear,

"'* * * In accordance with terms of sale, we would be obliged by your sending us check by return of mail,' etc.

"And in numerous other letters the same language is used. Then, referring to the testimony of witness Stimpson (page 2):

"'There was a sale made to them previous to my coming into their employ, two locomotives,' etc.

"Also in the invoice of May 18th the words appear:

"'Sold to the John Shields Construction Company.'

"And, as seen from the testimony of John A. Carter (pages 9 and 10), the sale was completed by the delivery of the locomotives to the John Shields Construction Company. The terms of the sale not having been complied with by the John Shields Construction Company, the H. K. Porter Company then had a perfect right to retake the locomotives, provided they did so promptly. But they did not retake the locomotives, and the so-called car lease agreement was not executed until, as said above, five months had elapsed, and during that period at no time did they demand a return of the locomotives or assert any right of ownership in them. The question, then is, was there any retransfer of the title to the locomotives prior to the execution of the lease? In no place in the testimony does it appear that there was such a retransfer, and, although the testimony is slightly contradictory, the referee feels compelled to decide that the car lease agreement was an afterthought, which suggested itself to the officers of the H. K. Porter Company when they found that the John Shields Construction Company were in this instance such slow pay. The first mention that appears in the correspondence of the suggestion of having any car lease agreement signed is in the letter of September 20, 1905, from the

Porter Company to the Shields Company. None of the previous letters in evidence refers to such an agreement, and each, in referring to the transaction of May 16, 1905, speaks of it as a sale. The only scintilla of evidence in support of the contention that a car lease agreement was suggested at the time the original agreement was entered into is that testimony given by the witness Stimpson (page 4), when he testified that late in September or early in October, 1905, he saw John Shields, and that the following conversation took place:

" 'He spoke of the John Shields Company, was rather proud of the name of John Shields (and had good reason to be), and he spoke of their perfect ability to meet their obligations in every way, and I told him I hadn't the slightest doubt that was so, but as we had been six months or so, or several months, without anything on paper, we would like something to protect us, and then he agreed to signing the lease and the notes, and I went and got the notes and he signed them.'

"This testimony is so overwhelmingly contradicted by the written evidence, and by the fact that the car lease agreement was evidently an afterthought, which only suggested itself when the Porter Company began to worry about payment on the locomotives, that the referee feels compelled to disregard it. Therefore, in the opinion of the referee, there was a conditional sale, and with the conditional sale the title passed to the vendees, and the title could only have been revested in the vendors by their asserting promptly their right to ownership in the locomotives.

"In the case of Frech v. Lewis, 218 Pa. 141, 67 Atl. 45, 11 L. R. A. (N. S.) 948 (1907; C. P. 5, Philadelphia County), the plaintiff brought an action of replevin against the defendant for two carriages. The facts were that the plaintiff was to furnish the defendant with two carriages, to be paid for on delivery. The plaintiff furnished the defendant with the carriages, and the defendant used them. Frequent demands were made on the defendant for the money, and two months and a half elapsed, and then the plaintiff began an action of replevin for the carriages. The lower court permitted the case to go to the jury, who found in favor of the plaintiff and gave the plaintiff a verdict for the property. The lower court was affirmed by the Superior Court in a divided court of four to three. In reversing the court of common pleas and the Superior Court, Mr. Justice Stewart said:

" 'The settled doctrine of our cases is to the effect that where the contract of sale provides for payment of the purchase price on delivery of the article sold, and the seller delivers the goods, but the buyer fails to pay, the right of property does not pass to the buyer with the possession, but remains with the seller, who may, at his option, reclaim the goods. In some jurisdictions the right of property is held to pass with the delivery unless at the time the right to retake is expressly declared by the seller. We have not gone so far. Our cases proceed on the theory that until payment has been made or waived the contract remains executory, and that delivery in such case is not a completion of the contract, except as an intention to so regard it is expressly declared or can fairly be inferred from the circumstances attending. Possession, however, having passed, and the buyer by the act of the seller having been invested with the indicia of ownership, the policy of our law requires that this situation—possession in one and the right of property in another—shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right in such case to reclaim his goods, but he must do so promptly; otherwise, he will be held to have waived his right and can only thereafter look to the buyer for the price. The question the present case suggests is, when does this inference of waiver arise? Our authorities admit of but one answer: Except when delayed by trick or artifice, the assertion of the right to reclaim the property must follow immediately upon the buyer's default. This does not mean that the seller must eo instante begin legal proceedings to recover the goods; but it does mean that the seller, when he discovers that his delivery is not followed by payment, as he has the right to expect, is at once put to his election whether he will waive the condition as to payment and allow the delivery to become absolute, or retake the property, and that he is to allow no unnecessary delay in making his choice. The object of the law is not to

multiply his remedies because of his disappointment. He may not continue to hold his right to the goods and at the same time hold the buyer as his creditor. One or the other he must relinquish, and do it promptly, or the law will forfeit his right to elect. Two months and a half elapsed before he began this action of replevin, which was his first assertion of continued ownership of the property. It was not only too late, but his conduct shows that during all this time he was dealing with the defendant as though the latter was his debtor.'

"As under the above decision the H. K. Porter Company did not have the right of ownership in the locomotives, they could not, of course, lease them to the John Shields Construction Company, as the power to execute the lease is predicated upon ownership in the lessor. It is, however, contended by the H. K. Porter Company that they did not assert their right to ownership in the locomotives until the expiration of some four or five months owing to the fact that fraud or artifice was practiced on the part of the John Shields Construction Company; but, after an examination of all the testimony and of the authorities, the referee is of the opinion that there was no fraud or artifice practiced by the John Shields Construction Company, and that this question, therefore, does not enter into the case, and therefore, under the authority of Frech v. Lewis, supra, that the H. K. Porter Company is not entitled to the locomotives in question."

As the referee's decision upon this point disposes of the case completely, I see no occasion to consider his second conclusion. But this remark must not be understood even to intimate a dissent from the views he has expressed in support of such conclusion. It simply means what it says, namely, that under the circumstances it would be superfluous for me to consider his discussion of the second proposition embraced in his report.

The exceptions of the H. K. Porter Company are therefore overruled, and the decision of the referee is confirmed.

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## ROGERS v. LAWTON.

(Circuit Court, W. D. Wisconsin. June 24, 1908.)

No. 4.

1. COURTS—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.
   In a suit for an accounting by a surviving partner, the amount in controversy is the value of the entire partnership property, and where that exceeds $2,000 it is sufficient to sustain the jurisdiction of a federal court.
   [Ed. Note.—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. PARTNERSHIP—CONTRACT CREATING—PARTNERSHIP OR LEASE.
   A written contract, in the form of a lease of a farm by the first party to the second for a term of years, provided that the first party should furnish with said farm one-half of all the stock, seed, teams, feed, and machinery necessary to work the farm, and pay one-half of the taxes on the personal property and one-half the repairs on machinery and tools; that the second party should furnish the remaining half of such items, farm the land in a workmanlike manner, and deliver up to the first party "one-half of all the products of such farm" and the premises and appurtenances at the expiration of the term. *Held*, that such contract was one of lease, and not of partnership, the parties sharing gross returns, and not profits, and the business to be conducted by the second party in his discretion and on his sole responsibility, and that the fact that in practice the second party sold the products, and paid the expenses, cost of addi-

tional stock, machinery, etc., from the proceeds, and divided the remainder, with the assent of the first party, was merely a matter of convenience, which did not change the nature of the contract, nor show an intention to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 25.]

In Equity. On demurrer to plea to jurisdiction.

A. G. Scott and Olin & Butler, for complainant.
A. A. Jackson, for defendant.

SANBORN, District Judge. General demurrer and plea to the jurisdiction. The amended bill, as amended by leave of court, shows the diverse citizenship of the parties, and alleges that on July 18, 1902, one F. D. Rogers, then husband of complainant, but since deceased, made an agreement with defendant to form a general copartnership business in farming, stock raising and selling, and the manufacture and sale of butter and other dairy products, on a farm belonging to said F. D. Rogers, which agreement was reduced to writing and signed by the parties. The agreement is set out verbatim in the bill, and is in the ordinary form of a lease, except as to the reservation of rent. In substance the agreement so set out is as follows: Rogers leases, demises, and lets to Lawton, his heirs, executors, administrators, and assigns, a farm of 214 acres, to have and to hold for the term of 10 years from December 1, 1902. The agreement then proceeds as follows:

"(1) The said party of the first part hereby agrees to furnish with said farm one-half of all the stock and teams necessary to work said farm, one-half of the seed of all kinds, one-half of the tools, one-half of the repairs on the same, one-half of the blacksmith's bills, pay one-half of the tax on the stock, teams, and tools on said farm, one-half of the feed for the stock and teams, and pay one-half of the thresher's bill of all kinds.

"(2) That said party of the second part doth hereby agree to take said farm with the appurtenances thereon, farm the same in a workmanlike manner, and furnish one-half of all the stock, teams, and tools necessary to work said farm, pay one-half of the repairs on the tools, furnish one-half of the seed of all kinds, one-half of the feed for the stock and teams, pay one-half of the blacksmith's bill, one-half of the thresher's bill of all kinds, pay one-half of the tax on the stock, teams, and tools on the farm, and deliver up to said party of the first part one-half of all the products of such farm (except the fruit and poultry, which he has for his own use), said products properly stored and cared for in a proper manner, and in as good order as possible, and deliver up said premises and appurtenances thereof at the expiration of said term to the said party of the first part, his agent, attorney, heirs, or assigns, peaceably and in good order.

"(3) That the said party of the first part hereby agrees to furnish for said party of the second part a garden and firewood for his personal use, and the keeping of one cow (out of undivided feed), and all the material for repairing buildings and fences on said farm, or for new buildings or fences, the party of the second part doing the work of repairing and building of new fences; the party of the second part to furnish butter for the family use of the party of the first party out of common stock.

"(4) That the party of the second part also agrees to cut up the corn whenever it is proper or will pay to do so."

These are all the provisions of the paper; the matter quoted being followed by the attestation and signatures. The bill further alleges

that at the time the contract was made all the personal property on the farm consisted of all property necessary or desirable for a stock and dairy business, and was owned jointly by said Rogers and Lawton, and had greatly increased in value since the establishment of the business, which was a long time before the agreement was made, so that at the time of the filing of the original bill the property owned by the partnership was in excess of $4,000. It is further stated as follows:

"Your oratrix further shows that at no time since the execution of said contract has there been a division between the parties thereto of the gross products of said farm, or of the products in kind; but all the products, consisting of hogs, cattle, butter, milk, and surplus grain, have been sold and converted into cash, and from the money derived from such sales the defendant has paid the running expenses of the business, purchased additional brood and stock animals, dairy and farm machinery and implements as required and agreed upon, and thereupon, on or about the 1st of each month, the said defendant, Lawton, has paid to or deposited in bank for account of the said Rogers one-half of the net remaining cash, after deducting all expenses and disbursements. Your oratrix further shows that all losses accruing to said parties by reason of the death of stock or otherwise have been shared equally between them, in like manner as they have shared the profits and expenses."

Allegations follow showing the death of F. D. Rogers and how complainant succeeds to his interest in the property, and it is claimed that the bill shows a partnership, and not a lease, which partnership was dissolved by the death of F. D. Rogers. An account is sought against Lawton as surviving partner. By an amendment to the bill the allegation as to the interest of complainant in the common property is made more specific, and the value of the balance of the term, assuming the agreement to be a lease, is stated.

Defendant filed a plea to the jurisdiction, for the purpose of showing that the amount in controversy did not exceed $2,000, exclusive of interest and costs, and was allowed to amend the plea to show the rental value of the farm and the value of the balance of the term. Assuming the plea to be true, it appears therefrom that the common personal property considerably exceeds $2,000, and I shall assume, without particular examination of the question, that the whole of the common property constitutes the amount in controversy, and that the court has jurisdiction. The amended plea to the jurisdiction is therefore overruled, and the jurisdiction sustained.

The important question is whether the amended bill states a partnership or a lease. This question is raised by the demurrer for want of equity. On the part of complainant it is argued that the agreement, as acted on and modified by the parties, by dividing money, instead of products, constituted a partnership, in which the common fund was the use of the land and half of the stock, implements, etc., contributed by Rogers, and the other half of the personal property and his own services contributed by Lawton. On the other hand, it is urged that the parties made a lease, created a term for a definite time, with a reservation of rent in kind; that the agreement clearly stipulates only for a division of gross returns, and not profits; that the custom of the parties to sell and divide the proceeds could not change such clear agreement to divide gross returns; and that, the instrument being in

the usual form of a lease, without any agreement to share profits, the intention of the parties to create the relation of landlord and tenant is clear.

There are several reasons why the relation is not, in my judgment, a partnership. The parties put their agreement in the form of a lease, thus showing their intention not to create a partnership. It is true that, if they had stipulated for the relation of partners and clearly created that relation, the fact that Rogers leased the land to Lawton would be unimportant. If they had clearly contracted for those things which make a partnership, they would have been partners, whatever they might have called themselves or each other. Woolworth v. McPherson, 55 Fed. 558; Rosenfield v. Haight, 53 Wis. 260, 10 N. W. 378, 40 Am. Rep. 770. But, as said by the Supreme Court in London Assurance Co. v. Drennen, 116 U. S. 461, 472, 6 Sup. Ct. 442, 29 L. Ed. 688:

"Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist."

Another reason is that the agreement is one for sharing gross returns, not profits. Lawton is to farm the land and "deliver up * * * one-half of all the products of the farm" to Rogers. No matter how much it may cost to farm the land "in a workmanlike manner," no matter how many hired men Lawton may need in order to do so, and without regard to whether there is any profit, Lawton must deliver to Rogers one-half of all the products of the farm. The rule that a contract to share gross returns negatives a partnership is well settled. Lindley on Part. 16, 17; 22 Am. & Eng. Encyc. of Law, 44, 45. Agreements like that in question here furnish a common instance of contracts to share gross returns. Id. 45.

It is argued, however, that the allegations of the bill show a waiver of the agreement to share gross returns, and establish a contract to share profits, as such. The allegations are that there never has been a division of gross products, or products in kind, but all such products have been sold, after paying expenses, and the money divided, and that all losses from the death of stock or otherwise have been shared equally. I do not think that this allegation shows a clear or positive modification of the agreement to share gross returns, or a clear or positive intent to change a term into a partnership. Probably this change was made as a mere matter of convenience, without any intention to change so vitally and radically the whole relationship. At all events the change is not so clear and unequivocal as to authorize a definite inference that a partnership was thus created, where none before existed, out of the leasehold. The bill does not allege that the agreement was modified by the conduct of the parties, but claims that the original written agreement itself constitutes a partnership. The allegation that all losses by the death of stock or otherwise have been equally shared is entirely consistent with the agreement that each should furnish half of the stock, etc.

Finally, there is nothing in the original agreement, or in the conduct of the parties in carrying it out, which reserves any control or influence of Rogers in the management of the business. Lawton is to farm the

land in a workmanlike manner. He is entirely responsible for this. What crops were to be planted, and how the business was to be managed, are left entirely with Lawton. Suppose a farm hand, employed to assist in haying, had been injured by Lawton's negligence; would Rogers have been liable? Having no responsibility, control, or influence in his selection, or direction, or in the selection of other workmen, it is clear he would not. Norton v. Wiswell, 26 Barb. (N. Y.) 618. To the effect that such an instrument as that in question does not create a partnership, see Strain v. Gardner, 61 Wis. 174, 21 N. W. 35; Foley v. S. W. Land Co., 94 Wis. 329, 331, 333, 68 N. W. 994; Rowlands v. Voechting, 115 Wis. 352, 91 N. W. 990; Simanek v. Nemetz, 120 Wis. 42, 45, 46, 97 N. W. 508; Warner v. Abbey, 112 Mass. 355, 360; Reeves v. Hannan, 65 N. J. Law, 249, 48 Atl. 1018; Walls v. Preston, 25 Cal. 60, 63, 67; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Schlicht v. Collicott, 76 Miss. 487, 24 South. 869; Alexander v. Zeigler, 84 Miss. 560, 36 South. 536; Day v. Stevens, 88 N. C. 83, 43 Am. Rep. 732.

The plea is overruled, and the demurrer sustained. The bill should be dismissed for want of equity.

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## In re ALPER.

(District Court, S. D. New York. November, 1907.)

BANKRUPTCY—CONTEMPT OF COURT—FAILURE TO PRODUCE BOOKS.

A bankrupt, who failed to produce his books used in the conduct of his business on his examination before a special commissioner appointed by court to examine him under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), as required by the order for such examination, and also by a subsequent order made by the commissioner, although he admitted keeping books and gave no reasonable explanation of their disappearance, is guilty of a contempt of the court, which has jurisdiction to commit him therefor.

In Bankruptcy. Habeas corpus to test validity of the imprisonment of a bankrupt for disobedience of an order of the bankruptcy court. The opinion states the case.

Max D. Steuer, for petitioner.

James, Schell & Elkus (Abram I. Elkus and James N. Rosenberg, of counsel), for defendant.

HOLT, District Judge. This is a writ of habeas corpus to test the validity of the imprisonment of Israel Alper. Alper is a bankrupt, who was adjudged guilty of contempt by the District Court for not producing and delivering to the receiver in bankruptcy certain books of account. The sole question upon this application is whether the court had jurisdiction to make the order.

By an order of the District Court dated September 4, 1907, Alper, the alleged bankrupt, was directed to appear before a special commissioner and submit, under section 21a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), to an examination relating to his acts, conduct, and property. The order

contained a clause which ordered that Alper produce at the said examination all books and other memoranda used by him in the conduct of his business. Alper appeared before the commissioner and was examined. He admitted that he had kept various books in his business, which he did not produce. The commissioner directed him to produce them, but he did not produce them. A motion was thereupon made to punish him for contempt. Upon the hearing of the motion the district judge, in addition to the affidavits presented, directed that the bankrupt be examined orally in his presence, and such examination took place. After the hearing and argument of the case, the court adjudged the bankrupt in contempt, and made an order committing him to prison until he should produce the books in question, directing, however, that for two days the marshal should permit him to go wherever he wished for the purpose of searching for the books. The bankrupt thereupon went to his safe, which had been blown open and had previously been found to be empty, and found there some books or papers, formerly used in his business, but of no importance, which were not the papers that he had been ordered to produce. His counsel having claimed that he had complied with the order, the matter came up again before the judge, who thereupon entered a final order finding the bankrupt again guilty of contempt and committing him to prison.

There seems to me to have been ample grounds for holding that he had been guilty of contempt in violating the provision in the original order for his examination which required him to produce his books before the commissioner. If such order had not contained any such provision, he would have been guilty of contempt in not complying with an order of the commissioner on the examination that he produce his books. If at any time subsequently, after the notice of motion was given, or before the order for his commitment was entered, he had produced the books, his contempt might have been purged. His claim, in substance, was that he did not have the books and did not know where they were; but the entire evidence showed an extremely suspicious disappearance of assets for a large amount and a like disappearance of important business books, for the disappearance of which no reasonable explanation was given.

In my opinion, the District Court had jurisdiction in the case, and the writ of habeas corpus is dismissed.

## SCHAGUN v. SCOTT MFG. CO.*

(Circuit Court of Appeals, Eighth Circuit. April 17, 1908.)

No. 2,689.

1. ACCORD AND SATISFACTION—RIGHT OF ACTION FOR FRAUD AND DECEIT.
Where a purchaser of a machine, after using it for a time, resold it to the seller at an agreed price exceeding that which he paid, to be credited upon the purchase price of a new machine, the transaction operated as an accord and satisfaction of any claim for damages he may have had for fraud and deceit in its sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, §§ 98-110.]

2. FRAUD—GROUNDS OF ACTION—INTENT TO DEFRAUD—BURDEN OF PROOF.
In an action for fraud and deceit, the burden rests on the plaintiff to prove that the representations relied on were of material facts, that they were false, and made by defendant without reasonable ground to believe them to be true, and with intent to defraud, and that plaintiff was reasonably entitled to, and did in fact, rely on the same to his damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 46, 47.]

3. SAME—RATIFICATION OF CONTRACT.
Plaintiff purchased a brick machine from defendant under a written contract which provided that, after the machine had been operated for three days under direction of a man furnished by defendant, plaintiff might either accept or return it. After such trial, although it did not work successfully, plaintiff retained it and gave his notes therefor. Some months afterward, and after the notes had matured, at plaintiff's request they were renewed on his making a cash payment, and a new and supplemental contract was made. For several months more he continued, with the assistance of machinists from defendant's factory, to experiment with the machine; but they were unable to make it work successfully. *Held*, that such facts would not sustain an action for fraud and deceit, on the ground that the machine failed to comply with oral representations made by defendant as to its successful operation and capacity, both because the provision of the contract giving plaintiff the right to reject the machine if not satisfactory negatived any intent to defraud, and because the renewal of the notes after a longer and unsuccessful trial was a waiver of any such right of action, if it existed, and a ratification of the sale.

Sanborn, Circuit Judge, dissenting.

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

Silas M. Finch (John H. Steele, on the brief), for plaintiff in error.
Clarence A. Webber (Fred B. Dodge, on the brief), for defendant in error.

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

PHILIPS, District Judge. The plaintiff in error, on March 20, 1907, brought suit against the defendant in two counts, which will be considered in their order. The plaintiff was and is a citizen of the state of Minnesota, and the defendant is a corporation organized under the laws of the state of Missouri, with its principal office in the city of St. Louis. The substance of the allegations of the first count is that prior to March 20, 1905, the defendant represented to

*Rehearing denied June 19, 1908.

the plaintiff that a secondhand three-mold Andrus brick press owned by it possessed certain qualities which fitted it for making brick out of sand and cement, and that it was capable of manufacturing a given quantity of brick per day; that the plaintiff, relying upon said representation as true, was thereby induced to enter into a written contract for the purchase of said press at the sum of $1,000; that he built a concrete foundation for said press, furnishing material, etc., at an expense of $1,500. It is then alleged that said representations were false and fraudulent, and so known to be to the defendant, and were made to induce him to enter into said contract; that the press was out of repair, broken, and incapable of being operated, which was well known to the plaintiff, whereby he was damaged in the sum of $2,500, in addition to the expenditure of the sum of $1,000 in setting up said machine, and for materials furnished in trying to operate it. The answer, after admitting the existence of the corporation and its residence, denied each and every other allegation otherwise alleged in the petition.

The proof was that the contract was in writing, in the form of a letter addressed to the plaintiff by F. C. Frost, of date March 20, 1905, which was accepted by the plaintiff on the same day in writing. There was nothing on the face of this writing to indicate that the defendant was a party thereto or had any responsible connection with the transaction. The oral testimony tended to show that whatever representations or statements as an inducement to the plaintiff to enter into the agreement were made by Frost. The evidence further shows that said agreement was changed or modified on the 20th of April, 1905, in writing, signed only by said Frost on his own behalf and by the plaintiff. It contained the following provision:

"This additional agreement is hereby made part of the original agreement herein, and is in consideration of the payments therein provided for, and is to be considered of effect from date of original instrument."

While the evidence showed that, at the time the negotiations leading up to the contract were conducted between Frost and the plaintiff, the machine in fact belonged to the defendant, it was in Frost's possession, who obtained from the defendant the lowest price it was willing to take for it. The evidence discloses the fact to be that Frost sold the machine to the plaintiff on his own account, in connection with a lot of other machinery and articles belonging to him, at the aggregate price of $1,500, and that he realized about $1,100 on account of the machine in question, which he obtained from the defendant at a sum not exceeding $1,000, including transportation charges. The petition was not framed on the theory that in making the contract in his name Frost was in fact acting merely as the agent, and therefore the defendant should be held responsible for any misrepresentations he may have made.

More than this, the facts developed on the trial furnish a further sufficient reason why, on the issues joined on this count, the plaintiff could not recover. The machine proving unsatisfactory to the plaintiff, on the 17th day of July, 1905, by written contract, he bought from the defendant another machine, designated as a "four-mold An-

drus improved brick press," at the price of $4,000, and as part payment thereon, the defendant allowed to the plaintiff a credit of $1,500 on account of the said three-mold Andrus press, which the plaintiff was to reship to the defendant at Keokuk, Iowa. When he consented to be thus credited on the purchase price of the four-mold machine, he waived any claim he might have for the damages sued for; so that, had he alleged in the petition that Frost was acting as the agent of the defendant, and, therefore, it should be held responsible for the alleged misrepresentations of Frost, the defendant could have answered that any damages resulting from the sale of the first machine were settled, by accord and satisfaction, on the 17th day of July, 1905, in the manner above stated. The Circuit Court was therefore warranted in holding that the proof did not sustain the allegation of the petition, and in directing a verdict for the defendant as to the first count.

The second count of the petition, in substance, alleges that on or about the 17th day of July, 1905, the defendant represented to the plaintiff that a certain four-mold Andrus improved brick press, with its equipments, was a new machine manufactured by the defendant, capable of manufacturing sand and cement brick, and, when properly set up, was capable of manufacturing 16,000 bricks per day, running 10 hours; that, relying upon said representations and believing them to be true, he was induced to enter into a written contract with the defendant, agreeing to pay for said last-named press the sum of $4,000 and the freight from Keokuk, Iowa, to Minneapolis, Minn., amounting to $125, which freight the plaintiff paid on the arrival of the press at Minneapolis; that, relying on the truth of said representations, he was induced to perform labor and furnish material in building a foundation, and to furnish fuel to operate the same to the amount of $1,000; that said press failed to make brick to the amount of 16,000 per day, or any quantity, and that it was worthless; that the plaintiff was thereby induced to make, execute, and deliver to the defendant three promissory notes in part payment of said press, bearing the date of November 25, 1905, for the sum of $2,159.50, with interest from date, which notes the defendant fraudulently transferred for value to a third party, who had obtained judgment against the plaintiff thereon for the full amount thereof. The petition then charges that the said representations were false and fraudulent, known to the defendant to be such at the time they were made, and were made for the purpose of deceiving and defrauding him. The damages claimed are $6,059.

To this count the defendant tendered the general issue, except as therein admitted. It admitted entering into a contract in writing with the plaintiff, attached as "Exhibit A" to the answer. The answer further alleged that on or about the 25th day of November, 1905, it and the plaintiff entered into a further contract, supplementary to said "Exhibit A," which is attached to the answer as "Exhibit B," which said contracts constitute the only agreements between the parties. It then alleged delivery of the machine, its acceptance by the plaintiff in accordance with the contract, and the execution of

the note and making the cash payment in performance of the terms of the contract. The answer further alleged that on or about the 25th day of November, 1905, at the time of the execution of said supplemental contract, "Exhibit B," the plaintiff delivered to the defendant the promissory notes therein agreed to be delivered. It admitted that before the maturity of the last-mentioned notes it transferred them to third parties, but as to whether or not a judgment had been rendered thereon against the plaintiff it denied any knowledge or information sufficient to form a belief, and alleged that the plaintiff had never paid said notes, or any part thereof. The answer further pleaded that on the 25th day of November, 1905, after full opportunity to test said machine, and after testing the same, the plaintiff in adjustment, paid the defendant the sum of $400, as set forth in the said "Exhibit B," as part of the contract price of the machine, and executed to it the three promissory notes mentioned in the amended complaint and in said "Exhibit B."

The reply denied that the said machine was accepted by the defendant as conforming to the contract, and alleged that the contract, "Exhibit B," and the notes mentioned therein, were obtained by plaintiff through false and fraudulent statements and representations made by the defendant at the time, and denied that on the 25th day of November, 1905, there had been full opportunity to test said machine, or that it had been tested to the satisfaction of the plaintiff, and charges that the sum of $400 was paid and the said notes executed through fraudulent statements and representations made by the defendant at that time.

At the conclusion of the plaintiff's evidence the court directed a verdict for the defendant. The question to be decided is, did the court err in so doing? It matters not on what ground the court placed its ruling, as it will not be disturbed on writ of error if it is justified by the facts and the law. The action predicated in the petition is essentially for fraud and deceit, ad damnum. To authorize recovery in such action, the burden rests upon the plaintiff to establish:

"First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant on reasonable grounds to be true; fourthly, that it was made with the intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; sixthly, that in so acting on it the complainant was ignorant of its falsity and reasonably believed it to be true." Southern Dev. Co. v. Silva, 125 U. S. 250, 8 Sup. Ct. 882, 31 L. Ed. 678.

In Lord et al. v. Goddard, 13 How. 211, 14 L. Ed. 111, Mr. Justice Catron said:

"The gist of the action is fraud in the defendant and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue. Since the decision in Haycraft v. Creasy, 2 East, 92, made in 1801, the question has been settled to this effect in England. The Supreme Court of New York held likewise in Young v. Covell, 8 Johns. 23, 5 Am. Dec. 316. That court declared it to be well settled that this action could not be sustained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple

fact of making representations, which turn out not to be true, unconnected with a fraudulent design, is not sufficient. This decision was made 40 years ago, and stands uncontradicted, so far as we know, in the American courts."

In Thorwegan v. King, 111 U. S. 549, 553, 4 Sup. Ct. 529, 532, 28 L. Ed. 514, it was held to be error to refuse the following declaration of law:

"The jury are instructed that unless the evidence clearly shows that defendant, with intent to defraud the plaintiff, falsely represented to him some material facts alleged in the petition and relied on by the plaintiff, whereby plaintiff to his damage was induced to enter into the contract, then they must find for the defendant."

Mr. Justice Matthews said:

"The proposition contained in the request is a correct statement of the law and strictly applicable to the case."

Again, in Dushane v. Benedict, 120 U. S. 636, 7 Sup. Ct. 697, 30 L. Ed. 810, Mr. Justice Gray said:

"If the seller falsely represents to the buyer that the goods are of a certain quality or fit for a certain purpose, he is liable to an action for the fraudulent representations, although they are not in a form to constitute a warranty; and in such a case the action must be in tort in the nature of an action of deceit, and must be supported by proof that he knew the representations to be false when he made them."

This rule has been repeatedly recognized in this jurisdiction. In Shippen v. Bowen (C. C.) 48 Fed. 659. Judge McCrary, speaking to an action of deceit on the sale of bonds represented to have been genuine when they were worthless, said:

"The counsel for plaintiff insists that in such a case as this no scienter need be alleged, nor, if alleged, need be proved. I am unable to concur in the soundness of this proposition. The contention of the plaintiff's counsel is that, because the mere sale of the bonds rendered the seller liable upon an implied warranty of their genuineness, he is equally liable for an implied tort; but this argument fails to note the distinction between an action upon an implied contract of warranty of the genuineness of the bonds sold and an action for deceit or misrepresentation sounding in tort. It is impossible to conceive the idea of a tort as separate and apart from an intentional wrong and injury, or such negligence or other misconduct as necessarily to imply such wrong or injury. A scienter is the very gist of a tort. To say that one may recover in tort without proving a scienter is to say that he may omit from his proof the chief element of his case."

In Glaspie v. Keator, 56 Fed. 203, 5 C. C. A. 474, Judge Thayer, speaking of an instruction to a jury in a case of fraud and deceit, said it was correct—

"in view of the fact that the jury were further advised that, in order to hold a person liable for fraud in making such a representation, they must be satisfied that he did not actually believe the facts to be as represented, or that he had no reasonable ground for supposing it to be a representation."

And in U. P. Ry. v. Barnes, 64 Fed. 83, 12 C. C. A. 50, Judge Sanborn, speaking of this character of action, said:

"Such an action requires for its foundation a false statement knowingly made, or a false statement made in ignorance of and in reckless disregard of its truth and falsity, and of the consequence such a statement may entail. The evil intent—the intent to deceive—is the basis of the action. Such an

intent, it is true, may be inferred from the positive statement as of his own knowledge of a fact concerning which one knows he has no knowledge at all, because such a statement shows such a contempt for the truth, and such a reckless disregard of the rights of others who may rely upon it, that it is deemed sufficient evidence of an evil intent to warrant a recovery when damages have resulted from the falsehood."

Does the evidence in this record bring the plaintiff's grievance within the rule? The only letter respecting the "Andrus four-mold sand-cement brick press" written by the defendant to the plaintiff prior to the sale was of date February 4, 1905, which is as follows:

"Dear Sir: Answering your favor of the 1st, we are inclosing you an illustration of the Andrus four-mold sand-cement brick press. This press we can recommend for making 18,000 to 20,000 face brick per day. You will notice that the brick made on this press are pressed on the side, and consequently cured on the side. This, then, gives the contractor a chance of selecting between two faces, as both of them remain intact. We have no idea what you have in prospect, Mr. Schagun, for you do not state; but, if you are contemplating going into the sand-cement brick business, we would advise that you call and see our representative in your city, Mr. F. C. Frost, Phœnix Bldg. We believe it would be decidedly to your advantage to investigate this subject, as we have a great deal of success in this line, and believe that there is a future to the sand-cement brick."

In its essence, this was nothing more than a recommendation of the four-mold press. The plaintiff was asked "to investigate this subject." He did not buy this kind of a press upon that representation, but negotiated with and bought of Frost the secondhand three-mold press, declared upon in the first count of the petition. The record fails to show any other letter from the defendant to the plaintiff respecting the four-mold press prior to the time of entering into the written contract of July 17, 1905. This contract was consummated through one Dickinson, defendant's agent at Keokuk, Iowa. The plaintiff claims that he also talked with Frost about it, who was in Minnesota. It developed in the testimony that at that time Frost and one Finch were jointly engaged in the sale of machinery in Minneapolis. At the time of the trial of this case Frost had ceased to be the local agent of the defendant company, and seems to have gone over to the plaintiff in this controversy, furnishing him with all the correspondence that ever transpired between him and the defendant respecting any of this machinery, while his former partner, Finch, appears as counsel for the plaintiff in this case. Frost, being introduced as a witness by the plaintiff, testified in respect of the conversation had between the plaintiff and Dickinson when they were discussing the trouble about the old three-mold press:

"Mr. Dickinson said that he was not sure whether he had put a new attachment on that three-mold press or not, but he thought it would be better for them to buy or put in a four-mold press—four-mold press would do the work alright, without any question; that they had an attachment on that press that they called the 'positive' feed for feeding the material into the machine, and the hopper would be fixed so that the material would drop into the charger box and be carried out to the molds. He said on his return to Keokuk he would take up the matter with his head man, and that if they decided that they could put in the attachment on the three-mold machine they would make it and send it up. If not, he would make out contracts and send up a four-mold machine according to the conditions and terms that they outlined there in the office, which were afterward carried out."

According to this statement the contract sent by Dickinson contained the conditions and terms outlined in the office. Frost later testified that the contract, when drawn by Dickenson, was sent to him, and that he went over the contract with the plaintiff, which contained the terms, and was acceptable to and signed by the plaintiff. Turning to the testimony of the plaintiff, it appears that when Dickinson came to Minnesota in July, 1905, to see about the old secondhand machine, in a conversation between them after that machine was started up, Dickinson said:

"He was not satisfied with it. They had another machine down at the factory which he would send out as quick as he could. He said he had another machine that would do the trick, and make brick, and I would be satisfied with it, and he would guarantee it to do it, * * * and I took his word for it. He said, also, he was going to talk to his expert as to how much it would cost to fix this secondhand machine so it would work, and if he could fix it up he was going to fix it up; and in a couple of days afterward there came a telegram that he was going to send a new machine. He could not do anything with the old machine, and was going to allow me on the secondhand machine for the new machine."

He further testified:

"Mr. Frost said just the same as Mr. Dickinson—that the press would do the work, and he guaranteed it to do it. He said it would make so many brick. * * * He said it was a good press. It was guaranteed to do the work."

He was then asked by his counsel:

"Now I will ask you to state what it was that induced you to enter into this contract? A. He said the machine would turn out the brick, would make the brick, and I would be well satisfied with it in a short time. If it didn't, he said he was going to send a man to fix it up, and if he couldn't make it work—make it do good work—he would send another man to fix it up."

It is not charged in the petition that the contract was not drawn up according to the understanding of the parties; and if, as Frost testified, the contract contained the terms and understanding in the altercations of the parties, we must turn to it to see what are its provisions. The substance of them is that the defendant agreed to deliver on board cars at Keokuk, Iowa, one completed four-mold Andrus improved brick press, equipped, etc., for filling molds, to be shipped to Minneapolis, by the 20th of July, 1905. The plaintiff agreed to take the press from the cars upon arrival in Minneapolis, pay the freight, build foundation, and connect with the proper driving machinery a machine in accordance with directions to be furnished by the defendant, free of expense to the defendant, to have the same done within five days after its arrival, and to notify the defendant promptly when it was ready to be started. Upon such notice the defendant was to send a competent man to superintend the starting and operating the machine, who was to remain until it was in proper working order, or until the machinery should be accepted or rejected; the plaintiff to pay the said workman the sum of $5 per day and his railroad fare, to furnish a competent man to run and operate the brick press during the time of the trial, and to furnish proper and sufficient driving power, and the sand and cement in proper condition

so as to run the press to its minimum capacity of 16,000 brick per day, while under the supervision of the man sent by the defendant. The plaintiff was to properly handle and care for the press the same as if it were his own, and be answerable for any damage to the press resulting from the want of proper handling, protection, and care, and keep the same insured for a sum not less than $4,000. It also provided that if, at the expiration of the time provided, the press should fail to cut the sand and cement into proper brick form under the conditions specified, and should it be rejected by the plaintiff, he would promptly remove the press from the brickyard, place it on board cars, and have it delivered at Minneapolis, subject to the order of, and free from cost and charges to, the defendant, in the same condition as when received, excepting the wear, tear, and breakage incident to the trial. The plaintiff agreed to accept or reject the press on or before the expiration of three days after it had been started and running properly and cutting sand and cement into brick form, and the defendant agreed to refund the money paid upon the purchase price of said press, excepting freight charges and expenses of a man to superintend the trial experiment, in case the machine was rejected by the plaintiff, and agreed to honor the sight draft of the plaintiff for that amount, with bill of lading covering shipment of the press, showing delivery of the press to carrier, etc. The purchase price was fixed at $4,000, $1,500 of which was to be allowed for the three-mold Andrus press hereinbefore mentioned, which press was to be delivered on cars at Minneapolis and consigned to the defendant at Keokuk. The balance, $2,500, was to be paid as follows: $200 cash upon acceptance of the press, $800 within three months, $750 in four months, and $750 in five months. It was further stipulated that the defendant should not be held liable for damages for any delay in the operation of the business of the plaintiff resulting from the trial herein provided for or the rejection of said press. The defendant was to supply duplicates of such parts of the press as might break within a period of two years by reason of defective material or workmanship. The contract concluded as follows:

"It is also mutually agreed and understood that there are no understandings outside of this written agreement, and that any subsequent waiver or alteration of any of the terms or conditions hereof shall be in writing and signed by the parties hereto."

So far from the contract on its face evidencing any deception or artifice, it rather indicates business method and open dealing. The plaintiff got rid of the old machine with a credit of $1,500 therefor, and assumed the expenses of making the experiment, on which the evidence shows he expended only $50 in the erection of a foundation for setting the machine, and he also furnished coal for running the engine, and sand and cement for the experiment. The only evidence to support the action for deceit is that the machine did not make bricks as expected. Negativing, however, a fraudulent purpose on the part of the defendant to sell a machine known or believed to be worthless, the defendant sent its workman, who earnestly strove to make the machine operate successfully, by making changes and employing new

devices, and Mr. Dickinson seemed hopeful all along that the press could be made to do the work.

We fail to find in the record sufficient evidence to justify the inference that the defendant knew, or had reason to believe, when it sold the machine, it would not make the brick. The very fact that it sold, and the defendant took it on trial, tends to negative any fraudulent purpose on the part of the defendant, as it had nothing to make and much to lose in reputation of its manufacture if the machine failed to work. The very terms of the contract indicate that the parties were dealing with each other at arm's length, neither trusting the other. The effect of it was the vendor said: "I have confidence the machine will answer your purpose." The vendee said: " I want such a machine as you represent, but am unwilling to take your word, and pay for it. I will take it on trial, and, if the test be satisfactory, I will then accept and pay for it, part cash, and balance in time notes." The vendor replied: "Yes; but I will retain title until conditions are complied with." The machine was delivered, and the test made, with unsatisfactory results. The contract expressly provided, in such contingency, that the vendee should return the machine and receive back what he had paid, or promised to pay. It is not perceivable how, under such a sale, the vendee can be heard to claim that the vendor inveigled him into the compact by deceit, merely because the machine failed to do the desired work.

It is suggested that, although the plaintiff by returning the machine could avoid paying the purchase money and recover back what he had paid, he would be damaged to the extent of what he had outlaid in experimenting with the machine. The defendant might aptly reply to this by saying it had to take back its machine as a second-hand machine, with the loss of prestige to its manufacture, all of which was in the contemplation of the parties to the compact, and was in effect written into it. In Holdom v. Ayer, 110 Ill. 448, it is held that the defendant is not liable to the action of fraud and deceit where it appears he did not rely upon the representations charged in the declaration, but upon a guaranty of the defendant—citing Wheeler v. Randall, 48 Ill. 182; Hiner v. Richter, 51 Ill. 299; Merwin v. Arbuckle, 81 Ill. 501; Schwabacker v. Riddle, 99 Ill. 343. In Elphick v. Hoffman, 49 Conn. 331, the petitioner sold defendant certain oyster grounds. Suit was brought on the contract. The defendant set up fraudulent representations in the sale as to the quantity of ground planted and the quality of the oysters. The evidence tending to show that the defendant relied not alone upon the representations, by requiring a written guaranty, it was held he could not avail himself of the fraud as affecting the title. The court said that, if the alleged false representations did not induce the purchase, it was a case of fraud without damage. If he refused to accept the representations, unless put in the form of guaranty, his only redress was on contract. He is not at liberty to lay that aside and resort to fraud. So in McNaughton v. Conkling, 9 Wis. 316, it was held, where the party relied upon a guaranty, he could not recover for false representations.

The plaintiff in the case at bar was indulged to testify to two other

sales of such machines by the defendant. One was to a man named Wunder, at Minneapolis, September 26, 1904. He put in evidence the written contract thereof, which he testified he saw before he signed the contract in question. By the terms of the Wunder contract the machine was to make 16,000 merchantable brick in 10 hours on a certain mixture of sand and Portland cement. The provisions respecting the shipping and paying freight thereon were practically the same as the contract in suit. Wunder was to accept the machine within three days after the completion of the test, and pay part in cash and the balance in notes, and in case of failure of the machine to do the work he was to reject the same and ship it back to the defendant. As the plaintiff offered no evidence of any misrepresentations made by the defendant to Wunder, nor any evidence that the machine did not work successfully, the reasonable inference is that no trouble arose over it; and therefore the further inference should arise that the defendant had good reason to believe, when it contracted with the plaintiff, that the machine was efficient.

If the foregoing views are passed by, there is another reason, founded on fact and law, why this action cannot be maintained. The machine was received and set up by the plaintiff about the 1st of August, 1905, and put to work. On September 29th, the plaintiff wrote to the defendant, apologizing for his delay in replying to a letter from the defendant, in which he said:

"Owing to a variety of unforeseen accidents and disappointments, I have been compelled to give up brickmaking, as so far the brick plant has been all an expense, entirely without any return. We could not get any satisfactory pallets, and have had many other hindrances too numerous to mention; consequently, as I have already put all the money I have into the plant, I could not afford to work it any longer at present. As I am in a very hard predicament just now regarding money matters—in fact, have none at all—therefore I engaged in more profitable business than making brick (at the rate we were doing), and expect about $800 the last of December; and if you could kindly grant me an extension of time until then I can pay you the $200 which I owe you, $300 on the forthcoming payment, allowing me to pay the remainder with the last payment of $750. That would then leave me a small surplus to start the brick plant again, as I already have on hand a large contract to deliver the brick early in the spring, which would then enable me to meet the last two payments. The freight on the returned secondhand machine I will also settle as soon as I possibly can. I assure you that it is from no desire to deprive you of your just rights that I make this request, as it is my intention, and always was, to deal fair, and am doing the best I can toward that end, straining every nerve, almost working night and day, in order to honor your demands. I hope you will take into consideration my request, and endeavor to make some arrangements by which I may be enabled to retrieve myself from my present difficulties. Your compliance would also confer an obligation which will be my endeavor to repay."

The plaintiff worked off and on with the machine until the 25th of November following. According to his testimony, he had then become fully impressed with the fact that the machine was a failure. He had the right under his contract to return it; but he kept it until his cash payment was due and the notes were maturing. About the 25th of November, Dickinson visited Minneapolis and had an interview with the plaintiff, who then urged him for an extension of time for payments. The witness Frost detailed what occurred:

"The plaintiff said it had got so late in the season, and so cold, and on account of the brick having been of material that had to be wet, and after being sprayed 24 hours in order to harden them, it was impossible to make further test; that the notes were coming due and he asked Dickinson to extend the time of payment on these notes until the summer of 1906, and make a personal test of the press in that spring."

Dickinson objected to extending the time of payment. Plaintiff "said that he had been to a great deal of expense and trouble with the press, had been unable to do anything with it, and he thought it was only right to extend the time until he could get the press running in the spring and get to work and make some brick. He had a car load of cement up there and was unable to use it. Dickinson finally consented to an extension of the notes."

Plaintiff then paid $400, and the parties thereupon entered into a supplemental contract, the substance of which is that the plaintiff should pay the sum of $400 (the receipt of which was acknowledged), on account of the money due and becoming due for the machine, and should give three notes for the balance of said indebtedness, in which plaintiff's wife would join—one for the sum of $959.50, due June 1, 1906; one for $600, due July 1, 1906; one for $600, due August 1, 1906, with interest, etc.; "the said amount being the balance due upon said machine." As additional security for the payment of said notes, the plaintiff agreed to sell to the defendant about 180 barrels of cement on the ground where the machine was located to be used in making brick, and the brick, when so made, to be the property of the defendant and sold; the proceeds to be paid over to Finch for the benefit of the defendant, but Finch should take out a sufficient amount of money to pay for the necessary expenses of manufacturing the brick and the material therefor. The defendant should keep an itemized account of all such costs and expense, and render a statement to said Finch after commencing to make brick. The defendant was to surrender to the plaintiff the three promissory notes, aggregating $2,300, given on the sale of the machine, which the defendant accordingly surrendered. The plaintiff continued to hold and deal with the machine as his own.

In Negley v. Lindsay, 67 Pa. 217, 227, 228, 5 Am. Rep. 427, Judge Sharswood held that it was the better recognized rule that a contract tainted by fraud may be confirmed or ratified without a new contract founded on a new consideration; that he who knowingly accepts or obtains any benefit under such contract, or who uses the property after the discovery of the fraud, or does any positive act forgiving the fraud, or unduly delays claiming back his property, affirms the validity of the contract—citing Jones v. Emery, 40 N. H. 348; Masson v. Bovett, 1 Denio (N. Y.) 69, 43 Am. Dec. 651. " 'Ratification,' says Chief Justice Lowrie, 'is in general the adoption of a previously formed contract, notwithstanding a view that rendered it relatively void; and by the very nature of the act of ratification, confirmation, or affirmance * * * the party confirming becomes a party to the contract.' He that was not bound becomes bound by it, and entitled to all the proper benefits of it. * * * If it be merely against conscience, then, if the party, being fully informed of all the circumstances of it and of

the objections to it—in his own words, 'with his eyes open'—voluntarily confirms it, he thereby bars himself of that relief, which he might otherwise have."

In People v. Stephens, 71 N. Y. 527, 554, it is held that payment voluntarily made under an executory contract for work and labor, with knowledge of the facts upon which fraud from the inception of the contract might have been claimed, cannot be recovered back, or damages recovered for the fraud. Rapallo, J., said:

"As the contract was executed before the discovery of the fraud, there was no doubt of the right of the defrauded party to retain the property to recover damages for the fraud, and, as the consideration for the demise had not been paid, it is a plain case for recoupment. It is well settled that a party is not bound to return the property he has been induced by fraud to purchase, but may retain it and take his remedy by action for the fraud. But it by no means follows, either logically or legally, that one who has made an executory contract for property to be delivered and paid for in the future, and discovers that he has been cheated, and without objection or protest receives the property and pays for it, may then sue for the fraud. The fraud in such case is consummated and legal damages incurred by the acceptance of the property and paying for it. The parting with the consideration constitutes the legal damage, and that, being done with full knowledge of the cheat, fraud, or deception, cannot be alleged."

In Edwards v. Roberts, 7 Smedes & M. (Miss.) 544, it is held that if a party has knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to relief. In that case the party claimed to have been defrauded in a contract of purchase of land by misrepresentation of the vendor as to the quality and title, about which there was some arbitration had. The court said:

"Whatever, therefore, may be the merits of the original position assumed by Edwards respecting the charge of fraud having been practiced upon him in the purchase, the fact of his having consented to abide by the result of an arbitration upon the matters in dispute, and above all the circumstance that he acted upon the award, however unwillingly, and gave a new note to Roberts in accordance with the terms of that award, constitute such a reaffirmance of the contract as was a virtual relinquishment of any right to relief which he might up to that time have possessed."

In a suit upon a promissory note against the maker by an indorsee, the answer alleged that the note was procured by fraud. It was held that it was a good reply thereto that after the assignment and maturity of the note the defendant verbally agreed that, in consideration of the extension of time of payment for a specified period, the agreement was a waiver of the fraud and a ratification of the contract. The court said:

"We do not hold that any new contract was created thereby, but that the old one was in that way recognized and ratified."

The court further said:

"The allegation in the reply that the appellee promised to pay the note after its execution on a reasonable and easy condition is inconsistent with the averments in the answer that the note was procured by fraud." Doherty et al. v. Bell, 55 Ind. 205.

In Schmidt v. Messmer, 116 Cal. 267, 48 Pac. 54, after recognizing the doctrine that a party to the contract may elect to rescind it on account of fraudulent representations, when he acts promptly upon discovering the fraud and putting the other party in statu quo, or may affirm the contract and sue to recover damages for the deceit, the court said:

"The rule which relieves a party when he elects to sue for damages [is that] he must stand toward the other party at arm's length, must comply with the terms of the contract on his part, and must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise, he waives the alleged fraud."

In that case the party was alleged to have made misrepresentations as to the amount of income received monthly from a hotel leased by the defendant to the plaintiff. The defendant occupied the premises about 17 months after knowledge of the facts constituting the fraud, without making complaint that any false representations had been made, asked for a reduction of rent, and was permitted to give a new note for unpaid rent. It was held that the fraud was waived.

In St. John v. Hendrickson, 81 Ind. 350, the court said:

"We fully recognize and approve the rule that a party may retain what he receives, stand by his bargain, and recover for the loss caused him by the fraud. * * * We neither hold, nor mean to hold, that affirmance by retention of the thing bargained for cuts off an action for damages. We do hold that where a party, with full knowledge of all the material facts, does an act which indicates his intention to stand to the contract and waive all right of action for fraud, he cannot maintain an action for the original wrong practiced upon him. Where the affirmance of the contract is equivalent to a ratification, all right of action is gone. * * * Nor are we unmindful of the settled rule that the defrauded party has an election of remedies. * * * We do decide that where a party, with full knowledge, declines to repudiate an action known to him to be fraudulent, and fully and expressly ratifies it, he can neither rescind nor maintain an action for damages."

The conduct of the plaintiff in dealing with this property, after the adjustment of November 25, 1905, clearly enough shows that the imputation of fraud and deceit in the original and in the supplemental contracts is an afterthought, born when his counsel brought this suit. On February 18, 1906, the plaintiff wrote the defendant:

"I would like to know if you have brick plates for fancy trimmings. We have calls for fancy brick for trimmings. We have not been doing very much in making brick, but intend to start soon."

The defendant evidently answered this letter; for on the 13th day of March following the plaintiff acknowledged the receipt, saying that he had been too busy to find time to write, and adding:

"We started the plant going last week, but we cannot make it run good, for the cement sticks so on the top plates that we all have to stop and brush it off."

In February, 1906, the plaintiff's testimony shows that he dealt with the property as his own, by taking off the friction and shaft of the machine, an essential part of it, and lending it for three or four days to a neighbor to apply on his machine. He continued to experiment with the machine through the spring of 1906, and Dick-

inson and machinists from the defendant's factory were trying to remedy the defects, when the plaintiff put the matter into the hands of his attorneys. In view of the facts and circumstances disclosed by this record, this action for fraud and deceit cannot be maintained.

The judgment of the Circuit Court must be affirmed

SANBORN, Circuit Judge (dissenting). There was substantial and undisputed evidence in this case that the defendant induced the plaintiff to make the contract of July, 1905, to purchase the four-mold machine, to make the subsequent contracts about it, to retain and try to operate it, by false representations, before the defendant saw the machine, that it would manufacture out of sand and cement 16,000 bricks in 10 hours, and by subsequent repeated representations of the same nature and promises that it would make the machine comply with the representations. There was undisputed evidence that the machine would not manufacture, and the defendant could not make it manufacture, any considerable amount of brick out of sand and cement; that the defendant suffered damages from these false representations, in that he expended $50 for a foundation for it, $75 for moving it, and surrendered a three-mold machine and a claim for fraudulent representation in its sale estimated worth $1,500 before he tested the machine at all; that he paid about $1,000 in cash, and gave his notes for more than $2,000, which the defendant subsequently sold for value and upon which the indorsee recovered judgment against him. In my opinion here was ample evidence to sustain an action for damages for false representations.

The plaintiff was ignorant of the capacity and character of the press. He was a purchaser. The defendant was a seller. A vendor is presumed to know the character and capacity of a machine which it manufactures or sells. Concede that the defendant was ignorant of the worthlessness of the press which it sold, and that it never intended to defraud the plaintiff, as it did defraud him out of more than $3,000, yet it was liable under the law for the damages which resulted from its false representations. It made the material and false statement as of its own knowledge that the press was capable of manufacturing 16,000 bricks per day out of cement and sand. If it knew that this statement was false, its making was fraud of the most positive character. If it did not know whether the statement was true or false, its positive statement of it was a false representation that it did know so, and was as damaging to the plaintiff as it would have been if it had known it to be false, and was equally fraudulent and actionable. "If one states of his own knowledge material facts susceptible of knowledge which are false, it is fraud which renders him liable to the party who relies and acts upon that statement as true, and it is no defense that he believes the facts to be true." Litchfield v. Hutchinson, 117 Mass. 195, 198; Barnes v. Union Pacific Ry. Co., 4 C. C. A. 199, 201, 202, 54 Fed. 87, 89, 90; Cooper v. Schlesinger, 111 U. S. 148, 155, 4 Sup. Ct. 360, 28 L. Ed. 382; Kiefer v. Rogers, 19 Minn. 32, 36 (Gil. 14); Slim v. Croucher, 1 De Gex, F. & J. 518; Hazard v. Irwin, 18 Pick. (Mass.) 96; Savage v. Stevens, 126 Mass. 207, 208; Frost v. Angier, 127

Mass. 212, 218; Jewett v. Carter, 132 Mass. 335, 337; Cole v. Cassidy, 138 Mass. 437, 438, 52 Am. Rep. 284; Masson v. Bovet, 1 Denio (N. Y.) 69, 73, 43 Am. Dec. 651; Lockbridge v. Foster, 4 Scam. (Ill.) 569, 573; Joice v. Taylor, 6 Gill. & J. (Md.) 54, 58, 25 Am. Dec. 325; McFerran v. Taylor, 3 Cranch. (U. S.) 270, 2 L. Ed. 436; Doggett v. Emerson, 3 Story (U. S.) 700, 732, 733, Fed. Cas. No. 3,960; Burrows v. Lock, 10 Ves. 470, 475; Ayre's Case, 25 Beav. 522; Rawlins v. Wickham, 3 De Gex & J. 304, 313; Sears v. Hicklin, 13 Colo. 143, 152, 21 Pac. 1022; Haight v. Hayt, 19 N. Y. 464, 470, 471.

It may be that if the plaintiff had refused to rely upon the false representations, if he had not been induced to make the contract by them, and if he had relied upon the guaranty in the contract alone, as in some of the cases cited by the majority, he would have had no cause of action for the fraud; but the evidence in this case in undisputed that he relied upon the false representations, and that he was thereby induced to enter into the contract which contains the guaranty. It was no defense to this action for this fraud in this state of the case that the defendant embodied its false representations in a written agreement and guaranteed them to be true, or that it promised to make them good. Nor was it a defense that the plaintiff, induced by subsequent false promises and representations of the defendant, which it reiterated until it had collected all the money it could squeeze out of him and had placed his notes beyond defense by a sale of them to an innocent purchaser, continued to try to perform, or failed completely to perform, his contracts. Parol agreements made in good faith are merged in subsequent contracts; but false and fraudulent representations, which induce contracts, are torts. They are not merged in subsequent agreements which do not clearly release or discharge them, and the damages which such representations cause may be recovered, regardless of the terms of such contracts or of their performance. Barnes v. Union Pacific Ry. Co., 4 C. C. A. 199, 203, 204, 54 Fed. 87, 91, 92, and cases there cited; Wardell v. Fosdick, 13 Johns. (N. Y.) 325, 327, 7 Am. Dec. 383; Ward v. Wiman, 17 Wend. (N. Y.) 193, 196; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Whitney v. Allaire, 1 N. Y. 305; Id., 1 Hill, 484; Id., 4 Denio (N. Y.) 554.

The authorities cited by the majority to the effect that the supplemental contract of November, 1905, and the plaintiff's action thereunder ratified and confirmed the original agreement, and so barred plaintiff from rescinding it and from defending an action by the defendant upon that contract, probably announce a correct rule of law. To that effect, and to that effect only, are Negley v. Lindsay, 67 Pa. 217, 227, 228, 5 Am. Rep. 427, Edwards v. Roberts, 7 Smedes & M. (Miss.) 544, and Doherty v. Bell, 55 Ind. 205. But this is not an action to rescind the contract or to enforce it, and hence these cases are not apposite to the issue here under consideration.

In St. John v. Hendrickson, 81 Ind. 350, cited by the majority, Hendrickson, who had been induced to pay $800 into and to become a member of the partnership by the false representation that two of

the partners had invested $800 each therein, brought an action for damages for the fraud, and the defendants pleaded that after he had learned the truth they offered to release him from the partnership and to place him in the same situation that he occupied before he became a member of it, but that he repaid to them the money they returned to him, elected to remain a member of the firm, bought out the interest of two of the partners, and assisted in conducting the business; and the court held that these facts constituted a good defense to his action. If the Scott Manufacturing Company had offered to release Schagun from his contract, and had repaid to him the value of his three-mold press and of his claim on account of its purchase, which they estimated worth $1,500, and the other moneys he expended before he learned of the fraud, this case would be analagous to the Hendrickson Case; but, in the absence of any such offer or repayment, it does not seem to me to be governed by it.

People v. Stephens, 71 N. Y. 527, another case cited by the majority, was an action by the state of New York to recover of contractors the difference between the reasonable value of the work they had done and the agreed price, which the state had paid them, upon the ground that their contract was the result of a fraudulent combination of bidders. The action failed because the state knew of the fraud before it paid out any of its money, and thereafter elected to carry out the contract and to pay the contract price for the work. The court applied the rule "volenti non fit injuria," but it said in the course of the opinion:

> "It is also well understood that, if fraud is not discovered until after a contract entire has been partly or wholly performed and the defrauded party has parted with his property or money, he need not rescind, but may affirm the contract and bring an action for the damages." 71 N. Y. 553.

In Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54, the plaintiffs were induced to lease a hotel by a fraudulent representation of the amount of income derived from it. They learned the truth before they paid any rent or occupied it a day. The rent was due monthly. They paid it for 14 months, took extensions of time to pay 2 months' rent, and occupied the hotel without objection or complaint for 17 months, and then brought an action for the false representation, which failed.

All these cases differ from that in hand in the very material particular that the plaintiffs did not part with their money or property until after they had learned the truth, while in the case at bar the plaintiff parted with his three-mold press, his claim for damages for the fraudulent representation in its sale, and the moneys expended for the foundation and for moving the press, before he had any notice or knowledge of any defect in the machine he bought. For this reason they do not seem to me to rule this case, and the statements in some of the opinions that one who is induced by fraudulent representations to make a contract and to part with a valuable consideration before he discovers the fraud deprives himself of his action for the tort by subsequently ratifying and performing the contract, either according to its original terms or according to subsequent terms and extensions, do not commend themselves to my judgment and seem to

me to be contrary to the established rule of law. The plaintiff had made the contract of July, 1905, and had lost about $2,000 before he tried the machine or discovered the fraud, and his subsequent performance or failure to perform it, in the absence of any release or satisfaction on his part of his cause of action for the fraud, did not, in my opinion, deprive him of it.

The gravamen of this action was the inducement of the plaintiff to make the contract of July 17, 1905, to purchase the four-mold press by the fraudulent representation that it was capable of making 16,000 bricks per day out of sand and cement, when it was worthless and was incapable of manufacturing them in any paying quantities. That cause of action was complete when the contract was made. It was proved by undisputed evidence. The ratification of the contract, the extensions, modifications, partial performance, or partial failure to perform it, and the subsequent contracts about it, in my opinion neither released nor discharged that cause of action. They affected only the causes of action upon the contract. When the contract was made the plaintiff had the option to rescind it, or to perform it and to recover the damages suffered from its breach; but that was a choice of remedies under the contract. His action for tort remained in either event. He had the right to sue, and to recover the $3,000 or $4,000 out of which the defendant had defrauded him by the false representations which induced him to make the contract, whether he rescinded or performed or failed to perform it. In my opinion there was ample evidence of causal false representations and of substantial damage to the plaintiff, which ought to have been submitted to the jury.

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## OMAHA WATER CO. v. CITY OF OMAHA.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1908.)

No. 2,683.

1. WATERS AND WATER COURSES—CONTRACT BY CITY FOR PURCHASE OF WATERWORKS—ASCERTAINMENT OF VALUE BY APPRAISERS—VALIDITY OF APPRAISAL.

A city ordinance granting a franchise to a water company reserved to the city the right, at its election, to purchase the works of the company after a stated term at an appraised valuation "ascertained by the estimate of three engineers, one to be selected by the city council, one by the waterworks company and these two to select a third." The city having elected under authority of a state statute to exercise its option, appraisers were selected as therein provided, who organized as a board, and, after an investigation extending over three years, filed a report fixing the value of the property, which was signed by two of the number, but upon which the third noted his dissent. *Held*, that the matter in question was one of public concern, and that, under the rule of law applicable in such case, the appraisers having all qualified and acted throughout, the decision of the majority was a valid exercise of the power.

2. SAME—PROCEDURE BY APPRAISERS.

The fact that appraisers selected to make a valuation of the property of a water company, which a city had elected to purchase under an option reserved in the company's franchise, took the oral testimony of witnesses who were examined by counsel for the respective parties, did

not limit them to such method of procedure throughout, where it was understood and agreed by the parties in the beginning that they might arrive at the facts by any method or means deemed advisable by them, and their subsequent action in causing the books of the company to be sent to another city where they were in session, and to be there examined by experts, in the absence of counsel, did not invalidate their appraisal where their good faith was not questioned.

3. SAME—POWERS OF APPRAISERS—DISCRETION AS TO METHODS OF PROCEDURE.

A valuation of property by appraisers selected as experts under a contract for its sale is not an arbitration, and the appraisers do not act judicially, nor are they bound by the rules relating to arbitrations, but, so long as they act honestly and in good faith, they have a wide discretion as to their methods of procedure and sources of information.

4. MUNICIPAL CORPORATIONS — POWERS — PURCHASE OF WATERWORKS—CONSTRUCTION AND VALIDITY OF CONTRACT.

In 1880 the city of Omaha granted a franchise to a water company under Laws Neb. 1879, p. 99, § 27, which authorized the city to construct and maintain waterworks "either within or without the corporate limits of the city," and to contract with others to construct and maintain waterworks on such terms as might be agreed upon. In the ordinance granting such franchise, the city reserved the right to purchase the works of the company after 20 years at an appraised valuation. By a subsequent statute, still in force in 1903, the city was authorized to appropriate private property for waterworks purposes, or any system already constructed, the power to extend a distance of 10 miles beyond the city limits. Laws 1903, p. 66, c. 12, required the city to either construct or purchase waterworks and authorized it to take the necessary steps to acquire such water plant "by virtue of any rights inuring to such city through contract or otherwise." In 1903 the city elected to purchase the company's plant under the option reserved in the ordinance of 1880, and appraisers were selected by the parties to make the valuation. When the works were constructed, it was necessary to take the water from the Missouri river above the city, and the intake, pumping station, and reservoirs were located in the town of Florence, and some miles outside the city limits. Between that time and 1903 the city had grown in population from 30,000 to 125,000 or more; the adjoining city of South Omaha containing over 30,000 population, and other adjoining, but separate, municipalities had grown up, into all of which, including the town of Florence, the company had extended its distribution system which was supplied with water from its station at Florence. *Held* that, under such statutes, the city had power to acquire the property of the company outside, as well as inside, of its limits, and that, when it made its election, it elected to purchase the entire system, and could not require the company to sell its pumping plant and the pipes connected therewith which extended into and lay within the city limits, and to retain its outlying distribution systems.

5. CONSTITUTIONAL LAW—CONTRACTS PROTECTED FROM IMPAIRMENT—CONTRACT BY CITY.

The election by a city, expressed by ordinance duly authorized by statute, to exercise an option reserved in a prior ordinance to purchase the property of a water company which ordinance was accepted by the company, creates a contract binding on both parties, and which cannot be impaired by any subsequent action of the city or of the Legislature of the state taken after the property has been appraised as provided by such contract.

6. WATERS AND WATER COURSES—CONTRACT BY CITY FOR PURCHASE OF WATERWORKS—VALIDITY OF APPRAISAL.

An appraisal of a large system of waterworks under a contract of purchase will not be invalidated because the title to a small part of the property not vital to the integrity of the system is afterward found to be defective, nor because it may include pieces of property not necessary

to the system; a court having power to make an equitable adjustment of such matters between the parties.

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

Howard Mansfield (R. S. Hall and Herbert C. Lakin, on the brief), for appellant.

John Lee Webster and Carl C. Wright (Harry E. Burnam, on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge

HOOK, Circuit Judge. This is an appeal from a decree of the Circuit Court for the District of Nebraska dismissing the bill of complaint of the Omaha Water Company to compel the city of Omaha to complete the purchase of complainant's system of waterworks in accordance with a contract giving the city an option to purchase, the exercise of the option, and an appraisal fixing the price to be paid. The objection of the city is to the appraisal.

The installation of the waterworks was begun in 1880 by a predecessor in title of the Omaha Water Company; the original franchise ordinance having been adopted in that year in the exercise of power granted by a Nebraska statute of 1879. Section 14 of the ordinance provided that, after the expiration of 20 years, the city should have a right to purchase the works at an appraised valuation "ascertained by the estimate of three engineers, one to be selected by the city council, one by the waterworks company, and these two to select a third." Nothing was to be paid for the unexpired franchise of the company. The works were completed in 1883, and on September 4th of that year an ordinance was adopted accepting the works as a full and complete compliance with the obligations to the city. In 1903 the Nebraska Legislature passed an act which in effect required the city to buy or build a system of waterworks. Consequently, on March 2d of that year, it was declared by ordinance to be necessary and expedient for the city "to purchase the system of waterworks operated by the Omaha Water Company," and that the mayor and council "so elect and determine to purchase and acquire such waterworks by virtue of the rights inuring to said city through the contract between said city and the grantors of said water company, and as authorized and provided by section 14 of ordinance No. 423." Ordinance No. 423 is the ordinance of 1880. Thereupon the water board of the city, having been recently created by legislative act and invested with authority in the premises, nominated an appraiser, and the nomination was confirmed by the city council. The company then named one and those two selected the third. These men were hydraulic engineers. Two of them lived in Chicago, Ill., and one in Milwaukee, Wis. On July 20, 1903, the appraisers organized by the election of one of their number as chairman and another as secretary. Their report which was submitted July 7, 1906, fixed the aggregate value of the property at $6,263,295.49, a sum barely sufficient for the discharge of the outstanding mortgage bonds issued by the company in-

cluding a small premium to be paid upon their call before maturity. The report was signed by but two appraisers. Appended thereto was the following, signed by the other who was the one selected by the water board and the city: "I do not concur in the above report, nor in the values as fixed therein." The water board whose jurisdiction had in large measure superseded that of the city council thereupon declared that it rejected the appraisal. The company then tendered a deed conveying the system of waterworks and demanded the payment of the appraised value. Payment being refused, suit was brought by the company.

The city says the appraisal is void for several reasons, the two most important of which are: That the appraiser named on behalf of the city refused to concur, and that the appraisers were guilty of misconduct. It is also claimed that improper items of property and elements of value were included in the appraisal, and that the deed tendered by the company embraced property which the city of Omaha had no power to acquire or operate because it lay beyond its corporate limits. Did the refusal of one of the appraisers to concur defeat the appraisal? The rule is that, when the subject of the inquiry or controversy is of a private character, all intrusted with the power of ascertainment or decision must agree, unless it is otherwise provided by the interested parties. Hobson v. M'Arthur, 16 Pet. 182, 192, 10 L. Ed. 930. But it is equally well settled that when the matter in question is of public concern, all being qualified and having assembled and acted, the finding or decision of a majority is a valid execution of the power. Colombia v. Cauca Co., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159; Grindley v. Barker, 1 Bos. & P. 229; King v. Beetson, 3 Term, 592; Withnell v. Gartham, 6 Term, 388; Gas Co. v. Wheeling, 8 W. Va. 320; Green v. Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Ex parte Rogers, 7 Cow. 526; Downing v. Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; People v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734; The People v. Walker, 23 Barb. (N. Y.) 304; Young v. Buckingham, 5 Ohio, 485; Patterson v. Leavitt, 4 Conn. 50, 10 Am. Dec. 98; Eames v. Eames, 41 N. H. 177, 181. That the first of these rules is not applied where matters of public interest are involved is doubtless due in part to a question of its practical wisdom—to the fact that its application generally leads to continued controversy and litigation. The views of those whose interests are at stake are likely to be adopted and insistently maintained by the appraisers or arbitrators they personally select, and the chance of agreement and final disposition of the matter is not materially enhanced by the submission On the other hand, the rule that is applied in cases of public concern is in harmony with the plan of representative governments which move and act by majorities. Public officials are chosen, laws enacted, rights judicially determined, and business transacted by majorities. The affairs of subordinate divisions of the state, such as counties, townships, and cities are conducted by local boards or bodies whose controlling and effective voice is that of the greater number of the members. The rule pervades almost every branch of the public service where power is lodged in the hands of several, and it is a distinctive

recognition of the truth that the transaction of public business cannot wait for unanimity. All of the steps leading to the construction of the waterworks and the reservation of the right of purchase from the original organization of the city itself down to the adoption of the ordinance of 1880 were manifestations of majority power. The legislative direction to the city to buy or build, its ordinance of 1903 electing to buy, the nomination of an appraiser by the water board and his confirmation by the city council were all expressions of the will of the majority. And, if the city shall acquire the waterworks the levy and collection of taxes, the payment of the purchase price and the conduct of the business in the future are matters that will be committed to public bodies acting by the greater number of their members. And it may be observed that, on the other hand, the corresponding acts of the water company were the acts of a majority of the members of its managing board. The appraisal of the waterworks is an intermediate step in this long progression, and it would be strange, indeed, if by mere construction of law its validity should be held to rest upon unanimity of concurrence, a requirement long since rejected as impracticable and not suited to matters affecting public interests. Experience teaches that in cases like this the parties are seldom able to agree upon the value where the company is required by force of circumstances to part with the ownership of its property. It also teaches that appraisers are apt to be partisans of those who name them, and that unanimous agreement is the rare exception. The provision of the ordinance of 1880 was intended to be a practical one and to be productive of an actual appraisal of the waterworks. It was not intended that the appraiser selected by the city or the one selected by the company might at the last minute, when all the work was done, cause the appraisal to miscarry by mere refusal to join in the valuation found by the other two. As was said in Colombia v. Cauca Co., supra: "Of course, it was not expected that a commission made up as this was would be unanimous." The engineer named by the city acted with his associates through an expensive investigation extending over three years, and, when the report was finally made up and signed, he simply appended thereto the bare, unexplained statement that he did not concur in the report or in the values fixed. The water board then resolved to reject the appraisal and to name a new appraiser in its behalf, though it cannot reasonably be anticipated that new appraisers would be more likely to agree unanimously. It was not contemplated by the ordinance of 1880 that either party, the city or the company, could at will arbitrarily defeat the appraisal contracted for, and yet in practical effect that is what is contended. The case is not as though one of the appraisers resigned and left the board incomplete during the progress of its labors. All continued to the end. Both the city and the company had the benefit of their experience and joint investigation, and the final valuation after conference and interchange of views sufficiently bears the impress of the one who dissented because he did not wholly have his way.

It is not improper to observe that until the report was made the three appraisers were regarded by all parties as composing a board or body invested with powers in their aggregate capacity. Imme-

diately upon their selection they organized as a "Board of Appraisers" by the election of one of their number as chairman and another as secretary, and thereafter they constantly referred to themselves as a board. They were so addressed by counsel for the city when he outlined a method of procedure for their adoption. While the appraisal was in progress, the water board and the city filed a bill in the Circuit Court against the appraisers and the company to secure authoritative directions as to the appraisal. In this bill of complainants, in the answer of the company and in the decretal order of the court, there is constant reference to them as "the board" and the "board of appraisers." The popular conception of a board is that like tribunals in general it acts as a unit and speaks through a majority of its members.

The case of Gas Co. v. Wheeling, 8 W. Va. 320, is quite similar to the one at bar. The act incorporating the Wheeling Gas Company contained a provision that at the expiration of 20 years the city might, if it so elected, purchase the gas works at a price to be agreed on or to be ascertained "by the award in writing of three persons to be chosen, the first by the directors of said company, the second by the council of said city and the third by the two thus chosen." The city having elected to purchase and there being a disagreement as to the price, the appraisers or arbitrators were selected. All three of them participated in the investigation, and at the conclusion two of them signed the award. The third merely expressed thereon his dissent. The city tendered the price fixed, the company refused it, the city deposited the money in bank to the order of the company, and took possession of the works. In an action by the company to regain possession, it was held among other things that the matter was of public interest and the award was valid. In People v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734, there was an appropriation by the state for the purchase from a private person of certain relics, to be paid only upon the certificate of three persons named in the act that the relics were in their opinion genuine, and that it was desirable in their judgment that they be placed in the museum of the state library. The parties named having met and inspected the relics, two of them signed the certificate and recited therein that the third refused. Justice Peckham, in delivering the opinion of the court, said:

"In my judgment, by the well-settled rule at common law, this power would have been legally exercised by the signature of two of the three to the certificate when all three assembled to pass upon the question. The only answer specially urged against this rule is that it solely applies 'to matters of public concern'; that 'as to matters of private concern,' as this is claimed to be, all must join to make a valid execution of the power. * * * Then is this a matter of private concern? We are all of opinion it is not. The cases referred to by the respondent cannot fail to establish his doctrine. They hold that arbitrators, to determine controversies between individuals, are engaged in matters of private concern. But, where appraisers act between individuals and the state, it is a matter of 'public concern,' and a majority act as the whole, when all have met. In the case at bar the Legislature desired to purchase, upon certain terms, what they regarded as of interest and value to the public. It was a question between an individual and the state. This would seem, then, to be plainly matter of public concern. This certifi-

cate, therefore, would have been legally given at common law when signed by a majority."

Colombia v. Cauca Co., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159, was a bill by the Republic of Colombia to set aside an award of a special commission settling in favor of the Cauca Company a controversy over a concession to build and operate a railroad, and accompanying land grants, etc., and a claim that the concession and grants had been forfeited. The commission was composed of three members, one selected by each party to the controversy and the third by the Secretary of State of this country and the Colombian minister at Washington. A few days before the expiration of the time limited for their action, and when little remained to be done except to sign the award, the Colombian commissioner resigned and the other two made the award. Colombia said the award was void because made by but two of the three commissioners. Several reasons were given by the Supreme Court for sustaining the award, among them one that the matters involved were of public concern.

The city contends that the contract with the water company for the acquisition of the waterworks is not a matter of public concern, and it cites Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, and similar cases to the effect that such contracts are of a private or business nature. But that was said in contradistinction to acts done in the exercise of the legislative and governmental powers of municipalities. It has never been held, and never can be with reason, that a contract between a water company and a city for the acquisition by the latter of a system of waterworks is not a matter of public concern. By common consent a water company is called a public service corporation, and is therefore given the use of the public streets for its mains and pipes. Its system of waterworks constitutes a public utility of vital importance to the health and well-being of a city and its inhabitants. The city of Omaha was invested with power to appropriate private property for the public use in constructing and operating waterworks of its own. The rates and charges of water companies are subject to regulation by the state within constitutional limitations; and this on the theory that the property and operations of such a company are affected with a public interest. To say that the matters submitted to the appraisers in this case were not of public concern is to disregard the essential nature of things. It is true that in People v. Nichols, 52 N. Y. 478, a state law provided for the purchase of the relics, and in Gas Co. v. Wheeling, 8 W. Va. 320, the original authority to purchase the gas works was found in the statute incorporating the company, but the proximity or remoteness of a state statute does not determine the character of the subject-matter, whether of private or public concern, though were it otherwise the fact remains that the reservation by the city of Omaha of the right to purchase at an appraised value was a condition authorized by state statute, and, when the election was made, the city was acting under direct mandate of the Nebraska act of 1903. Laws 1903, p. 66, c. 12. Considering the character of the parties, the nature of the contract, the property in

question, and the end to be attained, the matter involved in the appraisal was one in which the public was greatly interested, and all the appraisers having acted two of them could fix the value.

The city also claims that the appraisal is void because of misconduct of the appraisers. The chief complaint in this respect is that the water company sent its books to Cincinnati, Ohio, where the appraisers held a meeting, and thence to Chicago, Ill., where they had them examined by an audit company selected by them for the purpose, and that the city was not given access to the books nor permitted to examine witnesses upon their contents. Emphasis is placed on the fact that for more than a year previously the appraisers held open sessions and received oral testimony from witnesses who were examined and cross-examined by counsel, and it is asserted that the books were received after the inquiry had been closed. The company contends that the action of the appraisers was consistent with the advisory instructions given them when they entered upon their duties, and also with the character of the proceeding in their charge. At the beginning of their inquiry the appraisers were addressed by counsel upon their method of procedure. The city attorney said:

"As to the matter of the procedure to be adopted by your board, as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the city of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the water company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the water company, the city of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the city of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts [to] whose judgment the question of value must be submitted upon the examination of the property."

That the appraisers at first received evidence in the presence of counsel did not irrevocably commit them to a continuance of that course; and counsel are in error in saying the inquiry was closed when they ceased doing so. It was distinctly announced at the time by the chairman of the board that much more information must be sought than that already presented, and "the board will undoubtedly wish to call on the city and the company for special information as to details the necessity for which will develop as the work proceeds." What they did with the company's books was not exceptional. In performing their duties the appraisers did much investigating in the absence of the parties, doubtless believing that their course of procedure was largely within their discretion, and it cannot be doubted that it was in view of the character of the submission for appraisal and the instructions given them at the beginning. There is no ground for questioning their entire honesty and sincerity. The books were not submitted, audited, or examined at the instance of the company, nor did it offer them in evidence as such act is usually

understood in a legal proceeding The sending of the books to Cincinnati and Chicago was at the instance of the appraisers, and the only participation by the company in the examination was to explain the method of keeping them. All three appraisers participated in what was done. There was no concealment. We have the bare fact that the books were sent and examined. What, if any, use was made of the information contained in them, does not appear. We think undue importance is given this matter merely because of the adventitious fact that the books were shipped to Cincinnati and thence to Chicago. If the appraisers had gone into the office of the company at Omaha and demanded the production of all of its records for examination by themselves or by an expert bookkeeper selected by them without participation by either the city or the company, it is doubtful any complaint would have been made. It was not intended by the submission to three expert engineers for appraisal that attorneys should always attend them and participate in every inquiry they made to secure information, nor does that seem to have been the view of counsel before the appraisal was made. It may at once be admitted that, were this an arbitration, the examination of the books in the absence of counsel would have defeated an award. But there is a clear distinction between an appraisement by valuers and an arbitration, though the latter term is frequently but incorrectly applied to both proceedings. An arbitration presupposes a controversy or a difference to be tried and decided, and the arbitrators proceed in a judicial way, sometimes as an adjunct to a court of justice. Their investigation is in the nature of a judicial inquiry, and rules of procedure must be strictly observed or their award will be void. On the other hand, an appraisal or valuation is generally a mere auxiliary feature of a contract of sale, the purpose of which is not to adjudicate a controversy but to avoid one. Thus, if A. and B. contract, the former to sell, and the latter to buy, certain property at the value thereof as fixed by X., Y., and Z., the latter are appraisers, not arbitrators, and are not governed in their proceedings by the rules relating to arbitration. As long as appraisers act honestly and in good faith, they have a wide discretion as to their methods of procedure and sources of information. Generally speaking, they may inform themselves in any way that an honest seeker for the truth would adopt. While there are many cases in which no distinction is made between the two proceedings, in most of them it will be found either that the term "arbitration" was used in the general sense of a submission of some matter to third persons for ascertainment or decision, or that some feature peculiarly the subject of arbitration was involved. Sometimes the doubt whether the submission is in arbitration or appraisal is determined by the character of those to whom it is made and the method of their selection. Thus in Bottomly v. Ambler, 38 L. T. 545, 26 W. R. 566, it was held to be an appraisal because two of the men selected were agents of the interested parties and all three were experts in the matter to be determined. When the attention of the courts has been directed to the distinction, it has been generally recognized both in England and in this country. Kelly v. Crawford, 5 Wall. 785, 18 L. Ed. 562; Collins v. Collins, 26

Beav. 306, 28 L. J. Ch. 184; Bos v. Helsham, 4 H. & C. 642, 36 L. J. Ex. 20, 15 L. T. 481; In re Wilson and Green, 56 L. J. Q. B. 530, 55 L. T. 864; Guild v. Railroad Co., 57 Kan. 70, 45 Pac. 82, 33 L. R. A. 77, 57 Am. St. Rep. 312; James v. Schroeder, 61 Mich. 28, 27 N. W. 850; Railway v. Moore, 64 Pa. 79; Norwich Gas, etc., Co. v. Norwich, 76 Conn. 565, 57 Atl. 746; Palmer v. Clark, 106 Mass. 373; Noble v. Grandin, 125 Mich. 383, 84 N. W. 465; Wurster v. Armfield, 175 N. Y. 256, 67 N. E. 584; Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839.

In Railway Co. v. Moore, 64 Pa. 79, 91, it was said:

"An award is the judgment of a tribunal selected by the parties to determine matters actually in variance between them—not merely to appraise and settle the price of property contracted for under the stipulation that this term of the contract was to be so ascertained. Had the parties made the contract, and afterwards, on a dispute arising, chosen arbitrators to determine what was due upon it, that might have been an award. The case is entirely different where the parties originally agree to buy and sell at a sum to be fixed by an appraisement to be made by a third person or persons. * * * Nor is such an appraisement subject to the strict rules governing arbitrations and awards. * * * It would not be necessary that the appraisers should decide upon evidence heard in the presence of the parties. They could decide, and indeed would be expected to fix the value of the articles, upon their own knowledge of the subject, though doubtless they might seek information from other quarters."

In Palmer v. Clarke, 106 Mass. 373, 389, the court said:

"A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive."

The other complaints of the conduct of the appraisers are disposed of by what has been said.

It is also contended that the appraisal includes property which the city did not contract to purchase and was without power to own. This refers to the extensions of the waterworks system beyond the corporate limits of Omaha into the city of South Omaha and the towns of Dundee and Florence and the territory known as East Omaha. All these immediately adjoin the city of Omaha—Florence on the north, East Omaha on the east, South Omaha on the south, and Dundee on the west. South Omaha, Dundee, and Florence have separate municipal governments under the laws of Nebraska. In 1880, when the installation of the system of waterworks was commenced, Omaha was a city of about 30,000 inhabitants, but it grew rapidly and at present contains 125,000 or more. In South Omaha, which was incorporated in 1886 and in 1903 contained more than 31,000 people, there are located extensive industries in the conduct of which residents of the larger city are interested and which require great quantities of water. These two cities are connected by continuous streets traversed by continuous street car lines. In the

year 1900 Dundee had 400 inhabitants and Florence 688. All these cities and towns are practically one metropolitan city, and it needs no foresight to predict their ultimate consolidation. Indeed, the laws of the state now provide that "any city, town or village adjoining any city of the metropolitan class may be annexed or merged with such city of the metropolitan class" whenever a proposition therefor has been approved by the majority of the votes in each city, town or village cast on such proposition at a general election. Laws 1905, c. 14, § 2. Obeying the law of its existence and responding to the necessities of the public, the water company extended its mains and pipes throughout the city of Omaha and into these adjacent municipalities. That it did so for profit is but part of the proposition; that it was its duty to do so conclusively appears from a survey of the situation. Florence, Omaha, and South Omaha are on the west bank of the Missouri river. It was recognized in the beginning that the water supply for Omaha would have to be taken from the river and considerations of public health imperatively demanded that it be taken from a point far enough up the river so that it would not be contaminated by the sewage of the cities. With this in view an intake, pumping station, and settling reservoirs were permanently located about 9,000 feet north of the north line of the city of Omaha, and at present they constitute the principal source of supply of the water that is furnished all the cities and villages. The waterworks of the company is one complete, uniform system planned and designed to serve the municipalities and their inhabitants as one aggregate community. It is incapable of segregation into parts so as to make a separate and independent system for each city and town. There is no pumping station in East Omaha, Dundee, or South Omaha. A refusal of the company to extend its mains and pipes into these communities would have been indefensible. It would have resulted in depriving the villages of fire protection and water for domestic consumption since the cost of a separate system of waterworks would be prohibitive to a community of a few hundred inhabitants, especially to Dundee because of its location on the heights west of Omaha. For South Omaha pumping works would have had to be installed at the river bank north of Omaha and flow lines run through the streets of the latter city, involving a wasteful and unnecessary expenditure of money and an unjust burden upon the people and the industries in which both cities are interested. The growth of the system of waterworks throughout the larger city and into these suburban and adjacent communities was a natural one, and considerations of justice not only to the company, but also to the inhabitants of the smaller communities, require that no dismemberment of the system be made unless the law imperatively requires it. The city of Omaha says it is willing to purchase the property within its corporate limits and also the intake, pumping station, and reservoirs at Florence, with the connecting mains, but it is not willing to purchase the distribution systems in Florence, East Omaha, South Omaha, and Dundee. We may dismiss from further consideration the distribution system in Florence, because the duty to maintain and operate it was one

of the conditions upon which that village granted to the water company the right to install its works there and use its public grounds. To continue that maintenance and operation is a burden which must accompany the ownership of the supply works. Two reasons are assigned for cutting off and excluding those parts of the system lying in East Omaha, South Omaha, and Dundee: First, that the city has no power to acquire them since they lie without its corporate limits; and, second, if it has the power, it has not exercised it.

We think, if the statutes of the state are construed in the light of conditions to which they were intended to apply, they disclose ample authority in the city to own and operate the entire system of waterworks including the parts beyond its boundaries. In 1880, when the franchise was granted, the city had power (Laws 1879, p. 99, § 27) "to erect, construct and maintain waterworks either within or without the corporate limits of the city * * * and to contract with and procure individuals or incorporations to construct and maintain waterworks on such terms and under such regulations as may be agreed on." By virtue of this authority the ordinance of 1880 was adopted. In 1897 (Comp. St. 1901, c. 12a, § 27) Omaha was given power "to appropriate private property for the use of the city for * * * waterworks, including mains, pipe lines and settling basins therefor, the right and power * * * to extend a distance of ten miles from the corporate limits of the city"; also "power to appropriate any waterworks system, plant or property already constructed to supply the city and the inhabitants thereof with water, or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs, and all appurtenances reasonably necessary thereto and a part of or connected with said system, plant or property, and franchises to own and operate the same if any." This law was in force in 1903 when the city made its election to purchase. The act of 1903 (Laws 1903, c. 12, p. 66) made municipal ownership compulsory, and the city was directed to construct or purchase. Section 3 commanded the mayor and council of the city "to take the necessary steps to acquire such water plant under the powers granted to such city or by virtue of any rights inuring to such city through contract or otherwise." Section 10 provided that the authority and powers of the water board should extend as far beyond the city limits as it might deem necessary, not exceeding 10 miles. A provision of a prior law granting power to the city to construct or purchase waterworks within or without the city was retained, but so amended as to adapt thereto the powers and functions of the water board. Section 135. There were thus three methods provided by law by which the city could secure a system of waterworks: First, by its own construction in the city and within 10 miles of its exterior limits, exercising in aid thereof the power of eminent domain; second, by appropriating a system already completed whether lying wholly within or partly within and partly without the city, but within the 10-mile limit; and, third,

by purchasing an existing system lying within or without the city if the right to do so had been reserved to the city by contract. But, however acquired, the jurisdiction of the water board in respect thereof was supreme and extended a distance of 10 miles beyond the city limits. We do not think this studied and persistent reference to the territory beyond the city limits is wholly satisfied by saying it was a mere provision for the establishment of the supply works. Doubtless that was in mind, but it was a fact publicly known that the Omaha system extended into the adjacent communities and a custom thereby secured that constituted an important part of its value of which a purchaser would naturally desire to avail himself, and the later laws of the state, applying as they did exclusively to the city of Omaha, were framed in view of that known condition. The Legislature was not blind to the history of American cities, their rapid growth in population, and the continual expansion of their boundaries, nor to the fact that, while there may be clustered around a growing city smaller cities and villages, they really constitute one center of population with a community of interest, and that sooner or later the arbitrary lines of division will disappear. Nor can it be conceived that the Legislature intended that these smaller municipalities should be subjected to the oppressive burden of maintaining separate means of procuring that which is so vital to health and safety as a supply of water. In other respects, also, the laws affecting Omaha had regard to its future growth and development. Authority was given (Comp. St. 1901, c. 12a, § 101b) to acquire lands within three miles of the city limits for public parks, parkways, and boulevards, and it was provided that, if the lands acquired were within the corporate limits of any other city or village such other city or village should cease to have jurisdiction over them.

We are also of the opinion that, when the city made its election, it elected to purchase the entire system of waterworks. The ordinance of 1880 by which the franchise was granted, related to a system of waterworks "within and adjacent to the city of Omaha, in Douglas county, state of Nebraska, for the purpose of supplying said city and the citizens and inhabitants thereof with water." The ordinance required that the pumping capacity of the works keep pace with the growth of the city, and that in a practical sense meant not merely from day to day, but implied the exercise of business foresight in making reasonable provision for the future. The right of purchase reserved by section 14 of the ordinance refers, of course, to the system of waterworks designed for supplying the city of Omaha with water, but it includes everything fairly appurtenant to the system as a whole. Section 11 provides that, upon failure to comply with the terms of the ordinance, all rights thereunder shall be forfeited, and the city of Omaha shall become vested with the ownership "of said waterworks and property appurtenant thereto and connected therewith subject to the payment of a just compensation therefor to be ascertained as provided in section 14." In 1896 the city of Omaha commenced a suit to forfeit the franchise granted by this ordinance and to obtain title to the system of waterworks.

By the averments of its bill and references to the mortgages on the property, it charged that all of the property of the company in Douglas county, Neb., specifically including that in Florence and South Omaha, was absolutely essential to the operation of the waterworks, to the performance of the public duty of the defendant company, and to the fulfillment of its contract obligations to the city; and the city asserted its right "to take possession and control of the said water works plant, and all the property connected therewith or appertaining thereto." The ordinance adopted under the mandate of the act of 1903 declared it necessary and expedient for the city to purchase "the system of waterworks operated by the Omaha Water Company," and recited that the election to do so was by virtue of the provisions of section 14 of the ordinance of 1880. The declaration and recital were in effect an assertion that the right of purchase under that ordinance embraced the entire system operated by the company. At the first meeting of the appraisers, the chairman of the water board stated they wanted and expected to purchase the entire property if they could possibly do so; but, in view of the question as to the power of the city, they wanted a separate appraisal of the outlying properties. The water company has always protested against the dismemberment of its property. In 1905 the city and the water board sued the company and the appraisers in the court below to obtain authoritative instructions for the appraisal then in progress. After a trial an order was made that the property be appraised as an entirety and also in parcels with a separate statement of certain elements of value, so that the report would be available whatever the ultimate decision of the rights of the parties might be. The trial judge was of opinion that the election ordinance of 1903 contemplated the purchase of the entire system, though he thought it doubtful that the ordinance of 1880 in which the right of purchase was reserved was so comprehensive.

A contract of sale and purchase between the company and the city arose in 1903 which was not subject to impairment by subsequent legislation; but it may be well to notice some provisions in the act of 1905 adopted in anticipation of municipal ownership and operation of the waterworks. Laws 1905, p. 175, c. 15. By that act the water board was authorized to contract with any adjacent municipality to supply it with water for public or private purposes or with any person, copartnership, or corporation engaged in that business. It is said, in effect, that the express grant of power to contract with an adjacent municipality or with a corporation engaged therein in supplying water is an implied denial of power to furnish water direct to the inhabitants, and therefore the Legislature intended the outlying distribution systems should not be acquired by Omaha but should be left on the hands of the company to hold or sell if the smaller towns chose to buy. In other words, the contention is that Omaha has no power to own or operate the pipes and mains beyond its limits, but may contract to furnish water to the owner whether it be the company or an adjacent municipality. Ordinarily power in Omaha as owner of the system within its limits and the supply station at

Florence to contract with an adjacent municipality to supply it with water for public and private purposes would warrant the adoption of either of two methods: First, through a distribution system owned by Omaha itself in the adjacent territory, in which event it would deal directly with the consumers, public and private, as it would within its own boundaries; and, second, the delivery, say at the city limits, into a distribution system owned either by the adjacent municipality or by the water company. The fact that the power granted was to contract with an adjacent municipality would not necessarily exclude the first of these because the furnishing of water for both public and private consumption is invariably done under contract with the municipality in which the use is enjoyed. But the provision in the act for compensation to Omaha for this service would seem to preclude any direct relation between it and the consumers in the adjacent communities and to imply that it should deliver the water in quantity, leaving to others the duty of distribution and the relations with consumers the different classes of whom are served at different rates. The provision referred to requires that all water furnished by Omaha for use in adjacent municipalities shall be measured by meter at the expense of the adjacent municipality or company, and the rate per 1,000 gallons "shall not be less than the gross average income per thousand gallons for all water" used in Omaha, including a fixed allowance for hydrant service therein. This seems to contemplate a wholesale, flat rate, and settlement only with the adjacent municipality or the company as the case may be.

If the act of 1905 affected the fixed contract relations between Omaha and the company, a result would follow so remarkable and so inequitable it is difficult to believe it was intended. If Omaha now bought only the property within its borders and the supply works, and left the outlying distribution systems on the hands of the company, the latter would either have to sell them to the adjacent municipalities, or to Omaha if hereafter invested with power, at their own figure, or continue business under such conditions as would practically destroy the value of its property In the latter case, it would be confronted with the problem of procuring a water supply for the smaller communities since the existing facilities would be owned by Omaha. Of course, separate, independent supply works on the river north of Omaha, the only feasible location, would be out of the question. Besides the disproportion of cost to the amount of consumption, the plan would not be practicable unless Omaha granted the right of way for flow lines through her streets. The alternative would be to apply to Omaha for water. If Omaha furnished the water, say, for example, to be used in South Omaha, the only property it would employ in that service would be its supply works at Florence and its flow lines or mains running thence to and through the city to the southern limits thereof where delivery would be made into the distribution system in South Omaha still owned by the company; yet, under the act of 1905, it would charge the company a rate per 1,000 gallons not less than the gross income per 1,000 gallons derived by it from all water furnished within its own limits, includ-

ing the estimate for hydrant service. In this gross income would be not only cost of maintenance and operation, but also interest, return, or profit upon Omaha's entire investment. The rates paid by consumers in Omaha which would go to swell the gross income would be for water delivered at their doors, but the water for South Omaha would be delivered on its northern boundary, and remain to be distributed to consumers through the mains and pipes of the company. To enable the company to receive cost of maintenance and operating expenses, saying nothing of returns on its investment in South Omaha, it would have to charge more than it paid for water; but the rate the company would be required to pay under the act of 1905 is not less than the average of rates to public and private consumers in Omaha, and it is known that the ordinance of South Omaha under which the company is authorized to do business there provides that the Omaha rates shall prevail in that city. The company could not charge more than it would have to pay. It thus appears that the 31 miles or more of mains and pipes in South Omaha regarded as a distribution system, and not as so much iron, would be rendered worthless in the hands of the company. The situation to which the act was directed was quite complicated, and it is preferable to believe some other purpose was in view to express which the language was unhappily chosen.

When the report of the appraisers came in, the water board adopted a resolution rejecting it, and it is claimed that the act of 1905 conferred authority upon the board to do so. But in 1903 the city, proceeding in accordance with the act of that year, availed itself of the right reserved in the ordinance of 1880 by electing to purchase; and appraisers were duly chosen and were engaged in the performance of their duties when the act of 1905 was passed. The continuing offer of the company to sell arising from the acceptance of the ordinance of 1880 and the election of the city in 1903 to buy made a contract binding upon both parties. The provision for fixing the price by appraisal was a valid one, and it was recognized by the act of 1903 which authorized the water board to nominate an appraiser for confirmation by the city council. There was no withdrawal from the appraisal proceedings. The appraisal being valid the Legislature could no more authorize the water board or the city to reject it than it could authorize the abandonment of the contract of purchase itself. Nor can an impairment of the obligation of the city to complete the purchase be effected by prescribing new conditions in respect of the voting of bonds. Sala v. New Orleans, Fed. Cas. No. 12,246, 2 Woods, 188.

The ownership by a city of a waterworks system extending beyond its limits is not an unusual thing. The legislative act in the Kansas City case (Laws Mo. 1873, p. 286, § 1) provided that the city might acquire and use for that purpose property "within and without the corporate limits of the city and also in the state of Kansas," and (section 22) that the city might grant to any person or corporation the right of construction, reserving the privilege of purchase. When the purchase clause was invoked some 20 years later, the company's distribution system extended beyond the city limits and the main supply

works were in another state. The difficulties suggested by counsel here are not greater than those before Mr. Justice Brewer under whose judicial supervision the purchase by the Missouri city was effected. National Waterworks Co. v. Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827; National Waterworks Co. v. Kansas City (C. C.) 65 Fed. 691. In a transaction of this magnitude, there will always be encountered minor obstacles that will readily yield to business methods. What the parties cannot agree upon the trial court has full power to determine according to principles of right and justice. We refer here to such contentions as that there are two or three properties in the city of Omaha belonging to the company but not needed in the business, and also that there are supposed defects in its title to other properties. The latter are not of great importance in comparison with the magnitude of the entire system. The property not needed was appraised separately and it can be excluded from the sale, and the trial court can determine whether the title to other properties is defective. It is not necessary that the title of the company to all the lands upon which its works are built or through which its pipes are laid should be a fee simple, perfect in every particular, and subject to no criticism. An irrevocable license, for instance, would be sufficient, or a title based upon prescription. If, however, there should be found substantial defects, opportunity should be given the company to remedy them, and, if it is unable to do so, the parts of the property so circumstanced can be valued and the purchase price abated accordingly. It would be expressing too narrow a view to say that an appraisal of a great system of waterworks under a contract of purchase must fail because the title to a small part not vital to the integrity of the system was afterwards found to be defective. That the deed tendered by the company was not such as the city was required to take is immaterial. It is sufficient that the company was able, ready, and willing to do what might lawfully be required of it. At some time during the progress of the cause in the trial court the trustees of the mortgages should be made parties, to the end that the precise amount of outstanding bonds may be ascertained and paid and the liens discharged concurrently with payment by the city of the purchase price. Doubtless the company will have to use the proceeds of sale in paying its mortgage indebtedness, or, if an arrangement is desired such as was made in the Kansas City case whereby the mortgages are assumed by the city, and the company released from liability, the presence in the case of the trustees would facilitate it.

The decree is reversed and the cause is remanded, with direction to proceed to decree in accordance with the views expressed in this opinion.

CHICAGO, B. & Q. R. CO. v. WINNETT et al., State Ry. Com'rs.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1908.)

No. 2,722.

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—CONTROLLING ACTION OF STATE BOARD.

A court of equity is without power to interfere by injunction to control in advance the exercise of the legislative power conferred on the State Railway Commission by the Constitution and statutes of Nebraska to fix reasonable and just rates for the transportation of property between points within the state, by restraining such commission from considering or acting upon the question of establishing new rates on any given commodities, or from giving notice to a railroad company of any order which may be adopted establishing such rates.

Sanborn, Circuit Judge, dissenting.

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

W. D. McHugh, for appellant.

W. T. Thompson, Charles H. Aldrich, and Halleck F. Rose, for appellees.

Before SANBORN and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. The record in this case discloses that on or about the 17th day of August, 1907, appellees, acting as the Nebraska State Railway Commission, issued a notice to appellant that on the 9th day of September, 1907, at 10 o'clock a. m., said Railway Commission would consider the question of fixing the rates on grain and grain products in straight car loads, transported between points in Nebraska, and that the rates contained in a schedule attached to said notice would be adopted with such changes and modifications as should be deemed necessary unless good and sufficient cause should be shown why they should not be. The only good and sufficient cause shown by appellant pursuant to the invitation contained in said notice was the filing of the bill in this case on the 10th day of September, 1907, while said Railway Commission was engaged in considering the matter mentioned in said notice and before said Commission had reached any conclusion therein. Upon the filing of said bill, appellant obtained an order fixing the 23d day of September, 1907, as the time when the court would hear an application for a temporary injunction, and also in the meantime restraining appellees, as members of the Nebraska State Railway Commission, from mailing to appellant any copies or copy of any order reducing the rates for the transportation of corn, wheat, and flaxseed, and from in any manner giving any notice to appellant of any order of said board reducing the rates for the transportation of corn, wheat, and flaxseed in the state of Nebraska, charged and maintained by appellant. At the time appointed for the hearing of the motion for a temporary injunction appellees appeared and filed a demurrer to the bill. In ad-

dition to the general ground of want of equity, said demurrer specified the following grounds:

"(3) It appears on the face of said bill that the schedule of rates for the transportation by railroads within the state of Nebraska of the commodities of corn and wheat mentioned and complained of therein has not been fixed, determined on, or adopted by defendants, and the consequences alleged by said bill to be threatened are not cognizable in equity prior to the adoption of such rates by the Nebraska State Railway Commission.

"(4) The functions of the Nebraska State Railway Commission to fix and determine upon reasonable rates for transportation of commodities by railroads within said state are legislative, and are delegated to it pursuant to an amendment of the Constitution of said state, duly adopted, and the powers of defendants in that behalf as members of said commission are co-ordinate and independent of the judiciary and not subject to control or restraint by a court of equity till after its acts have been duly passed and finally adopted; and so upon the face of complainant's bill showing no final action has been had by defendants touching the adoption of the schedule of rates complained of this court has no jurisdiction to hear and determine this action.

"(5) It appears on the face of said bill that the fixing of schedules of rates for transportation of corn and wheat, the acts complained of, are not threatened to be done in any event till after complainants shall have been given a hearing and opportunity to show cause why the same should not be adopted, and that complainant had an adequate remedy at law."

Upon said hearing the court sustained said demurrer, refused to grant a temporary injunction as prayed, and dissolved the restraining order theretofore granted. Appellants declining to plead further, final decree dismissing the bill was entered, and appellant has appealed therefrom to this court. The Circuit Court refused to continue the restraining order pending the appeal, and the record does not show what the Railway Commission has done as to the matters referred to in the notice of August 17, 1907. It was stated, however, at the argument in this court by counsel for the appellees, that the Railway Commission had never as yet concluded its consideration of said matters. In view of this condition of the record, we turn to the allegations of the bill with some interest. The demurrer admits all the facts alleged therein that are well pleaded. It does not admit conclusions of law or mere matters of opinion not justified by the facts. The following material facts appear in the bill: Appellant is a citizen of Illinois. Defendants are citizens of Nebraska, and constitute the Nebraska State Railway Commission. The requisite amount in controversy to give jurisdiction. Appellant is the owner and engaged in the operation of a system of railways extending through the states of Illinois, Iowa, Missouri, Kansas, Nebraska, Colorado, Wyoming, and Montana.

On the 17th day of August, 1907, said Railway Commission served a notice upon appellant in words and figures as follows:

"Lincoln, Nebraska, August 17, 1907.

"Notice is hereby given the Chicago, Burlington & Quincy Railroad Company that at 10 o'clock a. m., September 9, 1907, the Nebraska State Railway Commission will consider the question of fixing the rates on grain and grain products in straight car loads, transported between points within this state, and the rates hereto attached will be adopted, with such changes and modifi-

cations as may be deemed necessary, unless good and sufficient cause is shown why they should not be.

"[Seal.] Nebraska State Railway Commission,
"By H. J. Winnett, Chairman.

"Attest: Clark Perkins, Secretary."

The rates now in force on appellant's lines in Nebraska were established by the Legislature of said state by an act approved April 8, 1907. Said act is as follows:

"Section 1. (Maximum freight rates.) It shall be unlawful for any railway company or common carrier, operating or doing business in the state of Nebraska, to charge, collect or receive for the transportation of live stock, potatoes, grain and grain products, fruit, coal, lumber, or building material in carload lots, within the state of Nebraska, more than eighty-five per cent. (85%) of the amount fixed in the classification and schedules of such railway companies or common carriers for the transportation of such property in force and effect on their various lines of railway on the first day of January, 1907, until after the State Railway Commission shall have provided a greater rate upon any article or property in such schedules from the rate herein fixed.

"Section 2. (Reasonableness of rate; hearing.) The State Railway Commission shall have the power to hear and determine whether or not the freight rate upon any article or articles in such schedule or classification of rates is either so high as to be unjust to shippers, or so low as to be unremunerative or unjust to any common carrier affected thereby and upon complaint in writing, of any person or corporation affected thereby, particularly specifying the article or articles upon which such rates are either too high or too low and the facts in connection therewith, said railway commission shall set such cause for hearing and upon a trial thereon and a full hearing after notice thereof, shall either raise or lower the rate herein fixed upon such article or articles to the end that the same shall be just and reasonable to all parties concerned." Laws 1907, p. 345, c. 95.

The bill further alleges: That the rates fixed by said act are unjust, unreasonable, and confiscatory; that the rates between points in Nebraska for the transportation of corn, wheat, and flaxseed as stated in the schedules attached to the notice served on appellant on or about August 17, 1907, are very much lower than the rates on said commodities fixed by the Legislature in said act of April 8, 1907; that the rates stated in said schedule attached to said notice are confiscatory, unjust, and unreasonable and will directly interfere with interstate commerce if established and enforced; that no complaint by any person or corporation affected by the rates named in said act of April 8, 1907, has been filed with or presented to the said defendants or either of them or the Nebraska State Railway Commission. The bill then proceeds as follows:

"Your orator further avers that, notwithstanding the facts aforesaid, the said defendants, constituting the said Nebraska State Railway Commission, threaten and intend, and unless restrained by the order of this honorable court will attempt, to establish, and establish, as the rates for the transportation of said grain within the state of Nebraska, the rates named and set forth in said schedules, and will require your orator to make, keep, and publish the schedules showing the said rates and charges and will at once and without opportunity to be heard mail copies thereof to your orator and give notice thereof to your orator, and will require your orator to transport said grain within the state of Nebraska at said rates, and will attempt to enforce its said orders, and will institute proceedings against your orator for any violation of said order, and will institute various proceedings against your orator for penalties for violation of the said order, and will institute various proceed-

ings against the officers and agents of your orator for violations of the said order, all of which will give rise to a great multiplicity of suits, and will constitute a continuous and serious interference with and an interruption of the business of your orator, and will be a continuing trespass upon the rights of your orator.

"And your orator further avers that if the said defendants, as members of the Nebraska State Railway Commission, should make an order putting into effect the said schedule of rates or any schedule of rates for the transportation of said commodities lower than those now in force and should mail copies thereof to your orator, then, under the laws of Nebraska, every person interested in said order, which would include all producers and shippers in grain, would have a right to institute proceedings against your orator to enforce the provisions thereof, and your orator avers that, if such order is made and said copy mailed, very many of the persons interested in said order would institute separate proceedings in the various counties of this state against your orator; that many county attorneys throughout the state would, in their respective counties, institute criminal proceedings against your orator; that many private persons would file complaints in many counties and institute criminal proceedings against your orator; and that many private persons and county officials would file complaints and institute many criminal proceedings in various counties against the various agents and officers of your orator; and that grand juries throughout the state would return indictments in various counties against your orator and against the various agents and officers of your orator—all of which would give rise to a great multiplicity of suits and subject your orator to ruinous expense and greatly embarrass your orator in the transaction of its business. And if your orator in a proper proceeding brought for that purpose should, upon a true and sufficient showing, apply for an injunction to prevent all of said proceedings, the parties to be affected thereby are too numerous to be joined, and the enforcement of any writ of unjunction would be difficult and give rise to conflicts and the remedy of your orator would be rendered much less efficacious."

The following is the prayer of the bill:

"In consideration whereof, and for as much as your orator is remediless in the premises by the strict rules of the common law, and can have relief only in a court of equity where matters of this kind are properly cognizable and relievable, your orator prays that the said defendants, and each of them as members of and constituting the Nebraska State Railway Commission, be upon the filing of this bill temporarily restrained and enjoined from putting into effect or attempting to put into effect, and from establishing or attempting to establish, the said schedules of rates as the rates to be charged by your orator for the transportation of said grain within the state of Nebraska, and from mailing copies thereof to your orator, and from giving notice thereof to your orator, and from in any manner reducing or attempting to reduce the rates to be charged by your orator for the transportation of said grain within the state of Nebraska, and from mailing to your orator any copy or copies of any such order, and from giving to your orator any notice of any kind of any order reducing rates on said products, and that upon a final hearing hereof that the said injunction be made perpetual, and that your orator have such other and further relief as the circumstances of the case shall require and as shall be agreeable to equity and good conscience."

As it is not even pretended in the bill or outside of it that appellees, as the Nebraska State Railway Commission, have established or fixed any rates such as are contained in the schedules attached to the notice of August 17, 1907, or any other rates, it must necessarily follow that the bill in this case has no other object than to perpetually restrain the Nebraska State Railway Commission from even considering the question of establishing or fixing a rate for the transporta-

tion of grain and grain products in straight car loads between points in Nebraska.

With reference to the power of the Nebraska State Railway Commission to enter upon the consideration of the subject mentioned in the notice of August 17, 1907, under the laws of Nebraska, in addition to the act of April 8, 1907, we quote the following from the Constitution of Nebraska:

"There shall be a state railway commission consisting of three members who shall be first elected at the general election in 1906, whose term of office except those chosen at the first election under this provision shall be six years and whose compensation shall be fixed by the Legislature. Of the three commissioners first elected the one receiving the highest number of votes shall hold his office for six years, the next hightest for four years and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But in the absence of specific legislation the commission shall exercise the powers and perform the duties enumerated in this provision." Const. art. 421a.

We also quote the following from the act of the Legislature of the state of Nebraska approved March 27, 1907:

"Sec. 2 (b). Said commission shall have the power to regulate the rates and services of, and to exercise a general control over all railroads, express companies, car companies, sleeping car companies, freight and freight line companies and all other common carriers engaged in the transportation of freight or passengers within the state."

"Sec. 2 (d). Said commission shall have the power, and it shall be its duty to make all necessary classifications and to fix all necessary rates, charges and regulations to govern and regulate the freight and passenger tariffs of railway companies and common carriers, the power to correct abuses and prevent unjust discriminations, extortions and overcharges in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as hereinafter provided, through proper courts having jurisdiction.

"Sec. 2 (e). Said commission shall have the power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character and description that may be transported over the railways of this state, into such general and special classes as may be found necessary and expedient, and to fix to each class or subdivision of freight, a reasonable rate for each railway company or common carrier, for the transportation of each of said classes and subdivisions; the classifications herein provided for shall apply to and be the same for all railway companies or common carriers subject to the provisions of this act." Laws 1907, p. 314, c. 90.

As all rightful legislative power, except as its exercise may be limited by the federal or state Constitutions, is possessed by the Legislature of Nebraska, it is incorrect to speak of the Constitution of Nebraska as a grant of power so far as the Legislature is concerned. The Legislature would have full power to delegate to the Nebraska State Railway Commission the authority to fix rates for the transportation of passengers and freight by common carriers within the state of Nebraska if the Constitution were silent upon that subject. It seems clear therefore that the power to act in the matter in controversy, so far as the laws of Nebraska are concerned, has been fully conferred. That the general power to fix rates for the transportation of passengers and freight by common carriers between points within a state belongs to the Legislature of each state, that said power may

be exercised by the Legislature itself or be delegated by it to a commission established for that purpose, and that courts of equity will not interfere by injunction to control the exercise of this power in advance, are propositions established beyond question by the following authorities: Munn v. Illinois, 94 U. S. 113, 144, 24 L. Ed. 77; Peik v. Chicago N. W. Railway, 94 U. S. 164, 178, 24 L. Ed. 97; Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; C., M., etc., Railway v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; St. Louis & San Francisco Ry. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; Cincinnati, New Orleans, etc., Ry. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Texas & Pacific Ry. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; Interstate Commerce Commission v. Cincinnati Ry. Co., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 338, 1191, 29 L. Ed. 636; Smyth v. Ames, 169 U. S. 515, 18 Sup. Ct. 418, 42 L. Ed. 819; McChord v. Louisville & Nashville R. R. Co., 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289; Alpers v. City of San Francisco (C. C.) 32 Fed. 503; Southern Pacific Co. v. Railroad Commissioners (C. C.) 78 Fed. 236; New Orleans Water Works Co. v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; Atlantic Coast Line v. North Carolina Corporation Comm., 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933.

It must be conceded, we think, that the Nebraska State Railway Commission cannot interfere with a power of Congress to regulate interstate commerce nor confiscate the property of appellant by the mere consideration of the question mentioned in the notice of August 17, 1907; but, even if it could, the judiciary cannot control its actions in advance. The great political truth that "the accumulation of all powers legislative, executive, and judiciary, in the same hands whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny," has always been recognized by those who have struggled for liberty in the years that are gone, and it has always formed one of the great basic principles upon which the national and state governments have been founded. The national Constitution and those of all the states have provided that the powers of government shall be vested in three departments, the executive, the legislative, and the judicial. The fact that the appellant might be subjected to a multiplicity of suits, or that it might suffer irreparable damage when compared with the necessity of maintaining in all its integrity the proposition that the judiciary will not seek to control legislative action in advance, is dwarfed into insignificance.

"The legislative and judicial are co-ordinate departments of the government of equal dignity; each is alike supreme in the exercise of its proper functions and cannot directly or indirectly while acting within the limits of its authority be subjected to the control or supervision of the other without an unwarrantable assumption by that oth-

er of power which by the Constitution is not conferred upon it. The Constitution apportions the powers of government but it does not make any one of the three departments subordinate to another when exercising the trust committed to it. The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative." Cooley's Constitutional Limitations, 192.

If it is an unwarrantable assumption for the judiciary of the same sovereignty to directly or indirectly control or supervise the legislative power, what can be said of the attempt of the judiciary of a different jurisdiction to control or supervise the legislative power when the orders of said judiciary even when acting within its undoubted jurisdiction are received with hostile resentment? It is claimed, however, that conceding that the fixing of rates as proposed by the State Railway Commission is an act of legislation, and that a court of equity will not seek to control the action of said commission prior to the actual fixing of the rate, still the bill in this case may be maintained for the purpose of perpetually enjoining said commission from giving any notice to appellant of any rates that they may fix. This claim arises from the fact that section 5 of the act of the Nebraska Legislature approved March 27, 1907, provides as follows:

"The said Railway Commission shall fix as soon as practicable thereafter a schedule and classification of rates and charges except joint rates hereinafter provided for for the transportation of freights, passengers, and cars, over the various lines of railroad in this state and to that end the said commission shall give the railroad company or common carriers to be affected thereby ten days notice of the time and place when and where the rates will be fixed and any such railroad company or common carriers shall be entitled to be heard at such times and place to the end that justice may be done; and shall have process to enforce the attendance of witnesses to be served as in civil cases. Said schedule of rates and charges so fixed and prescribed, shall go into effect not less than thirty days nor more than sixty days within the discretion of the commission, after the same have been completed and copies thereof mailed to the railway companies and common carriers affected thereby and any or all rates therein contained shall be and remain in force and effect from and after said time unless modified, annulled or otherwise revised either in whole or in part by the said Railway Commission upon a hearing with respect thereto before said commission or until such rate or rates are finally adjudged to be unreasonable and unjust in a court of competent jurisdiction."

It is argued that if the Railway Commission are permitted to fix the rate and to fix the time within the limits of the law when the same shall go into effect, and shall mail copies of the schedule or schedules of rates so fixed, appellant would be without remedy in a federal court of equity, for the reason that the law fixes the time when the rates shall go into effect, and that after notice has been mailed there would be nothing to enjoin, as the court has no power to restrain the passing of time. We will first consider the objections that stand in the way of granting such relief on the present bill, and then consider whether or not appellant would have a remedy in a federal court of equity after notice of the fixing of the rate had been mailed to it.

The first objection against granting the relief claimed is that prior

to the fixing of the rate this court is bound by a conclusive presumption that the Railway Commission will act justly, fairly, and within the limits of its power.

The second objection to the issue of a perpetual injunction against giving a notice of the fixing of a rate is that courts only concern themselves with real controversies. It certainly cannot be the law that the different railroads in a particular state after a commission has been empowered to fix rates may file a bill in equity in the United States Circuit Court for the proper district and obtain an injunction restraining the commission from putting into effect any schedule of rates which it may thereafter adopt. Take the present case for illustration. Upon what evidence would a decree rest perpetually enjoining the Railway Commission from giving notice to appellant of any rates it may hereafter fix? The answer is plain.

The decree could rest only upon proof that the rates, notice of which is to be restrained, were void for some valid reason, and as the rates are not yet fixed, and the court has no authority to interfere in advance with the fixing thereof, it results that inherently and fundamentally the bill must fail to support the relief now under discussion. But counsel for appellant take a much too narrow view of the powers of a federal court of equity. Those courts are not limited in their powers to the mere restraint of threatened injury but may, in proper cases, where the necessity exists compel action by mandatory injunction.

In the case of In re Lennon, 166 U. S. 556, 17 Sup. Ct. 661, 41 L. Ed. 1110, it is said:

"But it was clearly not beyond the power of a court of equity which is not always limited to the restraint of a contemplated or threatened action but may even require affirmative action where the circumstances of the case demand it. Robinson v. Lord Byron, 1 Bro. C. C. 588; Hervey v. Smith, 1 Kay & Johns. 389; Beadel v. Perry, L. R. 3 Eq. 465; Whitecar v. Michenor, 37 N. J. Eq. 6; Broome v. New York & New Jersey Telephone Co., 42 N. J. Eq. 141, 7 Atl. 851."

In this very case, if the Railway Commission should proceed and fix a rate which would be unlawful in view of constitutional limitations and give notice thereof to appellant, there would be 30 days at least before the rates would go into effect in which appellant could file a bill in equity in the United States Circuit Court and upon a proper showing obtain a temporary injunction, mandatory in character, compelling the Railway Commission to withdraw and cancel the notice already given until the further order of the court, and if appellant should maintain its bill upon the merits it would be entitled to a perpetual injunction either mandatory or otherwise preventing the enforcement of the rates so established. Not only is this true, but, even after a schedule of rates has gone into effect, appellant, its stockholders, its mortgage bondholders, or any other person or corporation having the proper interest may file a bill in equity to enjoin the enforcement of rates, and the court which first acquires jurisdiction over the matter will hold it to the exclusion of all other courts or officers until the case is finally determined. In the matter of Edward T. Young, Petitioner (opinion by Supreme Court of the Unit-

ed States filed March 23, 1908) 28 Sup. Ct. 441, 52 L. Ed. ——; Thomas F. Hunter, Sheriff, etc., v. James H. Wood (opinion by the Supreme Court of the United States, filed March 23, 1908) 28 Sup. Ct. 472, 52 L. Ed. ——.

It results from the foregoing that the bill was prematurely filed, and the decree of the Circuit Court must be affirmed.

It is so ordered.

SANBORN, Circuit Judge, dissents.

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## NORTHERN COMMERCIAL CO. v. LINDBLOM.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,483.

1. SHIPPING—LOSS OF GOODS—OWNERSHIP—RIGHT TO SUE.

Where plaintiff, having a grub-staking contract with certain miners providing for the delivery of outfits to them at an Alaskan port in consideration of one-half of the profits of the mining venture, and pursuant thereto purchased and shipped the outfits by defendant's steamer, which was lost, so that the outfits were never delivered at destination, plaintiff was still the owner, and was therefore entitled to sue for the damages sustained.

2. SAME—TRUSTEE OF EXPRESS TRUST.

Plaintiff was still entitled to sue as the trustee of an express trust, even if the title to the outfits passed to the firm, consisting of himself and the persons to whom the outfits were to be delivered, and should be regarded as the owner of the goods from the time they were delivered to the steamship for transportation.

3. SAME—EVIDENCE.

In an action against the owners of a vessel for loss of freight, evidence *held* sufficient to go to the jury in support of plaintiff's claim that he entered into the contract of affreightment with defendant, paid the freight, and was the owner and consignor of the merchandise.

4. SAME—NEGLIGENCE.

In an action against the owners of a vessel for loss of goods, an allegation that the vessel was wrecked and the merchandise lost on account of defendant's negligence, and without fault on plaintiff's part, raised the issue of defendant's negligence, and authorized the admission of evidence that the vessel was being operated without a full complement of officers, required by Rev. St. § 4463 (U. S. Comp. St. 1901, p. 3045).

5. SAME—DUTY TO PROVIDE OFFICERS.

Rev. St. § 4463 (U. S. Comp. St. 1901, p. 3045), declares that no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers and full crew sufficient at all times to manage the vessel, etc. *Held*, that not only must the vessel have a full complement of licensed officers and adequate crew with reference to all the exigencies of the intended route under such section, but the officers and crew must be competent for any exigency that is likely to happen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 451.]

6. SAME—DAMAGES.

In an action against a vessel for loss of miners' outfits destined to a place on the coast of Alaska, where there was no market in which such goods could be bought, the goods being intended for consumption, and not

for sale, the measure of damages was the market value of the goods lost at the place of destination at the time when they should have been delivered, which the jury was authorized to ascertain by taking the price at the place of shipment and adding thereto the cost of carriage and interest at the legal rate.

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

This was an action brought by the defendant in error, who was plaintiff in the court below, against the plaintiff in error, defendant in the court below, to recover the sum of $5,297.10 for a breach of contract to carry from Nome, Alaska, and deliver at Point Blossom, Alaska, four passengers and certain merchandise.

The Northern Commercial Company was a common carrier and the owner of the steamship Saidie, and the passengers and merchandise were to be carried by this vessel. It is alleged in the complaint that the defendant was a common carrier for hire, and that the passengers and freight were delivered to the defendant for transportation from Nome to Point Blossom in pursuance of the contract; but the defendant negligently, and without fault on the part of the plaintiff, utterly failed to transport and carry such freight and passengers, or either of them, to the point of destination. In the defendant's answer, it admits that it was a common carrier of passengers and freight for hire between Nome and Point Blossom, both in Alaska, but denies all the other allegations of the complaint.

Upon the trial of the case the plaintiff, Lindblom, testified, among other things, that in September, 1904, he shipped from Nome to Point Blossom on the steamship Saidie certain passengers and freight; that he paid to the agent of the defendant in the office of John J. Sesnon Company about $297 for freight and passenger money. The freight consisted of provisions, mining tools, machinery, and outfit for nine men for one year. The cost of the outfit was $5,203. It was lost on the sea, and he never got any of it back. The passengers were not carried to Point Blossom. The freight shipped was marked ⟨3⟩, which meant Lucky Three Mining Company. Witness said the Lucky Three Mining Company was himself, and they worked under his contract. He paid for the goods and owned them. He paid the passenger money of some of the passengers and some paid their own fare. He paid for two or three. He says, further, that the bills from the merchants amount to $5,300. That was the amount that was on his memorandum that was shipped on the Saidie. The stuff that he bought was used in mining the company's claims on the Kobuk river. The people interested with him in this company were his brother, Classel, Freey, Hansen, and Dahl. The witness had a half interest in the company, and the others owned the other half, and they were all working together. Witness was furnishing the provisions, tools, and money, and they furnished the labor. The profits were divided half and half. This arrangement had been running since 1902 and had not terminated. There were no profits in the year 1904. Some gold dust was taken out, but there was a loss. He bore his part of it, and they lost their labor. The stuff shipped was for the company. The Lucky Three Mining Company was not a corporation. It was a partnership of which witness was a member. When the goods were on the Saidie, they belonged to the company. He was the one that put up the money. The witness finished his testimony, and was afterward recalled, and testified that there were some other persons interested with him in the Lucky Three Mining Company, but that they had no interest in the freight aboard the Saidie. It belonged to the witness until it was turned over to the men in the Kobuk. The men in the Kobuk were "grub-staked" by him. He furnished the provisions. The company had no interest in the provisions before receiving them. There were no more provisions for them to work with, and witness was to furnish the provisions, and they do the work. The proceeds were to be divided half and half, after paying all expenses. Witness was to furnish provisions and machinery, and they were to furnish the labor. After the provisions were lost, witness duplicated the order and sent another outfit on the Corwin.

On cross-examination, the witness testified that he had talked to Mr. Fink (his attorney) at noon about testifying as to who owned the freight and understood now that it was necessary for witness to own these goods, and witness had a talk with Mr. Fink after he got off the witness stand. Mr. Fink did not say it was necessary for witness to say that he owned the provisions, instead of the Lucky Three Mining Company, or anything to that effect. Mr. Fink asked him whether the Lucky Three owned it or the witness. Witness said he owned it; "my own until it gets to its destination." Witness did not understand that he was to be recalled. Witness said that he had bought the goods in the name of the Lucky Three Mining Company; bought for them— for the Lucky Three Mining Company— and he charged them up to the Lucky Three Mining Company. This is true of every article purchased. The Lucky Three Mining Company was a partnership. He had a half interest in the partnership and furnished all the provisions.

On redirect examination he was asked: "Q. Under your contract with these people, and with your partners, Mr. James Lindblom, Classel, and others, were they to have any interest whatsoever in goods and supplies furnished by you prior to the time of their delivery to them? A. No, sir."

The testimony of other witnesses was to the effect that the Saidie ran on the rocks and was lost. She struck on a well-known reef at 3:30 in the afternoon; the weather being fine, and the sea like a mill pond. The vessel had but one mate. The certificate of inspection of the vessel issued by the United States inspector for the district of Juneau, Alaska, on the 9th day of September, 1903, required the vessel to carry two mates. When the vessel struck, neither the master nor mate was on deck. The vessel was in charge of a watchman.

The testimony on behalf of the plaintiff being concluded, counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant, upon the grounds: First. It appeared from the testimony that the ownership of the goods at the time they were placed on board the steamer Saidie was in the Lucky Three Mining Company, a partnership. Second. The plaintiff failed to show that said defendant failed to deliver said goods according to the contract of affreightment. The court overruled the motion. No evidence was offered on behalf of the defendant. The court instructed the jury, and thereafter the jury returned a verdict for the plaintiff in the sum of $5,619.24.

Joseph K. Wood and T. M. Clowes (William Thomas, of counsel), for plaintiff in error.

Albert Fink, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The defendant contends that the motion to instruct the jury to find a verdict for the defendant should have been granted, upon the ground that the ownership of the goods at the time they were placed on the steamer Saidie was in the Lucky Three Mining Company, a partnership. It is true that the plaintiff in the course of his testimony did say that, "When the goods were on the Saidie, they belonged to the company"; but he also stated the facts concerning his purchase and shipment of the goods to the Lucky Three Mining Company, from which it appeared that the company was not the owner of the goods on the Saidie, but that the plaintiff was. The plaintiff in his testimony said that the company was a partnership; that the parties interested with him in the company were his brother, Classel, Freey, Hansen, and Dahl. The plaintiff had a half interest in the company, and the others owned the other half, and they were all working together. He furnished the provisions, tools, and money, and they furnished the labor, and the profits were divided half and half. When

there was a loss, plaintiff bore his part of it, and his partners lost their labor. This is an agreement common to mining partnerships in the West, but it is something more than a "grub-staking" contract. Lindley on Mines, vol. 2, § 858. The plaintiff used this term in his testimony. He said "The men in the Kobuk were 'grub-staked' by me. I furnished the provisions. The company had no interest in the provisions before receiving it." The plaintiff made the contract with the defendant for the transportation of the provisions, tools, and other merchandise to the mine and paid the freight on the same. In other words, he delivered the "grub-stake" at the mine where his associates furnished their labor, and the plaintiff was the owner of the "grub-stake" until so delivered. The merchandise was lost. The plaintiff is the only one who has suffered a loss under that contract, and the only one who makes a claim for that loss. He is the real party in interest. This is a fair and reasonable inference from the facts stated, and justified the court in overruling the motion of the defendant to instruct the jury to find for the defendant.

But, assuming that plaintiff's ownership of the goods terminated when they were delivered to the defendant on board the Saidie at Nome for shipment to the Lucky Three Mining Company at Point Blossom, and that on board the Saidie they belonged to the partnership, the defendant would be in no better position, for the plaintiff would still be entitled to maintain this action as the consignor, who made the contract with the defendant as carrier; the plaintiff having thereby constituted himself the trustee of an express trust. In Carter v. Southern Ry. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354, Carter sued the railroad company for damages resulting from the breach of a contract of shipment which the defendant had entered into with the plaintiff. Upon the trial the plaintiff testified concerning the shipment and the damaged condition of the goods upon delivery, but just before leaving the witness stand the plaintiff stated:

"The goods belonged to my wife, Mary Carter. She owned them, and I had the goods in my charge as her agent."

There being no further evidence from the plaintiff, the court, on motion of defendant's counsel, granted a nonsuit, on the ground that the goods alleged to have been damaged did not belong to the plaintiff, but to his wife. The case went to the Supreme Court on a writ of error, where leading cases upon this question in England and the United States are reviewed, and the conclusion reached was that the plaintiff was entitled to recover as the consignor. The court says:

"The courts of both this country and England are now, with a few exceptions, all agreed that, where the consignor makes the contract of shipment with the carrier, he may bring an action for loss of or injury to the consignment, although he may not be the actual owner of the property. In such a case the privity of contract between the carrier and the consignor is a sufficient foundation on which to base the action. It is also well settled by the authorities that where a consignor, who is himself not the real owner, recovers damages from the carrier for a breach of the contract of carriage, the recovery inures to the benefit of the owner, and the consignor is regarded simply as the trustee of an express trust."

The rule here stated is abundantly supported by the authorities cited, and, if we apply the rule to the facts of this case, it establishes the plaintiff's right of action as the trustee of an express trust.

We do not overlook the fact that the bills of lading introduced in evidence were issued by the defendant to the parties who sold the merchandise to the plaintiff; but the plaintiff testified that he paid for the merchandise, and that in September, 1904, he paid the freight and passenger money at the office of the defendant's agent, and the only receipt in the record for the freight on the Saidie is one dated September 4, 1904, and this receipt was issued to the plaintiff. This evidence was sufficient to go to the jury in support of plaintiff's claim that he entered into the contract of affreightment with the defendant, and that he paid the freight, and that he was the owner and the consignor of the merchandise.

The defendant objects to certain evidence and instructions of the court to the jury, relating to the negligence of the defendant in having but one mate on board the vessel, whereby the vessel was wrecked and the merchandise was lost, on the ground that the pleadings raised no issue as to any negligence on the part of the defendant operating the Saidie. In paragraph 4 of the complaint, it was distinctly charged that the "defendant negligently, and without fault upon the part of the plaintiff, utterly failed to transport and carry said passengers and freight, or either of them, to said point of destination." This allegation was denied in defendant's answer. The question of negligence was therefore placed in issue by the pleadings, and the evidence was relevant and material to the issue. It is true the plaintiff might have alleged the failure of the defendant to deliver the goods in accordance with the terms of the contract, and left the burden with the defendant to show that the failure was not by reason of any negligence on its part; but the plaintiff having charged the defendant with negligence as the cause of its failure to deliver the goods, and the allegation having been denied, it was relevant and material for the plaintiff to show that the vessel did not have in her service a full complement of officers as required by section 4463 of the Revised Statutes (U. S. Comp. St. 1901, p. 3045). It is the duty of the owners of a steam vessel carrying goods and merchandise, not only to provide a seaworthy vessel, but they must provide a full complement of licensed officers and a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route. The officers and crew must not only be competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as the striking of a ship on a reef of rocks. Section 4463, Rev. St.; In re Pacific Mail S. S. Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71, citing In re Meyer (D. C.) 74 Fed. 881; Lord v. Goodall Steamship Co., 4 Sawy. 292, Fed. Cas. No. 8,506. The certificate of inspection of the vessel issued by the United States inspector required the vessel to carry two mates. The evidence was that it carried but one. The question of negligence was properly submitted to the jury by the court.

The defendant also objects to the instructions of the court with respect to the measure of damages. The court instructed the jury upon the question as follows:

"These damages will embrace two items: First, the amount, if any, of freight or passenger fare prepaid on any goods and passengers you find were sent, together with interest at 8 per cent. on such sum from the time demand was made on said defendant for such sum to date. Second, the market value of such goods as you find were sent at the place of destination, Blossom, that is, such a sum as the plaintiff could have replaced the goods for at that point, together with interest at 8 per cent. on said sum from the time of demand on the defendant therefor to date."

The objection is made to this charge that it does not correctly state the proper measure of damages. The instruction of the court was correct as applied to the facts in this case. The measure of damages is the market value of the goods lost at the place of destination at the date when they should have been delivered, with interest from that time. The Nith (D. C.) 36 Fed. 86, 96; Ringgold v. Haven, 1 Cal. 108, 118; Prettyman v. Railway Co., 13 Or. 341, 343, 10 Pac. 634; The Arctic Bird (D. C.) 109 Fed. 167, 175; Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 596, 4 Sup. Ct. 566, 28 L. Ed. 527; 3 Hutchinson on Carriers (3d Ed.) § 1360; 3 Sutherland on Damages (3d Ed.) par. 918. But manifestly, if there is no market at the place of destination, which would presumably be the case in a mining camp on the shore of the Arctic Ocean, the jury might consider any other competent evidence tending to prove value at that point. The court accordingly instructed the jury that the market value of the goods at the place of destination was such a sum as would have enabled the plaintiff to replace the goods at that point. This was a reasonable and practical method of ascertaining market value in this case, and hence we find authority for the rule that, if there be no market value for the goods at the place of destination, the jury may ascertain their price by taking the price at the place of shipment, adding thereto the cost of carriage, and allowing, in addition, a reasonable sum for the importer's profit. 3 Sutherland on Damages (3d Ed.) par. 933. In this case the plaintiff did not ship the goods to Point Blossom with the view of realizing a profit on their sale. They were shipped for the purpose of being used by the consignee in mining operations. Under such circumstances, the court properly directed the jury to allow interest, instead of profits. The legal rate of interest in Alaska is 8 per cent. per annum. Section 255, Civ. Code Alaska. The instruction of the court as to the measure of damages was therefore correct.

Finding no error in the record, the judgment of the District Court is affirmed.

NORTHWESTERN S. S. CO., Limited, v. TURTLE et al. (ROBERTSON et al., Interveners).

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,475.

1. SEAMEN—CONTRACT OF HIRING—DEVIATION FROM VOYAGE NAMED IN SHIPPING ARTICLES.

Shipping articles for a voyage described as "from the port of Seattle to Shanghai, China, and such other ports and places in any part of the world as the master may direct," required the vessel after leaving the port of departure to proceed directly by the ordinary route to Shanghai, and to touch at no intermediate port unless the exigencies of the voyage required that she enter the same for coal, supplies, repairs, or other like reason, and where she proceeded by way of Dutch Harbor, Alaska, into the Okhotsk Sea, intending to make the port of Vladivostok with a cargo which was at the time contraband of war, she deviated from the voyage described in the contract, and the members of the crew were entitled to recover damages resulting from their exposure while caught in the ice, consequent upon such deviation to an unusual course in the winter, and from confinement after the capture of the vessel by a Japanese warship.

2. SAME—VARIANCE OF SHIPPING ARTICLES BY PAROL.

Under Rev. St. § 4511 (U. S. Comp. St. 1901, p. 3068), which provides that the shipping articles signed by a crew shall indicate the nature of the intended voyage, the shipowner cannot vary such articles by evidence of a verbal agreement, made at the time they were signed, that the voyage should be other than that described therein.

3. SAME—ACTION FOR BREACH OF CONTRACT—DAMAGES.

Evidence considered, and *held* to sustain the decree of a court of admiralty awarding damages to seamen for injuries suffered by reason of the deviation of the ship from the voyage designated in the shipping articles.

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

For opinion below, see 154 Fed. 146.

In the month of January, 1905, at the port of Seattle, Wash., the appellees shipped as members of the crew of the steamship Tacoma for a voyage from that port "to Shanghai, China, and such other ports and places in any part of the world as the master may direct, and back to a final port of discharge in the United States on Puget Sound, for a term of time not exceeding six calendar months." At that time, and for some time prior thereto, a state of war existed between Japan and Russia, and the Japanese government had declared the Russian port of Vladivostok closed to trade and commerce. Instead of Shanghai, the destination of the vessel was Vladivostok. The steamer carried a cargo of salt beef, intended for the Russian government, and contraband of war. The vessel, in attempting to reach Vladivostok by an unusual and indirect route, presumably for the purpose of avoiding capture by the Japanese, whose war vessels were then patrolling the waters in the usual course of vessels to Vladivostok, became wedged in the ice at a considerable distance northeast of Vladivostok, where she remained for a period of 41 days, during which she was at times in imminent danger of being crushed by the ice. Before she was finally extricated from the ice, she was captured by a Japanese man-of-war, a Japanese prize crew was placed on board, and she was taken to Yekosuka, a naval station near Yokohama. There the appellees were taken by the Japanese authorities from the vessel and brought to Yokohama, where the United States consul secured their release. They were then sent to Seattle on the Empress of China. Their wages were paid for the whole period of their absence from the port of shipping. They filed libels in personam against the appellant, the owner of the vessel, alleging in substance

the foregoing facts, and in addition thereto alleged that the appellant, notwithstanding the provisions of the shipping articles, at all times intended to, and did, without their knowledge or consent, dispatch the vessel upon a voyage from Seattle to Vladivostok; that while the steamship was wedged in the ice they suffered greatly from cold and exposure, and lack of proper food, and from mental strain and anxiety caused by the danger and fear that the steamship would be crushed by the ice; that they suffered humiliation by being made prisoners of war, and experienced discomfort and inconvenience because of the inferior quarters and insufficient food furnished them at Yokohama and upon the steamer Empress of China upon her voyage home. The appellee Moritz claimed damages on the further ground that by reason of such exposure to cold he contracted rheumatism, whereby he suffered greatly and was compelled to lie idle and to incur expenses in medical treatment. The appellee Raymond also testified to special hardships suffered, and to mental strain and anxiety, after leaving the vessel while she was caught in the ice, in his effort to find a station from which news of the dangerous condition of the others could be conveyed to the owners and news to his family that he still survived. The answers to the libels are substantially the same. They admit that while the vessel was lying in the harbor of Seattle, and was about to engage in a voyage from Seattle to Shanghai and return, the appellees signed shipping articles as above set forth; that on January 5, 1905, the vessel sailed from the port of Seattle, in accordance with the shipping articles, and pursued a northerly course. They denied the allegations of hardship and suffering set forth in the libels, and by way of affirmative answers alleged that it was announced to the appellees before leaving Seattle that the steamship would coal at Dutch Harbor, and that she would land her cargo at Shanghai, China, or such other port as might be required by the consignee, if any other port should be required by the consignee after touching any port where the master could get into correspondence with the consignee or its agent, or upon such orders as might be made before leaving the ports of the United States. On the issues so framed, a large amount of testimony was taken, and thereupon the District Court found in favor of the appellees, holding that there was a deviation from the voyage for which they shipped, that they had undergone suffering and hardship as alleged, and assessing their damages as follows: To Moritz, $1,000; to Raymond, $2,000; and to the remaining appellees, $200 each.

John P. Hartman, for appellant.

Daniel Landon, Ormsby McHarg, and Jesse A. Frye, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to the finding of the District Court that there was a deviation from the voyage which was described in the shipping articles. The shipping articles described the voyage as "from the port of Seattle to Shanghai, China, and such other ports and places in any part of the world as the master may direct, and back to a final port of discharge in the United States, on Puget Sound." To comply with these articles, the vessel, after leaving the port of departure, was bound to proceed directly by the ordinary route to Shanghai, and to touch at no intermediate port, unless the exigencies of the voyage required that she enter the same for coal, supplies, repairs, or other like reasons. Under those articles the vessel was not permitted to touch at any other or intermediate port for discharge of cargo before going to Shanghai. Deviation, as applied to the rights of seamen, is analogous to deviation in its application to marine insurance, although there may be deviations which would discharge underwriters that would not discharge seamen. In either case it is a voluntary departure, without necessity or reasonable

cause, from the regular and usual course of the specified voyage. The course taken by the vessel in the effort to reach Vladivostok was clearly a departure from the prescribed route. That it was voluntary is beyond question. The evidence shows that at the time when the shipping articles were signed the intention of the appellant was not to send the vessel to Shanghai, but to Vladivostok, for discharge of her cargo. In order to reach that port and avoid the danger of interception by the blockading fleet, the vessel was sent out of the usual course to that port, and northward through the Kurie Islands into the Okhotsk Sea.

The appellant argues that, because the shipping articles permitted the vessel, after going to Shanghai, to visit other ports, their proper construction would permit the visiting of other ports on the way to Shanghai; but such is not the law. Such articles have always been construed as requiring the vessel to visit the designated ports in the order named therein. United States v. Matthews, 2 Sumn. 470, Fed. Cas. No. 15,742; The Ship Moslem, Olc. 298, Fed. Cas. No. 9,875; Weiberg et al. v. The St. Oloff, 2 Pet. Adm. 428, Fed. Cas. No. 17,357; Anon., Fed. Cas. No. 449. Not only was there deviation, but the crew were taken upon a voyage of a totally different nature from that for which they had shipped, and involving perils which were not incident to the voyage described in the articles. They were carried in the winter time far out of the usual course of a voyage to Shanghai, into a northern sea, full of ice, on a ship insufficiently supplied with provisions and fuel for their comfort, where they were subjected to hardships and perils not contemplated in the shipping articles, and were subject to capture and detention.

It is contended, however, that, if it should be found that there was deviation, the appellant is not liable, because the appellees knew that the vessel was to go to Vladivostok, and they consented to such a course. It would be enough to say, in answer to this, that the shipping articles cannot thus be varied by parol. It is the intention of the statute that the articles shall express the true nature of the voyage, and it is contrary to its policy to permit a variation of the articles by evidence of a verbal agreement made at the time when they were signed. Thompson et al. v. The Oakland, Fed. Cas. No. 13,971; The Triton, 1 Blatchf. & H. 282, Fed. Cas. No. 14,181. But the District Court found that this contention was not sustained by the preponderance of the evidence, and we find in the evidence no ground to question that conclusion. The appellant points to the clause in the articles which provides:

"Should vessel not return to United States, passage and wages of crew to be paid back to Seattle."

It is said that this was inserted in the articles because the appellees insisted upon it, and that this is strong proof that they knew where they were going. The appellant refers to the testimony of the appellee Raymond to show that he so understood the purport of that clause. His testimony, however, is not susceptible of that construction. He testified to a conversation with the chief engineer, shortly before the articles were signed, in which he said to that officer, "It is reported that you people are going to run the blockade," and the engineer answered,

"There is nothing in it." Raymond said, "I would not think of going if you are going to Vladivostok," and the engineer answered:

"We are not going to Vladivostok. We are going direct to Shanghai, and return. * * * The ship is going to Shanghai. There she will be sold to the Russians, and they will offer a big amount of money to stay upon the ship."

This would show that the clause so referred to in the shipping articles was inserted in view of a contemplated sale of the ship at Shanghai, and not with reference to the contingency of her capture in attempting to run the blockade. The evidence as a whole justifies the conclusion that the appellant carefully guarded the secret that the vessel was going to Vladivostok. Her clearance and health certificate, when leaving Seattle, were obtained under the pretense that she was bound for Shanghai. The portion of the freight bill on which the port of destination was entered was torn off. A false entry was made that the ship was bound for Shanghai in the ship's journal, in the deck journal, and in the engineer's journal. When the vessel was captured, there is evidence that the captain attempted to conceal the freight bill. The testimony of the first assistant engineer was that the chief engineer informed him that they were to go through La Perouse Strait, between Saghalin Island and Yezo Island, during the night, and that they were to be prepared to put out all the lights on the ship. The instruction given by the captain to the second mate after leaving Dutch Harbor was to head the log book "from Seattle to Shanghai, by way of Dutch Harbor." All these items of the evidence tend to show an intention to conceal the destination of the vessel and to deceive the appellees.

The appellant contends that there is no proof in the record that the appellees sustained damages, or damages in the amounts allowed by the District Court. There can be no doubt that during the period of their detention in the ice in the Okhotsk Sea the appellees experienced serious bodily and mental suffering. For 41 days they were surrounded by the ice. The weather was extremely cold, and there was insufficient fuel. Some of the men had their feet frozen. The vessel was often in imminent danger of destruction from the crushing force of the masses of ice, which was jammed against her on all sides. Sleep was often made impossible from the noise of the chafing of the ice cakes. The crew, including the captain, were in constant fear of being crushed. After they had been 22 days in this position, the appellee Raymond volunteered to go ashore for the purpose of reaching a telegraph station, in order to inform the owners of the perilous situation of the vessel and advise his family that he was still alive. From his story, which is briefly and modestly told, it is evident that the venture was an exceedingly difficult and dangerous one, and that he endured great suffering from cold and hunger. He went 18 miles over the ice to the shore. The ice was extremely rough in places; in other places it was broken. Nine times he testified he broke through to his arms, and was obliged to proceed with blistered and freezing feet and frozen clothing, which cracked and broke. The appellee Moritz had his feet frozen, and according to his testimony thereafter suffered severely from inflammatory rheumatism, induced by the extreme cold to which he was subjected. He showed that he had paid out the sum of $450

for a nurse, physician, and other expenses resulting from his illness. In view of the evidence, we find no ground for holding that the award allowed to any of the appellees by the District Court was excessive.

The decree is affirmed.

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BEAM v. UNITED STATES et al.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,535.

INDIANS—ALLOTMENT OF LANDS—RIGHT OF CURTESY IN HUSBAND OF ALLOTTEE.

Act March 3, 1885, c. 319, 23 Stat. 341, authorizing allotments of land in severalty to the Umatilla Indians in Oregon, provides that the President shall cause patents to issue to the allottees, which shall be of the legal effect and declare that the United States will hold the land for the period of 25 years in trust for the sole use and benefit of the allottee, "or, in case of his decease, of his heirs according to the laws of the state of Oregon," and that at the expiration of said period the United States will convey the same to the allottee "or his heirs as aforesaid, in fee, * * * provided that the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided." *Held*, that such provision relating to descent applied to lands after the execution of the first so-called patent and during the 25-year period, that during such period the allottee held an equitable estate of inheritance, and that under B. & C. Comp. Or. § 5544, on the death of an Indian woman allottee during such period, leaving a husband surviving, the husband was entitled to hold the land for life as tenant by the curtesy.

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

For opinion below, see 153 Fed. 474.

Stillman & Pruitt and R. J. Slater, for appellant.

M. L. Olmstead, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges

GILBERT, Circuit Judge. Lester Beam, represented here by his prochein ami, the appellant, was born on March 14, 1889, the illegitimate son of an Indian woman. In the year 1891 land in the Umatilla Indian reservation was allotted to his mother under Act Cong. March 3, 1885, c. 319, 23 Stat. 341. On September 21, 1890, she and the appellee intermarried. They lived together as husband and wife until January 26, 1894, when the wife died, leaving no issue living, except the said Lester Beam. A daughter born of the marriage reached the age of two years and died, shortly before the death of the mother. The appeal brings to our consideration the single question whether the appellee is tenant by the curtesy of the land so allotted to his wife during the coverture.

The act of March 3, 1885, after providing for an allotment of lands in severalty to the Indians of the Umatilla Reservation, thus proceeds:

"The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, and which shall be of the legal effect, and declare that the United States does and

will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state of Oregon, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided."

Act Feb. 8, 1887, c. 119, 24 Stat. 388, commonly known as the "General Allotment Act," went into effect before allotments were made under the special act of March 3, 1885. It provided for allotments, within the discretion of the President, of all Indian reservation lands, granted citizenship to all Indians upon the completion of allotments to them, and repeated the language of the prior act in regard to the patents to be issued by the President and the nature thereof, with the amendment that after the expiration of the 25-year period the President might in any case in his discretion extend the period.

By the laws of Oregon in force at the time of and since the passage of the act of March 3, 1885, it is provided that, where property of a decedent has not been lawfully devised, the same shall descend in equal shares to his or her children and to the issue of any deceased children by right of representation; that, if there be no children, it shall descend to all his or her other lineal descendants; and it is further provided that an illegitimate child shall be considered an heir of its mother, and shall inherit or receive her property, real or personal, in like manner as if such child had been born in lawful wedlock. B. & C. Comp. §§ 5577, 5580. The law of Oregon in regard to estates by the curtesy is as follows:

"When any man and his wife shall be seized in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life as tenant thereof by the curtesy, although such husband and wife may not have had issue born alive." B. & C. Comp. § 5544.

It is settled by the courts of Oregon that curtesy attaches to equitable as well as to legal estates. Gilmore v. Burch, 7 Or. 374, 33 Am. Rep. 710; Elliott v. Teal, 5 Sawy. 252, Fed. Cas. No. 4,396. We have to inquire, therefore, whether or not under the act of Congress an Indian allottee took an estate of inheritance. Construing the general allotment act, the Supreme Court, in United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, said:

"The word 'patents,' where it is first used in this section, was not happily chosen to express the thought which it is clear all parts of the section being considered, Congress intended to express. The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing designed to show that for a period of 25 years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period, unless the time was extended by the President, convey the fee discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a 'patent,' showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee."

It is true that by the statute of 1887 the time for issuing the final patent may be deferred, and in fact may never arrive; but in the meantime it is clear that the allottee takes, under the first so-called patent, an estate in the land allotted to him. He is given absolutely the sole and exclusive use and benefit of the land. Such a right acquired under the statute would, if the statute were silent on the subject of inheritance, descend, upon the death of the grantee, to his heirs. The Indian tribes had their own rules and customs governing the descent of land (Brown v. Steele, 23 Kan. 672; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49), and it must have been for the purpose of removing all doubt as to the succession, and establishing the more equitable rules of descent and distribution adopted by state laws, that the provision was inserted that the so-called first patents should declare the trust for the benefit of the allottee, "or, in case of his death, of his heirs according to the laws of the state or territory where such land is located."

If this were the whole expression of the intention of Congress in regard to the inheritance of such an estate, there might be plausible ground for the argument that the words so used were words of purchase, and not of inheritance, or, in other words, that the intention was to name the heirs as cestuis que trustent, who should immediately succeed to the right of the allottee in case of his or her death, before the issuance of the final patent. But other language of the act expressive of the intention of Congress is to be found in the final proviso:

"That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents shall have been executed and delivered, except as herein otherwise provided."

The appellant contends that this proviso refers to the descent of the land after the issuance of final patent, and does not affect its disposition prior to that time. But the proviso is in its terms inclusive enough to refer to both patents, and from its position in the text, following directly after and connected with the provision declaring null and void all conveyances of the allotted land before the issuance of the final patent, it is evident that its purpose is to regulate the disposition of the property upon the death of an allottee before the issuance of the final patent. It is not to be supposed that Congress, after providing for the issuance of a final patent in fee, discharged of the trust and of all charge or incumbrance, would consider it necessary to attach thereto the proviso that the descent of such property and partition thereof should be governed by the laws of the state, because such laws would, of their own force, attach from the time when the fee vested in the grantee. That proviso, therefore, as we construe the statute, applies to the descent of the property during the time it is held in trust by the United States, and by its terms the descent of the property here in controversy, on the death of the allottee, is to be governed by the law of Oregon. While, strictly speaking, the estate by the curtesy does not "descend" to the husband, it being rather in the nature of a continuation of the wife's estate, it is nevertheless regarded more in the nature of an estate by descent

than by purchase. 1 Washb. Real Property (3d Ed.) 159. And this is recognized in the statutes of Oregon, where, at the close of the chapters regulating descent and distribution, it is provided in section 5589 that:

"Nothing contained in this and the preceding chapter shall affect or impair the estate of a husband as tenant by the curtesy."

In brief, the act of Congress, as we construe it, leaves the whole disposition of the land, in case of the death of the allottee before final patent, to be governed by the state law. While in some states by statute the just and equitable rule has been adopted that the husband is not entitled to curtesy, where the wife leaves issue by a former marriage and no issue by the last marriage, unless the estate came from him or one of his ancestors (Hathon, Guardian, v. Lyon, 2 Mich. 93; Tilden v. Barker, 40 Ohio St. 411), there is no such statutory provision in the laws of Oregon. We have not overlooked the doctrine that the husband may not be entitled to curtesy in his wife's equitable separate estate of inheritance when the terms of the instrument creating the estate, either expressly or by implication, exclude him from curtesy, as announced in McCulloch v. Valentine, 24 Neb. 215, 38 N. W. 854, Mullany v. Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238, and other cases; but we find nothing in the statute to justify such a construction.

The appellant compares the estate of the allottee before the final patent to that of a donation claimant before he had completed the settlement which entitled him to patent, and cites Quinn v. Ladd, 37 Or. 261, 59 Pac. 457, in which the court denied the right of the husband of a donation settler, who died before the expiration of the residence and cultivation required by law, to hold as tenant by the curtesy. But the two cases are essentially different. The settler under the donation law held only a possessory right in the land occupied, until the completion of the four years' residence and cultivation and full compliance with all the conditions of the donation land act. Until that time he had no grant and he acquired no estate. Hall v. Russell, 101 U. S. 503, 25 L. Ed. 829. In the case of an Indian allottee there is a present grant from the time of the issuance of the first patent—an absolute grant of an estate in trust for the allottee, subject to no conditions to be complied with upon his part. The Indians were not donees of the government, and the allotment was not made as a mere act of its bounty. It was an act of partition in severalty to individual Indians of lands the title to which the United States then and for many years had held in trust for the tribe. It was an act which went into effect only upon the assent of the Indians. It was the expression of the more recent policy of the government, the purpose of which is to dissolve the tribal relation, establish the Indians in individual homes, in the possession of individual estates, ultimately to be vested in them in fee, to confer upon them the rights and impose upon them the duties of citizenship, and to make their tenure of real estate in all respects subject to the local law.

The decree is affirmed.

## ANGLE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 6, 1908.)

No. 606.

1. CRIMINAL LAW—APPEAL AND ERROR—AFFIRMANCE—MODIFICATION OF JUDGMENT.

On affirmance of a conviction on a writ of error by the Circuit Court of Appeals, it is the duty of the trial court after it has received the mandates of the Circuit Court of Appeals, in the absence of permission given by the latter to hear an application for a new trial, to see that the judgment is carried into execution.

2. SAME—NEW TRIAL AFTER AFFIRMANCE—NEWLY DISCOVERED EVIDENCE.

Where, in a prosecution for carrying on the business of a rectifier of distilled spirits with intent to defraud the United States of the tax thereon, and for removing and concealing distilled spirits on which the tax had not been paid, there was ample evidence to justify petitioner's conviction, and to show his connection with certain liquor concerns in the business of which the frauds were perpetrated, and such conviction was affirmed on a writ of error by the Circuit Court of Appeals, the judgment would not be modified so as to leave to the trial court discretion to grant petitioner a new trial for newly discovered evidence, that he was not connected with such concern which evidence was available, and must have been known to petitioner at the trial, but was not produced.

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

On petition for modification of judgment. Denied.

William P. Bynum, Jr., and George E. Hamilton (Spencer B. Adams, R. D. Reid, and E. J. Justice, on the briefs), for petitioner.

A. E. Holton, U. S. Atty. (A. H. Price, Asst. U. S. Atty., on the brief), for defendant in error.

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

GOFF, Circuit Judge. The questions raised by this writ of error have heretofore been disposed of. Sprinkle v. United States, 141 Fed. 811, 73 C. C. A. 285; Id., 150 Fed. 56, 82 C. C. A. 1. The judgment of this court refusing a rehearing to the plaintiff in error, T. M. Angle, was in effect affirmed by the Supreme Court of the United States, by its refusal on the 11th day of March, 1907, to grant the writ of certiorari theretofore prayed for by said petitioner. Thereupon said Angle, on the 9th day of April, 1907, tendered to this court his petition praying for a modification of the judgment entered herein on the 14th day of December, 1906. In his petition the history of this case is set forth, and certain affidavits relating to newly discovered evidence are filed with and made a part of the same. The petitioner asks this court to modify its judgment, so that it will show that, while the judgment of the court below is affirmed, it is remanded with leave to the court below to exercise its discretion in the matter of granting a new trial, on the ground of evidence discovered after the expiration of the term at which the judgment of conviction was entered, and after the cause had been removed to the Circuit Court of Appeals by

writ of error. Under the procedure as now established, in the absence of permission given by this court, it will be the duty of the court below, after it has received the mandate of this court affirming the judgment complained of, to see that the same is carried into execution.

It therefore becomes our duty by an examination of the affidavits in which the after discovered evidence is set forth to determine whether or not the petitioner has presented for our consideration such facts as will authorize us to suggest to the court below the propriety, in the light of the record of this cause, of hearing and of disposing of the motion for a new trial so far as the petitioner Angle is concerned. In the opinion of this court affirming the judgment of the court below (141 Fed. 811, 73 C. C. A. 285), the testimony offered at the trial in which the facts were fully elucidated is stated and commented upon. Do the affidavits now submitted, considered in connection with said facts, justify this court in making the modification requested? It does not appear that it is the intention of the petitioner to present to the court below any testimony other than that included within the affidavits referred to. The petitioner was convicted on an indictment charging that he and others were engaging in and carrying on the business of a rectifier of distilled spirits with intent to defraud the United States of the tax thereon, and for removing and concealing distilled spirits on which the tax had not been paid. The affidavits chiefly now relied upon are those of three of the parties with whom it is alleged the petitioner conspired to defraud the government, one of whom has been convicted and is now serving his sentence; the other two not having as yet been tried. B. F. Sprinkle, who was convicted, in the affidavit made by him states that the petitioner was not either directly or indirectly interested in or connected with the business of the Oak Grove Liquor Company, the Milton Liquor Company, or the Reidsville Liquor Company, the three companies shown by the evidence to have been engaged in the conspiracy to defraud, in connection with which the petitioner was convicted. The affiant, J. T. Sprinkle, against whom the indictment is still pending, swears that the petitioner had no connection and no interest in the Reidsville Liquor Company, and that he, said affiant, was the proprietor, owner, and manager of the same, and he further states that said petitioner was not interested in any manner in the business of the Danville Distributing Agency, in the firm of J. P. Jones & Co., or in the Diamond Distilling Company. H. C. Sprinkle, another affiant, who also is yet to have his trial, makes oath that he was the proprietor, owner, and manager of the Oak Grove Liquor Company, and of the Milton Liquor Company, and that the petitioner had no connection or interest in either of said companies.

One of these affiants was present with the petitioner during the entire trial of this case in the court below, and was with him duly convicted. If his testimony was material, it must have been known to the petitioner during the trial, and should then have been submitted for the consideration of the court and jury. The statement he makes in his affidavit, that the petitioner was not interested in the business of the

liquor companies mentioned, must be considered in connection with other testimony offered during the trial by the defendant in error, tending to show the connection of petitioner with said business. Giving full effect to this affidavit, it simply means that so far as the affiant knew the petitioner was not interested either directly or indirectly in the companies named, and it is not sufficient to overcome the inferences the jury was justified in drawing from the other testimony, and from the circumstances surrounding said case in which the petitioner was clearly shown to have been involved. So far as the affidavits of J. T. Sprinkle and H. C. Sprinkle are concerned, the record clearly discloses that the facts set forth in them must have been known to the petitioner at the time of his trial. And the statements contained therein are not to be taken as conclusive of the facts referred to, but must be weighed in connection with the documentary and other testimony on which the jury rendered their verdict of guilty. The testimony before the jury justified it in finding that the petitioner rented to H. C. Sprinkle the building in which the business of the Oak Grove Liquor Company was conducted, and that he must have known that his said lessee was at least the ostensible proprietor of said company. It also demonstrated that the petitioner was frequently in the possession of the keys of said building, and that he sold therefrom distilled spirits found therein, that he frequently visited said building, and that his familiarity with the conditions surrounding it did not indicate that he was a stranger to the business carried on therein. The evidence further disclosed that the petitioner dealt with the Reidsville Liquor Company, and that he must have known that J. T. Sprinkle was at least an active participant in its management. It is at least suggestive that the petitioner did not when his case was called for trial advise his counsel of the materiality of the testimony of J. T. Sprinkle and H. C. Sprinkle, and that they, learned in the law and of great experience as they are, did not also advise the court, either for the purpose of securing a continuance, or for obtaining a new trial after the verdict of conviction. The record discloses no such proceeding in the court below.

We do not deem it necessary to set forth specifically the testimony of the many witnesses examined before the jury, the tendency of which was to show the connection of the petitioner with the offense of which he was convicted. We are certainly justified in saying that the record discloses that gross frauds were perpetrated upon the government, and that it was defrauded of the taxes due it. Also are we warranted in saying that from all the facts set forth in the record, presented as they were by many witnesses who were subjected to the rigid cross-examination of counsel, that the jury whose province it was to consider said facts, in finding the verdict they did, discharged faithfully the duty imposed upon them.

While it is entirely proper for an Appellate Court, in a case where the facts justify it, to remand a case with leave to the court below to hear a motion for a new trial, or to entertain further proceedings therein, nevertheless, in the case we now consider, we find it to be our

duty to decline to modify the judgment complained of and to deny petitioner's prayer.

Let the usual mandate issue.

PRITCHARD, Circuit Judge. I dissented from the opinion of the court when this case was before us upon the merits affecting the conviction of the defendant T. M Angle and the judgment, but I am in accord with the other members of the court upon the questions presented now, and therefore concur in this opinion.

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CASCADEN et al. v. BORTOLIS.

(Circuit Court of Appeals, Ninth Circuit. May 18, 1908.)

No. 1,442.

MINES AND MINERALS—LOCATION OF MINING CLAIMS—SUFFICIENCY OF DISCOVERY—EVIDENCE.

Upon an issue as to whether there was a sufficient discovery of mineral in a mining claim to meet the requirement of the statute and support a location, where there was evidence that gold had actually been found within the limits of the claim, sufficient to warrant the submission of the case to the jury to determine whether the discovery was sufficient within the rule which requires it to be such as to justify an ordinarily prudent man, not necessarily a miner, in expending his time and money in the development of the property, the locator was entitled to supplement such evidence by showing the situation, character, and value, and mineralogical conditions of adjacent claims, and to prove by the opinions of experienced miners, based upon the facts, that the discovery was sufficient to justify him in developing the claim.

[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 Aslaka.

Louis K. Pratt and T. C. West, for plaintiffs in error.

Campbell, Metson, Drew, Oatman & MacKenzie, for defendant in error.

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

HUNT, District Judge. Upon the former hearing of this cause, judgment in defendant's favor was reversed for error in the instructions. Cascaden v. Bartolis, 146 Fed. 739, 77 C. C. A. 496. New trial having been had, defendant again prevailed, and again plaintiffs have brought the case here.

The action was brought by John Cascaden, John Bernstein, Richard Stein, Louis K. Pratt, and Carl A. Johanson, plaintiffs in error, to recover from Joseph Bortolis, defendant in error, two certain lots in the town known as Gate City, Alaska. The complaint prayed that plaintiffs be adjudged the owners of and entitled to the possession of the lots described, and that defendant be adjudged to have no right or title thereto, and that he be removed therefrom. Plaintiffs set forth that

they owned the lots as against all persons except the United States, and that in September, 1904, the defendant went upon them and withheld possession from plaintiffs, and that he has built buildings thereon and claims to own the same. The amended answer denied the allegations of ownership, and set forth that in September, 1904, the defendant entered the land described in plaintiffs' complaint, which was vacant, unappropriated public land. Defendant admitted that he occupied the premises, and set forth that the cabins he built were situated within what was known as the town site of Gate City, where a large number of buildings had been erected, and that it was the intention of the occupants of the land upon which the town was situated to enter the same for town site purposes and secure patent therefor, in accordance with the act of Congress in such cases made and provided. Defendant claimed ownership, and right of possession of the cabins and grounds. Plaintiffs' replication denied that the land described in the pleadings was vacant and unappropriated public land.

The principal question involved and submitted to the jury upon the last trial, as upon the first, was whether or not there had been such a finding of mineral in the placer claim, under which the plaintiffs asserted their rights, as would satisfy the laws of the United States (Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424]), which provide, among other things, that no location of a mining claim shall be made until discovery of mineral within the limits of the claim located. Was there such a discovery of mineral as gave reasonable evidence of the fact that the ground was valuable for placer mining? Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770. The lower court having been of the opinion that plaintiffs made a sufficient showing to submit the question of discovery to the jury, charged, among other things, that there must be a discovery of gold or other mineral upon the ground included within the locator's claim, and said:

"What is 'discovery'? What finding of mineral on a placer mining claim is sufficient to satisfy that clause of the statute which provides that 'no location of a mining claim shall be made until the discovery of the mineral within the limits of the claim located?' Where mineral has been found upon a placer mining claim, and the evidence thereof is of such a character that a person of ordinary prudence, not necessarily a skilled miner, would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a mine thereon, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States * * * are * * * described to be free and open to exploration and purchase.' It is not a fair criterion that the locator says he is willing to further expend his labor and means in seeking for mineral thereon. The question should not be left to his arbitrary will or statement, but the facts which are within the observation of the discoverer and which induce him to locate should be such as to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property. Mere slight indications of the existence of mineral in the ground, a mere possibility that it contains gold, is not enough to justify a prudent person in the expenditure of money and labor in its exploration. There must be such a discovery of mineral on the claim as to satisfy you that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor thereon in the development of the property; and unless you are so satisfied in this case by a fair preponderance of the evidence, you should find a verdict for the de-

fendant. * * * You are instructed that evidence of mining, extensive or otherwise, or of the value of gold deposits, on other and adjacent claims, must not be accepted by you as evidence of a discovery on the plaintiffs' claim. Such knowledge might have justified the plaintiff Cascaden in locating the ground in dispute in the hope that it, too, contained gold; but such facts are not evidence of the existence of gold on the claim in dispute. The proofs of discovery must be such as to establish the fact of finding mineral on the claim in dispute, within its outer boundaries. It must be a finding of mineral in fact, and not in theory; and the mineral found must be in such quantity and found under such circumstances and conditions as would justify a man of ordinary prudence, not necessarily a skilled miner, in the further expenditure of his time and money in further work and labor in developing the claim If plaintiff Cascaden, or any of the plaintiff's employés, did so find mineral on that claim to that extent, it is sufficient to constitute a discovery, and you should so find. But proof of finding gold in large or small quantities on other claims is not evidence of a discovery on the claim in dispute, and you should not so consider it."

It will be observed that the first portion of the instruction quoted, wherein the court discusses what constitutes discovery, is substantially a reiteration of the rules approved of by this court in Cascaden v. Bartolis, supra, where the principle was laid down that, to constitute a valid location, there must be such a discovery of mineral as that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and money thereon in the development of the property; while in the latter part of the instruction the court expressly charged that evidence of the value of gold deposits on other and adjacent claims was not evidence of a discovery on the plaintiffs' claim, although it was charged that such knowledge might have justified the plaintiffs in locating the ground in dispute in the hope that it contained gold, but that such facts were not evidence of the existence of gold on the claim in dispute.

Upon the trial of the case, plaintiffs sought to prove by witnesses called to the stand that a large amount of gold had been extracted in the mining of claims in the immediate vicinity of the one involved in the suit But the court rejected the plaintiffs' offer. Plaintiffs contended that such evidence was admissible as a circumstance to be considered with the positive testimony of the plaintiffs and their witnesses that gold was found within the claim as staked. Counsel stated that he wished to show that the "neighborhood was gold-bearing ground, immensely rich deposits." Continuing, he said:

"We have shown the character of the explorations we have made, and the kind of looking ground we got. I will show that the débris coming out of these shafts, where these valuable deposits have been found and demonstrated, is similar. I will connect it in that way. I will connect it with the configuration of that country up there, especially in connection with Wolf creek."

Plaintiffs further sought to prove the familiarity of experienced mining men with the workings and the results of the workings on the creek below the Cascaden claim, and upon the benches thereabouts, in order to introduce opinions whether, if as a fact Cascaden knew at the time of his location of the result of work upon Discovery and Discovery Bench, and the Hilty Fraction claim near by, it would have influence in causing a prudent man to locate the ground as mining ground. The court sustained the objection to such testimony, and refused the offer of

plaintiffs to prove in a general way the lay of the ground in which the Cascaden claim was situated.

A witness was also called to prove that a drift had been driven upon an adjacent claim close to the lower side line of plaintiffs' claim, as tending to show that there had been gold discovered in valuable quantities upon adjacent claims. Counsel said:

"I propose to prove that that coarse run of gold was found on Discovery Bench; that they have explored for it below, between that and our ground, and have failed to find it; that they have explored for it below our claim, and have found it; and that, for that reason, in the opinion of mining men, the probabilities are that it passed across the Cascaden placer."

The court held that a discovery could not be established in any such way. Plaintiffs' counsel said he was not trying to establish a discovery in such a way, but that he wished to sustain the evidence of the plaintiffs that they had found gold and made a discovery on their claim. The court held that such evidence was wholly immaterial and not competent.

Again, a witness, an experienced miner, was asked whether, from his knowledge of the ground, and what he had seen of the development work, and what he knew of the prospects of gold that had been found upon the ground, he would say that an ordinarily prudent mining man would be justified in sinking a shaft to bed rock, with the expectation of finding a pay streak of gold there. Objection to the question was sustained; the court holding that the essential question was whether plaintiffs had made a discovery, and that that was not a question for an expert to testify to, but was one of fact.

Plaintiffs preserved their exceptions, and the point for decision is whether the court erred in rejecting plaintiffs' offers of proof. Inasmuch as the court was satisfied that there was enough evidence as to mineral found to submit the issue of discovery to the jury, we are of opinion that plaintiffs had a right to introduce the evidence offered. While mere possibility that ground claimed contains gold, or that there are mere indications of the existence of mineral in the ground, is not enough to justify a prudent person in expending money and work in exploration of it, yet where the evidence shows the actual existence of gold in the claim, and such evidence is of sufficient weight to submit to the jury upon the issue of discovery, we think the locator has a right to strengthen his proof upon any of the elements which enter into what is comprehended by discovery. In doing so, he may supplement the showing that mineral actually did exist by introducing evidence of the fact that, as a ground of justification for the expenditure of time and money, the adjacent ground in the same gulch is rich in the same mineral, or that adjacent claims were developed into paying mines after development upon similar showings of mineral, or that geological conditions are so similar that, from the character of the mineral discovered, it is reasonable to expect to find mineral in valuable quantities in the exploitation of the ground staked. When we consider that physical conditions vary so in mining regions, it would be very unsafe to lay down hard and fast rules by which the evidence of dis-

covery must be controlled. It is not uncommon to find that certain physical conditions in one district may reasonably lead to the conclusion, if gold is found, that, by following certain slight showings of such mineral, deposits of immense value will be uncovered; while apparently like conditions in other districts may afford neither justifiable expectation, nor even well-founded hope, to the prospector. Such conditions are, nevertheless, evidentiary. They become proper as a means by which the alleged matter of discovery, the truth of which is being investigated, is established or disproved. Of course, there must be a discovery of mineral within the limits of the claim before a valid location thereof can be made; but, as Judge Hawley said in his learned opinion upon quartz locations, in Book v. Mining Co. (C. C.) 58 Fed. 106:

"It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities, the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location."

How is the prospector for placer gold to be guided? He discovers gold, a few cents only to the pan. He knows he is in a gold-bearing placer region, but is unacquainted with any distinct characteristics of the mineral-bearing area in the vicinity where he has made his discovery. Naturally he does not wish to make a location unless the mineral discovered is of sufficient value to justify the belief that the ground will be valuable for placer mining. He is thus confronted with the need of deciding whether or not he is justified in spending his time and money in going ahead with his work, expecting to find gold in paying quantities. To aid him in making up his mind, he will consult miners who are experienced in that particular district. He will find out the special character of the country about, and will at once gather all the knowledge he can readily obtain of how the adjacent claims are paying, where the pay streak is likely to be, and what amount of gold was discovered by the miners who located such other claims and developed them afterwards, and what method of development was adopted; and when he has informed himself upon these matters he will use the information, together with the fact that he has found mineral, as a basis for a justification for action, and, if the justification for his action is well founded, the facts and circumstances upon which it was based are proper to be shown. "It is impossible," says Lindley on Mines, § 437, "to lay down any arbitrary rule to govern all cases as to what may be a sufficient discovery upon which to predicate a location. It is a question of fact, to be determined from a consideration of all the circumstances and surroundings." The same doctrine is recognized by Judge De Haven, speaking for this court, in Lange v. Robinson, 148 Fed. 799, 79 C. C. A. 1, citing authorities. Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Shoshone M. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223.

We therefore conclude that, inasmuch as there was evidence of gold having been found within the limits of the plaintiffs' claim, the court erred in refusing to permit plaintiffs to show the situation, character, value and mineralogical conditions of adjacent claims, and in refusing plaintiffs' offer to prove by experienced miners that plaintiffs were justified in expending time and money in prospecting and developing the ground claimed as valuable for mineral.

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

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## J. J. QUINLAN & CO. v. HOLBROOK.

(Circuit Court of Appeals, Second Circuit. May 5, 1908.)

No. 199.

1. PRINCIPAL AND AGENT—STOCKBROKERS—EVIDENCE OF AGENCY.
   In an action against a stock brokerage company, based on transactions between plaintiff and a so-called "correspondent" of defendant, who maintained an office at its expense, was guaranteed a stated compensation by defendant, and transmitted to it all orders taken over defendant's private wire, the evidence *held* to warrant the court in submitting to the jury the question whether, as to plaintiff, the correspondent was an agent of defendant.

2. BROKERS — TRANSACTIONS BETWEEN BROKER AND CLIENT — LIABILITY FOR BREACH OF CONTRACT.
   Plaintiff had a number of transactions pending with defendant through an agency at the time such agency was closed, in each of which defendant had purchased and was holding on margin for plaintiff certain stocks. Plaintiff then ordered the stocks sold, with which order defendant did not comply. *Held*, that plaintiff was entitled to recover on the basis of the market price of the stocks when they were ordered sold, but that he could not recover on such basis as to the transactions which showed a profit, and rescind the contracts as to those showing a loss, and recover the advances made therein.

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

Judgment was entered upon the verdict of a jury in favor of the defendant in error, who was the plaintiff below. In the opinion following the parties are designated as in the trial court.

Joseph Cavanaugh (Elisha May and Ernest W. Gibson, of counsel), for plaintiff in error.

Harland B. Howe and H. W. Honey, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The cause of action stated in the complaint grew out of certain operations in stocks conducted by the plaintiff at Newport, Vt., through the instrumentality of one Brady. The operations ostensibly involved the purchase and sale of securities. Both parties assume them to have been legitimate. Not without effort we make the same assumption.

The plaintiff having conducted his operations through Brady, the question whether the relations of the defendant and Brady were those of principal and agent was the important one at the trial. The plaintiff claimed that an agency existed. The defendant contended that Brady was merely its correspondent. The trial court submitted the question of the existence of an agency to the jury. The defendant contends that this action was erroneous—that there was insufficient evidence to warrant a finding of agency either by agreement or through estoppel. But, assuming that the proof failed to show an agency agreement between Brady and the defendant, the difficulty with the defendant's contention and its entire case is that the very arrangement—that of correspondents—which it seeks to establish as having existed has been held by the Supreme Court of the United States in a recent case to constitute, with respect to third persons, the relation of principal and agent. In this case (Board of Trade v. Hammond Elevator Co., 198 U. S. 436, 25 Sup. Ct. 742, 49 L. Ed. 1111) the methods of doing business as described by the Supreme Court are almost identical with those shown in the present case. Mr. Justice Brewer said:

"The company maintains a place of business at Hammond, Ind., and had under lease from the Western Union Telegraph Company the exclusive use during business hours of certain telegraph wires running from Hammond to certain offices in different cities in Illinois. * * * In the lease of these wires, signed by defendant, the offices of these 'correspondents' are designated as offices of the defendant, and are contained upon regular printed forms prepared by the company. The cost or rental of these wires was paid to the telegraph company by the defendant. Over these wires the defendant caused to be transmitted continuous market quotations of the New York Stock Exchange to persons * * * who are called 'correspondents,' and who posted these quotations upon blackboards in their respective offices. Customers resorting to the correspondents' offices, and desiring to trade in any one of the sixty different stocks whose quotations are posted, give a verbal or written order to buy or sell certain grain or stocks, which is transmitted by the correspondent in his own name over the private wire of the correspondent running into his office from the office of the defendant at Hammond as an offer by the correspondent to buy from or sell to the defendant. Sometimes the price is mentioned by the customer, and sometimes not. In the latter case it is understood that the trade is to be at whatever the market is. When the order is given the correspondent exacts from the customer such margin as he sees fit, unless the customer already has money on deposit with the correspondent, or is of known financial responsibility. Defendant accepts these orders, when the state of the market justifies, by return message over the same wire, the contents of which are communicated by the correspondent to the customer. The individuality of each trade is preserved throughout by a number given to it by the correspondent's operator at the outset. The correspondent, upon receipt of this return message, gives the trader a memorandum showing the trade and the price to which his margin carries it, and, except in case of a losing trade where he has failed to protect himself by securing from the customer a sufficient margin, the correspondent neither participates in the loss nor the profit incurred in the trade. He derives as his compensation a fixed sum, whether the trade results in a profit to the defendant or to the customer."

In the present case the parties not only did business in substantially the same manner as in the Hammond Case, but the defendant guaranteed Brady a certain monthly compensation. Moreover, the existence of an agency was not expressly disclaimed by the defendant to customers of the office. How, then, can the conclusion reached in the

Hammond Case—where elaborate precautions were taken to avoid the appearance of an agency—be avoided here? The court, continuing the opinion in that case, said:

"The relations of the correspondent with the elevator company are in each case fixed by formal contract, to the effect that the parties shall deal as principals, and that the relations of principal and agent shall neither exist nor be held to exist. * * * The fact, however, that the relations between the defendant and its correspondents are, as between themselves, expressly disclaimed to be those of principal and agent, is not decisive of their relations so far as third parties dealing with them upon the basis of their being agents are concerned. * * * Notwithstanding these protestations and excessive precautions used to prevent the correspondent being held as agent, the method of business shows that the party really interested in the transaction is the defendant, and that the correspondents are compensated as if they were agents, and not principals. * * * The real transaction in this case is undoubtedly artfully disguised; but, notwithstanding the fact that the order is made and accepted at Hammond, and the margin is charged up at Hammond against the correspondent, and the profits or losses made there, we are of the opinion that in receiving, transmitting, and reporting orders to the customers, receiving their margins, and settling with them for the profits or losses incident to each transaction, the correspondent is really 'doing business' as the agent of the elevator company. * * *"

Upon the facts admitted by the defendant, the trial court might perhaps have charged, as a matter of law, that, with respect to persons in the plaintiff's position, an agency existed. The defendant, therefore, cannot complain that the question was submitted to the jury, nor that they found for the plaintiff in respect thereof.

The other assignments of error, in the charge of the court and in rulings upon evidence, do not require extended consideration. Assuming that errors were made, it cannot be said that the defendant was prejudiced thereby. If the rulings complained of had been the reverse of what they were, the verdict of the jury must have been the same, in view of the uncontradicted testimony concerning the relations between the defendant and Brady; and if the court in its charge failed to properly distinguish between agency in fact and agency by estoppel, or to properly caution the jury concerning Brady's declarations, the defendant was hardly prejudiced when the testimony which it offered itself was sufficient to establish an agency.

Upon the defendant's own case, a plaintiff's verdict for some amount was warranted. But it does not follow that a verdict for the amount actually rendered can be sustained. The plaintiff had eight transactions pending with the defendant in the Newport office when it closed. Six of these then showed profits at market prices, and two showed losses. The plaintiff sued for damages for breach of contract with respect to the profitable "trades," but elected to rescind the contracts covering those which were unprofitable, and sued to recover the moneys deposited as margins. This course of procedure was successful, and the verdict was rendered upon that basis. Thus the plaintiff recovered all the profits and stood none of the losses—a result so without precedent in stock speculation that it seems almost a pity to disturb it. But it was obtained by the application of erroneous legal principles and cannot be permitted to stand.

The rights and obligations growing out of the relation of broker and

customer are clearly stated in the following extract from the opinion in Markham v. Jaudon, 41 N. Y. 235, quoted with approval by the Supreme Court of the United States in Richardson v. Shaw (decided April 18, 1908) 28 Sup. Ct. 512, 52 L. Ed. ——:

"The broker undertakes and agrees: (1) At once to buy for the customer the stocks indicated. (2) To advance all the money required for the purchase beyond the 10 per cent. furnished by the customer. (3) To carry or hold such stocks for the benefit of the customer so long as the margin of 10 per cent. is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer and not of the broker. (4) At all times to have in his name and under his control ready for delivery the shares purchased, or an equal amount of other shares as the same stock. (5) To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker. (6) To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

"Under this contract the customer undertakes: (1) To pay a margin of 10 per cent. on the current market value of the shares. (2) To keep good such margin according to the fluctuations of the market. (3) To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker."

Now, the plaintiff's whole case depended upon the assumption that his transactions with the defendant were legitimate and that the defendant as a broker actually bought the stocks in accordance with the memoranda furnished by its agent Brady. This assumption applied to all the transactions, for they were all of the same nature. Thus, when the Newport office closed, the plaintiff and the defendant stood in the relation of pledgor and pledgee. The defendant had the plaintiff's stocks, and the plaintiff owed the defendant a balance upon their purchase price. The defendant was bound to deliver the same or similar shares upon payment of the balance, or to sell them if so ordered by the plaintiff and account for the proceeds. As said by Mr. Justice Day in Richardson v. Shaw, supra:

"How, then, stood the parties at the time of the demand for the return of these shares of stock? They were held upon a contract which required the broker, upon demand, to turn over the shares purchased, or similar shares, to the customer upon payment of advancements, interest, and commissions."

In the present case the plaintiff demanded his stocks, and upon their nondelivery ordered them sold at market prices. As the defendant did not do so, the plaintiff had a right of action for breach of the contract to sell and account. The special counts in the complaint with respect to the six transactions undoubtedly afforded a proper basis for the recovery of the market price of the stocks ordered sold, with dividends collected by the defendant, but not paid over, less the advances made by the defendant, with interest and commissions. The verdict, so far as it stood upon this basis, was, with a deduction to be noted later, correct.

The plaintiff's rights and remedies with respect to the two transactions in question were precisely the same as in the case of the other six. The contract to purchase these shares had been executed and was incapable of rescission. Certainly the plaintiff was in no position to

rescind. The very fact that there were losses to the defendant when it closed those transactions showed that the plaintiff had failed to keep his margins good. These shares, having been purchased, belonged to the plaintiff as a pledgor. The defendant, by failing to sell them and account for their proceeds as directed, may have repudiated the obligation to make such sale and rendered itself liable in conversion, as well as for breach of contract. But the plaintiff had those rights of action only, and no right to recover the moneys originally advanced, and the amount thereof—$980—with interest from January 15, 1906, to June 15, 1907—amounting together to $1,063.30—was improperly included in the verdict.

Judgment reversed, unless the plaintiff remits $1,063.30. If such remittitur be made, it is affirmed. Costs of this court to the plaintiff in error.

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## COLUSA PARROT MINING & SMELTING CO. v. MONAHAN.

(Circuit Court of Appeals, Ninth Circuit. May 25, 1908.)

No. 1,521.

1. MASTER AND SERVANT—INJURIES TO SERVANT—LIVE WIRE—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, a common laborer, knowing nothing of electric work and unfamiliar with its perils, was directed to do certain work on an iron roof which was wet and slippery, and, on slipping on the roof, seized a live electric wire negligently maintained by defendant over the roof and improperly insulated from which plaintiff was severely injured, plaintiff was not negligent as a matter of law.

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

2. JUDGMENT—DISMISSAL WITHOUT PREJUDICE—EFFECT.

In general, an order or judgment dismissing an action without prejudice leaves the party as if no such action had been instituted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1018.]

3. SAME—BAR.

Under Mont. Code Civ. Proc. 1895, § 1007, providing that a final judgment dismissing the complaint either before or after trial does not prevent a new action for the same cause of action unless it expressly declares, or it appears by the judgment roll that it is rendered on the merits, an order entered on motion of plaintiff's counsel, dismissing the action without prejudice as to defendant mining company, etc., was no bar to a subsequent action by plaintiff against such company for the same cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1018.]

4. EVIDENCE—ADMISSIONS—PLEADINGS—COMPLAINT.

In an action for injuries to a servant by an electric shock communicated from the live wire negligently insulated extending over the roof of defendant's building, an allegation that plaintiff without any negligence on his part, and in the exercise of due care, and being ignorant of the danger of touching the wire, "inadvertently" took hold of the wire so insufficiently and negligently insulated by defendant and was thereby injured, did not by the use of the word "inadvertently" admit that plaintiff was negligent.

5. MASTER AND SERVANT—INJURIES TO SERVANT—DUTY OF MASTER.

Where defendant maintained a heavily charged electric wire insufficiently insulated about four feet above the corrugated iron roof of its ore-

house, defendant in sending plaintiff, a common laborer, to make certain repairs on the roof, was bound to know that he might come in contact with the wire, and was therefore required to properly insulate the same so that those likely to come in contact therewith would not be injured.

6. SAME—PROXIMATE CAUSE.
Where defendant maintained an insufficiently insulated electric wire, four feet above the corrugated iron roof of its orehouse, and plaintiff, while working on the roof according to defendant's directions, slipped and, in seizing the wire to save himself was badly burned, defendant's negligence in maintaining the wire in an improper condition was the proximate cause of the accident.

7. EVIDENCE—EXPERTS—ELECTRIC WIRES.
Where a servant was injured by seizing an insufficiently insulated electric wire strung over defendant's orehouse, the court properly permitted expert electricians to testify as to the condition of the wire and premises at the time of and shortly after the accident, and as to the method adopted by defendant for insulating.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2328.]

8. ELECTRICITY—WIRES—INSULATION—CARE REQUIRED—NEGLIGENCE.
At places where people have a right to go for work, business, or pleasure, the insulation of electric wires should be made as nearly perfect as possible and the utmost care used to keep them so; the fact that a person received a shock from touching the wire under such circumstances being evidence of improper insulation.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 7.]

9. DAMAGES—PERSONAL INJURIES—EXPECTANCY OF LIFE.
In an action for personal injuries, evidence as to plaintiff's expectancy of life according to life tables, and in respect to the amount required to produce him an annuity equal to the difference between the amount which he would have earned each year and what he could have earned in his injured condition, was admissible.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 487–489.]

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

W. M. Bickford and George F. Shelton, for plaintiff in error.
H. Lowndes Maury, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error was an employé of the plaintiff in error, and as such was sent by the company to the roof of its orehouse to do some work, where he slipped, and, in falling, caught hold of a live wire, which inflicted the injuries for which he sued and recovered a verdict and judgment for damages in the court below. The case is brought here by the defendant below.

The plaintiff alleged in his complaint that the defendant negligently and intentionally permitted the roof of its orehouse to be unsafe and dangerous to all persons going thereon, in that it negligently and wantonly permitted a certain copper wire, insufficiently and carelessly insulated, carrying and charged by the defendant with a dangerous current of electricity, to wit, 2,500 volts, to hang and remain at a distance of only four feet above the roof where the plaintiff was sent and put to work by the defendant; that at the time the defendant strung the wire so insufficiently insulated defendant knew that the plaintiff and other of

its employés would in the course of their employment likely go upon the roof and would be likely to come in contact with the wire, and be thereby killed or receive great bodily injury; that the pretended insulation of the wire was weatherproof only, and was not designed to protect human beings, and was insufficient for the latter purpose; that for a long time prior to the plaintiff's injury the defendant well knew that at the place where the plaintiff touched the wire it was not insulated, and yet permitted the same to hang about four feet above the roof; that on or about the 12th day of July, 1904, the plaintiff was sent by the defendant upon the said roof, "and without any negligence on his part and in the exercise of all care on his part, and being ignorant of the danger of touching the said wire, inadvertently, with his left hand, and while engaged in the business of his master, took hold of the said wire so insufficiently and negligently insulated by the defendant as aforesaid, and charged by the said defendant with electricity as aforesaid; that immediately the said current of electricity passed through the body of this plaintiff into the said roof, the same being of iron as aforesaid, and which said roof was a good conductor of electricity, and the plaintiff was thereby grievously burned and injured" in particulars specifically stated. The answer of the defendant put in issue the alleged negligence on its part, and set up contributory negligence on the part of the plaintiff, in that while upon the roof, which was in a wet and slippery condition and difficult to stand upon, the plaintiff failed to exercise due and proper precautions to avoid slipping, and did slip, and, to save himself from falling, took hold of the wire in question, and thereby received the shock of electricity which caused his injury. Such being the answer of the defendant on that point, we may here dispose of the defense of contributory negligence by saying that the plaintiff could not have taken hold of the wire if the defendant had not permitted it to hang within his reach, and that having sent the plaintiff, who, it appears, was a common laborer, knowing nothing of electrical work and unfamiliar with the perils attending it, on a wet and slippery roof to work, the jury might well have considered that it was, in view of the plaintiff's testimony to the effect that he did not know the wire was dangerous, perfectly natural that he should catch hold of it when he slipped, in the effort to save himself from falling. The answer further set up in defense that the plaintiff assumed the risks incident to his employment, and that among those risks was the presence of the electric wire on the roof of which he complains. The defendant further plead in bar of the action the fact that on the 26th of November, 1904, the plaintiff filed in the court below a complaint against the defendant and others, alleging the same cause of action; that, a demurrer of the defendant to that complaint being sustained, the plaintiff filed therein an amended complaint, which amended complaint the defendant moved the court to strike from the files, the result of which motion is shown by this order entered in the minutes of the court, as appears from the record:

"This cause came on regularly for hearing at this time upon motion of defendant, Colusa Parrot Mining & Smelting Company, to strike from the files the amended complaint; W. M. Bickford and Geo. F. Shelton, Esq., appearing as counsel for said defendant, and H. L. Maury, Esq., as counsel for plaintiff,

and thereupon upon motion of counsel for plaintiff, it is ordered that this action be dismissed without prejudice as to said defendant Colusa Parrot Mining & Smelting Company, and without costs to either party. In open court Feb. 14th, 1905."

The general rule is that an order or judgment dismissing an action without prejudice leaves the party as if no such action had been instituted. Creighton v. Kerr, 87 U. S. 8, 22 L. Ed. 309; Taylor v. Slater, 21 R. I. 104, 41 Atl. 1001; Seamster v. Blackstock, 83 Va. 232, 2 S. E. 38, 5 Am. St. Rep. 262; Ray v. Adden, 50 N. H. 84, 9 Am. Rep. 175; O'Keefe v. Irvington Real Estate Co., 87 Md. 196, 39 Atl. 428; Storey's Eq. Pl. § 793; Beech, Eq. Prac. §§ 643–644; Daniell, Chancery Prac. 659. By statute in Montana, where this case arose, it is declared:

"A final judgment dismissing the complaint either before or after a trial does not prevent a new action for the same cause of action unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits."

Section 1007 of the Statutes of Montana (Code Civ. Proc. 1895), which statute has been construed by the Supreme Court of Montana in accordance with the general rule upon the subject. Glass v. Basin & Bay State Mining Co., 34 Mont. 88, 85 Pac. 746.

There remains to consider the points made by the plaintiff in error in respect to the sufficiency of the complaint, the question of the defendant's negligence, the alleged assumption of risk by the plaintiff, and the alleged errors of the trial court in respect to the admission of testimony. No point is made in respect to instructions, nor is the charge of the court brought up. It must, therefore, be presumed that the jury was properly instructed. The objection to the sufficiency of the complaint grows out of the use of the word "inadvertently" in the quotation therefrom which we have heretofore given; the contention of the counsel for the plaintiff in error being that the plaintiff in the case thereby admitted his own negligence. The case cited from the Court of Appeals of Kentucky—Lexington Ry. Co. v. Fain's Administrator (Ky.) 71 S. W. 629—in support of the point is, we think, not only against the plaintiff in error on that point, but also against it as respects the defendant's alleged negligence. In that case a boy 14 years of age was killed in the city of Lexington by an electric shock received from one of the wires of the company. The pole to which the pulley wire was attached which the boy took hold of as he passed along the street was in the sidewalk; the wire being about four and a half feet from the ground. The court said, among other things:

"It is not unusual for persons of mature age and judgment, when standing near a tree or post, to lean against it; nor is it unnatural for a boy to touch any object that he may pass in walking along a street or sidewalk. The pulley wire, when it was attached to the reel, was within 4½ feet of the ground, and therefore convenient to the touch of man or boy; and, there being nothing in its appearance to excite alarm or suspicion, it is hardly probable that a boy would know its dangerous character or appreciate the necessity of avoiding contact with it in passing. We think it a self-evident proposition that it was the duty of appellant, in using the streets of the city of Lexington, by permission of the municipal authorities, for purposes of private gain, to so conduct its business as not to injure persons passing along such streets, and to keep the highways occupied by their apparatus in substantially the same condition as to convenience and safety as they were in before such occupancy. The law applicable to this

case has been well settled in Kentucky in the several cases that have been brought to this court for final adjudication. It is that those who manufacture or use electricity for private advantage must do so at their peril, and the only way to prevent accidents where a deadly current is used is to have perfect protection at those points where people are likely to come in contact with it"—citing McLaughlin v. Light Co., 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; Schweitzer's Adm'r v. Electric Co. (Ky.) 52 S. W. 830; Thomas' Adm'r v. Gas Co., 112 Ky. 569, 66 S. W. 398; Macon v. Railway Co., 110 Ky. 680, 62 S. W. 496.

After referring to a similar case in the Supreme Court of North Carolina, where a similar conclusion was reached, the court proceeded:

"The boy Fain was, when killed, traveling on the sidewalk, where he had a right to be. The deadly wire was in easy reach. He, boylike, inadvertently or purposely touched or took hold of it, without knowing of the danger of so doing, as there was nothing in its appearance to give him warning of the presence of the mysterious and deadly current with which it was charged. Under such circumstances, it may be doubted whether there was any proof of contributory negligence to go to the jury; but the question of whether he was guilty of negligence in thus taking hold of the wire was properly submitted to the jury by the instructions of the lower court, and we think the conclusion of the jury that he was not guilty of such negligence is fully sustained by the evidence."

In the present case it appears, as has been said, the plaintiff was a common laborer, knowing nothing of electrical work, and unfamiliar with the perils attending it. In sending him upon the roof to work the defendant was bound to know that he might come in contact with its wire. Newark Electric Light & Power Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 729. And it was bound by the plainest principles of law and justice to properly insulate its wire, to the end that those likely to come in contact with it should not be injured. Authorities, supra. See, also, Bourke v. Butte Electric Light & Power Co., 33 Mont. 267, 83 Pac. 470; Griffin v. United Electric Light Co., 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; Western Union Telegraph Co. v. McMullen, 58 N. J. Law, 155, 33 Atl. 384, 32 L. R. A. 352. There is nothing in the suggestion that the defendant's negligence was not the proximate cause of the plaintiff's injury. The proximate cause, as said by the Supreme Court in Insurance Company v. Boone, 95 U. S. 130, 24 L. Ed. 395, is the efficient cause.

We see no error prejudicial to the defendant in the allowance by the trial court of testimony of expert electricians as to the condition of the wire and premises at the time of and shortly after the accident, and as to the method adopted by the company for the insulation of the wire. It is contended on behalf of the defendant that all of the electricians who were introduced in the case testified that the form of insulation adopted by the defendant was the best form of insulation in commercial use at the time. A reference to the record is far from bearing out counsel's statement in that regard. For instance, the witness A. D. Aiken testified, among other things, as follows:

"I was working for the Colusa Parrot Mining & Smelting Company at its reduction works on the 12th of July, 1904. I remember the incident of Mr. Monahan being hurt on that day. I was doing electrical work. I am an electrician by occupation. I have followed that occupation about 12 years. This is a correct model of the situation there at the time Monahan was hurt.

That point where the rag string is tied is about the place he got burned, I believe. As to the current that wire was carrying when Monahan was hurt, I believe it was about 2,500 volts, something along there—2,500 or 2,700. I do not know the amperage. I could not say anything about that of my own knowledge. The current was made down in the engine room. The current came in over these wires, over a pole, which you have marked 'X,' and this was the Missouri River Power Company's line. The engine room is down in here [indicating], right about in there where it is marked 'Y' with the chalk; right about in there. The current which was going over the point of the rag string was feeding motors on each end; and, after it left the motor, it came out back that way [indicating] to where it started from. It was measured before it reached the point of the rag string. The meter was in the engine room at the point 'Y'; approximately so, yes. The meter belonged to the Missouri River Power Company, I believe. That meter was used for measuring the quantity of current that they used at their works. The Colusa Parrot Mining & Smelting Company used it. As to how high the point of the rag string was above the roof on the day of the injury, I would say about four feet and a half, something like that, I should judge. Yes; I saw Monahan there while he was hurt. I tried to bring him to; worked on him about 20 minutes. We got him to at last. He was away from the wire when I got there. I heard the current was shut off when it was ascertained that Monahan was on the wire. I don't know, but I am sure it was shut off from the fact—I didn't see that it was shut off, but Mr. Bartzen telephoned for them to shut it down at the plant at the substation down there. I don't know whether it was a dead wire after that. I didn't test it to see. This roof was made out of corrugated iron. The conductivity of corrugated iron for electricity is very good. The insulation at the rag string was weatherproof. Well, rubber-covered insulation is supposed to be the best—the best they can get. That has been in use in Butte ever since I can remember. They don't use it on the outside very much—only sometimes they do."

And thereupon the witness was asked the following questions:

"Q. What have you to say as to the safety of a human being coming in contact with this wire, even if the insulation was in perfect condition, with the current which that wire was carrying, and standing on that corrugated roof?

"Mr. Shelton: This is objected to as incompetent, irrelevant, and immaterial.

"The Court: I think that is competent—his opinion.

"A. Well, I would not like to take chances myself, even if it was rubber covered.

"Q. You would not, even if it was rubber covered?

"A. I would not consider it safe.

"Q. And, supposing it were not rubber covered, but covered with the insulation which it had on it, and suppose that insulation were new and in good condition?

"Mr. Shelton: That is objected to as incompetent, irrelevant, and immaterial. (Objection overruled. Defendant excepts.)

"A. Well, I would not consider that safe, either.

"The Witness: I was at this point [indicating] some time just before the trial of this case last April, or at the last trial I believe I was. I think it was practically in the same condition, then, compared to its condition on the day that Monahan was hurt. I think it was practically the same, as near as I can remember."

There could have been no better evidence of the improper insulation of the wire in question than the shock the plaintiff received from touching it. At points or places where people have the right to go for work, business, or pleasure the insulation and protection should be made as nearly perfect as reasonably possible, and the utmost care used to keep them so. Authorities, supra. See, also, Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am.

St. Rep. 786; Atlanta Con. St. R. Co. v. Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; Thompson's Commentaries on the Law of Negligence, § 800.

It was not error to admit evidence, upon the question of damages, as to the plaintiff's expectancy of life according to the life tables, and in respect to the amount required to produce him an annuity for such life term equal to the difference between the amount which he would have earned each year if he had not been injured, and that which he could earn in his injured condition. Baltimore & Ohio Co. v. Henthorne, 73 Fed. 634–641, 19 C. C. A. 623; Bourke v. Butte Electric L. & P. Co., 33 Mont. 267, 83 Pac. 470; 4 Sutherland on Damages (3d Ed.) § 1249.

We think no other point needs special mention. The judgment is affirmed.

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## ROTH v. MUTUAL RESERVE LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1908.)

No. 2,692.

1. APPEAL AND ERROR—REVIEW—MATTERS REVIEWABLE—WHEN DIRECTED VERDICT IS ASKED BY BOTH PARTIES.

Where both parties request a directed verdict, the defeated party is estopped to claim that any question of fact should have been submitted to the jury, and the only questions reviewable on a writ of error are (1) whether there was any substantial evidence to support the court's finding upon the facts, and (2) whether there was any error in the application of the law.

[Ed. Note.—For cases in point, see Cent. Dig. 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. SAME—SECOND REVIEW—LAW OF CASE.

Questions which were once determined by an appellate court or conceded on the hearing therein will not be considered on a second appeal or writ of error in the same case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358–4368.]

3. INSURANCE—LIFE INSURANCE—"ABANDONMENT OF CONTRACT."

Where an insured under a life policy refused to pay an assessment made against him solely on the ground that the amount of the assessments had been increased, but without any claim that the increase was illegal, and formally notified the company that he withdrew therefrom, such action constituted an "abandonment of contract," which precluded a recovery on his policy after his death, unless some other act supervened to reinstate his claim.

4. SAME—ESTOPPEL AFFECTING RIGHT TO AVOID POLICY—FURNISHING BLANKS FOR PROOF OF DEATH.

The furnishing by a life insurance company to a beneficiary named in one of its policies of forms for making proof of the death of the insured does not estop it from asserting that the policy had lapsed and was not in force at the time of the death, where such forms were furnished at the request of the beneficiary, and were accompanied by a letter stating that it was done without prejudice to or waiver of any of the company's rights, and also stating its claim that the policy had lapsed.

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

F. H. Bacon and J. E. McKeighan, for plaintiff in error.

James C. Jones (S. T. Tyng, Lon O. Hocker, and J. Lionberger Davis, on the brief), for defendant in error.

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

PHILIPS, District Judge. This action was originally brought by Margaret Roth against the Mutual Reserve Fund Life Association on a policy certificate for life insurance dated January 9, 1884, issued on the life of Adam Roth, for the sum of $10,000. After the institution of suit, said Margaret died, and the present plaintiff in error was substituted. The name of the defendant, after the commencement of said suit, was changed to Mutual Reserve Life Insurance Company, which was duly substituted of record. The policy was issued and delivered in the state of Missouri, where the first and subsequent premiums were paid. The stipulations of the policy as to assessments are as follows:

"If, at such date as the board of directors of the association may from time to time fix or determine for making an assessment, the death fund is insufficient to meet existing claims by death, an assessment shall then be made upon every member whose certificate is in force at the date of the last death assessed for, and said assessment shall be made at such rates, according to the age of each member, as may be established by the said board of directors, and the net amount received from such assessment (less 25 per cent. to be set apart for the reserve fund) shall go into the death fund."

By the conditions of the certificates, the by-laws of the company are made a part of the contract. The provisions of the by-laws applicable to this case are as follows:

"Sec. 5. On the first week day of the months of February, April, June, August, October, and December of each year (or at such other dates as the board of directors may, from time to time, determine) an assessment shall be made upon the entire membership in force, at the date of the last death of the audited death claims prior thereto, for such a sum as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member.

"A member failing to receive a notice of an assessment, on the first week day of February, April, June, August, October, and December, for his share of the losses occurring during the time specified, it shall be his duty to notify the home office in writing of such fact.

"A failure to pay the assessment within 30 days from the first week day of February, April, June, August, October, and December (or within 30 days from the day of the date of such periods as may be named by the directors), shall forfeit his membership in this association, with all rights thereunder, and the certificate of membership shall be null and void."

The answer, inter alia, pleaded that an assessment, No. 106, styled "mortuary call," was levied October 2, 1889, and was not paid by Adam Roth within 30 days of the call, whereby the policy lapsed and was forfeited. It is conceded that the assured did not pay this mortuary call No. 106, although he had paid in premiums on said policy up to that time over $6,000.

On the first trial of this cause, the plaintiff recovered in the Circuit Court on the ground that the policy was subject to the non-

forfeiture law of the state of Missouri; that the net value of the policy was sufficient to carry it beyond the time of the death of Adam Roth. That judgment was reversed by this court. Mutual Reserve Life Insurance Company v. Roth, 122 Fed. 855, 59 C. C. A. 63, to which reference is here made for further statement of facts. The case being remanded for new trial, the plaintiff again asserted that the policy sued on was subject to the said nonforfeiture law of Missouri; and, second, it pleaded an estoppel, because of representations of the company, to which the court sustained a demurrer, which action of the court is not pressed here for consideration. The reply further alleged that after the death of Adam Roth, the defendant being notified thereof and requested to furnish blank proofs of death, the plaintiff furnished defendant, at an expense of $5, said proofs, and the defendant, at the time having full knowledge of the various defenses alleged in its answer, was thereby estopped from setting up said defenses. At the conclusion of the evidence both parties requested a directed verdict of the jury. The court granted the request of the defendant.

This court, when this case was here on a former writ of error, having adjudged that the defense of the nonforfeiture law of Missouri was unavailing to the plaintiff, the only questions to be decided are the defense of abandonment by Roth in his lifetime and the affirmation in the reply of an estoppel. As both parties at the conclusion of the evidence requested a directed verdict, the defeated party is estopped from asserting that any question of fact should have been submitted to the jury, as every disputed question of fact is concluded in favor of the prevailing party. The only questions open to review on this writ of error are: (1) Was there any substantial evidence to support the court's finding upon the facts? and (2) was there any error in the application of the law? U. S. v. Bishop, 125 Fed. 181, 182, 60 C. C. A. 123, and authorities cited.

The evidence clearly enough established that conformably to the by-laws of the company the board of directors made an assessment, No. 106, known as a "mortuary call," levied October 2, 1899, and notice thereof was duly published in the usual form. On the 31st day of October, 1899, the said Adam Roth gave to the defendant the following notice:

"I beg to notify you herewith of my withdrawal from your association, and respectfully refer you to my policy No.17,522."

That he intended by this to advise the defendant of his unqualified abandonment of the policy is confirmed by Gust Hoeber, who was at that time the defendant's agent at St. Louis, who testified that in February, 1899, on inquiry by the assured, he was advised that his assessment would be increased in October next, whereat Roth said that he intended to "drop his policy"; that he "would continue his policy until it was raised again, and then he would drop it." The witness further testified that afterward, in October, 1899, at the time of the mortuary call No. 106, he called upon Mr. Roth to know why he had not sent check for the assessment, when Roth in answer said:

"He would not pay any more; that he would not continue his policy: that he told me so last spring; that he had been raised again about $20. and he would not continue his policy; * * * that his wife was well provided for, and she did not need the money."

There was no claim advanced by him that there was any irregularity, or want of authority in the board of directors, in making said assessment. Indeed, neither in the petition nor the reply does the plaintiff allege that Adam Roth withdrew from the association on the ground that the demand of the company for the additional due was illegal, or that he so informed the company; but, when called upon by the local agent to pay and urged not to carry out his letter of withdrawal, he simply said he would not stand another raise—that his wife was well provided for anyhow. He did not claim, as is now asserted in argument, that there was any trust fund applicable to such payment, but placed his declinature solely on the ground that he would not stand another raise—that his family was well provided for. It is questionable whether his beneficiary can now urge other ground after his death, as the presumption should be indulged, had he urged other ground, the company might have altered its situation. See Kansas Union Life Ins. Co. v. Burman, 141 Fed. 836, 73 C. C. A. 69.

Be this as it may, the question of the regularity of the assessment and the abandonment of the policy by Adam Roth were in effect conceded on the former hearing of this case. In the opening paragraph of the opinion of Judge Thayer (122 Fed. 854, 59 C. C. A. 64) he said:

"We are of the opinion that, when the trial ended, all of the material facts in the case were practically confessed, and that the learned trial judge was right in holding that the only question involved was one of statutory construction arising upon the aforesaid statute."

And it appears from the brief of plaintiff's counsel on the former writ of error that:

"The questions of the legality of the assessment upon which it was claimed the policy was forfeited and the estoppel of the company by requiring proofs of death were determined in favor of the defendant below, and need not be considered here."

On the well-recognized rule of "the law of the case," these questions should be regarded as having passed in rem judicatam. Judge Hook, in Mutual Reserve, etc., Association v. Ferrenbach, 144 Fed. 344, 75 C. C. A. 305, 7 L. R. A. (N. S.) 1163, said:

"We will not re-examine the question when the cause again comes before us on the same facts and under the same conditions."

It is the established rule in the application of the doctrine of res judicata that:

"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." Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195.

This rule applies with equal force to matters adjudged, or definitely passed upon, on appeal or writ of error, when the case again comes

before the appellate court. "It is settled in this court that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate of this court." Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; Clark v. Keith, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302. Questions passed upon, and matters involved in the first appeal, become "the law of the case" on a subsequent appeal or writ of error. Guarantee Co. v. Phenix Ins. Co., 124 Fed. 170, 59 C. C. A. 376.

Laying this aside, there is no evidence in this record tending to impeach the levy of the assessment. The settled rule of law is that "it was prima facie evidence against the members of the association." Anderson v. Mutual Reserve, 171 Ill. 40, 49 N. E. 205; Bagley v. A. O. U. W., 131 Ill. 498, 22 N. E. 487; Demings v. Sup. Lodge, 131 N. Y. 522, 30 N. E. 572. In Schmidt v. Mutual Reserve Fund Life Association, 106 S. W. 1082 (decided December 17, 1907), the St. Louis Court of Appeals, per Bland, J., said:

"The calls of mortuary assessments are periodically adjusted on the estimated cost of insurance according to the experience of the association, and is acquiesced in among the members by taking into account the attained age of each member. It seems to us that this is right, and it certainly is authorized by the by-laws and constitution of the association, and expressly provided for in the contract of insurance itself. * * * There is no direct evidence in the record before us that call No. 96 resulted in discrimination by which Schmidt was injured, nor can the inference that the call resulted from such discrimination be drawn from the opinion and the record. On the contrary, the only evidence on the subject is to the effect that call No. 96 was the result of a readjustment of the assessments by which each member was required to pay his equitable part of the death fund; and the Strauss Case (a North Carolina decision) is repudiated in Mutual Reserve Fund Life Association v. Ferrenbach, 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163."

So in the case at bar the evidence of the actuary was to the effect that call No. 106 was regular and without discrimination.

The letter of Roth of October 31, 1899, notifying the defendant of his withdrawal from the association, was an effectual abandonment of the contract on his part, and bars his right of recovery, unless some other fact has supervened to reinstate his claim. Ryan v. Association (C. C.) 96 Fed. 796; Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 345, 20 Sup. Ct. 906, 44 L. Ed. 1088; Mutual Life v. Hill, 178 U. S. 347, 20 Sup. Ct. 914, 44 L. Ed. 1097; Jones v. Insurance Co., 120 Mich. 211, 79 N. W. 204; Haydel v. Association (C. C.) 98 Fed. 200.

The plaintiff in the replication seeks to avoid the effect of this abandonment by pleading an estoppel. It only remains to examine the evidence in support of this plea. On the 28th day of July, 1900, the beneficiary, Margaret Roth, by her attorney, wrote the defendant as follows:

"You are hereby notified that Adam Roth, insured under your policy No. 17,522, dated December 31, 1883, for $10.000, died June 20, 1900. As the beneficiary named in said policy I hereby request you to furnish blank proofs of death, and I hereby offer to furnish such proofs as you may require."

To this the defendant replied by letter on July 31, 1900, as follows:

"Dear Madam: Your favor of the 28th inst., to hand. We herewith inclose proof blanks, which we do at your request, without prejudice to or waiver of any of the rights of the association in the premises. We would further state that policy No. 17,522, issued to Adam Roth (for $10,000) lapsed for the nonpayment of assessment due October 2, 1899. If, however, you persist in making claim under said policy, the association will require the performance of all conditions precedent as provided in the contract."

The testimony on behalf of the plaintiff was that she prepared, on the blank sent her, the customary proof of death and forwarded it to the defendant, at an expense of $6.10.

The contention of plaintiff's counsel is that, by requiring proof and putting the claimant to the expense of making same, the defendant is estopped from pleading the abandonment and lapse of the policy. The letter admits of no such construction. It was simply polite to send the blank proofs, as requested by plaintiff's counsel. But, lest it might be sought to construe this act of courtesy into a recognition of the defendant's liability, it sent along with it the safeguard, "Without prejudice to or waiver of any of the rights of the association in the premises," and in addition thereto, and to advise her "further," it stated, in effect, that in no event did any liability on its part exist, because the assured had forfeited his contract of insurance by letting it lapse for nonpayment of the assessment due October 2, 1899. Read by its four corners, with the eye of common sense, with an honest mind, this letter cannot be construed into an invitation to the claimant to incur labor or expense in making out proofs, in the belief that the claim would be recognized. Any other construction of this letter would be a perversion of the language and violative of the clear intendment of the writer.

It results that the judgment of the Circuit Court must be affirmed.

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## RAINY LAKE RIVER BOOM CORP. v. RAINY RIVER LUMBER CO., Limited.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1908.)

No. 2,708.

1. APPEAL AND ERROR—REVIEW—MATTERS REVIEWABLE WHEN DIRECTED VERDICT IS ASKED BY BOTH PARTIES.

Where both parties request a directed verdict, the defeated party is estopped to claim that any question of fact should have been submitted to the jury, and the only questions reviewable on a writ of error are (1) whether there was any substantial evidence to support the courts finding on the facts, and (2) whether there was any error in the application of the law.

[Ed. Note.—For cases in point, see Cent. Dig. 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. LOGS AND LOGGING—BOOM COMPANIES—POWERS UNDER STATE STATUTE.

Laws Minn. 1889, p. 351, c. 221, § 2, relating to boom companies as amended by Laws Minn. 1905, p. 106, c. 89, which authorizes the organization of

such companies to take possession of and improve any streams for the purpose of aiding in the driving and handling of logs therein, and to take charge of and drive logs at the request of the owner and make a charge therefor which shall be a lien on the logs, cannot be construed to authorize such a company to extend its works beyond the center of Rainy Lake river and within the jurisdiction of the Dominion of Canada.

3. SAME—RIGHT TO LIEN FOR TOLL—OBSTRUCTION BY BOOM OF INTERNATIONAL WATERS.

Defendant, a boom corporation, organized under the laws of Minnesota, had its principal booms on the Minnesota side of the Rainy Lake river, but extended its sheer boom across to the Canadian shore for the purpose of turning all logs floated in the river into its boom. Plaintiff, a Canadian lumber company, cut logs on the Canadian side and placed them in the river, to be floated down to its mill, which was on the same side. The river was free from obstructions, and no artificial aid to the floatage of the logs was necessary; but they were caught by defendant's sheer, and directed into its boom, where it sorted them from the logs of its customers and then again turned them into the river below. There was no contract between the parties; but defendant claimed its established tolls for handling such logs, and held a quantity of the same, claiming a lien thereon under the statute. *Held*, that under the Webster-Ashburton treaty of 1842 between Great Britain and the United States, which made the Rainy Lake river a part of the international boundary and provided that it should be "free and open to the use of the citizens and subjects of both countries," defendant's booms, at least such part as extended within the jurisdiction of Canada, were unauthorized and unlawful obstructions of the river, and that plaintiff could not be subjected by means thereof, without its consent, to tolls for handling its logs, and was entitled to maintain replevin in a court of the United States for the logs so unlawfully held by defendant.

Sanborn, Circuit Judge, dissenting.

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

Charles Loring (Halvor Steenerson, on the brief), for plaintiff in error.

C. J. Rockwood (A. Y. Merrill, on the brief), for defendant in error.

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

PHILIPS, District Judge. This is an action of replevin, in common form, instituted by the defendant in error (hereinafter designated the Lumber Company), against the plaintiff in error (hereinafter designated the Boom Company) to recover the possession of 500,000 feet of pine saw logs, alleged to be of the value of $7,500.

The answer pleaded that the Boom Company was organized for the purpose of improving, driving, and handling logs in the stream known as the Rainy Lake river, and that for such purpose it had taken possession of a considerable part of said stream, upon which no other corporation organized for such purpose had made improvements or taken possession, in aid of driving or handling logs therein; that its power to do so was granted by the statute law of the state of Minnesota (Laws Minn. 1889, c. 221, § 2, as amended by Laws Minn. 1905, p. 106, c. 89); that it has established and charged reasonable and uniform toll for booming, sorting, rafting, handling, and driv-

ing logs on said stream through said works; that the rate it established and charged was 35 cents per thousand feet, board measure, for booming and sorting saw logs; and that between the 18th day of April, 1905, and the 8th day of October, 1906, the Lumber Company had turned into its boom and had driven and floated upon said river into its works 27,305,664 feet of saw logs, bearing a designated stamp at the end, and on the side certain marks; and that for such service it held the logs for tolls, costs, and expenses, amounting to the sum of $9,556.98, together with interest since the 8th day of October, 1906. The answer admits that the logs were of the value of $7,500.

The Lumber Company replied, tendering the general issue as to the new matter set up in the answer, and further alleged that said Rainy Lake river is the international boundary between the United States and Canada, a colony of Great Britain; that by treaty made in 1842, between the United States and Great Britain, said river was made a navigable stream and highway, open and free to the citizens and subjects of the United States and Great Britain; that the center of said stream is the northerly boundary of the state of Minnesota; and that said state had no jurisdiction or authority over the traffic and commerce upon said stream, and was without jurisdiction or authority of any kind beyond the center thereof. It alleged that the statute laws of Minnesota are of no effect, because one-half of the river is beyond the jurisdiction of the state, and are in conflict with the treaty above mentioned, etc. It then charges that the Boom Company had wrongfully and unlawfully constructed entirely across said river a boom, which was designed to and did stop all of the logs floating on said river, and has so maintained it, except as it from time to time opened the boom and permitted them to pass through, and that it had wrongfully and unlawfully maintained such boom entirely across said stream, to stop and detain all logs floating on the river. It further alleged that the logs in question had been cut from timber owned by the Lumber Company upon lands in the province of Ontario, Canada, that the mill owned by it is situated at the town of Rainy River in said province, and that it employed the International Boom Company, a corporation engaged in driving logs upon the river, to take charge of and drive its logs in the season of 1905 and 1906, and to deliver the same at its mills in the town of Rainy River, which it did, except as hindered and prevented by the boom constructed by the defendant company, which was erected some three or four miles above the town of Rainy River, where the Lumber Company's mill was located. The reply charged that, without the consent and against the will of the Lumber Company and of the International Boom Company, said Boom Company stopped and detained said logs described in the petition.

At the conclusion of the evidence, both parties requested of the court a directed verdict. The court granted the request on behalf of the Lumber Company and refused that of the Boom Company. The rule of law and procedure in this jurisdiction is well established that, where both parties ask the court to instruct a verdict, both affirm that there is no disputed question of fact to be submitted to the

jury, and that every disputed question of fact is concluded in favor of the prevailing party, and that the only questions open to review on writ of error are: Was there any substantial evidence to support the court's finding upon the facts? And was there any error in the application of the law? Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; U. S. v. Bishop, 125 Fed. 181, 182, 60 C. C. A. 123; Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 459, 77 C. C. A. 601; Roth, Executrix, v. Mutual Reserve Life Ins. Co. (recently decided by this court) 162 Fed. 282.

So much of the said amendatory act of 1905 of Minnesota as is pertinent to this controversy, in substance, is as follows: It authorized the corporation formed for the improvement of any stream and driving or handling logs therein, which shall have taken possession of such stream or any considerable portion thereof, upon which no other corporation so organized has taken possession or made improvements, to improve such stream by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, sluicing and flooding dams, etc., or otherwise as may be necessary. "But such corporation shall in no case, in any manner, materially obstruct or impede steamboat navigation or driving or handling logs." The corporation is required to serve the public equally and reasonably, and for a reasonable compensation. "Every such corporation which shall so improve a stream and so keep in repair and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs driven, sluiced, or floated on the same, and may take possession of all logs put into such streams so as to impede the drive, when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools, for breaking the rollways and driving such logs in season for making a thorough drive down such stream, without hindering the main drive, and shall also, at the request of the owner of any logs, put into said stream, take charge of and drive the same down and out of such stream, or down such stream so far as their improvement may extend, and charge and collect therefor of the owner or party controlling said logs reasonable charges and expenses for such services." The act gave to the corporation for such tolls a lien on the logs, and authorized it to seize a sufficient amount to pay the tolls and to make sale thereof upon giving ten days' notice. The act further provided:

"That any corporation formed for the improvement of a stream which is in whole or in part, a boundary between them and an adjoining state or country and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in corporations in such adjoining state or country created for similar purposes upon the same stream or to consolidate or unite with such corporation in such adjoining state or country whenever the purpose for which the corporation in this state is organized can be better effected thereby. * * * Provided that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling of logs upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined to points below its works on said stream, except where dams have been constructed to accumulate water for sluicing logs and

flushing the river below the same, and in such case, shall not detain logs in any part of the river so as to form a jam or to prevent the prompt delivery of logs destined for points below the works under authority of this act."

It is observable that there are some positive provisions, in the nature of limitations, imposed by this statute. While it empowered the Boom Company to take possession of a stream of water, it must be for the purpose of aiding and driving or handling logs thereon, "but such corporation shall in no case, in any manner, materially obstruct or impede steamboat navigation or driving or handling logs;" and, second, it may take possession of said logs put into such stream, if they so impede the drive when the owners shall not come upon the stream adequately provided with men, teams, and tools, etc., for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive, and it may, on request of the owner of the logs, take charge of the same and drive them down and out of the stream, or as far as its improvements go, and make charges therefor. There is no allegation in the answer that the Lumber Company's logs were so put into said river as to impede the drive, or that it came upon the stream with its logs, without adequate men and equipments for handling and driving the same. Nor is there any allegation in the answer that the Boom Company took charge of said logs at the instance and request of the owner. On the contrary, the plea accords with the Boom Company's conduct. It proceeded upon the assumption that, by reason of its incorporation, it was authorized to so construct its boom, with sheers extending across the stream, as to draw into the housing yards or sorting pens of the boom, every log floating on the stream, and subject the owner, nolens volens, to handling fees of the company and the inspection fees of the state surveyor.

This is precisely what the Boom Company did. It constructed from its boom what is termed "sheers," which extended entirely across the river to the Canadian side, with only a small space left in the obstruction through which rafts, when manned, might be piloted, and with an opening or draw through which small boats might pass. Its general manager, Mr. Kennedy, testified that the sheer, so extending across the stream, was purposely so constructed as to compel all logs floating in any part of the stream to go inside of the boom. The right of the Boom Company to thus treat the logs of the Lumber Company floating on said river must be viewed in the relation sustained to this highway of commerce by the respective citizens of the United States and of Canada. Under what is known as the "Webster-Ashburton Treaty" of 1842 between the United States and Great Britain, this Rainy Lake river, throughout its extent, was recognized as a dividing line between the United States and the Dominion of Canada. The treaty declared that:

"All the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior, to the Pigeon river, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

This treaty, having been made under the authority of the United States, became "the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding." Article 6, Const. U. S. The right to the free and open use of this river by a citizen of Canada is not referable to any local regulation of a state of the United States that chances to be erected contiguous to the river, but it is established by said treaty. Said river is about 80 miles in length, extending from Rainy Lake to the Lake of the Woods. To a point within about 3 miles from its source to its outlet it is navigable in its natural condition, not only for floating logs, but for steamboats of considerable size. At the point where the boom in question is located, and for many miles above and below, it is smooth, deep water from bank to bank, from one-quarter to one-half mile in width. It required, for the purpose of navigation and floating logs, the construction of no artificial dams or sluiceways, or removal of any natural obstructions. Without the interference of obstructions erected by the hand of man, the logs of the Lumber Company cast upon the stream would flow on throughout its extent. The logs in question came from the Dominion of Canada. Their initial point of transportation was from the Canadian shore, and they were destined to the mill of the Lumber Company situated on the Canadian side of the river, several miles below the defendant's boom works.

As applied to this river, it is perhaps not too much to say that the term "state and interstate commerce" has no exact relation. While logs were driven from points on the Minnesota side to other points on the same side, and some were destined beyond the limits of the state, and this was true of shipments on the Canadian side of the river, the commerce partook of the character of foreign commerce, because citizens of the United States and their property necessarily come in contact with citizens and subjects of Great Britain and their property on an international highway, declared by treaty between the two countries to be free and open to the use of the subjects and citizens of each. Therefore it might, on principle, be said that this commerce was not subject to the control or regulation of any one state. Lord v. S. S. Co., 102 U. S. 541, 26 L. Ed. 224. In any event, the jurisdiction of the state of Minnesota could not extend beyond the center channel of the river. As said by Chief Justice Marshall, in Rose v. Himely, 4 Cranch, 279, 2 L. Ed. 608:

"It is conceded that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law, without the circle in which that law operates."

The only ground upon which the power of the state of Minnesota to make regulations, to be exerted through such a corporation as this Boom Company, respecting the navigation of and floating logs on a waterway, is that it is within its territory. Mr. Justice Field in Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487, where the Illinois river was concerned, wholly under the jurisdiction of the state of Illinois, said:

"The state is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois river, and to increase its facilities, and thus augment its growth, it has full power. * * * If, in the opinion of the state, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state—and on that point the state must necessarily determine for itself—it may authorize them, although increased inconveniences and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. * * * How the highways of a state, whether on land or by water, shall be best improved for the public good, is a matter for state determination, subject, always, to the right of Congress to interpose in the cases mentioned."

It is noticeable that in the leading case of Osborne v. Knife Falls Boom Corp., 32 Minn. 412, 21 N. W. 704, 50 Am. Rep. 590, touching the power of the state Legislature to authorize a boom company to take and hold logs floated on streams for fees exacted, it is based entirely upon the state's jurisdiction over its internal, domestic affairs. Speaking of the conflicts likely to arise among the several users of a stream for floating logs, the court said:

"In this conflict, who is to determine how the right of floatage upon this common highway shall be enjoyed? Who is to fix upon the just and proper compromise of these conflicting interests? Obviously, the Legislature—that department of government which, in the exercise of lawmaking and a police power, prescribes the rules by which the use of public highways in general is regulated; and, save as controlled by paramount law (that is to say, in this instance, by our state Constitution or Enabling Act), the discretion of the Legislature in the premises is practically unlimited. It may enact laws prescribing the manner in which the common right of floatage shall be enjoyed. It may determine what means shall be adopted and by what agency it is to secure results which, in its judgment, are the best and fairest practical compromises of conflicting interests."

It may be conceded that under ordinances erecting states with a dividing waterway forming a boundary line, and likewise under treaties between nations respecting such boundary water courses, the provisions securing to the citizens and subjects of both states and countries the free use of the stream is understood to mean that it shall be exempt from taxation and duties imposed or exacted by either of the states or countries to the compact. Cardwell v. American Bridge Co., 113 U. S. 210–211, 5 Sup. Ct. 423, 28 L. Ed. 959; Willamett Iron Bridge Co. v. Hatch, 125 U. S. 9 et seq., 8 Sup. Ct. 811, 31 L. Ed. 629. And it may be further conceded, for the purposes of this case, that either party to this treaty might authorize the construction of booms or other artificial structures within the boundary of its jurisdiction, to aid in the floating of logs. But the state of Minnesota had no right to authorize this Boom Company (which we hold it did not do under the legislative act in question) to so extend its boom by sheers across the river, beyond the channel to the Canadian shore, within the jurisdiction of Canada, so as to obstruct the free and open use of the river for floating logs thereon by a citizen of Canada. J. S. Keator Lbr. Co. et al. v. St. Croix B. Corp., 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837.

The language of the treaty in question is not only that this water communication shall be free to the use, but also open to the subjects and citizens of both countries; that is to say, it shall not be

closed or otherwise so obstructed by either country as to prevent its free and equal use. While it is to be conceded that where the private citizen alone complains of such obstruction, by asserting detriment to his private interests in consequence thereof, he may not get relief in a private suit, as the state alone may complain of such encroachment upon its jurisdiction (Keator Lbr. Co. et al. v. St. Croix B. Corp., supra, and cases cited), this, however, can have no application to the case at bar, where this corporation, a citizen of the state of Minnesota, has wrongfully seized and withholds the private property of a citizen of Canada, when it comes and appeals to the courts of this country for the recovery of its property. Indeed, it would be a reproach to the nation, which in the opening preamble to its Constitution has declared it to be among the chief objects of the Union to "establish justice" (through the creation of courts for its administration), to hold that, when the foreign citizen's private property is wrongfully seized and withheld by a citizen of and within this country, our courts are not open for redress. It would be a poor consolation to the plaintiff to call upon its sovereign to complain to this government of an obstruction, in violation of the treaty obligation, which might only result in the removal of the obstruction.

Reliance for this extraordinary assumption of jurisdiction over the complainant's property, floating on the current of Rainy river, is upon the ruling in Lindsay & Phelps v. Mullen, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400, where it was held that a boom company, organized under the Minnesota statute of 1889, which had erected on the Minnesota side of the Mississippi river a boom for the improvement of navigation and to facilitate the floating of logs and lumber thereon, was entitled to exact fees for handling logs taken within the inclosure of its boom, for the purpose of separating the logs which it was authorized to care for from other logs. The case dealt with a boom erected on the Mississippi river running between the states of Minnesota and Wisconsin. The defendant contested the lien, on the ground that the Mississippi river was a navigable stream, a national highway of commerce, and therefore any legislative act of the state affecting the regulation of navigation itself or the subject of such commerce was not permissible. The distinguishing feature of the discussion by Mr. Justice Brewer in that case lies within the following paragraph:

"The principal works of the boom company are wholly within the state of Minnesota. The center of the main channel of the Mississippi river is northeast of the island. The state of Minnesota had therefore the undoubted right to improve this portion of the Mississippi river lying southwest of the island for the purpose of facilitating the navigation of logs. It could do the work itself, or could authorize a corporation to do the work, and it could prescribe any reasonable fees for the use of the improvement. The power of the state to authorize the construction of these works did not depend at all upon the question whence all or most of the logs likely to be run into the boom should come. It is enough that the state authorized this improvement and prescribed the conditions upon which it might be used by any owner of logs. These conditions are not shown to be unreasonable. It is a legitimate exercise of power on the part of a state to provide state supervision of what is done in works of such a character and to require payment of reasonable charges for such supervision. It does not appear that the plaintiff was com-

pelled to avail itself of this boom, or that its logs were forcibly seized by the boom company and against its will passed through the boom. On the contrary, it would seem not improbable from the testimony that the persons who organized and owned the boom company were engaged in the business of cutting logs on the Chippewa river, and that this litigation sprang from their desire to get all the benefits of the boom without submission to the inspection laws of the state, which gave authority for the works. At any rate, if this plaintiff wanted to take advantage of the conveniences furnished by the boom, it is not in a position to avoid compliance with these provisions of the statutes of the state which authorized the construction of the works. * * * Indeed, its complaint is not that the sheer boom interfered with its rights of navigation in any way, but that after its logs had been passed into the works constructed under the authority and within the limits of the state of Minnesota it was not permitted to avail itself of the advantage furnished thereby and repudiate the charges prescribed by the state."

That was a waterway wholly within the jurisdiction of the United States, and constituted the dividing line between the two states. In such instance, under the common law respecting waterways, the channel of the river, designated "the Thalweg," is the dividing line of the respective state jurisdictions for certain purposes; and either state might, through the agency of an organized corporation, make needful regulations, within the confines of its jurisdiction, for rendering the stream serviceable for the purpose of navigation, such as the floating of logs in promotion of such industrial, commercial pursuit. So it was held that persons enjoying the benefit of improvements for facilitating such transportation might be subjected to contribution for the enjoyment thereof. While, in that case, the boom company had extended its sheer over near to the Wisconsin shore, the right of the boom company to exact fees and enforce the lien was justified, because the plaintiff there assented to and enjoyed the use of the boom, which the evidence showed was essential to the facilitation of such commerce.

The only case where the right of this Minnesota corporation to hold logs floated on Rainy Lake river for boomage charges is that of International Boom Co. v. Rainy Lake River Boom Corp., 97 Minn. 513, 107 N. W. 735. It did not present a controversy between a citizen of Canada and a citizen of Minnesota. So, when the plaintiff invoked the provisions of said treaty, the court met it with the assertion that:

"The evidence clearly shows that the plaintiffs acquiesced in defendant's possession of the river and the operation of its works, at no time questioning its right to do so, but utilizing the same in handling their logs."

And therefore it was not in position to raise the question. Further on the court said:

"If, then, the labor and services performed by defendant, and for which it claims a lien, were performed under a contract with plaintiffs, express or implied, the validity of the statute as applied to this particular stream of water is not involved. The question would be involved if defendant sought to enforce its asserted lien solely under the statute."

The court found, as a matter of fact, that the plaintiff used defendant's boom under contract, or, at least, there was sufficient evidence to entitle the defendant to take the verdict of the jury thereon. That

is not this case. It is true that defendant's counsel, in argument to this court, in the attempt to bring his case within the ruling of the Minnesota court, suggested that there was some such evidence in this case. Aside from the rule, hereinbefore announced, that where both parties requested a directed verdict the unsuccessful party affirmed "that there was no disputed question of fact which could operate to deflect or control the question of law," the incident relied on by the defendant to carry the case to the jury was so obviously insufficient as not to deserve consideration. On the contrary, the case presented by this record is where, without any request or invitation by the complainant, a citizen of Canada, the defendant Boom Company, a citizen of Minnesota, purposely so constructed its works, with its sheer extending across the entire surface of the stream over to the Canadian shore, as to compel the Lumber Company's logs floating on the river to pass inside of the housing of the boom, without even an allegation in its answer that it was necessary to aid the proper use of the river for such logging. In short, as this record advises us, this boom company had a contract with two or three other lumber companies for gathering in their logs, to be sacked and sent on to their mills, some situated on the Lake of the Woods. To accomplish and carry out its contracts, it constructed its barriers so as to float inside of its housing yards every log that came down the river; and for this work of separation it imposed a toll tax, in the form of fees, amounting to $9,556.96, on the plaintiff's logs rightfully floating on the river under said treaty stipulation.

Be it conceded that, in order to effect this separation of its patrons' logs from those of the plaintiff Lumber Company, the law indulged it in detaining the latter's logs a reasonably sufficient time therefor, yet it conferred no benefit whatever on the plaintiff company. Stress was laid by the Minnesota court in the International Boom Co. Case, supra, on the fact that, without the interposition of the boom company in gathering in the logs, they would go down the stream and into the Lake of the Woods, where, by reason of its size, they would be driven by wind in all directions and lost to the owner. In the case under review, this argument, ab inconvenienti, can have no force. The evidence is that when the Boom Company and its inspector, for the purpose of their fees, got through with the marking of the logs not belonging to its patrons, the defendant turned them afloat, unsacked and unattended, just as they were before they were brought into the defendant's network, to become, as far as the defendant cared or was concerned, a prey to the scattering winds of the Lake of the Woods. This boom company did not drive these logs within the meaning of the statute. It simply turned them loose at the lower end of its boom, to float on the current of the river as before it intercepted them. The evidence shows that the plaintiff Lumber Company, in order to gather its logs, when they reached the point of its mill on the Canadian shore, had the International Boom Company employed to gather and house them, for which it paid. We are unable, as applied to such situation, to perceive the force of the suggestion that as the plaintiff's logs were floated, mingling with the logs of other

owners, necessitating the gathering of the whole into the defendant's boom, in order to discover by the brand or mark what logs of its patrons might be in the mass, it was reasonable and equitable that the plaintiff should contribute to this expense. Mutatis mutandis, the defendant or its patrons should contribute to the expense incurred by the plaintiff in having its logs gathered into harbor for its mill. This suggests that each party should bear the burden, whatever it be, of gathering in their respective logs, on the rule that he who receives the benefit should bear the burden.

Be this as it may, on the broad proposition, asserted on the face of the answer, that any boom works established and maintained by the defendant which contributed to the gathering and separating of logs floating on the river, without any request for assistance by or any benefit conferred on the plaintiff, this defendant was entitled to a fee on every log it drew into the boom, it would result that, if it handled and housed only 100 logs of its patrons, with whom it had a contract, and uninvited gathered in 1,000 logs of the Lumber Company, it would recover ten times more fees from it than from its contracting patrons. To state such a proposition is to repudiate it. In our judgment, the amended statute of 1905 of Minnesota admits of no such construction, and affords no protection to the defendant's act in withholding from the plaintiff its property, under the facts and circumstances disclosed by this record.

It results that the judgment of the Circuit Court must be affirmed.

SANBORN, Circuit Judge (dissenting). In my opinion there is no essential difference between the facts in this case and the law applicable thereto and those in Lindsay & Phelps Company v. Mullen, 176 U. S. 126, 140, 144, 145, 148, 150, 152, 153, 20 Sup. Ct. 325, 44 L. Ed. 400. In that case the limit of the jurisdiction of the state of Minnesota was the thalweg of the Mississippi river. In this case it was the thalweg of the Rainy Lake river. In that case the Minnesota Boom Company constructed its main boom on the Minnesota side of the Mississippi river and extended its sheer boom to the Wisconsin shore, so that it turned all the logs coming down the river into the upper end of its main boom. In this case the Rainy Lake Boom Corporation constructed its boom under the same statute on the Minnesota side of the thalweg of the Rainy Lake river and extended its sheer boom to the Canadian side, so that it turned all loose logs coming down the river into the upper end of its boom. In that case there was no evidence that the Lindsay & Phelps Company either contracted or consented that their logs should be turned into the Minnesota Company's boom; nothing but that it did not appear "that the plaintiff was compelled to avail itself of this boom, or that its logs were forcibly seized by the boom company and against its will passed through the boom." Page 150, of 176 U. S., page 334 of 20 Sup. Ct. (44 L. Ed. 400). In this case the record discloses an essentially similar state of facts. In that case the Supreme Court held that a Wisconsin corporation, whose logs were on the way from Wisconsin to Iowa upon the Mississippi river and were turned into

the Minnesota Company's main boom by its sheer boom, must pay the charges of the surveyor general of Minnesota for inspecting and measuring them in that boom; and in this case the Rainy Lake Corporation boomed these logs and claims its lien under the same Minnesota law. Upon the authority of the argument in the opinion in that case, which it would be useless to repeat here, and of the decisions in that case, in Osborne v. Knife Falls Boom Corporation, 32 Minn. 412, 419, 21 N. W. 704, 50 Am. Rep. 590, in Pound v. Turck, 95 U. S. 459, 24 L. Ed. 525, in J. S. Keator Lumber Co. v. St. Croix Boom Corporation, 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837, in Rundle v. Delaware & Raritan Canal Co., 14 How. 80, 93, 14 L. Ed. 335, in Willson v. Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412, in Cooley v. Port Wardens, 12 How. 299, 315, 13 L. Ed. 996, and in the other cases cited in the opinion in the Lindsay & Phelps Company v. Mullen Case, it seems to me that the Boom Corporation has a lawful lien upon the logs in dispute which ought to be enforced.

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BURN LINE, Limited, v. UNITED STATES & A. S. S. CO.

(Circuit Court of Appeals, Second Circuit. May 5, 1908.)

No. 259.

1. SHIPPING—FREIGHT—WHEN EARNED.

By the American law freight is due only if the goods are carried to destination, and, even if prepaid, may be recovered back on a failure to make delivery, unless expressly otherwise provided in the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 514.]

2. SAME—CHARTER HIRE—CONSTRUCTION OF CHARTER PARTY.

Respondent chartered a vessel from libelant to be used as one of its line steamers in making a voyage to Australia, the hire to be a lump sum payable in installments. The charter party provided that the owner should sign customary bills of lading and should hold the charterer indemnified against claims for loss or damage to cargo from any cause after delivered on board. It contained an exception of liability for losses through strandings, collisions, etc., "even when occasioned by negligence," and then provided as follows: "Owners agree to hold charterers indemnified in so far as the said negligence clause may be contrary to the laws of the United States, to accept the usual line form of bill of lading as customary in this trade, with the conditions therein, and the same to form a part of this agreement." Respondent collected freight in advance from shippers under bills of lading providing that it should be considered earned and was not recoverable, ship lost or not lost. On the voyage out the vessel and cargo were lost through stranding; a part only of the charter hire having been paid and the remainder not then due. *Held*, that the reference in the clause of the charter party quoted to the bills of lading was restricted to the negligence clause preceding, and that it did not incorporate into the charter party in favor of the owners the stipulation of the bills of lading that prepaid freight was to be considered earned, so as to impress such freight with a trust for payment of the charter hire.

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

For opinion of court below, see 150 Fed. 423.

Wing, Putnam & Burlingham, for appellant.
J. Parker Kirlin and Charles R. Hickox, for appellee.
Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. January 24, 1906, the United States & Australasia Steamship Company, operating a line of steamers between New York and Australia, chartered of the libelant the steamship Oakburn for a voyage to Australia and New Zealand. The charterer put up the ship on its line as a general ship, and gave to shippers its own line bills of lading, signed by it in the master's name by his authority. The charter party contained the following provisions, among others:

"(19) Steamer is to hoist the line flag of the charterers, which will be supplied by charterers, and funnel is to be painted as required by charterers."

"(16) The master or owner to attend daily, or when requested, at the charterers' or agents' office to sign bills of lading as presented and as customary, and at any rate of freight, without prejudice or reference to this charter; but charterers or their agents are authorized to sign bills of lading on behalf of the master or owners against written authority from the master, such authority to be binding upon the owners."

"(18) The owners agree to hold the charterers free of and indemnified against claim for loss or damage to cargo arising through the act, neglect, or default of the captain, officers, or crew, or from any cause whatever after the goods have been delivered to the steamer."

The above conditions show a very clear intention to make the steamer appear to shippers to be a line steamer, but as between the charterer and the owners to make the owners responsible for the transportation. The shippers, if advised of all the facts, could sue, for loss of or damage to cargo, either the owners or the charterer. The charterer collected from shippers prepaid freight to an amount in excess of the charter money, being all the freight due except about £135; the bills of lading containing the provision:

"Freight prepaid is considered earned at time of payment, and is not recoverable, ship lost or not lost."

The provisions of the charter party as to the charter money were as follows:

"(5) Freight to be a lump sum, £9,225 to be paid in New York as follows: One-third, less 3½ per cent. to cover interest and insurance, with demurrage, at loading port, if any, to be advanced 10 days after final departure of the steamer from New York, bills of lading as presented by charterers having been duly signed; one-third in London two months after sailing of steamer, without discount; and the balance after right and true delivery of the cargo in Australia and/or New Zealand, less 2½ per cent. commission. Any freight which may be payable by bills of lading at ports of discharge, not exceeding said balance, to be accepted by owners without recourse to charterers."

"(7) Charterers' responsibility under this charter to cease upon payment of the aforesaid advance freight."

Clause 7 is an illustration of the inartistic character of the charter party, because it is not to be taken literally, but only as a cesser of liability for so much of the third installment as is not covered by the freight due at destination, as may be seen from the account rendered by the charterer to the owners. It is the law of this country that freight, being compensation for the actual transportation of goods, is due only

if the goods are carried to destination. The charter freight in this case was a lump sum, and would only be earned upon delivery of cargo at the last port of discharge. The prepaid bill of lading freight, even if the goods were not delivered, could not be recovered by the shippers on account of the clause above mentioned.

April 18th the steamship sailed from New York. April 28th the charterer paid the first installment of charter money. May 21st, before arriving at the first port, the steamship ran on a reef on the west coast of Africa, and became, with her cargo, a total loss. The second installment of the charter money was not due until June 18th, and, the charterer having refused to pay the same, the owners brought this suit to recover it. If there was nothing more in the documents than as above recited, it is quite clear that the owners could not recover this second installment. Watson v. Duykinck, 3 Johns. (N. Y.) 335; The Kimball, 3 Wall. 37, 45, 18 L. Ed. 50; De Sola v. Pomares (D. C.) 119 Fed. 373. Indeed, they would have to repay to the charterer the first installment, but for the fact which the charterer admits would be a defense, viz., that they had paid for its insurance. This is in accordance with some of the reasoning in the opinions in The Barnstable, 94 Fed. 213, 36 C. C. A. 199; Id., 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954.

Of course, the result would then be that the charterer, by virtue of having collected prepaid freight, would be actually better off by the loss of the ship than if she had arrived and delivered her cargo, because it would be obliged to pay the owners only one-third of the charter money, whereas it had collected from the shippers more than the whole of the charter money. But there would be nothing inequitable in this, because it would be profiting by the better bargain it had made with the shippers in the bills of lading than the owners had made with it in the charter party. Willett v. Phillips, 8 Ben. 459, Fed. Cas. No. 17,683; Carver on Carriage by Sea, §§ 151 to 161. But the charter party contained a negligence clause which the court below (150 Fed. 423) held had the effect of incorporating the whole bill of lading into the charter party, so that the owners got the benefit of the freight prepaid by the shippers to the charterer. It is as follows:

"(21) * * * Strandings, collisions, and all losses and damages caused thereby, are also excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, * * * and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage. * * * Owners agree to hold charterers indemnified in so far as the said negligence clause may be contrary to the laws of the United States, and to accept the usual line form bill of lading as customary in this trade, with the conditions therein, and the same to form part of this agreement."

The language as to indemnity to the charterer amounts to saying that the owner will not enforce the negligence clause of the charter so far as it may be contrary to the law of the United States, which goes without saying. If they could not, they would not enforce it.

But the provision evidently contemplated something more than an agreement to take the line bills of lading, because the owners had already agreed to this and to become responsible for the transportation in clauses 16 and 18. We think it contemplated a difference of lia-

bility (although none actually existed) under the laws of the United States for negligence between the provisions of the bills of lading and the provisions of the charter party. If the shippers were to sue the owners and recover on the bills of lading, the owners agreed that they would not avail themselves of the exceptions in the negligence clause of the charter party as against the charterer; e. g., if it was good, the steamship not being as to the charterer a common carrier. The Fri, 154 Fed. 333, 83 C. C. A. 205. On the contrary, if the shippers were to sue the charterers on the bills of lading, and recover, the owners agreed to indemnify the charterers, notwithstanding the negligence clause of the charter party.

Whether this is the right explanation or not, it seems to us clear that the reference to the line bills of lading in clause 21 is restricted to the negligence clause, and does not incorporate into the charter party in favor of the owners the stipulation that prepaid freight is to be considered earned and not recoverable, or impress the prepaid freight with a trust in favor of the owners. The second installment of charter money was not due and had not been paid at the time the vessel was lost, so that it would not be covered by the clause, and it was not impressed with a trust in favor of the owners, because they had nothing whatever to do with it. If we have correctly construed the contract, there is nothing inequitable in the charterer retaining the bill of lading freight prepaid by the shippers, even if the owners, for want of a similar clause in the charter party, are unable to recover from the charterer.

This conclusion renders it unnecessary to consider whether the stranding was due to negligence or not.

The decree of the court belowed is reversed, with costs.

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## SUNSET TELEPHONE & TELEGRAPH CO. v. WILLIAMS.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,539.

CANCELLATION OF INSTRUMENTS — RIGHT OF ACTION — ADEQUATE REMEDY AT LAW.

A court of equity will not entertain a suit for the cancellation of a nonnegotiable contract, alleged to be false and fraudulent, on which the defendant has brought an action at law, since the question of the genuineness of the instrument may be fully and finally adjudicated in such action.

[Ed Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 8, 13.]

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

E. S. Pillsbury, Hughes, McMicken, Dovell & Ramsey, and Pillsbury, Madison & Sutro, for appellant.

Alfred L. Black and E. D. Kenyon, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This appeal is taken from a decree of the Circuit Court sustaining a demurrer to and dismissing the appellant's bill. The following is the substance of the bill: On January 20, 1905, the appellee, while in the appellant's employment, received a bodily injury. On March 6, 1905, he entered into an agreement with the appellant, whereby he released all claim of damages for the injury. The appellant's copy of the instrument of release has been accidentally destroyed, and the appellant has no written evidence to establish its terms. The appellee pretends to have a copy, and he falsely pretends that the same contains a stipulation that the appellant will pay the appellee the wages ($3 per day) which he was receiving at the time of the injury during the period of his disablement, and he pretends that he is permanently disabled. The appellee asserts, and, unless restrained by injunction, will continue from time to time to assert, his right to have and receive from the appellant his full wages during the period of his disablement, and will, unless restrained, harass and imperil the appellant by a suit or suits in which the said false copy of the agreement will be exhibited and relied upon. The appellant cannot defend against such claim unless the writing defining the terms of the agreement as made shall be restored, and the terms thereof established. The prayer is that the appellee be enjoined from asserting, in any court or otherwise, a claim or demand under said pretended contract and that the true contract be expressed and restored, and the pretended copy be surrendered for cancellation. It is not alleged in the bill that the appellee has brought an action, or that he threatens an action on the alleged pretended agreement, but both parties to the suit admit in their briefs in this court that such an action has been commenced.

The cancellation of written instruments is one of the recognized grounds of equitable jurisdiction which does not depend upon the inadequacy of the legal remedy, but courts of equity will in general refuse to exercise the jurisdiction when the legal remedy by action or defense is plain, adequate, and complete. Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 174. Thus the jurisdiction will be sustained in cases where the instrument has been obtained by fraud, and is a cloud upon title, or where the instrument is negotiable and the putting it into circulation would be a fraudulent act, or where there is danger of loss of evidence which constitutes the defense if the adverse party delays his action. But the jurisdiction will not be exercised in a suit to cancel a nonnegotiable instrument to which defense may be made in an action at law thereon, unless particular facts are alleged which show that such a defense will be inadequate. The decided weight of authority is that the mere ordinary danger of losing evidence to establish the defense, even where no action at law has as yet been brought upon the instrument, is not of itself sufficient to sustain the jurisdiction. In the present case we have the admission of both the parties to the suit that an action is now pending, in which an immediate determination of the question in controversy may be had.

A case in point is Insurance Company v. Bailey, 13 Wall. 616, 20 L. Ed. 501, in which a suit was brought by an insurance company to ob-

tain the cancellation of certain policies which had been procured by the defendant through fraudulent suppression and misrepresentation of material facts. The court, while recognizing the equitable jurisdiction to order the delivery and cancellation of policies thus fraudulently obtained, held that the jurisdiction is properly declined when the misrepresentations and suppressions can be perfectly well used as a defense at law in an action on the policies; there being no allegation that the holder of the policies meant to assign them, and suit on the policies having been begun at law after the bill was filed. The appellant relies upon the opinion of Field, Circuit Justice, in Sharon v. Terry, 36 Fed. 337, 1 L. R. A. 572. That was a case brought to cancel a forged marriage contract. The court, in ruling that the legal remedy would be inadequate, took into consideration the nature of such a contract, in that it conferred upon the wife certain rights in the husband's property, and the fact that the instrument was asserted by a woman who was young against a man who was old, and might be asserted by the former whenever she chose, even after the latter's death. The bill in the present case contains no such or other special facts showing the inadequacy of the legal remedy. On a plea of non est factum to the legal action there may be obtained a complete and final adjudication of the question whether such an instrument was ever made. The appellant needs no other relief. A judgment in its favor in such an action will be a complete bar to any other action on such alleged agreement. It is argued that such a judgment would be inadequate because it must be based upon the naked finding that the appellant did not execute the particular contract pleaded in the law action, and that the appellee or his assignee might hereafter bring another action on another alleged contract, and, failing to establish that, might still sue upon another, or might bring an action on the tort which caused his injury. But we are not to assume that the appellee, after an adjudication that the instrument which he sues upon is not genuine, will then forge other instruments and bring vexatious suits thereon, subjecting himself to the penalties in such cases provided, nor is there anything in the bill before us to show that he ever entertained such a purpose. And, if such indeed were his purpose, he would be impeded in carrying it out no more by a decree in this suit canceling the instrument on which he relies and establishing the true agreement between the parties than he would be by the judgment in the action at law. The restoration of lost instruments is one of the grounds of equity jurisdiction, and there might be occasion here for equitable interposition for that purpose, were it not for the fact that before the commencement of this suit an action for damages for the appellee's personal injuries had been barred by the statute of limitations of the state of Washington.

The decree is affirmed.

LEEDY et al. v. LEHFELDT.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,485.

APPEAL AND ERROR—EVIDENCE—HARMLESS ERROR—ADMISSION OF PARTY.

In an action to recover a mining claim in Alaska, known as "No. 9 on Otter Creek," the question in issue was the priority of location, on which the testimony was in direct conflict and apparently about evenly balanced. Plaintiff and another witness testified that they went to the claim in the night of December 31st and after 12 o'clock staked and posted a notice on the claim, while defendants introduced testimony tending to show that there were no such stakes or notice on the claim the next morning. Plaintiff introduced a witness who testified that he resided in a cabin some distance from the claim; that about 2 o'clock that morning he awoke, and found in his cabin the remains of a luncheon, and a note, with plaintiff's name thereto, which read as follows: "2:00 a. m. Happy New Year from No. 9, Otter Creek." There was no testimony in the case that the note was written by plaintiff, or that he was at the cabin. *Held*, that such note was incompetent upon the issue on trial, or to corroborate plaintiff's testimony, as in the nature of a self-serving declaration, and that its admission under the state of the evidence was prejudicial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

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

Albert H. Elliot, S. T. Jeffreys, T. M. Clowes, and Jos. K. Wood, for plaintiffs in error.

Albert Fink, Ira D. Orton, Gordon Hall, and Thomas H. Breeze, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On the trial of an action of ejectment, brought by the defendant in error to recover the possession of a mining claim known as "Claim No. 9 on Otter Creek," Alaska, the question at issue was whether the defendant in error located the claim prior to the location thereof made by the plaintiffs in error, Leedy and Hannan. It was not disputed that the latter staked and located the claim at 10:30 a. m. on January 1, 1906; but the defendant in error claimed to have located it at about 1 o'clock in the morning of that day. He testified that he had previously staked the claim, but that through his failure to do the assessment work thereon the location was to expire at the end of the year 1905; that at about 9 o'clock p. m. on December 31, 1905, he left Nome in the company of one Olson for the purpose of making the location immediately after midnight, and that he and Olson, carrying their stakes, went out to the claim, which was four miles distant from Nome; that they arrived there at about 11 o'clock, and after midnight staked the claim and posted on the initial stake a location notice, after which they returned to Nome. It was proven that on February 12, 1906, the location notice was recorded in the records of the Nome recording precinct.

The testimony of Olson corroborated that of the defendant in error.

On behalf of the plaintiffs in error, Bergman, who located the claim for them, testified that he arrived on the ground at about 10:30 o'clock in the morning of January 1, 1906, and made an examination of the corners of the claim to ascertain if there had been any new stakes placed thereon; that no new stakes of any description were there; that he then proceeded to stake the claim for the plaintiffs in error, Leedy and Hannan, and posted their location notice thereon; that the ground was covered with snow at each of the corners of the claim, that the snow had not been disturbed, and showed no evidence of any person having been about the corners of the claim during the previous night; and that, if persons had been there, their footprints would have been plainly visible in the snow. The plaintiff in error Hannan testified that prior to January 1, 1906, he had prospected upon the claim and made discoveries of gold thereon in different places, and that after the claim had been staked on that day he visited it, and found the stakes placed thereon as testified to by the witness Bergman; that there were no other stakes at any of the corners of said claim, nor was there upon any of them any notice of location posted by the defendant in error; and that there were no new stakes on the claim, except those that had been placed there by Bergman. There was other testimony on behalf of the plaintiffs in error tending to show that shortly after January 1, 1906, no stakes were found on the claim, except those placed there by Bergman. It was the contention of the plaintiffs in error on the trial that the defendant in error was not upon the claim on January 1, 1906, and that no location was made by him on that day.

With this preliminary statement of the nature of the issue and the evidence, we proceed to consider the only assignment of error which we find it necessary to discuss. A witness by the name of Kuhl, called on behalf of the defendant in error, testified that on the night of December 31, 1905, he was sleeping in his cabin, which is situate about 1½ miles from the claim in controversy, and that shortly after 2 o'clock on the morning of January 1st he arose and found in his cabin the remains of a luncheon, and a note, which he had afterwards destroyed, but which he testified read as follows:

"2:00 a. m. Happy New Year from No. 9 Otter Creek. E. G. Lehfeldt."

The plaintiffs in error objected to this testimony as incompetent, irrelevant, and immaterial, as not proving any issue of the case, as hearsay and self-serving, and because no proper foundation had been made for it. The objection was overruled, and after the testimony had been given the objection was renewed by a motion to strike out the same on the grounds so stated in the objection. The motion was overruled, and the plaintiffs in error duly excepted to both rulings. The defendant in error admits that this evidence was not admissible as of the res gestæ, but contends that it was admissible in corroboration of the testimony of the defendant in error and Olson that they were at the claim on that night. There was no evidence, other than this testimony of Kuhl, that the defendant in error and Olson were

at Kuhl's cabin on that night. Testimony to that effect had been proffered by the defendant in error, but it had been excluded by the court. There was no testimony that the defendant in error wrote the note, or that the note or the signature thereto was in his handwriting. All that was shown was that such a note was found by Kuhl in his cabin shortly after 2 o'clock on the morning of January 1, 1906. Evidence of the contents of the note was clearly incompetent for the purpose for which it was offered and received, namely, the corroboration of the testimony of the defendant in error and Olson that they were on the claim in dispute on that night. It was not a very important or conclusive item of evidence; but in a case where, as in this, a clearly defined issue of fact was presented, and the evidence was directly contradictory and nearly evenly balanced, it may readily be seen that such evidence, received for the purpose for which it was offered, and admitted under the sanction of the court, unaccompanied by any charge to the jury as to its probative value, may have been determinative in the minds of the jury in solving the question as to where the preponderance of the evidence lay. By its terms it purported to come from No. 9 Otter Creek, and to identify the writer with that claim as the owner or locator thereof, and the jury very probably viewed it as a declaration by the defendant in error tending to show that before 2 o'clock on the morning of that day he had located the claim. If, aside from this documentary evidence, there were in the record a clear preponderance of the evidence in favor of the defendant in error, we should not be disposed to say that its admission should afford ground for reversal; but, under the evidence as it is brought here, we are of the opinion that its admission was error prejudicial to the plaintiffs in error, for which the judgment should be reversed, and the cause remanded to the court below for a new trial.

It is so ordered.

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## WORTH BROS. CO. v. KALLAS.

(Circuit Court of Appeals, Third Circuit. June 3, 1908.)

No. 22.

1. NEGLIGENCE—WHEN QUESTION FOR JURY.

Where, from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence or contributory negligence, such questions are properly for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279–302.]

2. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Plaintiff, as an employé, although not a painter, was set to painting the inside wall of defendant's iron mill, which was a large building containing heavy machinery in noisy operation. He had not been inside the building before, and was set to work by a foreman about 20 feet above the ground, and directed to stand with one foot on the lower flange of a horizontal I-beam. Shortly afterward, while stooping to

paint below his feet, one arm, which was thrown over the beam, was run over by an electric crane, one of the tracks for which was laid upon the top of such beam. He was given no notice in respect to the crane, which traversed the entire length of the building, some 300 feet, and when he commenced work was quite a distance away. *Held*, that the questions of defendant's negligence and of plaintiff's contributory negligence were properly submitted to the jury, and that the court did not err in entering judgment in accordance with their verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1050.]

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

Thomas Leaming, for plaintiff in error.

Edward D. Mitchell, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. This was an action to recover for personal injury sustained by the plaintiff below, the defendant here, which he alleged was caused by negligence of the defendant below, the plaintiff here. There is no complaint of any action of the court during the trial, or of its charge to the jury. The sole question is whether a verdict for the defendant should not have been directed, or a judgment non obstante veredicto have been entered in its favor, and the facts involved in that question are not controverted.

The plaintiff was employed by the defendant. He was not a painter by trade, but he was set to painting the outside of the roof of the defendant's iron mill at Coatesville, Pa. He was engaged at this work for three days, and then was told to do some painting inside of the building. He had not been in the building before, and was in it but a very short time when the accident in question occurred. It was a very large building. There was some exhaust steam in it, and it contained heavy machinery which was in noisy operation. The plaintiff began painting its sides, which were of corrugated iron, at a point about 20 feet above the ground. He stood, as directed by the foreman, with one foot on an angle iron and with the other foot on the lower flange of a horizontal steel I-beam. His feet were about 18 inches apart, and when he was painting below the level at which he was standing he reached down between his feet. The I-beam referred to was about 3 feet high, and on its top was one of the rails of a track upon which traveled an electrically operated crane. This crane spanned the mill, and was supported on the other side by a similar rail about 73 feet distant from the rail first mentioned. It traversed the entire building, which was about 300 feet in length. The plaintiff had been given no information or instruction respecting it. It was at a point quite distant from him when he began to work inside of the building, and it was started on its first trip of that day without notice to him. He, as has been stated, painted below as well as above the level at which he was standing; and while he was thus painting and in a "squatting attitude" the crane ran over his left arm, which, but a moment before, he had thrown over the rail to support himself.

The plaintiff in error has contended that "there was not sufficient evidence of defendant's negligence," and that "the plaintiff was guilty of contributory negligence," and it may be that if a verdict for the defendant had been rendered it could have been sustained upon either of these grounds. But this was a case in which, though there was no dispute about the facts, the inference to be drawn from them, as to negligence either of the defendant or of the plaintiff, was fairly and reasonably susceptible of a difference of opinion. Washington & Georgetown Railroad v. Harmon, 147 U. S. 580, 13 Sup. Ct. 557, 37 L. Ed. 284. "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 682, 36 L. Ed. 485.

If all inferences that could justifiably be drawn from the evidence would not suffice to support a verdict for the plaintiff, a verdict for the defendant should have been directed. Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 482, 3 Sup. Ct. 322, 27 L. Ed. 1003. Of this we have no doubt; but as from the unquestioned facts reasonable men might have reached different conclusions respecting both negligence of the defendant and contributory negligence of the plaintiff, the learned judge was right in submitting both questions to the jury, and in subsequently entering judgment in accordance with the verdict.

Therefore that judgment is affirmed.

# THE EDWIN TERRY.

# THE WILLIAM E. CLEARY.

(Circuit Court of Appeals, Second Circuit. May 21, 1908.)

No. 210.

1. TOWAGE—MAKING UP OF TOW—DUTY OF TUG.

While it is the duty of a tug to make up her tow, where there are a number of vessels, by selecting the positions of the different vessels, attending to the leading hawser, and prescribing the distance apart of different tiers, the details, such as making fast breast lines between the boats in a tier, which are familiar to all boatmen, may properly be left to the tows themselves, where they have masters on board.

2. SAME—SINKING OF TOW BY ICE—LIABILITY OF TUGS.

The injury of a coal barge, after being placed in a tow which was being made up in the Hudson river, by being struck by floating ice, *held* not due to any fault of the tugs, but rather to structural weakness, where she was placed in the usual manner and not exposed more than the other boats, none of which were injured, or to the failure of her master to attach a breast line to the boat alongside, and where the tugs were not chargeable with negligence in making up the tow at the time.

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York (145 Fed. 837), holding the tugs liable for injury to the boat W. T. Lewis, which the tug Terry had in tow; said injury being caused by floating ice, which struck the boat on the port corner of her bow and knocked out a plank.

Amos Van Etten, for appellant.

James J. Macklin and La Roy S. Gove, for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The accident happened on January 30, 1905, when there was much floating ice in the Hudson river. The Lewis, recently loaded there with coal, lay in the slip at Edgewater, N. J., and was bound for Havemeyer's Sugar Refinery in Williamsburgh. She and others were engaged in supplying the refinery with coal from the Edgewater docks. It appears that on the day in question the refinery had a supply sufficient to last for two or three days, but the tugboat owners were not notified that such was the case, nor was there any objection made to taking the boats in tow. Both parties evidently contemplated that during a severe winter, as this was, there would be many occasions when the tow would be hauled through floating ice, and it was not negligence on the part of the tugs to undertake moving the boats on that day.

The Terry came to Edgewater, called out to those on board the boats to make up just as they lay at the slip, and after a brief absence returned, made fast to the head tier with two hawsers of 25 fathoms, and hauled five boats out into the river, where she waited for the Cleary to bring some more boats to be made fast. The tide was ebb, and the Terry's engines were going at a speed sufficient to

keep the flotilla in place. In the hawser tier there were the Reynolds (port) and two Pennsylvania Company boats. In the second tier—five or six feet behind—there were the Lewis, astern of the Reynolds, and the Theresa Hughes alongside. The R. H. Williams tailed behind the Lewis. Much is said in the testimony and on the argument of the circumstance that the Lewis was the largest boat, and of her necessarily projecting beyond the Reynolds. The fact is that she was only a foot wider, so the projection was but six inches. We are not persuaded that the Lewis was placed in "an unsafe position." On the contrary, tailing close behind the Reynolds, she was relieved to a great extent from contact with the floating ice. Indeed, it is difficult to see how she could have been put in any safer position, unless she had been placed in the center and surrounded by all the other boats to act as fenders for her. But no one suggested to those in charge of the tugs that she was so tender as to need this full measure of protection.

It is also contended that the bow of the Lewis kept swinging in and out—"zigzagging," as the pilot of the tug describes it; a circumstance due to the fact that there was no bow breast line between her and the Theresa Hughes. When the pilot of the tug noticed her swinging, he called out to her master to get out a breast line. The latter says he did not hear this hail, but there is no doubt it was given. Witnesses from boats ahead and behind the Lewis heard it, and it was repeated to the latter by the master of the Reynolds. It is charged as a fault that the tug did not herself see to getting out and fastening these lines; but in Myers v. The Lyndhurst, 147 Fed. 110, 77 C. C. A. 336, we held that such is not the rule, where the tow has her own master aboard. It is the duty of the tug to make up the tow; that is, to select the positions to be occupied by its component vessels, to attend to the leading hawser on which they are towed, and to prescribe the distances apart of the different tiers. But the details, which are familiar to every boatman, of making fast the lines which attach his boat to those ahead, behind, or alongside of it naturally and usually are left to those on board the boat so attached. There can be no doubt upon the testimony that vessels about to be towed as these were should have breast lines out to any boat alongside. Even the master of the Lewis does not dispute this, but insists that he "had no show to put lines on the Hughes. The Pennsylvania boat was so short, and the Hughes boat behind was short, and that leaves her stern almost up to my amidships." We cannot accept this explanation, although the witness is voluble in his assertions that the other boats were little ones, asserting that the boat made fast to the Reynolds (and therefore ahead of the Hughes) "was an old plug—wasn't half the size of the Lewis." The evidence shows that the hawser tier was properly made up with breast lines bow and stern; that the Reynolds was 95 feet long, and the Pennsylvania boat next to her 91 feet long; that the boats of second tier tailed behind on hawsers only 5 or 6 feet long; and that the Hughes had a carrying capacity of 300 tons. The Lewis was 108 feet long, but her length is not material. It is manifest, from the dimensions of the other boats and length of hawsers

above set forth, that it was physically impossible for the Hughes to be lapping the Reynolds with her stern amidship of the Lewis. Her bow might have been 5 feet ahead of the bow of the Lewis; but that was no sufficient excuse for not getting out a breast line between them.

We are, moreover, rather inclined to the opinion that the absence of a breast line did not contribute particularly to the disaster. The witness who was most observant of the floe which did the damage was the master of the Reynolds. He saw it come against his own boat, followed it along as it drifted down his side, and stood on the stern watching it. He says: "As it got to the Lewis, it swung in and hit the Lewis." Another witness says it pushed the Reynolds over a little, and so came against the Lewis. When it is remembered that the Terry was not going at speed, but was merely holding her tow against the ebb tide, it would seem a fair inference that the accident happened because the Lewis was not of sufficient structural strength to meet the contacts which she might expect to be exposed to when moving about this harbor in the winter season; but, however that may be, we do not find that the Terry was in fault.

It is contended that the Cleary failed to take proper care of the Lewis after the accident. She towed her to the nearest available mud flat, and stayed by her till 4:30 p. m. (the accident happened about 10 a. m.), "pumping for all she was worth," as the master of the Lewis expresses it. Thereafter, at his request, she took his wife and himself ashore. The boat received some further damage before the wrecking company took hold of her the next day, apparently from moving ice; but we do not see how the Cleary would have prevented that by standing by all night.

The decree is reversed, with costs.

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## THE EDWIN TERRY.

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

No. 253.

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 appellant.

Amos Van Etten, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. This boat is apparently another of the fleet of coal boxes which libelant was running between Edgewater coal docks and the East river. See opinion in the case of the Same Libelant v. The Terry and The Cleary (filed to-day) 162 Fed. 309. At the time of the accident, February 3d, the tug was bringing the coal box empty to Edgewater, having dropped two others at Gutenburg. No objection was made to proceeding with ice in the river. Apparently both parties expected that the boat would often have to be towed un-

der such conditions. As the district judge expressed it, people who navigate the Hudson river at 3 o'clock in the morning of a day in February take their chances of meeting ice, and so far as we can see none other than the ordinary chances were encountered here.

The decree is affirmed, with costs.

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## THE H. B. RAWSON.

## THE PRINZ ADALBERT.

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

No. 245.

1. COLLISION—STEAMER AND MEETING TOW—NEGLIGENT NAVIGATION IN PORT.
   Conflicting evidence considered, and *held* to show that a collision in the evening between a steamship coming in from the sea to her dock at Hoboken and the second of two scows in tow of a tug on a line, passing down the river, was due to the fault of all four of the vessels; the steamship and the tug in navigating without proper lookouts or giving proper attention to other vessels, in consequence of which neither saw the other in time to give her a safe passage, and the scows in carrying but one light each, in violation of rule 11 of the harbor inspectors, which required each to carry two lights.

2. ADMIRALTY — EVIDENCE — JUDICIAL NOTICE — INSPECTORS' RULES IN ADMIRALTY.
   While a court of admiralty does not take judicial notice of the rules of the supervising inspectors, yet it may properly consider the same, although not formally introduced in evidence, where they appear in the record, were referred to in the testimony, and are discussed in the briefs of counsel.

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

For opinion of the court below, see 152 Fed. 1001.

J. W. Griffin and Wheeler, Cortes & Haight, for appellant.

Wing, Putnam & Burlingham (James Forrester, of counsel), for appellee The Rawson.

Carpenter, Park & Symmers, for appellee Bouker Contracting Co.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. September 5, 1905, some time after sunset, the steamship Prinz Adalbert of the Hamburg-American Line, bound in from sea to her pier at Hoboken, came into collision with the scow Orleans, which was the second scow towing tandem after the tug H. B. Rawson, and sank her. The tide was ebb, and the Rawson was bound from Canal street, New York, to Barren Island, on the south side of Long Island. This libel was filed by the owners of the Orleans against the steamship and the tug. The testimony is in remarkable conflict, even as to the place of collision. The pilot of the steamship says it was between Piers 4 and 8, one-third of the way across from the New York piers. The master of the tug says it was half a mile further down, at the second anchorage buoy below Communipaw. The master of the tug Bouchard, which was standing by in the neighborhood, and

Kruse, an employé of the Hamburg-American Line, who was on board, say that it took place at or near the first anchorage buoy, and this we find to be the fact.

It is admitted that the scows, which were both owned by the libelant, were towing on a hawser one behind the other, and that each carried a white light at the stern on a pole. By inspectors' rule 11 each was required to carry two lights, one at the bow and one at the stern. As we cannot say that this did not contribute to the collision, the libelant must be held at fault. The Lyndhurst (D. C.) 92 Fed. 681; The Nettie L. Tice (D. C.) 110 Fed. 461. The libelant contends that this fault is negligible, because the steamship admits she saw the tug's towing lights, and therefore knew that a tow must be following her. But the lights on a tow are intended to show where the tow is, and we think that four lights might have been seen by those on the steamship, even if they were not vigilant enough to see two. It is further contended that this fault cannot be considered, because the court does not take notice of the inspectors' rules and they were not offered in evidence. The Clara, 55 Fed. 1021, 5 C. C. A. 390, is cited, in which the court said:

"The rules of the supervising inspectors do not seem to have been introduced in evidence. They are not in the record, nor are there any statements in the briefs of counsel which can be taken as admitting the existence of any particular rule. According to the doctrine of The E. A. Packer, 140 U. S. 360, 11 Sup. Ct. 794, 35 L. Ed. 453, we cannot take notice of them. In that case the court said: 'No such rule is incorporated in the record or in the briefs, and it is not a regulation of which we can take judicial notice.' We must, therefore, in disposing of the case, disregard any alleged faults based upon the violation of such rules."

But in this case the rule is referred to in the record and exactly stated in the examination of Lyons, a witness on behalf of the libelant, and is fully considered in some of the briefs, so that we think we are authorized to consider it:

"Q. Is it customary in the port of New York, when you have two scows fastened together, to have four lights up, or two?
"Mr. Griffin: Objected to. I think the rule speaks for itself. It says two on each scow. All scows without rudders must carry two lights.
"The Court: How is the custom going to affect it?
"Mr. Forrester: Two scows fastened together are treated as one boat.
"The Court: I will take the testimony.
"Mr. Griffin excepts.
"A. Two."

The account of the navigation given by the tug is incredible. The master says that when on the Jersey side of the river, about abreast of the Jersey Central ferry, he saw dead ahead the green light of the Prinz Adalbert, at which time he was showing her his green light. He put the tug heading across the river to the southeastward, and says the steamship was heading into the Jersey flats as if going to anchorage. The tug then blew two whistles, to which there was no answer, when the steamship suddenly showed her red light, whereupon the tug blew one whistle and an alarm, and ported four points. The steamship, always showing her red light, followed him right around until she struck the tow.

Coming, now, to the steamship, there was a lookout in the crow's nest on the foremast, but none on the forecastlehead. The first officer, who, by the practice of the Line, should have been on the forecastlehead, had gone away ten minutes before the collision. The only person forward was the carpenter, at the capstan standing by the anchor, who neither heard nor saw anything until the collision happened. The pilot, who was on the bridge, 150 feet abaft the stem, thinks there was a lookout on the forecastlehead, but is not sure whether he reported the Rawson's lights, and naively testifies that the lookouts "sing out sometimes and you have to stop them; they annoy you if they report every light they see." He saw only the towing lights on the starboard bow and looked for no others. The master and third officer, who were also on the bridge, saw the Rawson's red light a little on the starboard bow. The Prinz Adalbert blew one whistle, stopped, and reversed, and, when her way was almost off, either struck the scows or they were carried across her bow by the ebb tide. The scows were not discovered until the actual collision. We think that the tug and tow were meeting the steamship a little on her starboard bow, and that neither vessel saw the other in time to give her a safe berth. The tug was not able to pull her tow across the steamship's bow, and the steamship did not see the tow at all. Both vessels were at fault.

The district judge exonerated the tug upon the strength of The Teaser, 127 Fed. 305, 62 C. C. A. 223. We think that case quite different. In it the vessels were meeting in the narrow channel between Blackwell's Island and New York. The tug Teaser, which was exonerated, was towing a barge astern on a hawser in the ebb tide. She had discovered the Transfer approaching head and head nearly a mile away, had ported to the New York shore as far as she could safely go, and had repeatedly blown signals of one blast interspersed with alarm signals. But the Transfer neither answered nor ported, so as to go over to the Blackwell's Island side of the channel. The district judge held the Teaser at fault for not stopping and backing; but we thought the danger of fouling her propeller with her hawser was a sufficient excuse, in view of the controlling fault of the Transfer in not keeping to her own side of the channel. If in this case the Rawson had seasonably signaled the Prinz Adalbert, and had by her been crowded in a narrow channel, where she could go no further, we would exonerate her; but this was not the case, and the account she gives of the navigation of both vessels is so incredible that we conclude that those on board of her were as little vigilant as those on board the steamship.

Both scows being at fault, and both being owned by the libelant, whether the damages should be divided between the tug, the steamship, and the scow, or between the tug, the steamship and scow, and the other scow, or whether the libelant should stand one half the damages and the other half be divided between the tug and the steamship, or between the tug, the steamship, and the other scow, is in the present state of the law uncertain. The Lyndhurst (D. C.) 92 Fed. 681; The Nettie L. Tice (D. C.) 110 Fed. 461; The Komuk (D. C.) 120 Fed. 841; The Eugene F. Moran (D. C.) 143 Fed. 187; Id., 154 Fed. 41, 83 C. C. A. 153. .

The decree is reversed, with costs of this court to the claimant of the Prinz Adalbert, and remanded, with instructions to enter a decree in favor of the libelant in accordance with the answer of the Supreme Court to the question certified in the case of The Eugene F. Moran, 154 Fed. 41, 83 C. C. A. 153, when it is handed down, and a reference to ascertain the damages.

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## WRIGHT v. WILLIAM SKINNER MFG. CO.

## SAME v. SKINNER.

(Circuit Court of Appeals, Second Circuit. May 20, 1908.)

Nos. 262, 263.

1. BANKRUPTCY—VOIDABLE PREFERENCE—EVIDENCE CONSIDERED.

A creditor who received payment of his debt, amounting to some $4,000, on the day before bankruptcy proceedings were instituted against the debtor, *held* to have had reasonable cause to believe that a preference was intended, so as to render it voidable under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), where he admitted that he knew the debtor was hard pressed and without credit, and that he had himself been persistently pressing his own claim for several months.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 255–257.]

2. SAME—PREFERENCE VOIDABLE UNDER STATE STATUTE.

A payment of a debt by an insolvent New York corporation on the day before a petition in bankruptcy was filed against it with intent to prefer the creditor is voidable by its trustee under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3449), and the stock corporation law of New York (Laws 1892, p. 1838, c. 688, § 48), which makes void any payment made by a corporation when insolvent or when its insolvency is imminent with intent to prefer a creditor.

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

See 136 Fed. 694.

The defendants appeal from judgments entered against them in the District Court for the Southern District of New York on the 14th of August, 1907, for $570,46 in the first of the above entitled actions and for $3,685.22 in the second. The actions were brought to set aside, as preferential and void, payments made to the defendants by W. C. Loftus & Co., a corporation, on the day preceding the filing of the petition in bankruptcy and when the corporation was insolvent. The questions involved in the two actions are the same.

Austin B. Fletcher and William P. S. Melvin, for appellants.

James, Schell & Elkus (Joseph M. Proskauer, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. These actions are brought to set aside as void, under sections 60a, 60b, and 67e of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]), certain payments made by the bankrupt to the defendants.

It is necessary for the trustee, in order to recover under section 60, to establish the following propositions:

First. That the payments were made within four months before the filing of the petition.

Second. That at the time of the payments the bankrupt was insolvent within the meaning of subdivision 15 of section 1 of the act (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3419]).

Third. That the effect of the payments was to give the defendants a greater percentage of their debts than other creditors of the same class.

Fourth. That the defendants had reasonable cause to believe that it was intended by such payments to give them a preference.

The first, second and third of these propositions are unquestioned. In other words, it is admitted that Skinner, individually and as the representative of the Skinner Company received, on the day prior to the filing of the petition, preferential payments from the bankrupt corporation when it was insolvent.

The only debatable question, therefore, is—Did Skinner have reasonable cause to believe that a preference was intended? This was a question of fact for the trial court and, unless we are prepared to say that its finding in favor of the trustee is clearly against the weight of evidence, we should not set it aside. Not only do we think the conclusion of the trial judge was justified by the proof but we fail to see how he could have reached any other conclusion.

Without discussing the testimony in detail it is sufficient to say that it shows that for four years prior to receiving the preference in question, Skinner knew that Loftus was in a precarious financial condition. He had failed in 1899, had borrowed money until all his collateral was exhausted and had secured the loan in question by giving Skinner the equity of redemption in some stock pledged to a bank. All this Skinner knew. After Skinner became uneasy about his loan he began to dun Loftus systematically. He was unable to find him. His telephone messages were invariably answered: "Mr. Loftus is not here." Surely this conduct was enough to put Skinner on inquiry. He evidently considered the situation critical, for a few days before the failure he told Loftus that unless he squared the account he (Skinner) would put the matter in the hands of an attorney. Skinner further testified as follows:

"Q. You were afraid of the account all during the spring and summer of 1903?

"A. Yes, sir.

"Q. And your fear, I suppose, was based on the way he acted when you dunned him to get your money?

"A. Yes, sir.

"Q. Had you made any inquiries about him in the trade?

"A. He had a bad name, financially speaking; very few people would sell to him.

"Q. Was it the general opinion that he was insolvent?

"A. They were all afraid of him.

"Q. That was the result of your inquiries during the spring and summer of 1903?

"A. I made no inquiries.

"Q. When you went there during the summer and fall of 1903, did you try to get anything out of him more specifically as to what his condition was?

"A. Yes, sir. His general story was that a cheap tailor had gone by; was a thing of the past.

"Q. When did you first find out about his selling out?

"A. Saw it in the paper.

"Q. He did not tell you anything about it?

"A. No, he did not. He told me that he was going to sell out. I knew a long time before that that he was negotiating with some people, Hart, or some one here in the city; I am not sure who it was, and he was negotiating with other people.

"Q. Was your information during the summer that other people were not selling to him?

"A. Yes. I am very much surprised that he owed about $25,000.00 for merchandise.

"Q. Did you have any opinion as to whether or not Loftus was insolvent when you took the $4,000.00?

"A. I didn't ask. I knew that he was hard pressed, else he would have been borrowing money from me. By 'he' I mean W. C. Loftus & Co.; but he always assured me that he had plenty to pay his accounts, if he could sell it.

"Q. Your idea was that he was insolvent, but that his wife would pay up?

"A. I thought that he was in a very tight position, but I never thought that he would fail. My idea was that his wife would see him through."

We know of no reported case where the evidence tending to show actual knowledge was more cogent. To our minds it is inconceivable that Skinner could have received the $4,000 check on the day before the petition was filed without having reasonable cause to believe that he was receiving a preference over the other creditors. As the Court of Appeals for the Eighth Circuit said in Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 91:

"Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose."

See, also, Wetstein v. Franciscus, 133 Fed. 900, 67 C. C. A. 62; In re Andrews (D. C.) 135 Fed. 599; Sundheim v. Ridge Ave. Bank (D. C.) 138 Fed. 951, affirmed (C. C. A.) 145 Fed. 798; Collier on Bankruptcy (6th Ed.) 485; Loveland on Bankruptcy (3d Ed.) 561. We are also of the opinion that the preference was voidable under section 48 of the stock corporation law of New York (Laws 1892, p. 1838, c. 688) and section 67e of the bankruptcy act. Section 67e provides, inter alia, as follows:

"And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Upon this branch of the case we think the pleadings sufficiently present the issue and that nothing need be added to the opinion of the court in Wright v. Gansevoort Bank, 118 App. Div. 281, 103 N. Y. Supp. 548, where the precise point was decided in an action growing out of the failure in controversy.

The judgments are affirmed with costs.

KNICKERBOCKER v. HALLA et al.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,478.

MINES AND MINERALS — CLAIMS — FORFEITURE—ASSESSMENT WORK—PERFORMANCE—QUESTION FOR JURY.

Evidence as to the performance of assessment work on a mining claim for the interest of a co-owner, sufficient to prevent a forfeiture of his interest, as authorized by Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), in case of a co-owner's failure or refusal after notice to perform his part of the necessary assessment work, *held* for the jury.

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

J. Allison Bruner, Elwood Bruner, and A. J. Bruner, for plaintiff in error.

J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman, and J. A. MacKenzie, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action in ejectment, tried by the court below with a jury; the plaintiff, who is the plaintiff in error here, suing to recover an undivided one-fourth interest in a certain mining claim, situate in the Fairbanks mining district of Alaska, containing about 160 acres, which was located by an association of eight persons, of whom the plaintiff in error was one, one S. Lapiana another, and the defendants to the action, and parties to whose interest they have succeeded, were the others. The validity of the location is not in question; both sides to the controversy claiming thereunder. In addition to his undivided one-eighth interest, claimed as one of the original locators, the plaintiff claimed the undivided interest of Lapiana, from whom he received a deed purporting to convey that interest shortly before instituting the action. Of the defendants, Halla claimed six-sixteenths, Sedlacek one-sixteenth, and the Solomon Mining & Trading Company nine-sixteenths, alleged in the answer to have been acquired by that company by deed from John A. Webb; one-sixteenth of which being conveyed to Webb by Halla, and eight-sixteenths being acquired by Webb through the doing by him of the annual assessment work upon the claim for the year 1902, and the alleged failure of Knickerbocker, Lapiana, and two of the other original locators to do any of that assessment work, or to contribute their proportion of the expense of the annual labor so alleged to have been done by Webb, and the consequent forfeiture of such interests to Webb. The defendant Sampson was a lessee of the other defendants. In his reply the plaintiff in the action put in issue the alleged forfeiture and set up the performance by him of his proportion of the annual labor upon the claim required for the year 1902.

Section 2324 of the Revised Statutes (U. S. Comp. St. 1901, p. 1426) provides, among other things, for the doing of a certain amount of work or the making of a certain amount of improvements upon mining claims, and that:

"Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

Webb testified that he and others interested with him performed labor upon the claim in the year 1902, of the value of $100, and that he thereafter demanded of the plaintiff, Knickerbocker, the payment of his proportion of that expenditure, which Knickerbocker refused to make, and that he subsequently published in a certain named newspaper, published nearest the claim, for the statutory period, a notice to the effect that he had performed such labor, and requiring of the plaintiff the payment of his proportion thereof, which payment the plaintiff refused, and ever since has refused, to make, by reason of which claimed failure and refusal it is contended the plaintiff forfeited his interest in the ground; and the court below took that view of the matter, and, upon the conclusion of all of the evidence, instructed the jury to render a verdict for the defendants, which was accordingly done.

The difficulty is that Knickerbocker testified that in the fall of 1902 Webb came to him in regard to the doing of the work upon the claim, and that he (Knickerbocker) agreed with Webb that he would send a man to do his proportion of the work, and that accordingly he did send a man named Stephen Jasper, who was indebted to him (Knickerbocker) in more than the sum of $25 for dental work, and that Jasper did, in the month of November of the year 1902, that amount of labor upon the claim for Knickerbocker. The affidavit of Jasper was introduced in evidence under a stipulation of counsel to the effect that it should be considered as his testimony, in which Jasper swore:

"That in the month of November, 1902, he did $25 worth of labor upon said Halla Tract claim at the instance of L. C. Knickerbocker, one of the owners thereof; that he was paid therefor by said Knickerbocker the sum of $25; that said labor so performed consisted in sinking a hole and running a cut in the southern portion of said Halla Tract; that said labor and improvements were made at the request of L. C. Knickerbocker, one of the owners of said Halla Tract, for the purpose of performing the anual labor upon said mining claim required by the law of the United States."

If that testimony was true, which was for the consideration and determination of the jury, then clearly Knickerbocker paid more than his proportion of the $100 which the defendants contend was the value of the labor necessary to be performed upon the claim during the year 1902, the necessary result of which would be that the forfeiture of the plaintiff's interest alleged and contended for did not occur.

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

JONES et al. v. F. A. HARDY & CO.

(Circuit Court, N. D. Illinois, E. D. June 25, 1908.)

No. 27,606.

PATENTS—INFRINGEMENT—EYEGLASSES.

The Finch patent, No. 666,928, for eyeglasses, construed, and *held* not infringed.

In Equity. On final hearing.

H. P. Doolittle and Coburn & McRoberts, for complainants.

L. M. Hopkins, for defendant.

KOHLSAAT, Circuit Judge. This cause was instituted to enjoin defendant from infringing patent No. 666,928, granted to R. B. Finch January 29, 1901, for improvements in eyeglasses, and is now before the court on final hearing. The single claim of the patent, as finally allowed, reads as follows, viz.:

"In eyeglasses the combination with the eyeglass frame or lens-mountings, of a bridge having bends at the extremities of its bow portion, said bends being substantially perpendicular to the plane of the lenses, and projections extending forwardly from the bends to the frame or lens-mountings; and spring-held lever-arms extending across the bridge, and suitably fulcrumed on the frame or mountings, their inner extremities or nose-pieces being normally spring-pressed toward the bow of the bridge whereby there is co-operative gripping action between the nose-pieces of the lever-arms and the bow of the bridge, in a plane substantially perpendicular to that of the lenses."

The saddle-bridge of the patent in suit is rigid, and consists of the bow, bends at each end in a direction perpendicular to the plane of the lenses, and extensions or forward projections continuing from the bends on which the lenses and guards carrying gripping pads are mounted.

As originally presented, the application called for six claims, all of which were rejected by the examiner. Thereupon claims 4, 5, and 6 were abandoned, and claims 1, 2, and 3 amended, refiled, and again rejected. Thereupon applicant erased all the claims and filed two substitute claims, both of which were rejected also. Applicant again erased his claims and substituted two other claims, both of which were rejected by the examiner with the suggestion that:

"Co-operative action between the bridge and nose-pieces in a plane substantially perpendicular to the plane of the eyeglasses is necessary."

In endeavoring to meet this suggestion, the last-named two claims were erased, and two new claims substituted. These were also rejected, as differing only in specification of function, and, following a further suggestion of the examiner, the claim as it now stands was substituted for the two last rejected, and allowed.

Some point is made by defendant that no new oath or specification was presented. It would seem that the fact that the original specifications are available indicates a retention of the substance of the original alleged patentable matter, to make it unnecessary that a new oath be taken as well as to in a way meet the claim of defendant that

the invention was that of the examiner, rather than that of the applicant, although the parentage of the inventive idea seems to have been somewhat in suspense at times. "It is suggested," says the examiner, "that the claims be amended to state that the bridge is bent in a plane perpendicular to that of the lenses, and that the lever-arms extend across the bridge and are pressed by their springs towards the bridge thereof, causing the gripping action between the bridge and the nose-pieces in a plane substantially perpendicular to that of the lenses." The advice seems to have been followed. This was apparently deemed necessary by the examiner, in order to escape the references of record and the charge of aggregation. As finally allowed, the patent in suit, it is claimed, differs from the prior art cited to the examiner mainly in the alleged "co-operative gripping action between the bridge and the nose-pieces," to quote complainants' solicitor. Brief, p. 15. The patentee had in mind the production of an eyeglass which should be readily adjustable with one hand, and at the same time grip the nose firmly. He took the well-known so-called saddle-bridge from the spectacle art, removed the temple pieces, and combined the bridge with spring-held lever-arms mounted on the frame and extending across the bridge; their extremities being spring pressed toward the bow of the bridge, thereby claiming to cause a gripping of the nose.

It was not new to adapt the saddle-bridge to eyeglasses. Cloutier patent, No. 598,908, granted February 15, 1898, calls for its use in connection with spectacles and eyeglasses, and also discloses the post, similar to that upon which Finch mounts his spring-driven gripping arms. Nor was it new to provide eyeglasses with spring-gripping arms. Cottet was granted a patent for a "pince nez," May 26, 1896, and numbered 560,895, in which the so-called c. bridge is placed in combination with spring or lever pressed plaquettes or guards, which are made to grip the nose in the same fashion as those of the patent in suit. In the original applications, Finch evidently contemplated the use of lever-guards having small, single pads, as distinguished from pads having long bearing surfaces. This feature remains in his drawings and specifications, and is emphasized in his argument before the examiner. The claim is somewhat obscure as to this feature. As actually mounted, commercially the guards have two bearing pads or small discs which are to all intents and purposes the equivalents of the Cottet guards or bearing pads. The Finch drawings show a bearing upon the nose practically in a line parallel with the eyes, while in the record and briefs it is insisted that the skin of the nose is, by the gripping action of the guards, forced into the opening between the nose and the bow, so that the glasses, while resting thereon, are firmly gripped by the pads. The single pads would not have a tendency to force into a bunch the skin of the nose. It will be borne in mind that the functional description of the claims in suit adds nothing to the patentable features of the device. The device of Norton patent, No. 622,779, granted April 11, 1899, discloses an eyeglass greatly resembling that in suit. It is not clear, however, that the bridge in use is a saddle-bridge, nor is the guard mounted on a projection

extending at right angles to the plane of the lenses, but rather in the same plane. Claim 1, however, calls for a "spectacle-bridge," and claim 2 for "a bridge-piece adapted to rest upon the wearer's nose and bent at each end beyond its points of attachment to the lens to form standards, and spring actuated clamping devices," etc. If the long pads are the equivalent of the two gripping discs on each of complainants' guards, as now constructed, the difference between the two devices is very narrow.

Many other patents are introduced in evidence, bearing more or less closely upon the matter under consideration. Those cited are all that it is deemed necessary to mention. There is no doubt as to infringement. Defendant has taken the Finch patent as allowed and added the long pad, or rather the two pads on each spring guard, practically identical with complainants' present mounting.

This, as above stated, is not the bridge and mounting of the patent. The long guard with its gripping pads is an essential feature of defendant's device. Whether or not there is novelty in the patent in suit is not here determined. Defendant has not appropriated the device therein shown, and is held not to be an infringer.

The suit is dismissed for want of equity.

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## In re LUFTIG.

(District Court, D. Massachusetts. September 13, 1905.)

1. BANKRUPTCY—DISCHARGE—GROUNDS FOR REFUSING.
   The fact that a bankrupt, after the filing of the petition against him, procured the buying up of a creditor's claim, and furnished the money therefor, with intent to defeat the bankruptcy act, is not a ground for refusing his discharge, under Bankr. Act July 1, 1898, c. 541, § 14b (1), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), where it is not shown that the creditor knew that the bankrupt furnished the money, so as to render him guilty of an offense under section 29b (4), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), although, if he was guilty of such offense, the bankrupt was also guilty as a participator therein.

2. SAME—COMMISSION OF FRAUD WHICH WOULD WARRANT REVOCATION.
   The court is not required to grant a discharge to a bankrupt, knowing at the time that facts exist which would render such discharge revocable for fraud had they first come to light after it was granted, although no cause for refusing it is shown under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427).

3. SAME—MAKING FALSE OATH.
   A bankrupt refused a discharge on the ground that he made a false oath in his testimony given in the bankruptcy proceedings.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 732–734.]

In Bankruptcy. On application for discharge.

Warren & Garfield, for objecting creditors.
Arthur Taylor, for bankrupt.

DODGE, District Judge. Luftig was adjudged bankrupt February 4, 1904, upon an involuntary petition filed by three creditors October

31, 1903. He contested the adjudication, which was finally ordered after a reference, in the course of which a considerable amount of evidence was taken and a report thereon filed by the referee January 28, 1904. The referee found that, being insolvent at the time, Luftig had conveyed property to certain of his creditors with intent to prefer them.

On August 6, 1904, the trustee in bankruptcy reported, although with some hesitation, that after examination he had been unable to discover any facts on the strength of which the bankrupt's discharge should be refused. The bankrupt applied for a discharge on May 28, 1904, and specifications of grounds of opposition were thereafter filed by several creditors. The referee to whom these were referred reported on May 4, 1905, that the charges made in them of failure to keep books of account and of concealment of assets had not been sustained, but that a charge of having purchased a claim from a creditor with intent to defeat the bankrupt act was sustained; also charges of having made false oaths in the proceedings in the case.

At the hearing which has been had before the court upon this report, both the bankrupt and one of the objecting creditors disputed the conclusions reached by the referee. As appears by the report, at the hearing before the referee on objections to the discharge the testimony taken at the earlier hearing on adjudication, and also the testimony taken during the bankruptcy proceedings prior to the application for discharge, was used, under an agreement of counsel making any evidence, taken at any stage of the proceedings, so far as the same was material and competent, available upon the question of discharge. All the evidence before the referee has been submitted to the court with his report.

1. So far as those grounds of opposition which have not been sustained by the referee are concerned, I am unable, on the whole, notwithstanding the argument of the objecting creditors, to find sufficient reason for disagreeing with the conclusions which the referee has reached.

2. The specification in relation to the purchase of a claim from a creditor, which the referee has found to be sustained, had not been made at the time the question of discharge was sent to the referee for report, but was contained in an amendment to the specifications originally filed, allowed by the court on April 6, 1905. It is as follows:

"Said bankrupt, on or about March 1, 1904, either himself or acting by one Jacob Soperstein and one Barney Aaronson, or one or more of said parties, did, with intent to defeat the bankruptcy act, and for the purpose of preventing or reducing opposition to his discharge in these bankruptcy proceedings, and for the purpose of eliminating from these proceedings one Louis Rosenberg, a creditor of his and one of the petitioning creditors in said bankruptcy petition, and said Rosenberg's attorney, make a settlement with said Rosenberg by which said Rosenberg's claim was satisfied in such a way that said Rosenberg and said [attorney] took no further part in these bankruptcy proceedings."

Assuming that the above specification sufficiently charges the bankrupt with the offense of which the referee finds him guilty, viz., that of aiding and participating in the receipt by Rosenberg of a material amount of property from the bankrupt, after the filing of his petition, with intent to defeat the act (Act July 1, 1898, c. 541, 30 Stat. 544 [U.

S. Comp. St. 1901, p. 3418]), and agreeing as I do with the referee that, if Rosenberg was guilty of the offense described in section 29b (4), the bankrupt was guilty of the same offense if he participated in Rosenberg's commission of it by virtue of section 1 (19), I am still unable to regard Rosenberg's guilt as sufficiently established by the evidence. There is no claim that Rosenberg received any money directly from the bankrupt. What he received was paid to him or to his attorney by Aaronson or Soperstein. Under these circumstances, unless he knew that the money so paid came from the bankrupt, I do not think he is proved guilty of having committed the offense referred to. The mere sale of his claim to Aaronson or Soperstein would not necessarily be a commission of that offense, or necessarily involve any intent to defeat the act. The referee has nowhere expressly found that Rosenberg knew that the money paid really came from the bankrupt, and the evidence does not convince me that such a finding was required or could be supported. If Rosenberg is not shown to have committed the offense, the bankrupt is not shown to have been a participant in it, and the utmost that can be said of him is that he procured the buying up of a creditor's claim and in some way provided or promised the money used for the purpose. This, though done with intent to defeat the act, is not a ground under section 14b for refusing his discharge.

The evidence shows, however, that Rosenberg received for the assignment of his claim to Aaronson or Soperstein its full amount and something further wherewith to pay his attorney's charge. I accept the referee's conclusion that the money paid came in some form from the bankrupt, and that the claim was thus purchased for the purpose of getting rid of a troublesome prosecutor. I agree with the referee that the purchase of the claim constituted a fraud upon the other creditors, and that such a fraud would make the discharge revocable under section 15, had it been granted before the facts were shown. I am unable to believe that the act requires the court to grant a discharge, knowing at the time that facts exist which would thus render it revocable for fraud, had they first come to light after it was granted, although no cause for refusing it under section 14b is shown. The facts proved in regard to the settlement of the Rosenberg claim would therefore, in my opinion, justify me in refusing the discharge, did the case present no other reasons for doing so; but other sufficient reasons appear, wholly independent of the settlement in question.

3. The bankrupt's testimony on December 23, 1903, during the hearing on the question of adjudication, first, that he did not remember what amount of stock in trade he had sworn to on May 25, 1903, as then owned by him, and later, on the same day, that he was sure he did not swear on May 25, 1903, that he then owned stock to the amount of $5,000, and also his testimony on January 20, 1904, in the same hearing, that the amount of stock he swore to on May 25, 1903, was $2,500, is, in my opinion, clearly shown to have been false testimony. Each of the above statements I consider to have been a false oath, knowingly and fraudulently made by the bankrupt in these proceedings, and material therein. That the bankrupt did in fact swear on May 25, 1903, for the purpose of qualifying as surety on a bond to dissolve an attach-

ment, that he then had a stock of jewelry worth $5,000 and unincumbered, is proved by the evidence of the attorney for the plaintiff in the suit wherein the attachment was made, by the evidence of the master in chancery before whom the oath was taken, and by his record of the oath then taken by the bankrupt. This evidence was introduced after the bankrupt's first testimony on December 23, 1903, which is above referred to, but before his later testimony given on the same day, and before his testimony given on January 20, 1904, also above referred to. I cannot doubt that the bankrupt knew perfectly well what he had sworn to when seeking to qualify before the master in chancery, and that his statements that he did not remember and that he did not swear to $5,000 worth of property were attempts to avoid the effect apprehended in the bankruptcy proceedings from the fact that he had so sworn.

The discharge is refused.

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## In re O'HARA.

(District Court, M. D. Pennsylvania. June 23, 1908.)

No. 875, in Bankruptcy.

1. BANKRUPTCY—EXEMPTIONS—TIME FOR CLAIMING.
   Ordinarily it is sufficient if a bankrupt makes his claim to exemption in his schedules, and an extension of time for filing his schedules also extends the time for making such claim.

2. SAME—RESIDENCE OF BANKRUPT.
   A bankrupt who, prior to the institution of involuntary proceedings against him, abandoned his business in Pennsylvania and went with his wife to reside with his parents in another state, while seeking a position to work wherever it might be found, and in fact secured a position in a third state, where he was when his schedules were filed, and to which he subsequently removed his wife and household goods, although he returned to Pennsylvania a year later on obtaining a position there, was not a bona fide resident of that state when his schedules were filed, so as to be entitled to claim exemptions under its laws.

In Bankruptcy. On exceptions to report of W. L. Hill, referee, refusing bankrupt's exemption.

A. Mitchell Palmer, for bankrupt.

F. B. Holmes, for creditors.

ARCHBALD, District Judge. Under ordinary circumstances, it is sufficient if the bankrupt claims his exemption in his schedules, and as that was done here it was in time. Lipman v. Stein, 14 Am. Bankr. Rep. 30, 134 Fed. 235, 67 C. C. A. 17. Nor is it material that he was given ten days extra by the referee within which to file his schedules; the grace accorded him extending to everything which was so covered. The reason given by the referee for denying the exemption cannot, therefore, be sustained. It is contended, however, that the bankrupt was a nonresident at the time of claiming his exemption, and so was not entitled to it. The right is to be determined as of the date

when it was claimed, and, if not a resident of Pennsylvania at that time, the bankrupt must be denied his exemption, even though a resident before and since. The facts with regard to this are as follows:

In the summer of 1906 he was conducting a store at Mt. Pocono, Pa., which he had started in April, having previously been a telegraph operator there; and some time in July or August, having become financially embarrassed, he abandoned his business, leaving it in the hands of two clerks, and going with his wife to his former home, with his parents, at Oswego, N. Y. Shortly afterwards, on August 26th, a domestic attachment was issued against him as an absconding debtor; and this was followed September 10th by the present involuntary proceedings in bankruptcy, in which an adjudication was obtained October 10th following. So out of reach with his former affairs was he during this period, and for several weeks afterwards, that he did not know that the proceedings had been instituted, and it was only with difficulty that counsel, who were supposed to represent him, were able to get in communication with him, so as to prepare and file his schedules and make claim for his exemption. This was due, no doubt, to the fact that he was seeking employment again as a telegraph operator, and was assigned to temporary positions, a few days at a time, here and there, finally landing in Connecticut, where he was when his schedules were filed, and where he remained for nearly a year, sending for his wife, removing their goods from his house at Mt. Pocono, and going to housekeeping in furnished rooms.

Under the circumstances, it is fair to conclude, notwithstanding his present protestations, that when he dropped everything, in the way he did, at Mt. Pocono, and went seeking work wherever he could get it, making it home for himself and wife, so far as he had any, at the home of his parents, although his wife's father was living in the vicinity of Mt. Pocono, he did it without any present intention of returning, or of retaining his hold there. It is true that he did not move the furniture out of his house at Mt. Pocono until about the time that he filed his schedules, when it was sold by the sheriff; but he had no place for them until he settled down in Connecticut. It is also true that he had lodged an application for a position as a telegraph operator with the Delaware, Lackawanna & Western Railroad, for whom he had previously worked, which might lead to his return, as it has recently. But this at best was a mere possibility. Accepting residence, giving citizenship and domicile, as defined in Price v. Price, 156 Pa. 617, 27 Atl. 291, as the place where a person has his true, fixed, and permanent home, to which it is his intention to return whenever absent from it, and that when one is so established it is to be taken as continuing until another has been acquired elsewhere, it is negatived, in the present instance, by the complete abandonment by the bankrupt of the business in which he was engaged, the breaking up of his home, and going with his wife to reside with his parents in Oswego, while seeking work elsewhere, and in his finally settling down and going to housekeeping in Connecticut, where he secured a position; no hold being retained meanwhile on anything in Pennsylvania, manifesting an intention or expectation of coming back here.

The exemption laws of a state are passed for the benefit of its resident citizens, in order that they may not be reduced to utter poverty and become charges on the community. Yelverton v. Burton, 28 Pa. 354; Snow v. Dill, 13 Phila. (Pa.) 138. A bona fide residence is essential to the right. Dock v. Cauldwell, 19 Pa. Super. Ct. Rep. 51; Collom's Appeal, 12 Wkly. Notes Cas. 309. And it does not exist in favor of an absconding debtor. McCarthy's Appeal, 68 Pa. 219. The bankrupt, therefore, had no such residence in Pennsylvania, at the time of claiming his exemption, as entitled him to it, and the referee was right in disallowing it, although not for the reasons given.

His action in refusing it is affirmed.

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## In re MINERS' BREWING CO.

(District Court, E. D. Pennsylvania. January 2, 1908.)

No. 2,301.

1. BANKRUPTCY—REFEREES—JURISDICTION—SALE OF REAL ESTATE.
   A referee in bankruptcy has authority, if the facts warrant it, to order a sale of the bankrupt's real estate discharged of liens, and to hear claims on the fund produced by the sale, and determine their validity, extent, and relative priority.

2. SAME—ORDER—CONCLUSIVENESS.
   Where a court of bankruptcy, after hearing, referred the case back to the referee, with directions to pass on all questions before him and to make distribution of the funds in the hands of the trustee, which were the proceeds of a sale of real estate of the bankrupt discharged of liens, such order constituted a conclusive determination of the referee's authority to order a sale of the real estate discharged of liens, so far as the district court was concerned.

3. SAME—CLAIMS—PRIORITY—DEFECTIVE LIENS.
   Where a mechanics' lien on real estate of a bankrupt sold freed from liens was defective on its face, claimant was not entitled to priority in the distribution of the fund derived from the sale.

4. SAME—CREDITORS—CHANGE OF POSITION—AMENDMENT.
   After bankruptcy proceedings had fixed the status of various creditors, a creditor claiming a mechanics' lien as a subcontractor should not be permitted to amend the record of his lien claim so as to change the same into a claim as a contractor on an agreement made directly with the bankrupt acting by one of its authorized agents.

In Bankruptcy. Certificates of referee.

Martin F. Duffy, for trustee.

George M. Roads, for First National Bank of Minersville, Pa., attachment creditor of Charles A. Gildemeyer, lien claimant.

Joseph H. Brinton, for Diehl Mfg. Co.

Charles E. Berger and Charles E. Breckons, for Charles Myers, mortgagee.

J. B. McPHERSON, District Judge. I shall add nothing to the voluminous record in this case, except what is necessary to announce as briefly as possible that I have considered the questions arising upon the two certificates of the learned referee—having been much assisted

by his clear and satisfactory reports—and that I am of opinion as follows:

(1) Under the facts reported by him, the referee had authority to order a sale of the bankrupt's real estate discharged of liens.

(2) Upon these facts, he had authority also to hear claims upon the fund produced by the sale, and to determine their validity, extent, and relative priority.

(3) In any event, the question concerning his authority thus to hear and determine is not now open for discussion in this court, having been decided by the following order made October 3, 1906:

"Upon hearing and consideration herein, it is ordered that this cause be referred back to the referee with directions to pass upon all questions before him, and to make a distribution of the funds in the hands of the trustee, being proceeds of the real estate of said bankrupt."

(4) The Gildemeyer mechanics' claim is not valid as a mechanics' lien, and confers no right to priority, either upon the claimant himself or upon the First National Bank of Minersville, his attaching creditor, or upon George Ball, his assignee.

(5) Even if the Gildemeyer claim is a valid mechanics' lien against other creditors, the claimant—and therefore his attaching creditor and his assignee—are estopped from asserting the priority of such lien against Charles Myers, mortgagee, and his assignee, the Union Safe Deposit Bank.

(6) The mechanics' claim of the Diehl Manufacturing Company is not valid as a mechanics' lien, being defective upon its face—as well as for other reasons—and therefore is not entitled to priority in the distribution of the fund.

In this connection it should be added that the Diehl Manufacturing Company presented a petition on November 6, 1907, after the argument of the questions certified by the referee, asking for leave to apply to the common pleas of Schuylkill county for permission to amend the record of the claim on file in that jurisdiction. This petition has been considered, but I think it should be refused. The petitioner desires to make, not a merely formal amendment of its claim, but so substantial a change as to alter its position materially. Instead of claiming to be entitled to a lien as a subcontractor, it desires to amend the record so as to claim as a contractor upon an agreement made directly with the bankrupt, acting by one of its authorized agents. This, I think, should not now be permitted. The bankruptcy proceedings have already fixed the status of the various creditors, and, while it may be true that even in such a situation merely formal amendments might with propriety be allowed, I do not think that the district court —assuming its power so to do—should permit a creditor to alter his position materially for the express purpose of obtaining an advantage over other creditors to which he would not otherwise be entitled. In the absence of exceptional circumstances, this certainly is, and should be, the general rule.

The petition of the Diehl Manufacturing Company, filed on November 6th is therefore refused. The clerk is also directed to enter an order affirming the action of the referee in hearing and passing upon

claims to the fund that was produced by the sale of the bankrupt's real estate, and in refusing priority to the Gildemeyer claim, and to the claim of the Diehl Manufacturing Company.

If these two claims are not entitled to priority, it is manifest that the Myers mortgage should be paid in full, and the trustee is therefore directed further to pay the sum due upon that mortgage, unless an appeal on behalf of the mechanics' lien claimants, or either of them, is seasonably taken from the foregoing order.

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## FALLON v. CORNELL STEAMBOAT CO.

(Circuit Court, S. D. New York. June 16, 1908.)

1. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURY TO SERVANT—FELLOW SERVANTS.

   The crews of two vessels owned by the same employer are not by reason of that fact in a common employment, and a member of one crew is not a fellow servant with members of the other.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 405, 406, 492.]

2. SAME—MASTER OF VESSEL AND SEAMEN.

   The master of a vessel is not a fellow servant with any other member of the crew.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 492.]

At Law. On demurrer to complaint

Hyland & Zabriskie, for plaintiff.
Amos Van Etten, for defendant.

HOUGH, District Judge. The demurrer admits (inter alia) that the defendant owned and operated two tugboats. Plaintiff's decedent was employed by defendant as an engineer on board one of them, but at the time in the complaint mentioned he was working as a fireman. The tugs collided, and it is alleged that the resulting death of plaintiff's decedent was "wholly caused by and through the fault, negligence, and carelessness of the defendant," and the erroneous navigation of "said vessels upon the part of the masters thereof, who were in charge of and controlling the navigation" of the same. In a separate sentence it is said that the master of one of the tugboats was at the time intoxicated.

The allegation of intoxication may be disregarded. If there were no other allegation of fault in the complaint, I am inclined to think it would be demurrable, for non constat that a man, though intoxicated, may not steer a boat skillfully. But the allegation of drunkenness stands by itself, and the statements of negligent navigation by both tugs and their masters are sufficient. It must therefore be assumed, on this hearing, that decedent was an engineer in defendant's employment, that he was at the time of his death voluntarily acting as a fireman, and that the careless navigation of both tugs caused his death without fault on his part.

The questions suggested are: First, whether a man who is an engineer, and voluntarily, but temporarily, acts as fireman, thereby changes his status in respect of the law concerning negligence of fellow servants; second, whether either an engineer or a fireman is a fellow servant with (a) the master of his own vessel, or (b) the master of another vessel of the same ownership.

This demurrer cannot be sustained, unless it be held that the engineer or fireman on one of two vessels of common ownership is a fellow servant with the master of both vessels; for under this complaint proven negligence on the part of the master of either tug would justify recovery. I have no doubt that the crews of two vessels owned by the same employer are not by reason of that fact in a common employment, and this for the reasons given in The Petrel, Prob. Div. 1893, 320. Strictly speaking, this disposes of the demurrer.

But, to consider the questions further, I am not aware of any case declaring, otherwise than by dictum, that the master of a vessel is not a fellow servant with the members of his crew; but I do think that the dicta to that effect in The Hamilton, 146 Fed., at page 727, 77 C. C. A. 150, and The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, are controlling on this court. The Clatsop Chief (D. C.) 8 Fed. 163, and The Transfer No. 4, 61 Fed. 364, 9 C. C. A. 521, look in the same direction, and with Judge Deady, in The Clatsop Chief, I think there is some authority and "more reason" for holding the common employer liable for injuries caused to inferior members of the crew by the negligence of the master. If reference be made to the leading case in the United States on the law of fellow servant (Farwell v. Boston & Worcester Railroad Corporation, 4 Metc. [Mass.] 49, 38 Am. Dec. 339), one must feel how inappropriate the reasoning there used is to the relation of crew and captain. Shaw, C. J., said:

"Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require." Page 59 of 4 Metc. (38 Am. Dec. 339).

This was said in 1842, it is a great lawyer's best justification for the fellow servant rule, and no better has ever been given. We are apt to cite the rule and forget the justification. Under modern conditions there may still be some employments to which this reasoning is applicable; but it is not and never was applicable to shipboard conditions. The master of a ship is for almost every purpose (so far as his crew is concerned) a vice principal, and he may on occasion not only represent his owners, but represent the law, certainly to the extremity of imprisonment, and possibly to the length of killing a mutinous subordinate. To hold that such a man is a fellow servant with any inferior officer or seaman seems nearly absurd, and certainly irreconcilable with the best reason for the rule laid down by Chief Justice Shaw.

It is asserted that most of the cases treating of the relations of master and crew are to be found in admiralty, and that they are therefore not applicable to this common-law action. The doctrine of fel-

low servant is not of admiralty origin. It is a common-law rule, which has been imported into the admiralty. It may be that admiralty has not unreservedly accepted it; but, if so, it is only because the rule is unreasonable as applied to conditions on board a ship. But, if the rule be inapplicable to such conditions, it is just as inapplicable in one forum as another. The conditions do not change with the forum. Indeed, the rule assumes that the persons are fellow servants to whom it is applicable. It is conceivable that the rules of law may vary as between common law and admiralty; but it is not conceivable that the relations between employés vary according to the forum in which an action is promoted.

Being, therefore, of opinion that the master of a vessel is not a fellow servant with any other member of the crew, I do not think that this decedent, even when serving as an engineer, was a fellow servant with the master of his own tug, or of any other tug belonging to the defendant, and it therefore becomes unnecessary to consider whether he changed his condition or gained any other privileges by voluntarily acting as a fireman at the time of his decease. It is suggested that a distinction should be made between large or deep-sea vessels and harbor tugs. I see no reason for such a distinction. The master of a tug is a licensed officer. It may not be necessary for him to exercise the great powers of a shipmaster as frequently as must the commander of a large vessel on a long voyage; but the power is there, the relation with the owner is the same, and the position of superiority toward every other person on board is identical in the case of the tug and in that of the ocean liner.

The demurrer is overruled, with leave to answer within 20 days, on payment of costs.

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SHULTHIS v. MacDOUGAL et al. (BERRYHILL, Intervener).

(Circuit Court, E. D. Oklahoma. December 28, 1907.)

No. 1.

1. INDIANS—DESCENT AND DISTRIBUTION.

Under the provisions of section 28 of the original agreement between the United States and the Creek Nation and approved by Act Cong. March 1, 1901, c. 676, 31 Stat. 869, no child born to Creek citizens after July 1, 1900, was eligible to the roll. Under the provisions of Act Cong. May 27, 1902, c. 888, 32 Stat. 245, and section 7 of the supplemental agreement made with the Creeks and approved by Act Cong. June 30, 1902, c. 1323, 32 Stat. 501, children born to citizens subsequent to July 1, 1900, up to and including May 25, 1901, and living upon the latter date, were eligible to the roll of citizenship, and directed to be enrolled by the Commission. If any such child died after May 25, 1901, or at any time before receiving his allotment, it was provided that "the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly." Section 6 of the said supplemental agreement, approved in 1902, repealed the provisions of the act of Congress of March 1, 1901, in so far as they provided for descent and distribution according to the laws of the Creek Nation, and directed that "the descent and distribution of land and money provided for shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas." *Held*, that a

child born to citizens of the Creek Nation on May 6, 1901, living May 25, 1901, dying in November, 1901, enrolled by the Commission on October 8, 1902, allotment selected on April 28, 1904, and patent issued to his heirs on October 10, 1904, the Arkansas law of descent and distribution embodied in chapter 49, §§ 2522–2545, of Mansfield's Digest (Ind. T. Ann. St. 1899, §§ 1820–1843), nominated the heirs of such deceased child and fixed the shares and portions the heirs derived in such allotment set apart and patented to them.

2. SAME—AGREEMENTS WITH INDIANS—CONSTRUCTION—EXTRANEOUS AIDS.
Whom the parties to the agreement meant to include within the term "heirs," if not clearly expressed, must be ascertained by resort to such extraneous light as the provisions and other acts and agreements relating to the same subject, and the history and surrounding conditions at the time, will afford.

3. SAME—AMBIGUITY.
The use of the term "descend," in the act of Congress and the agreements, being applied where descent, technically speaking, could not take place, creates an uncertainty and ambiguity calling for construction.

4. SAME—TAKING BY PURCHASE AND NOT BY DESCENT.
Where the deceased died before being enrolled, and the allotment selected or patented to him, his heirs take by purchase as donees of the nation, and not by descent.

5. SAME.
It was the evident intent of Congress and the tribe to allot the lands in severalty among the citizens upon the basis of justice, equity, and equality, and it was the intention of the parties to the supplemental agreement that in case a member of the tribe died before receiving his allotment which he would have been entitled to, if living, his heirs should take in all respects and with the same effect as if such member had not died until after receiving the allotment.

6. SAME—"NEW ACQUISITION"—ALLOTMENT.
Under the Arkansas law of descent and distribution an allotment acquired by a Creek citizen by selection and certificate of allotment or by patent became a "new acquisition," and upon the death of such citizen, before allotment or after allotment, without issue, or brothers or sisters, leaving a father, such father took a life estate; the fee passing to the uncles and aunts.
[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4783.]

7. LIFE ESTATES—RIGHTS OF LIFE TENANT—OPENING MINES OR WELLS.
A life tenant of lands containing minerals, oil, or gas cannot open mines or wells, or lease the land to others for such purposes.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, § 31.]

8. STATUTES—CONSTRUCTION—NATURAL MEANING.
In construing statutes like the ones in question, it is generally safe to reject an interpretation that does not naturally suggest itself to the mind of a casual reader, but is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey.

9. INDIANS—AGREEMENTS—CONSTRUCTION—TECHNICAL MEANING.
In construing any treaty or agreement between the United States and an Indian tribe, such treaty or agreement must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

10. SAME—INHERITED LANDS.
Under the provisions of section 22 of the act of Congress approved April 26, 1906 (34 Stat. 145, c. 1876), providing "that the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selec-

tion has been made, or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged may sell and convey the lands inherited from such decedent," the heirs (not full-bloods) of a deceased Indian, who died before his selection was made or patent issued, may sell and convey the allotment inuring to them as such heirs.

11. SAME—"INHERITED"—"DESCEND."
The term "inherited" used in section 22 of said act of Congress (Act April 26, 1906, c. 1876, 34 Stat. 145), is synonymous with the word "descend," as used in the original agreement and supplemental agreement, and covers those cases where heirs take by purchase, as well as by inheritance, technically speaking.
[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2012-2014; vol. 4, pp. 3606-3607.]

12. SAME.
Section 22 of said act of Congress (Act April 26, 1906, c. 1876, 34 Stat. 145), must be construed together with all other cognate acts, and, there being no reason for any distinction or discrimination between heirs taking by purchase and heirs taking by descent, technically speaking, the said section applies to all allotments selected by or for deceased members of the tribe in the hands of their heirs, whether such deceased member died before or after receiving the allotment.

(Syllabus by the Court.)

In Equity.

C. L. Thomas and Edgar A. De Meules, for complainant.

S. V. O'Hare and Farrar McCain, for intervener.

Geo. S. Ramsey and Preston C. West, for defendants.

CAMPBELL, District Judge. This is a suit in equity, instituted by the complainant, Albert W. Shulthis, against the defendants, asserting his right to the oil and natural gas in and under the N. E. ¼ of the N. W. ¼ of section 18, township 17, range 12 E., of the Indian base and meridian, in Oklahoma, and praying that the defendants be enjoined from interfering with his use and occupancy of said land and from going upon and operating or prospecting the same for oil and gas purposes, that the cloud cast upon his title by the adverse claims of defendants be removed, that an accounting be had, and that he recover damages for being kept out of the possession of said property by said defendants. The land in controversy is a part of that body of land formerly comprising the Creek Nation in the Indian Territory. The complainant claims under a departmental oil and gas lease, executed to him by George Franklin Berryhill, a citizen of the Creek Nation, of less than full blood, and Clementine Berryhill, his wife, a noncitizen, in March, 1906, filed in the office of the United States Indian agent, at Union Agency, Muskogee, Ind. T., on April 21, 1906, and in April, 1907, approved by the Assistant Secretary of the Interior. On June 5, 1906, George Franklin Berryhill and Clementine Berryhill, his wife, executed to the defendants Edmond and Perry McKay a warranty deed, conveying the land in controversy and other lands for a consideration of $2,000. In October, 1906, the McKays for a consideration of $800 executed an oil and gas mining lease to one Arthur B. Reese, covering the land in controversy. In the month of August, 1907, and subsequent to the 8th

day thereof, the defendant D. A. MacDougal secured deeds from the brothers and sisters of George Franklin Berryhill, upon the theory that they had inherited the fee in these lands as the uncles and aunts of Andrew J. Berryhill, the deceased child of George Franklin Berryhill, hereinafter referred to. Thereafter, and prior to the final approval of complainant's oil and gas lease, the defendant Kiefer Oil & Gas Company secured a lease of the land for oil and gas purposes from MacDougal, and also through a series of intermediate leases or assignments became the owners of the oil and gas lease executed by the McKays to Reese. In April, 1907, the Kiefer Oil & Gas Company entered upon said land and began developing the same, and at the time of the filing of this suit had made extensive developments thereon, and had taken and were taking large quantities of oil therefrom. A receiver has been appointed, and is now in charge of the property pending this litigation. Since the commencement of this suit George Franklin Berryhill has filed his bill of intervention herein, asking that the defendants be decreed to have no interest in the lands and that he be decreed the owner in fee, subject only to complainant's oil and gas lease, and that he recover 10 per cent. of the oil taken from the land by the defendant Kiefer Oil & Gas Company, and that the deeds and leases under which the defendants claim be declared null and void and may be delivered up and canceled as a cloud on his title.

In order to understand the contentions of the various parties, it is necessary to briefly review the history of the title to these Creek lands and the legislation affecting them. Early in the last century, by a series of negotiations and treaties between the United States and the Creek tribe of Indians, then residing east of the Mississippi, it was provided that said tribe should remove to lands west of the Mississippi river. By a treaty entered into between the United States and the Creek Indians in 1833 (7 Stat. 417), relative to lands which they had previously selected west of the Mississippi, it was provided that a patent in fee simple to this nation of Indians covering the lands assigned them west of the Mississippi should be granted them whenever the treaty should be ratified by the President and Senate of the United States, guaranteeing said lands to them so long as they should exist as a nation and continue to occupy the country thereby assigned them. Shortly thereafter patent was granted to the Creek Nation in accordance with the treaty, covering the lands which we now know as the lands of the Creek Nation, in what was formerly Indian Territory, and of which the land in controversy was a part. For more than half a century the Creek Nation continued to occupy these lands without any change in their status. During all this time they existed as a distinct community, with boundaries fixed, enjoying the right of local self-government, having their own Legislature, their own laws, including laws governing the distribution of the property of the deceased members of the tribe, having their own executive officers, and their own courts. The title to the lands remained in the nation, each individual enjoying only the possessory right to occupy a certain portion of the tribal domain.

But with the lapse of time and the development of the West came the demand for statehood and the allotment of the tribal lands in the Indian Territory to the individuals of the various nations or tribes, and on March 3, 1893, Congress passed the act providing for what has come to be commonly known as the "Dawes Commission," or "Commission to the Five Civilized Tribes." Act March 3, 1893, c. 209, 27 Stat. 645. Under the authority of this and subsequent acts of Congress, the said Commission proceeded to enroll the members of the various tribes, for the purpose of providing a complete and accurate list of the citizens of said nation as a basis of allotment. It was provided in the act creating the Commission just referred to that agreements looking to the allotment of the lands in severalty among the members of the various tribes should be entered into with the tribes, and on March 1, 1901, the Commission and the Creek Nation entered into their first agreement, providing in detail for the allotment in severalty of the Creek lands, commonly known as the "Original Creek Agreement" (Act March 1, 1901, c. 676, 31 Stat. 863), providing that all the lands of the tribe, except as therein provided, should be allotted among the citizens of the tribe by said Commission, so as to give each an equal share of the whole in value as nearly as might be, and then providing in detail a scheme of allotment. By this agreement it was further provided:

"Section 28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said roll after the ratification of this agreement. All citizens who were living on the 1st day of April, 1899, entitled to be enrolled under section 21 of the act of Congress approved June 28, 1898, entitled 'An act for the protection of the people of the Indian Territory and for other purposes,' shall be placed upon the rolls to be made by said Commission, under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly. All children born to citizens so entitled to enrollment, up to and including the 1st day of July, 1900, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

On June 30, 1902, another agreement was entered into, which is known as the "Supplemental Creek Agreement" (Act June 30, 1902, c. 1323, 32 Stat. 500). This latter agreement was amendatory of the original agreement, and among others contained the following provisions:

"Sec. 6. The provisions of the act of Congress approved March 1, 1901 [the original agreement], in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation; and provided further, that if there be no person of Creek citizenship to take the descent and distribution of said

estate, then the inheritance shall go to the noncitizen heirs in the order named in said chapter 49."

"Sec. 7. All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901 [the original agreement], subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living, shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

On the 6th day of May, 1901, there was born to George Franklin Berryhill and his wife, Clementine, a son who was named Andrew J. Berryhill. This child died the following November. It will be noted, therefore, that at the time of his birth, as well as at the time of his death, the original Creek agreement was in force, section 28 of which provided that children born to Creek citizens up to and including the 1st day of July, 1900, might be enrolled, but did not provide for the enrollment of children born subsequent to that date, and therefore, at no time during the life of Andrew J. Berryhill was he entitled to enrollment; but by the supplemental agreement, above quoted, he did become entitled to enrollment, for he was born prior to May 25, 1901, and was living upon that date. On October 8, 1902, his name was placed upon the approved Creek Indian roll of the Creek Nation. On April 28, 1904, selection of his allotment was made, and appears upon the official allotment plat of the Commission as the "allotment of Andrew J. Berryhill, deceased." On October 10, 1904, patent, subsequently approved by the Secretary of the Interior, issued from the Creek Nation to "the heirs of Andrew J. Berryhill, deceased," conveying to them the said allotment. The land in controversy is a portion of this allotment.

It is contended by the complainant that the heirs of Andrew J. Berryhill, deceased, acquired title to the lands in controversy by purchase and not by descent; that George Franklin Berryhill, as the nearest in line of succession, acquired an absolute estate in fee simple to the lands in controversy, and that the restriction on the alienation of the lands in controversy did not expire until August 8, 1907; and that, therefore, the deed under which the defendants Edmond McKay, Perry McKay, and Kiefer Oil & Gas Company claim is void. Complainant further contends that, even if the deed from the Berryhills to the McKays and the subsequent leases and conveyances were valid, they were taken with notice of the complainant's lease The defendants contend that the only estate George Franklin Berryhill has in the land, if any, is a life estate, and that therefore he cannot make a valid oil and gas lease, and that complainant's lease is therefore void. They further contend that, if Berryhill did have such an estate in the land as that he could make a valid lease, complainant's failure to comply with the terms of the lease, as to filing bond, etc., within the time required, followed by lessor's sale of the land and notice of rescission, voided the defendant's lease. Defendants further contend that they were innocent purchasers in good faith, for value, without notice of complainant's claim. The intervener contends that at the time of the

alleged sale to the McKays the land was still subject to restrictions against alienation, and was not "inherited land," and was therefore not relieved of restrictions by Act April 26, 1906, c. 1876, 34 Stat. 137. It is conceded that under the provisions of the supplemental agreement the mother, Clementine Berryhill, has no interest in the land; she not being of Creek blood.

We will first consider the question as to whether George Franklin Berryhill was an heir of Andrew J. Berryhill, deceased, and, if so, his interest as such in the land in controversy. If no further legislation had been enacted after the passage of the original agreement, it is clear that the child, Andrew J. Berryhill, would not have been entitled to an allotment, for he was born subsequent to July 1, 1900; but in the appropriation act of May 27, 1902 (32 Stat. 245, c. 888), Congress provided for the enrollment of all children born to members of the tribe, up to and including May 25, 1901, and then living, and that, if any such child should die before receiving his allotment, such allotment should descend to his heirs and be distributed to them according to the laws of Arkansas; it being also provided that the provisions of the original agreement relative to descent and distribution according to the laws of the Creek Nation should be repealed, and providing that the descent and distribution of the lands and money provided for by the original agreement should be in accordance with the provisions of chapter 49, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, c. 21). By reference to section 6 and section 7 of the supplemental agreement, above quoted, it will be observed that the provisions of the act of May 27, 1902, just referred to, were incorporated in the supplemental agreement. By Act Cong. May 2, 1890, c. 182, 26 Stat. 81, it was provided that certain laws of the state of Arkansas, as published in Mansfield's Digest of the Laws of that State, "not locally inapplicable, nor in conflict with this act, or with any laws of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory, until Congress shall otherwise provide"; and among these laws was chapter 49, relating to descents and distribution. Prior to the supplemental agreement, these laws of Arkansas, controlling descent and distribution, were inapplicable to the Creek Nation, as it had its own local laws covering the subject. By the Arkansas law thus adopted it was provided:

"Sec. 2522. When any person shall die, having title to any real estate of inheritance, or personal estate not disposed of, * * * and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, * * * in the following manner: First, to children or their descendants, in equal parts; second, if there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts," etc.

"Sec. 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate, in the manner provided in this act; and in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs, as before provided."

"Sec. 2543. The expression used in this act, 'where the estate shall have

come to the intestate on the part of the father,' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise, or descent from the parent referred to, or from any relative of the blood of such parent."

It must be borne in mind that Andrew J. Berryhill died before the supplemental agreement, entitling him to enrollment, became the law, and therefore, at his death, had no title to the land in controversy. But section 7 of the supplemental agreement provided for his enrollment even after his death. When enrolled, he became one of the units of allotment as much as though still living, for the roll was the basis for allotment, and there was to be an allotment made for every member appearing upon the roll, either selected by himself, by some one representing him, whether he be living or dead, or in default of such selection the allotment was to be selected by the Commission. Here, then, was an allotment, the title to which must pass from the tribe to some individual member or members of the tribe. It could not pass to Andrew J. Berryhill, whose enrollment had caused it to be carved out of the common domain, for he was dead. Section 6 of the supplemental agreement provided that the descent of allotments should be in accordance with the Arkansas law; but this allotment could not descend, technically speaking, under the Arkansas law, because the intestate had not died having the title thereof. This would be true of all allotments selected after the death of the person by the enrollment of whom the allotment had been occasioned. In the nature of things, the vast majority of those enrolled would live to receive their allotments, and consequently the provisions of section 6 would govern descent and distribution in all cases except the comparatively few who should die before allotment. It therefore became necessary for the agreement to provide for the disposition of those allotments not covered by the general provisions of section 6, and it was therefore added that in such cases the lands and money to which he (the deceased enrolled member) would be entitled, if living, should descend to his heirs as therein provided, and be allotted and distributed to them accordingly. In the cases covered by this provision the title to the land passed directly from the Creek Nation to the heirs, who, therefore, technically speaking, took the same by "purchase," and not by descent; the title never having vested in the ancestor. "In one thing all writers agree, and that is in considering that there are two modes only, regarded as classes, of acquiring a title to land, namely, descent and purchase; purchase including every mode of acquisition known to the law except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by act of the law." 3 Washburn on Real Property, p. 4. It is therefore in the nature of a grant of the land to which, if living, the deceased enrolled member would be entitled, from the Creek Nation to the heirs of such deceased.

The question for determination is: Whom did the parties to this agreement mean to include by the term "heirs," and in what proportion did they intend such persons to take? Their intention in this matter must control, and this we must gather from the terms of the agreement itself, if clearly expressed, and, if its provisions are ambiguous and uncertain, then resort must be had to such extraneous light as the

provisions of other acts and agreements relating to the same subject and the history and surrounding conditions at the time will afford. "It is indispensable to a correct understanding of a statute to inquire, first, what is the subject of it—what object is intended to be accomplished by it? When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies. * * * General words may be restrained to it, and those of narrower import may be expanded to embrace it, to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered, or supplied, so as to obviate any repugnancy or inconsistency with such intention. * * * In the Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548, Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the Legislature.' * * * Where the meaning of a statute, or any statutory provision, is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention, and among them are some extraneous facts. The objects sought to be accomplished exercise a potent influence in determining the meaning of not only the principal, but also the minor, provisions of a statute. To ascertain it fully, the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment." Lewis' Sutherland, Statutory Construction, vol. 2, §§ 347, 456.

By the use of the term "descend," as applied to conditions where descent, technically speaking, could not take place, an uncertainty or an ambiguity is clearly injected into this act, which calls for construction. If it was the intention of the framers of this act that the heirs of enrolled members, dying before allotment, should take the allotments just as if their ancestors had received their allotments before death, then we must look to chapter 49, as a whole, and from that determine, not only who the heirs are, but the proportion in which they take. If, on the other hand, it was intended that the persons included in the term "heirs" should take merely as "purchasers," and not as though taking technically by descent, then the contention of complainant that, having determined by reference to the first section of chapter 49 who the heirs are, the Arkansas law, so far as this class of cases is concerned, has served its purpose, is well supported by authorities. It must be borne in mind at all times, in construing these agreements, that the purpose, as expressed in the act creating the Commission, was to effect the allotment and division of these lands in severalty among the Indians of each nation or tribe, upon the basis of justice and equity, to enable the ultimate creation of a state or states of the Union, which should embrace the lands within said territory. The Commission was directed to enter upon negotiations with the several nations, and endeavor to procure such allotment of lands in severalty to the Indians belonging to each such nation, tribe, or band, respectively, as might be agreed upon as just and proper, to provide for each such Indian a sufficient quantity of land for his or her needs in such equal distribution and apportionment as should be found just and suited to the cir-

cumstances. An equal or equitable division of the lands must be made; that is, each member must receive the same treatment with reference to the division of the lands as every other member occupying the same relative position.

With the foregoing consideration in view, let us examine the act. It is provided that the lands to which Andrew J. Berryhill would have been entitled, if living, shall descend to his heirs as "herein provided"; that is, "in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas," as provided by section 6 of the act. So far, the act is possible of two constructions, either that the words "as herein provided" only have reference to the preceding term "heirs," or that they also have reference to the preceding term "descend"; but the act goes farther and provides that such lands shall be allotted to the heirs "accordingly." According to what? Clearly according to the provisions of chapter 49, above referred to. If the intention of the law is that the heirs of Andrew J. Berryhill shall be different in person, or in the proportion in which they take the land, from what they would have been, had he lived until after getting his allotment and then died, there must have been some reason for this difference, based upon a difference in their status, from that of heirs taking technically by descent; otherwise, the principle of an equitable distribution of the lands would be violated. The only difference in status is that the ancestor died before the allotment was made, instead of afterward. Had Andrew J. Berryhill died one day before the date upon which he might have received his allotment certificate, the disposition of the lands in controversy would have been governed by the portion of the act we are construing. Had he died one day after receiving his allotment certificate, no one would contend that the disposition of his land was not governed by the provisions of chapter 49, both as to who the heirs are and the proportion in which they take. I can perceive no such difference in the status of the heirs of Andrew J. Berryhill from those of an allottee dying after having received his allotment as would justify or furnish a reason for the distinction claimed. I believe the term "descend" was used in the act for the purpose of bringing this class of cases within the perview of chapter 49, and that it was intended that they should not take differently from those coming technically within the act. As said by the Circuit Court of Appeals for the Eighth Circuit in Ardmore Coal Co. v. Bevil, 61 Fed. 757, 10 C. C. A. 41, in construing a statute like this:

"It is generally safe to reject an interpretation that does not naturally suggest itself to the mind of a casual reader, but is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey."

In Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, it is said:

"In construing any treaty between the United States and an Indian tribe, * * * the treaty must * * * be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indian."

Had it been the intention of the framers of the law that it should be construed as contended for by complainant's counsel, it would have been an easy matter to have made such intention plain. On the other hand, the use of the term "descend" tends to negative such an intention, if it was used with any idea of its ordinary significance. I am not unmindful of the principle that the contemporaneous construction of an act of Congress by executive officers called upon to administer it, while not controlling, is ordinarily entitled to much consideration by the courts when called upon to construe such acts, and that the approval of the lease to complainant by the Department of the Interior indicates that that department construed the law as vesting in George Franklin Berryhill a fee-simple title to the land in controversy. But this question is now squarely presented to the court for decision for the first time, upon a full argument and presentation of authorities pro and con, upon careful consideration of which I am unable to agree with what appears to be the conclusion reached by the department.

It is further to be noted that the very fact that this provision appears in the act makes it clear that the framers realized that without it the Arkansas law adopted would probably not apply, because of the fact that at the death of the ancestor the title to the allotment had not passed to him. Realizing this, and the necessity of a special provision to cover such cases, this provision was inserted, specifically applying the Arkansas law to this class of cases. I therefore conclude that it was the intention of the parties to the supplemental agreement that, in the case of an enrolled member of the Creek Nation or Tribe of Indians dying before receiving the allotment to which he would have been entitled had he lived until selection was made and certificate issued, his heirs should take in all respects as if such member had not died until after receiving his allotment.

We now come to consider what estate the father, George Franklin Berryhill, acquired in his son's allotment by virtue of the Arkansas law. This law has been fully construed by the Arkansas Supreme Court in the celebrated case of Kelly v. McGuire, 15 Ark. 580, decided long before the adoption of the law here, and consequently is controlling. By reference to section 2522 it will be seen that, as Andrew J. Berryhill died without children or descendants, his estate passed to his father; but, to ascertain the extent of the interest in the land taken by the father, reference must also be had to section 2531, which provides that, in the absence of descendants, the estate, if it come by the father, shall ascend to the father and his heirs, and if by the mother, then to her and her heirs; but if it be a "new acquisition," it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate. As said in Kelly v. McGuire, supra:

"The first section (2522) is general and comprehensive, embracing all lands, whether ancestral or newly acquired, subject to certain exceptions, and qualifications hereafter more particularly noticed, and these exceptions refer to real estate alone."

The exceptions and qualifications referred to are those contained in section 2531, distinguishing between newly acquired and ancestral es-

tates. Finally the court in that case reaches a series of conclusions among which are the following:

"Third. That as to real estate it was the design of the Legislature, where there were no descendants, to point out the lines of the succession, and that this is to depend on the fact whether the inheritance is ancestral or new, and, if ancestral, then whether it come from the paternal or maternal line.

"Fourth. If the inheritance was ancestral and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion, of the mother's line; and so, on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

"Fifth. If the inheritance be not ancestral, but a new acquisition, then, after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncles and aunts," etc.

The question, then, is whether these allotments are new acquisitions or ancestral estates in the hands of the original allottee. The distinction between these two classes of estates is clearly and tersely stated by the court in Kelly v. McGuire as follows:

"It must be understood, however, that a new acquisition, in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry or by will or deed from a stranger. In other words, it is an estate derived from any source other than descent, devise, or gift, from father or mother, or any relative in the paternal or maternal line. * * * Land is to be considered as having come from or by or on the part of the father or mother when it comes by gift, devise, or descent, either mediately or immediately from them or from any person in their respective line."

We find the title to these lands originally passing by patent from the United States to the Creek Nation or Tribe of Indians, a distinct community or political entity, having the right of local self-government, and long recognized as in a sense a state, although not a foreign state or state of the Union. Such was the condition of the Creek Nation at the time it received the patent for these lands, and such it continued to be at the time the laws and agreements now being considered were created. The patent from the United States to the Cherokee Nation conveys to that nation the same character of title to the lands that nation occupies as that conveyed by the patent to the Creek Nation. In reference to the Cherokee patent, the Supreme Court of the United States said, in Cherokee Nation v. Journeycake, 155 U. S. 196, 15 Sup. Ct. 55, 39 L. Ed. 120:

"By that patent, whatever of the title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty to the Cherokees or any of them."

Therefore no title in severalty is vested in any Creek citizen, and in no sense can the title to any allotment be said to have come to any allottee by or on the part of his mother or father. I see no reason why the individual members of the Creek Nation do not bear practically the same relation to the nation as a political entity as the individual citizens of the United States bear to the United States government, so far as a consideration of such relationship will throw light upon this question. The Supreme Court of Arkansas, in the case of Hogan v. Finley, 52 Ark. 55, 11 S. W. 1035, held that public land entered by a settler, and for which he received patent from the United States, became

in such settler's hands a "new acquisition," as the term is used in the Arkansas law we are now considering, saying:

"The land in controversy was a new acquisition by Thomas V. Taylor, and upon his death it passed first to his father and then to his mother for life."

If, then, the assumption is correct that the individual member of the Creek Nation stands in the same relation to that nation as the individual citizen of the United States does to that government, so far as the title to national or public lands is concerned, it seems clear that an allotment acquired by patent from the Creek Nation becomes as much a new acquisition as a homestead acquired by patent from the United States. It is true that Andrew J. Berryhill acquired his status as a Creek citizen by virtue of the Creek blood of his father; but, as suggested by defendant's counsel, in a great number of instances both the father and mother of the allottee are citizens by blood, and the allottee acquires his right through the blood of both equally. If we were to adopt this theory, and declare the estate ancestral, then, having come by both the father and the mother, each would be equally entitled to it in case of the allottee's death intestate, without descendants, and a condition would be presented not provided for by the law.

I therefore conclude that the allotment of Andrew J. Berryhill was, in contemplation of law, a new acquisition, and that his father, George Franklin Berryhill, acquired only a life estate. Having but a life estate, he could not execute a valid oil and gas lease thereon. "A tenant for life, of lands containing minerals, oil, or gas, cannot open any new mines or wells, or lease the lands to others for this purpose." 16 Cyc. 625; Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601; Gerkins v. Ky. Salt Co., 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370; Hook v. Garfield Coal Co., 112 Iowa, 210, 83 N. W. 963. It follows that the lease relied upon by complainant, executed by George Franklin Berryhill, the life tenant, and Clementine Berryhill, his wife, who is conceded to have no title, is invalid, and conveys no interest to the complainant as against the defendants herein.

We now pass to the contention of the intervener that the land in controversy was not "inherited" land in the hands of George Franklin Berryhill, in the sense in which that term is used in Act April 26, 1906, c. 1876, 34 Stat. 137, removing restrictions from certain inherited lands of the Five Tribes. The act provides:

"Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent."

Then follow certain provisions as to sales by full-bloods and minor heirs. If the term "inherited" is to be confined to its strict literal signification, it cannot apply to the land in controversy in this case, and the contention of the intervener must be sustained. As said in McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015:

"The word 'inherited,' which is applied to real estate only, implies taking immediately from the testator as heirs take immediately from their ancestor, upon his death."

The act in which this provision is found is but one of a series of acts and agreements all having in view the abolishing of the tribal governments preparatory to statehood, and an equitable division of the lands and money of each tribe among its individual members. This act, therefore, must be read and construed, in connection with all the other acts and agreements relating to the same subject. Lewis' Sutherland, Stat. Construction, § 443. The reference to inherited lands in this act implies some law theretofore in existence providing for the descent of lands. As said in Starr v. Hamilton, Fed. Cas. No. 13,314:

"The term 'inheritance' is in legal parlance the exact equivalent of 'descent.'"

As applied to the Creek Nation, it has reference to lands inherited under the terms of the original and supplemental agreements. The land in controversy passed by the terms of the supplemental agreement. The act of 1906 and the supplemental agreement must be construed together. We have decided that by the use of the term "descend" in the supplemental agreement it was intended that lands of a member dying before receiving his allotment should, in contemplation of law, descend to his heirs in all respects as though title to the allotment had vested in him before his death. If that be true, then in contemplation of law such lands become inherited lands in the hands of the heirs, and construing the act of 1906, as we must, in connection with the supplemental agreement, the term "inherited lands" must be held to apply as well to lands passing to heirs of members dying before allotment as to lands passing by technical descent from members dying after allotment. I can conceive no reason why any distinction should be made between the two classes of lands referred to. The purpose of imposing restrictions in the first place was to protect a people presumably incompetent to deal with their own lands without some supervision. Congress has seen fit in this act to remove such restrictions from that class of lands termed "inherited land," subject to certain conditions as to full-bloods and minors, presumably considering that such measure of protection as Congress still deems necessary to afford the Indians can be exercised without longer imposing restrictions on this class of lands. But what possible reason could be suggested for continuing the restrictions on lands coming to the heirs as the land in controversy came to the intervener and removing them with reference to lands coming to heirs technically by descent? Certainly none can be suggested. If the act of 1906 stood alone, it might, with considerable force, be contended that its terms with reference to this matter are clear, and do not call for construction, and must, therefore, be literally construed. But this act, as we have seen, must be considered together with all other cognate acts. There being no reason for such a distinction, and no such distinction having been intended in the supplemental agreement, I conclude that the term "inherited lands," as applied to the Creek Nation, applies to all allotments selected by or for deceased members of the tribe, in the hands of their heirs, whether such deceased members died before or after receiving such allotments. It follows that by his deed to the McKays George Franklin Berryhill, the intervener, divested himself of all his title in the land in controversy.

Having decided that complainant's lessors had not such interest in the land as enabled them to make a valid oil and gas lease, and that the intervener's deed to the McKays divested him of all his title to the land, the other points raised at the trial become immaterial to a determination of this case.

A decree will be entered for the defendants, with costs taxed against the complainant and the intervener.

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## In re HICKERSON.

(District Court, D. Idaho, N. D. June 19, 1908.)

1. BANKRUPTCY—"VOIDABLE PREFERENCE"—KNOWLEDGE OF INSOLVENCY.
   A bank, which took a chattel mortgage from a debtor to secure a past indebtedness and withheld the same from record for nearly a year, and until a few days prior to the bankruptcy of the mortgagor, *held* to have had reasonable cause to believe that he was in failing circumstances when it was taken, and insolvent when it was recorded, which rendered it a "voidable preference," under Bankr. Act July 1, 1898, c. 541, § 60, cls. "a," "b," 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended in 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031]).
   [Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5498–5499; vol. 8, p. 7759.]

2. SAME—FRAUDULENT CHATTEL MORTGAGE—RIGHT OF TRUSTEE TO ATTACK.
   Rev. St. Idaho 1887, § 3396, provides that a chattel mortgage "is void as against creditors" of the mortgagor unless recorded, and section 3386 that the enforcement of a chattel mortgage may be contested "by any person interested in so doing." *Held*, that a chattel mortgage given by a merchant on his stock of goods to a bank to secure a past indebtedness, which was by agreement withheld from record for nearly a year and until within a few days of the mortgagor's bankruptcy, during which time he continued in possession of the property, selling the goods as usual, was fraudulent and void as matter of law as against any creditors having the right to contest the same, and that the trustee in bankruptcy into whose possession the property came and creditors whose claims had been allowed were by reason of such facts "interested" in the specific property as part of the bankrupt's estate in the custody of the court for distribution, and both under the bankruptcy act and the state statute entitled to contest the mortgage when it was sought to be enforced in the bankruptcy court.

3. CHATTEL MORTGAGES—EVIDENCE OF FRAUD—FAILURE TO RECORD.
   An agreement between the mortgagor and mortgagee to withhold a chattel mortgage from record is evidence of a fraudulent intent.

In Bankruptcy. On Validity of Chattel Mortgage.

A. S. Hardy, for First National Bank.

A. C. Emmons, J. B. Campbell, and Jas. De Haven, for objecting creditors and trustees.

DIETRICH, District Judge. On March 22, 1906, the bankrupt, being engaged in the retail mercantile business at Grangeville, Idaho, and being indebted to the First National Bank of that place, executed two notes, each for $3,000, due on demand, and secured by a chattel mortgage of the same date, in favor of the bank, covering the

stock of goods, which apparently consisted in the main of such articles as are usually carried in a hardware store. After a general reference to the merchandise as being situate in a certain store building and also in a warehouse, both located in Grangeville, there is set forth the following specific description:

"* * * And all other goods, wares, and merchandise forming a part of the stock of said Walter Hickerson in said stores and warehouses, or situated adjacent thereto, or elsewhere in Idaho county, and owned by the first parties [Hickerson and his wife] or either of them, together with all fixtures, consisting of shelving, counters, showcases, desk, safe, scales, etc., used in connection with and situated in either said stores or warehouse of said first parties, together with all additions which may be made to said stock of goods and merchandise, whether in said stores or warehouse, or elsewhere, and also all book accounts, notes, and debts due or owing, or to become due or owing, both for and on account of sales of goods, wares, and merchandise in said merchandise business and otherwise; all of the said property being now in the possession of said parties of the first part in the city of Grangeville, Idaho county, Idaho, and free from all incumbrances."

It is further provided:

"That it is understood and agreed that the said parties of the first part may remain in the possession of said property and stock of merchandise, and may sell and dispose of the same in the usual course of trade, as the agents of second party only, and that all such sales shall be for its benefit, and that first parties shall account to second party on the last day of each month, commencing March 31, 1906, for the proceeds of all such sales as its agents, and the proceeds of the sales of the said personal property shall be the property of the second party, whether consisting of cash, notes, or accounts, and the said proceeds shall be applied to the payment of said indebtedness."

The mortgage was acknowledged and sworn to in the manner required by the statutes of Idaho, and it was delivered to the mortgagee upon the day of its execution. The bankrupt was indebted to the bank on overdrafts in an amount a little less than the aggregate of the mortgage notes, and the amount of the difference was placed to his credit, with authority to check against it. The mortgage was not recorded until February 11, 1907. In the meantime the mortgagor continued to carry on his mercantile business in the ordinary way, and out of the proceeds of his sales and collections he paid the expenses of the business, including freight bills and clerk hire, and the balance he deposited from time to time in the bank of the mortgagee; the amounts so deposited aggregating a total sum of nearly $12,000. From time to time he drew checks upon the bank, and directed it to honor overdrafts in the payment of accounts against him, so that when he went into bankruptcy he was indebted to it in an amount approximating $3,000, besides the notes secured by the mortgage.

On February 16, 1907, five days after the mortgage was recorded, the mortgagor filed his petition, and upon February 20th he was adjudged a bankrupt. A trustee was appointed and took possession of all of his property, including that claimed to be covered by the mortgage, and upon April 6, 1907, applied for authority to sell the stock of merchandise. In response to a notice of hearing upon such application the mortgagee appeared and asked that the mortgage lien be recognized in any order of sale which should be made, whereupon

the trustee and most of the creditors objected to a recognition of the validity of the mortgage. It was thereupon agreed that an order for sale might be made, with the understanding that the proceeds of the property claimed to be subject to the mortgage lien should be held in lieu of the property itself; neither the mortgagee nor the objecting parties losing any rights or being in any wise prejudiced by reason of the conversion of the property into money. Accordingly an order was made and the property was sold. Evidence was taken before the referee, and by stipulation the whole matter is submitted to the court for its original decision upon the evidence, without any findings or report from the referee.

Upon the part of the trustee and the objecting creditors it is contended: (1) That under the terms of the mortgage the indebtedness secured thereby must be deemed to have been paid, in view of the deposit by the mortgagor in the bank of the mortgagee of proceeds from the sales of the mortgaged property amounting to more than the indebtedness secured by the mortgage; (2) that the mortgage is voidable as a preference under section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]); (3) that the mortgage is fraudulent, and that as against the trustee and creditors the lien thereof cannot be enforced upon any of the assets of the estate.

Upon the first point, it is, I think, fairly inferable from the evidence that there was some understanding between the parties from time to time by which the mortgagor waived his right to have the proceeds of the business applied to a reduction of the mortgage indebtedness. The record does not disclose an express agreement to that effect, but the conduct of the parties was such that the bankrupt must have known and acquiesced in, if he did not in terms authorize, the credit of his deposits to his current account, upon which he drew from time to time. This being the case, he could not be heard to object to the diversion of the funds from the purpose designated in the mortgage. Clearly a second mortgagee or other lienor would have the right to raise such objection; but I am not clear that either the trustee or the objecting creditors occupy such a favorable position in this proceeding, and in consideration of the view I have taken of the other questions, and the doubt I entertain as to the real understanding of the parties, I have concluded to consider the diversion of the proceeds of the mortgaged property only so far as the fact is material to the question of the good faith of the parties.

Does the mortgage transaction, as disclosed by the record, constitute a preference under section 60a of the bankruptcy act? By the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. 1907, p. 1031]) it is provided that, to constitute a preference, the period during which the transfer is made shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. The mortgage "transfer" must therefore be deemed to have been made on the 11th day of February, 1907, only five days before the filing of the petition in bankruptcy. Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

It is earnestly argued by counsel for the bank that the evidence is insufficient to show the insolvency of the debtor on February 11, 1907; but, although the record is somewhat meager and unsatisfactory, I think it is sufficient to bring the transaction within the statutory definition of a preference. While it does not appear that the mortgagor was insolvent in contemplation of law on the 22d day of February, 1906, still we have the undisputed fact that at that time the bank, which had been extending to him credit without security, was demanding that its claim be secured, and the mortgagor declined to give a mortgage upon property which he could claim as exempt, but did give a mortgage upon his stock of merchandise, which was the only other property he had free from incumbrance. It is also undisputed that from the time the mortgage was executed until the same was filed the business was conducted at a loss, and the mortgagor's financial ability declined. From the conduct of the parties and their close business relations, I cannot avoid the conclusion that when the mortgage was given the failure of the mortgagor, while not desired, or even expected, was a possible contingency contemplated by both parties, against which it was thought the mortgage would, in a measure, protect the bank, and that when the mortgage was filed the mortgagee knew or had reason to believe that the mortgagor was preparing to go into bankruptcy; nor can I doubt that the effect of the mortgage, if enforced, will be to enable the mortgagee to obtain a greater percentage of its debt than other creditors of the same class. It is argued by counsel for the bank that there is no conclusive proof that all creditors will not be paid in full; but from the showing made entire satisfaction is, to say the least, wholly improbable, and I doubt whether the bank's suit would be so vigorously pressed if it could be reasonably expected that all claims would be paid in full. I conclude that the mortgage must be held to be voidable as a preference under the law.

We come to a consideration of the third objection. The mortgage was not recorded for nearly a year after it was executed and delivered, and then just a few days before the petition in bankruptcy was filed. A mere failure to record an instrument is not conclusive evidence of a wrongful intent. Failure may be accounted for by inadvertence or by ignorance of the necessity for so doing. Upon the other hand, an agreement between parties to withhold an instrument from public record is not infrequently a circumstance of great weight in determining the good faith of the parties. It is manifest that at the hearing the bank felt the strain of this phase of the case. That the failure to record was not due to mere oversight, or to ignorance of the law, is conceded; and no rational explanation was or could be given for the delay in recording, other than an understanding between the parties that the instrument should be withheld. Both the cashier of the bank and the mortgagor testified that at the time the mortgage was executed the mortgagor asked that it be withheld from record, and the bank assented to the request, but did not agree that it should be withheld for any specific length of time. It was not to be expected that the time would be fixed, nor is that a very material consideration. It is sufficient if, with the knowledge and consent of both parties, the lien was kept

secret. Apparently it was not to the interest of either party to record the mortgage. It must be presumed that both the cashier of the bank and the bankrupt, being intelligent business men, realized that knowledge of the existence of an instrument of this character, under the circumstances surrounding the bankrupt's business, would immediately and absolutely destroy his credit in the mercantile world. The bankrupt could not have met his obligations, and the result must necessarily have been the closing up of his business by attachment or by some other appropriate proceeding, to the prejudice of both the mortgagee and the mortgagor.

It is true that, in answer to leading questions put to them by counsel for the bank, both the mortgagor and the cashier asserted their good faith and the absence of any intention upon their part to wrong or defraud other creditors, and the cashier also stated that he made no agreement to keep the mortgage off the records; but the admitted fact is that at the request of the mortgagor, made at the time of the execution of the mortgage, it was kept secret. The withholding was deliberate, and not a mere "neglect," as is now argued by counsel for the bank. In response to a question as to how it happened that the mortgage was placed on record just before the bankruptcy proceedings were instituted, the cashier testified that "we were talking about it for a month or so at the bank," etc. If the mortgage was given and accepted in good faith, solely for the security of the bank, and without any consciousness of the effect of withholding it from the records upon other creditors, it is not easy to imagine why the matter of recording was being talked about for "a month or so." The obvious course to pursue was to place the instrument on record. Upon the other hand, the parties must have known, and did know, that a withholding of the mortgage from record would have a tendency to lull other existing creditors into a feeling of false security, and would invite and encourage the extension of new or additional credit.

Nor are the reasons given by the cashier of the bank for taking the mortgage satisfactory. At one point of his testimony, in explaining why the bank took the mortgage, the witness stated that "we did it as a precaution in case of his death," etc., meaning the death of the mortgagor. If such an answer is to be accepted in its full import, apparently it is to be construed as meaning that the mortgage was to become effective only in case of the death of the mortgagor. If so, the condition has not arisen, and the mortgage could not be enforced. But I think that upon the whole record it must be concluded that Hickerson's business was not prospering; that the bank became anxious because of its large unsecured claim, and desired security; that naturally it sought a mortgage upon property that had stability, and which could be mortgaged without materially interfering with the debtor's business, and which would be free from the legal difficulties attending the mortgaging of a stock in trade; that the debtor, being conscious of the condition of his business, declined to hypothecate property which he could claim as exempt in case of disaster; that he was reluctant to give a mortgage upon his stock in trade, but consented to do so with the understanding that for some time, at least, the mortgage would not be

recorded; that in accordance with this understanding the mortgage was executed and delivered, and was withheld from the record until it appeared that the mortgagor could no longer meet his obligations and continue in business.

The validity of such a mortgage is a local question, and the decisions of the state courts will control. Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; In Ryan v. Rogers, 94 Pac. 427, it was recently held by the Supreme Court of Idaho that:

"The fact that the mortgagee permitted the mortgagor to remain in possession of the property which was within itself something like double the value of the debt secured, for a period of one year, and for at least nine months after breach of the conditions named in the mortgage, and sell and dispose of the property, without any attempt to collect any part of the mortgage debt, or to take possession of the property, would, as a matter of law, be such a fraud upon attaching creditors and purchasers as to avoid the mortgage."

Under the doctrine of this case, as well as others cited in the opinion therein, I think that as to attaching creditors and purchasers without notice this mortgage must be held void, even had it not been withheld from record. In the Ryan-Rogers Case it is further said that:

"The mortgage would be good as to any remaining property covered by it as between the mortgagor and the mortgagee, in the absence of attachment or other lien or incumbrance prior to the mortgagee taking possession."

And again the court says:

"In this case the mortgagee took possession of the remaining property covered by the mortgage prior to any creditors' rights initiating by reason of an attachment lien or other incumbrance on the property whereby a general creditor could bring himself within the purview of the statute and acquire a right to contest the mortgage. Neustadter Bros. v. Doust, 13 Idaho, 617, 92 Pac. 978. Possession of the remaining mortgaged property having been taken by the mortgagee prior to the rights of any creditor attaching thereto, the mortgagee would be exempt from the application of the general rule."

Excluding from consideration, for the time being, the effect of the provisions of the bankruptcy act, the mortgage must, as we have seen, be held to be in violation of local law, and to be void as to persons having the right to assert its invalidity. The serious question therefore, is whether or not this trustee or these objecting creditors have such right. Unfortunately the question is not conclusively answered in the Ryan-Rogers Case. The court there quotes, with apparent approval, from In re Rodgers, 125 Fed. 169, 60 C. C. A. 567, the statement that:

"With respect to the right to attack transfers or incumbrances by the bankrupt, as either actually or constructively fraudulent, the trustee stands in the same position as an attachment or execution creditor."

But, upon the other hand, Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, is cited in support of the proposition that the mortgage under consideration "would be good as to any remaining property covered by it as between the mortgagor and the mortgagee, in the absence of attachment or other lien or incumbrance prior to the mortgagee taking possession." Moreover, to just what extent the conclusions reached in the Ryan-Rogers Case are based upon a con-

struction of the bankruptcy act, and to what extent upon the local law, is not entirely clear. The inquiry is important, in view of the fact that the construction of the local law by the highest court of the state is conclusive and binding, whereas its interpretation of the bankruptcy act must, where there is conflict, yield to the decisions of the superior federal courts. Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

In the Ryan-Rogers Case the mortgagee had taken possession of the mortgaged property before the initiation of bankruptcy proceedings, and apparently this fact was considered very material to the conclusion which was reached. The mortgagee there, having seized the property, proceeded to sell it according to law, and the trustee brought the action against the mortgagee and the sheriff to recover a judgment for damages. Here the mortgagee did not take possession; but the mortgaged property, together with other property of the bankrupt estate, passed into the possession of the trustee. The other creditors filed their claims against the estate, and the same were allowed. The bank presented its claim, with the prayer that it be allowed and that its mortgage be recognized as a lien, thus seeking equitable relief.

By section 3396 of the Revised Statutes of Idaho of 1887 it is provided that:

"The right of a mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the district court by any person interested in so doing, for which purpose an injunction may issue, if necessary."

We have here a clear recognition, if not the creation, of a right upon the part of any "person interested" to question the validity of a mortgage. It is not apparent why a trustee in bankruptcy, having possession of the bankrupt estate, and charged with the duty of caring for and distributing it, is not "interested," within the purview of this statute, or why a creditor, whose claim against the estate has been presented and allowed, has not so connected himself with the mortgaged property that he may be considered in privity therewith. The reasons for the general rule that a creditor at large cannot attack a chattel mortgage are suggested in the following passage, quoted from the opinion in Neustadter Bros. v. Doust, 13 Idaho, 617, 92 Pac. 978. The court, in referring to the plaintiff, says:

"He has commenced no action against Lang and Wunderlich [the mortgagors], has never attached this or any property, and in no way connects his right, interest, or claim with the property that he seeks to restrain the sheriff from selling, and no assurance is given when he will prosecute his action, or that he will ever obtain a judgment against them."

Here the mortgaged property, being a part of the bankrupt estate, is in the possession of the court. The trustee, as an officer of the court, holds it in trust for distribution to those who are legally entitled thereto. The creditors have been brought into court, and have asserted their rights by presenting and having approved their claims against this trust fund. The mortgagee has come affirmatively asserting its lien and appealing to the court for equitable consideration. Upon principle, why should not the trustee and creditors be heard to object to the va-

lidity of the mortgage, equally with one who has procured a judgment at law or has caused the property to be attached?

Independent of a provision of law like that contained in section 3396 of the Idaho Revised Statutes of 1887, the Supreme Court of California, in Ruggles v. Cannedy, 53 Pac. 911, reached the conclusion that under the state insolvency act a creditor, whose claim against the insolvent estate has been allowed, may sue to set aside a mortgage which has not been seasonably recorded, although such creditor has acquired no lien by judgment or attachment, and also that an assignee in insolvency, after the claims of creditors have been allowed, may institute on their behalf an equitable action to avoid the mortgage. The decision is well considered, and its reasoning is equally applicable to the creditors and trustee in bankruptcy.

By section 3386 of the Revised Statutes of Idaho of 1887 it is provided that a mortgage of personal property "is void as against creditors" unless it is executed with certain formalities, and is "recorded in like manner as grants of real property." The statutes of New York contain a similar provision. In the Matter of the New York Economical Printing Company, 110 Fed. 514, 49 C. C. A. 133, the Circuit Court of Appeals of the Second Circuit, upon the assumption that, under the rule prevailing in the courts of New York, a nonfiled chattel mortgage was void only as to judgment creditors or creditors having acquired some lien, and not as to general creditors, held that a trustee in bankruptcy could not, upon behalf of the general creditors of the estate, assert the invalidity of such a mortgage. In a subsequent decision by the Court of Appeals in that state (Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885), it was considered that the conclusion reached in the Economical Printing Company Case was due to a misconception of the established rule, which, accurately stated, is that a nonfiled mortgage is void as to general creditors, but it cannot be attacked until they are in a position to seize the mortgaged property by virtue of a judgment, attachment, or otherwise. It being a question of local law, the state court declined to follow the Economical Printing Company Case, and held that a trustee in bankruptcy was in position to attack a nonfiled mortgage. And more recently in the Matter of Gerstman, Bankrupt, 157 Fed. 549, the Circuit Court of Appeals, having under consideration the right of a trustee to attack such a mortgage, uses the following language:

"As we are bound to follow the construction of the state law adopted by the highest court of the state, the case of Economical Printing Company must be held to have gone too far in deciding that a nonfiled mortgage is valid as to general creditors. Regarding the mortgage as void, though not subject to attack, because there were no judgments against the bankrupt at the time of the adjudication, the question is whether the trustee is in a position to attack it. We think he is."

It is not thought that the rule in Idaho should be held to be different from that of New York. In case of an unfiled mortgage the statute itself in terms declares that it is void, not as against "attaching creditors," but as against "creditors." By construction the courts add that the invalidity can be asserted only by a creditor who in some way connects himself with the property. Here, as we have seen, the requisite

privity exists. See, also, In re Garcewich, 115 Fed. 87, 53 C. C. A. 510; In re Standard Telephone & Electric Light Company (D. C.) 157 Fed. 106; In re Perkins (D. C.) 155 Fed. 237.

With much confidence the bank relies upon the doctrine of Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, and York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. By these decisions, undoubtedly, the rule is established or recognized that in the absence of fraud the bankruptcy act does not confer upon the trustee power to attack a mortgage upon behalf of a general creditor who has secured no lien. In so holding, however, the court defines only the authority conferred upon the trustee by the federal statute. It is not to be inferred that it would be incompetent for the state Legislature in terms to declare that a nonfiled chattel mortgage shall be void as to trustees in bankruptcy, or for the state courts, interpreting existing local law, to declare such a mortgage, or a mortgage permitting the mortgagor to sell the mortgaged property and apply the proceeds thereof to his own use, void as against trustees in bankruptcy and creditors whose claims have been presented and allowed. Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; In re Gerstman (C. C. A.) 157 Fed. 549.

But under the bankruptcy act alone it is thought the trustee has authority to attack this mortgage. As stated in Thompson v. Fairbanks, the rule is:

"Under the present bankruptcy act the trustee takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. In re Garcewich, 115 Fed. 87, 53 C. C. A. 510."

This language is substantially quoted from the opinion in the Garcewich Case, where it is also said that:

"It is not the meaning of the present act that the institution of proceedings in bankruptcy should secure immunity to the title of fraudulent vendors or mortgagors, and deprive creditors of a resort to property out of which, but for the proceeding, they could have satisfied their claims."

And again:

"Even in the case of a chattel mortgage, when it is understood between the mortgagor and the mortgagee that the mortgagor may sell the chattels in his business and use the proceeds, the transaction is fraudulent at law as against the creditors of the mortgagor."

It is not unreasonable to assume, therefore, that in the Thompson-Fairbanks Case the court considered an understanding "between the mortgagor and the mortgagee that the mortgagor may sell the chattels in his business and use the proceeds" as constituting a "case" so "affected by fraud" as to remove it from the class of instruments against which the trustee could assert only such objections as could have been interposed by the bankrupt himself. In other words, the general rule is applicable only to "cases unaffected by fraud," and a mortgage accompanied with such an agreement is not such a "case." But here the mortgage not only has the vices denounced in the Garcewich Case and

in Ryan v. Rogers, but there is the understanding to withhold it from the record. Such an agreement is evidence of fraudulent intent. Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164; In re Doran, 154 Fed. 467, 83 C. C. A. 265; Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080. In the last case the court, with apparent approval, quotes from a Kentucky decision to the effect that such an agreement, "if not directly within that class of acts which the law denominates 'constructive frauds,' approximates so nearly to it that the party avowing himself a participant in such transaction ought not to receive the countenance or aid of the chancellor in enforcing any lien or claim growing out of it as against a third person."

In view of this feature of the transaction, it is clear that the trustee has the authority to question the validity of the mortgage under the rule laid down in Thompson v. Fairbanks. See, also, Security Warehousing Company v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, and First National Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967. In the latter case it is said:

"The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt is not applicable to liens, which, although valid as to the bankrupt, are invalid as to creditors."

It follows that the mortgage must be held to be void, and, in accordance with the written stipulation of the parties filed herein, the referee is directed to allow and recognize the claim of the First National Bank of Grangeville as an unsecured claim, as of the date it was filed.

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## MEEKER et al. v. LEHIGH VALLEY R. CO.

(Circuit Court, S. D. New York. June 6, 1908.)

1. JURY—TRIAL BY JURY—NATURE OF ACTION.

An action by a shipper, authorized by the Sherman anti-trust law (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), to recover treble damages to his business and property by reason of a conspiracy and combination by interstate carriers to charge excessive and unlawful rates for the shipment of coal from the mines to tide water, was an action at law as to which the parties were entitled to a jury trial.

[Ed. Note.—Right to trial by jury in federal court, see notes to O'Connell v. Reed, 5 C. C. A. 603; Vany v. Peirce, 26 C. C. A. 528.]

2. CARRIERS—RATES—INTERSTATE COMMERCE LAW—COMPLIANCE.

Congress by Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), having established the Interstate Commerce Commission with plenary power to determine in the first instance what rates for the transportation of interstate commerce are legal and reasonable and what are illegal and excessive, it will be presumed, in the absence of averments to the contrary, that every interstate carrier has complied with the law by establishing, printing, filing, publishing, and posting them; and hence no action can be maintained unless the complaint alleges that resort has been had to the Interstate Commerce Commission and the rate charged and paid declared excessive or unreasonable.

3. SAME—PLEADING.

In an action for injuries to complainant's property and business by an alleged combination and conspiracy between interstate railroads controlling the shipment of anthracite coal, an allegation that plaintiffs' loss resulted from their being obliged to pay "unlawful rates" for the transportation of coal due to such combination and conspiracy was not effective to allege that the rates charged had been declared unlawful by the Interstate Commerce Commission.

[Ed. Note.—Jurisdiction of federal courts of suits under interstate commerce act, see note to Bailey v. Mosher, 11 C. C. A. 318.]

4. SAME—STATUTES—SCOPE.

The Sherman anti-trust law (Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), does not give any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates to interstate carriers, such relief being provided for by the interstate commerce act.

5. PLEADING—CONCLUSIONS OF LAW—DEMURRER.

An allegation in a complaint against an interstate carrier that plaintiffs had been obliged to pay excessive and unlawful rates without any facts to support the same was a statement of a mere conclusion of law, which was not admitted by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 527.]

At Law.

Demurrer to complaint in action to recover damages alleged to have been sustained by plaintiffs by reason of an alleged conspiracy and combination to raise the charges for the transportation of anthracite coal between the mines in Pennsylvania and tide water in New York and New Jersey, and to monopolize the trade and commerce in anthracite coal between said states, and obtain control of all the coal in Pennsylvania, and to raise the market price therefor and to compel independent shippers (of whom plaintiffs are one) who should continue to compete to pay such excessive rates for the transportation of anthracite coal as to prevent such independent shippers from competing with such conspirators at any profit.

Shearman & Sterling, for plaintiffs.
Alexander & Green (Frank H. Platt, of counsel), for defendant.

RAY, District Judge. The bill of complaint alleges a conspiracy and combination between certain parties to do certain acts, and charges that it was a combination and conspiracy in restraint of trade and commerce among the several states which is illegal and in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and known as the "Sherman Anti-Trust Act," and that, "by reason of the said conspiracy and combination, the plaintiffs have been injured in their business and property by the defendant to their damage in the sum of $250,000," and demand judgment for three times that sum, viz., $750,000.

The complaint is more specific than above stated in its allegation of the damage sustained by reason of the conspiracy and combination and its execution, and says:

"(12) Pursuant to the said conspiracy and combination to obtain absolute control of the market for anthracite coal, and to that end to make the rates

of transportation prohibitory to independent operators and shippers, the anthracite companies had previously increased the percentages of the tide water price which they paid to the owners of coal mining properties for their coal, and, as a condition for so doing, they had also exacted from all such owners perpetual contracts for the delivery to the anthracite companies or companies controlled by them of all their coal. In this manner the anthracite companies acquired the control of nearly all the anthracite coal mined, and substantially increased the market prices therefor at the mines, but they did not obtain exclusive control.

"(13) As a result of the foregoing unlawful acts, in which the defendant participated, the independent dealers and shippers were obliged to pay for the larger sizes of coal, at the mines, a price representing 65 per cent. of the tide water market prices for the larger sizes and a price correspondingly larger for the smaller sizes, and they were required by the anthracite companies to pay on the larger sizes of coal more than 35 per cent. of the tide water price for the transportation of such coal to New York tide water for the first few years, and correspondingly higher rates on the smaller sizes, and they are required to pay about that percentage under the present prices of coal; so that, after allowing for wastage incidental to handling and the expenses connected with the sale and delivery of the coal to the consumers, the independent shippers have been unable to ship coal to the New York market at the said rates, except at a loss, and substantially all of them have been forced out of business at Perth Amboy except the plaintiffs, and the plaintiffs have been obliged to pay excessive and unlawful rates upon all coal shipped by them to tide water over the lines of the defendant. While the tariff rates thus prescribed also made it impossible for the coal companies controlled by the anthracite companies to make any profit, it has made no difference in the general result to the anthracite companies, as what their coal companies thus lost the anthracite companies gained, and it is a mere matter of bookkeeping between the respective parent and puppet companies."

The plaintiffs do business under the firm name of "Meeker & Co.," and are engaged in the business of buying, shipping, and selling anthracite coal, and since 1898 have been shipping large quantities thereof over the lines operated by the defendant from mines in Pennsylvania to tide water at Perth Amboy, N. J., and thence to the New York market. The Lehigh Valley Coal Company, a Pennsylvania corporation, is engaged in the same business at the same places. The defendant company owns and controls its entire capital stock, and the greater part of the coal transported by it since 1899 was owned by the coal company. Eight different railroads transport coal from the anthracite region to New York Harbor. These companies, directly or indirectly, own coal lands and largely control the market for anthracite coal in the Eastern market. These, except the Pennsylvania Railroad Company, the complaint designates as the "Anthracite Companies." Subdivision 6 of the complaint alleges the conspiracy as follows:

"(6) In or about the year 1899 the anthracite companies, including the defendant, conspired and combined together to raise the charges for the transportation of anthracite coal between the mines in Pennsylvania and tide water in New Jersey and New York, and to monopolize the trade and commerce in anthracite coal between the said states and thereby to obtain control of substantially all the anthracite coal in Pennsylvania and to raise the market price therefor, especially in the New York market, and to compel such independent shippers as should continue to compete with them, to pay such excessive rates for the transportation of anthracite coal as to prevent such shippers from competing with them at any profit; and they have ever since maintained such conspiracy and combination."

Subdivision 8 reads as follows:

"(8) Any charge made by the defendant for transporting anthracite coal from the breakers, at the said mines or collieries, to tide water, in excess of the difference between the market price at tide water and a sum representing the price prevailing at the breakers, together with the expenses of selling the coal and a reasonable allowance for interest and profits is an unreasonable and excessive and unlawful charge, because it does not permit independent shippers, including the plaintiff, to sell coal except at a loss, and has resulted in enabling the anthracite companies, owning, as they do, the capital stock of their subsidiary coal companies, to drive nearly all independent shippers out of the market; for the excessive rates paid by the subsidiary coal companies are received by the anthracite companies, respectively, and the apparent losses to the coal companies are consequently only nominal as to the anthracite companies."

Subdivision 11 reads as follows:

"(11) The said anthracite companies adopted the said recommendations made by the said committee, and in further execution of the said conspiracy and combination, and for the purpose of raising the rates for the transportation of coal and making it impossible for all independent shippers or middlemen, including the plaintiffs, to continue in business and of thus insuring their absolute control of the anthracite coal market from August, 1901, the anthracite companies, including the defendant, which prior to 1901, as hereinbefore alleged, had not charged more than the difference between the market price of the coal at the breakers and the price at tide water for transporting coal, although they had been publishing nominal tariff rates, began to exact from all independent shippers a fixed charge per ton for carrying coal to tide water in excess of such difference in prices, amounting to $1.55 per ton for prepared coal, $1.40 per ton for pea coal, $1.25 per ton for buckwheat coal, and $1.10 for coal smaller than buckwheat coal; but during the said period any charge made by the defendant for transporting anthracite coal between the said points in excess of $1 per ton constituted an unreasonable and excessive charge, and the said charges to the plaintiffs were not only far in excess of the value of the services rendered and far more than the companies had previously received for such service, but they were in excess of the difference between the prices realized for the coal at New York tide water, after allowing for the expenses of selling and the prices paid for it at the mines, and constituted an excessive, unreasonable, and unlawful charge for the said services."

I find in this complaint no suggestion that plaintiffs have purchased any coal at an increased price because of the conspiracy or alleged illegal combination. The damages charged are the payment of an unreasonable and excessive charge or rate by the defendant for transporting coal made so by the conspiracy and combination aforesaid; that is:

"And the plaintiffs have been obliged to pay excessive and unlawful rates upon coal shipped by them to tide water over the lines of the defendant."

This is an action at law, and the parties are entitled to a jury trial. Concede the combination and the conspiracy, the "purpose of raising the rate for the transportation of coal," and "to raise the charges for the transportation of anthracite coal," and that it has been done, and that plaintiffs have paid such increased rates, is a cause of action alleged? There is no allegation that the Interstate Commerce Commission has examined into the matter and found, declared, or adjudged the rates of transportation complained of and charged by defendant company and paid by plaintiffs to be either illegal, unreason-

able, or excessive. It is not charged that the matter has been brought to the attention of that commission in any way. There is no averment in the complaint that the defendant and all the anthracite companies did not establish, publish, and file their rates for transporting coal as required by law. The averment is that they did publish nominal tariff rates.

The Sherman anti-trust law, so called, declares (section 7) that:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The plaintiffs must have been injured in their business or property, and the injury sustained must be charged in the complaint by proper averment. Without injury the action cannot be maintained. Unless there be an averment of injury, no cause of action is stated. Here the allegation of injury is:

"The plaintiffs have been obliged to pay excessive and unlawful rates upon all coal shipped by them to tide water over the lines of the defendant."

The compulsory payment of excessive and unlawful rates would, of course, constitute an injury to the plaintiffs in their business and property. But does this complaint sufficiently charge the payment of excessive and unlawful rates? It is conceded that these rates paid by the plaintiffs to the defendant company were paid for the transportation of interstate commerce, coal transported by the defendant from one state to another. Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), to regulate commerce, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), establishes the Interstate Commerce Commission, authorizes that commission to inquire fully into the management of the business of all common carriers subject to the provisions of the act—all engaged in interstate and foreign commerce—obtain from them full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created. Section 13 provides for complaints by any person, firm, etc. Section 15 provides as follows:

"That the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the commission find the same to exist, and shall not thereafter publish, demand, or

collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission or be suspended or set aside by a court of competent jurisdiction."

Section 6 provides:

"That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules and regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act."

While there are other pertinent sections and paragraphs contained in the act, I do not think it necessary to recite or refer to them.

It seems to me very plain that the Congress of the United States, having full power in the premises, has established this commission, and conferred upon it plenary power to determine, in the first instance at least, what rates for the transportation of interstate commerce are legal and what are illegal; that is, what rates are proper and just and reasonable and what are improper, unjust, excessive, and consequently, when so declared, illegal. It also seems clear to me that all complaining shippers are relegated to this commission, in the first instance at least, for the settlement and determination of the propriety, justice, fairness, and reasonableness of the rates established, filed, published, and posted. And I think it is presumed, in the absence of averments to the contrary, that every common carrier engaged in interstate commerce has complied with the law by establishing rates and printing, filing, publishing, and posting them. In Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426, 439, 440, 441, 448, 27 Sup. Ct. 350, 355, 51 L. Ed. 553, the court held:

"The interstate commerce act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discrimina-

tions and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates; and, consistently with the provisions of that law, a shipper cannot maintain an action at common law in a state court 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."

At pages 439–441 of 204 U. S., pages 354 and 355 of 27 Sup. Ct. (51 L. Ed. 553), the court said:

"When the act to regulate commerce was enacted, there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or preference given by the carrier to another. Parsons v. Chicago & Northwestern Ry., 167 U. S. 447, 455, 17 Sup. Ct. 887, 42 L. Ed. 231; Interstate Commerce Commission v. Baltimore & Ohio R. R., 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 494, 17 Sup. Ct. 896, 42 L. Ed. 243. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for, if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the commission, would give rise to a change of the schedule rate, and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question.

Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises. This must be, because, if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

And finally, at page 448 of 204 U. S., page 358 of 27 Sup. Ct. (51 L. Ed. 553), the court declared:

"Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce."

While that case arose in the state courts and came on appeal into the Supreme Court of the United States, I do not understand that it makes any difference whether the action be brought in the courts of a state or in the courts of the United States. The underlying and controlling principle is found in the last part of the opinion just quoted. It follows that this demurrer must be sustained, unless it is unnecessary to allege in the complaint that resort has been had to the Interstate Commerce Commission and the rate charged and paid declared excessive or unreasonable.

The Sherman act of July 2, 1890, "An act to protect trade and commerce against unlawful restraints and monopolies," gives to the injured party a right of action in any Circuit Court of the United States to any person or firm "who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by such act, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * is hereby declared to be illegal." So "every person who shall monopolize, or attempt to monopo-

lize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor," etc. This act does not declare or purport to declare excessive or unreasonable or unjust rates for the transportation of interstate commerce illegal. If, however, there is a combination, contract, or conspiracy to raise rates, and charge and exact excessive and unreasonable or unjust or unjustly discriminatory, etc., rates for the purpose of restraining trade or commerce (see sections 1 and 3 of the act), or such combination has that effect, then undoubtedly the combination or contract is illegal. But are the rates charged and paid illegal for the reason the combination is illegal? This act must be read and construed in connection with the act to regulate commerce as amended to date. It is the latter act that deals specifically with rates, charges for the transportation of coal, etc., among the several states, from the one state to another, and, as seen, confers on this administrative commission power to ascertain and determine what rates are unjust, unreasonable, or excessive and consequently illegal. When it has acted on complaint made and declared a rate established by a common carrier engaged in interstate commerce unjust, excessive, or unreasonable, it is determined by and in the appropriate tribunal having jurisdiction and plenary power that such rate is illegal. When this is done, there is a proper basis for the recovery of damages in the District or Circuit Court of the United States under the provisions of section 9 of the act based on the compulsory payment of excessive and unlawful rates. This is the true construction and meaning of the act as declared by the Supreme Court of the United States in Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 437, 438, 27 Sup. Ct. 356, 51 L. Ed. 553, where the court, after reciting the powers of the commission, the duties and obligations of carriers as to rates, and the control of the commission over them, says:

"Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. * * * In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of."

Is the allegation in this complaint that "the plaintiffs have been obliged to pay excessive and unlawful rates upon all coal shipped by them to tide water over the lines of the defendant" equivalent to an averment that the rates charged and paid have been declared excessive, or unjust, or unreasonable by the Interstate Commerce Com-

mission? A mere allegation that such rates were "excessive" is not. But the allegation is that the plaintiffs were obliged to pay "unlawful rates." In the minds of the plaintiffs and the pleader in making this allegation the "unlawful" character of the rate may be because of the combination or conspiracy, or because of its increase over former rates, etc. The averment does not necessarily charge or import that the rate established by the anthracite companies, including defendant, and paid by the plaintiffs, has been declared excessive by the Interstate Commerce Commission and consequently declared unlawful.

If it be true, and I hold it is, that a resort to the Interstate Commerce Commission is a condition precedent to the maintenance of an action in the Circuit Court of the United States to recover damages solely occasioned by the payment of excessive, unjust, or unreasonable rates for the transportation of interstate commerce, even when the exaction of such excessive rates was the result of a combination or conspiracy made unlawful by the "Sherman anti-trust law," then the complaint in such an action to recover such damages solely must aver that the rates charged and exacted have been declared excessive or unreasonable or unjust by the Interstate Commerce Commission. Until that is done, the rates established, filed, published, and posted must be regarded as legal rates or lawful rates. Whether or not that has been done is an issuable fact, and the defendant has the right to be informed whether the plaintiff will attempt to prove that the rate has been condemned by the Interstate Commerce Commission. If alleged to have been so condemned, the defendant may show that the proceeding was irregular, that he did not have notice or an opportunity to be heard, etc. The plaintiff might show, under proper allegations, that the rate exacted was illegal or unlawful, because in excess of that established, filed, published, and posted, or that the rate exacted was illegal, or unlawful, because in excess of that fixed by the commission, or because no rate at all had been established, filed, and published as required by law. In either case the rate would be unlawful. Under the act for the regulation of commerce, the carrier has no right to charge or collect any rate whatever until it has been established, filed, and published. So the carrier has no right to exact a higher rate than that fixed in the filed and published schedules, and, if that has been held to be excessive, or unjust, or unreasonable, then the carrier cannot exact that. Should not the complaint state the ground on which it is claimed the rate paid was an unlawful rate? Facts showing it was an unlawful rate? I think this clearly so. Hieronymus v. N. Y. Nat. L. Assn., 107 Fed. 1005, 46 C. C. A. 684, affirming 101 Fed. 12; Williamson v. Beardsley, 137 Fed. 467, 469, 69 C. C. A. 615; W. H. Thomas & Son v. Barnett (C. C.) 135 Fed. 172, 176; St. Louis R. Co. v. Johnston, 133 U. S. 566, 577, 10 Sup. Ct. 390, 33 L. Ed. 683; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133, affirming (C. C.) 41 Fed. 502, 8 L. R. A. 268; England v. Russell (C. C.) 71 Fed. 818. I do not think the Sherman anti-trust law, so called, gives any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates. I do not think that this complaint states any cause of action whatever under the provisions of that act. The cause of action for such damages as

are alleged here is given by the act to regulate commerce. But, treating the allegations of the complaint to the effect that this was a combination and conspiracy in restraint of trade and commerce among the several states, and that by reason thereof the plaintiffs have been injured in their business and property by the defendant in the sum of $250,000 as surplusage, see American Union Coal Co. v. Pennsylvania R. Co. (C. C.) 159 Fed. 278, 279, and, treating the action as really under the provisions of the act to regulate commerce—"Interstate Commerce Act"—no cause of action is stated. The allegation that "plaintiffs have been obliged to pay excessive and unlawful rates" is the statement of a mere conclusion of law with no facts to support it. It is a familiar rule that such allegations are not admitted by a demurrer.

The plaintiff says that the complaint charges, and the defendant admits by the demurrer, that by reason of the combination and conspiracy, the plaintiffs were compelled to do business "at a loss." Concede this to be so, still the action is for damages, and the only loss or injury in business or property is stated to be the payment of excessive and illegal rates for the transportation of coal from Pennsylvania into New Jersey; that, therefore, he made no profit and even lost money to the extent of the excessive charge made and exacted over a reasonable rate. Hence no damages to business or property is alleged except in the payment of "excessive rates" or "unlawful rates," and, as this is a mere conclusion not accompanied by the statement of any facts showing the rates paid to be either unlawful or excessive, the complaint does not state facts sufficient to constitute a cause of action, and the demurrer is sustained, with costs. The plaintiffs may file and serve an amended complaint within 30 days after being served with a copy of the order to be entered pursuant hereto on payment of such costs.

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## COHEN v. UNITED STATES.

(Circuit Court, N. D. California. July 18, 1908.)

No. 13,544.

1. EMINENT DOMAIN—"TAKING OF PROPERTY" AS GROUND FOR COMPENSATION—DIVERSION OF WATERS OF STREAM.

   The diversion of the water of a nonnavigable stream by the United States, so as to deprive a landowner of its natural flow adjacent to and upon his premises, for the purpose of improving the navigation of other navigable waters, is a "taking of property" of such landowner, within the meaning of the fifth amendment to the Constitution, which entitles him to just compensation therefor.

   [Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6852–6860; 7813.]

2. SAME—EVIDENCE OF DAMAGE.

   Evidence considered, and *held* not to sustain the claim of a landowner that her land received benefit from the water of a stream, which flowed only during the rainy season and overflowed her land in times of freshets, so as to entitle her to compensation from the United States for a diversion of such stream in improving the navigation of other waters.

3. WATERS AND WATER COURSES—RIPARIAN OWNERS—RIGHTS IN FUTURE ACCRETIONS.

A riparian owner has no vested right in future accretions, and cannot maintain an action for damages against one who lawfully obstructs or diverts a stream which has in the past carried and deposited such accretions from the lands of others, so that it will no longer do so.

Action to Recover Compensation for Diversion of Water Course.

J. J. Scrivner and Alfred H. Cohen, for petitioner.

Robert T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty., for the United States.

MORROW, Circuit Judge. This action was commenced January 29, 1904, under Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752). This act gives the Circuit Court of the United States concurrent jurisdiction with the Court of Claims of suits against the United States where the amount of the claim exceeds $1,000 and does not exceed $10,000. The action is based upon the claim of an implied contract for compensation for the value of a stream of water diverted from petitioner's premises by the United States in the improvement of Oakland Harbor.

The act of Congress approved March 3, 1873 (17 Stat. 566, c. 234), contained a provision for the survey and examination of San Antonio creek or estuary by the engineers of the army, under the direction of the Secretary of War, with a view to the improvement of Oakland Harbor. Under this authority the Board of Engineers made an examination and survey and reported a plan of improvement, which included the excavation of a tidal canal in Alameda county from the upper end of the estuary of San Antonio to San Leandro Bay, a distance of about 8,400 feet. The object of the canal was to carry a tidal current from San Leandro Bay into the estuary of San Antonio, and thus increase the tidal prism of the Oakland Harbor. The plan was approved by the proper authority, and the United States proceeded to condemn and acquire the land on the line of the proposed tidal canal. The improvement included also a subsidiary canal along a part of the northern or upper side of the main canal. The purpose of the subsidiary canal was to divert flood water that would otherwise empty into the canal from Sausal creek, a small unnavigable stream coming down from the hills to the north of, and from a direction at a right angle to, the canal, but which at the line of the canal turns to the east and empties into Brickyard slough, an arm of San Leandro Bay, navigable waters in which the tide ebbs and flows. The creek has about four or five square miles of watershed, and is a winter stream, carrying the rainfall in the immediate vicinity of its origin and course for a period of seven months in the year. During the remaining five months the bed of the creek is dry.

The work on the main canal was commenced by the United States in January, 1891, and was completed in March, 1903. The subsidiary canal was commenced in March, 1900, and finished in October, 1900. The main canal is a channel of 400 feet in width at the top and 300 feet at the bottom. It is 8 feet deep at low water and 14 feet deep at high water. The petitioner in this case is the owner of a tract of

land in Alameda county, containing 110 acres, lying to the south of the canal. The northern boundary of this tract extended along the line of the main canal a distance of about 1,970 feet. Along this boundary the line of the canal followed the course of Sausal creek and Brickyard slough. On February 9, 1903, the United States purchased from the petitioner two small tracts of land on the irregular line of the creek and slough for the purpose of giving the canal a uniform course. One of these tracts contained 2.16 acres and had a length along the line of the canal of 771.12 feet, and the other contained .54 acres and had a length along the line of the canal of 635.17 feet. Between these two pieces of land the boundary of petitioner's land had a line along the slough of 249.35 feet, which, being a satisfactory line for the canal, was not purchased. The total of these parts of the boundary line amounted to 1,655.64 feet, leaving approximately 315 feet of the boundary line of petitioner's land, in the northwest corner, along the line of Sausal creek. At this point the bend of Sausal creek is below the line of the canal. Petitioner claims that prior to the construction of these main and subsidiary canals the waters of Sausal creek were of great benefit and value to her lands; that they yearly brought down to and deposited upon her lands, adjacent to and through which said Sausal creek ran, gravel, silt, and alluvial earth; that the gravel was a merchantable article, and the silt was of great benefit to petitioner's lands, as it enriched the same and made them more fertile, and the overflow of the water was of great benefit to the land by reason of the natural irrigation which caused the same to produce green feed during the summer months for petitioner's horses, cattle, and other domestic animals.

The petitioner claims that by the diversion of Sausal creek she has been deprived of the use and benefit of 1,500 tons of gravel for each of the three years preceding the commencement of this action, making a total of 4,500 tons of gravel, of the value of $6,750; that but for the diversion mentioned the creek would have continued to deposit at least the same amount of gravel upon petitioner's land for all time, and that such deposit would, in the ordinary course of nature, have increased each and every year, and petitioner would have derived an annual benefit and revenue therefrom of $2,250; that but for the diversion mentioned the creek would have brought down and deposited upon the lands of petitioner, adjacent to and through which said creek ran, large quantities of silt and alluvial earth, which would have been of great benefit to the lands of petitioner, as it would have enriched the same and made them more fertile, and the overflow of said water would have been of great benefit to said lands, for the reason that it was a natural irrigation, which caused the same to produce green feed during the summer months for petitioner's horses, cattle, and other domestic animals; that the value of said deposits upon said lands is at least $5,000; that the value of the water of said Sausal creek so taken and appropriated by the United States is the sum of $5,000. Petitioner claims that the detriment to her property caused by the diversion of Sausal creek, as alleged, amounts to the sum of $24,000; but petitioner waives the excess over $10,000, and claims

compensation in the latter sum. The answer of the United States denies all the material allegations of the petition.

In Gibson v. United States, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996, the Supreme Court held that riparian ownership on navigable waters was subject to the obligation to suffer the consequences of an improvement of the navigation under an act of Congress passed in the exercise of the dominant right of the government in that regard, and damages resulting from the prosecution of such improvement could not be recovered in the Court of Claims. In that case the object of the petition was to recover damages because of the construction of a dike by the United States in the Ohio river at a point off Neville Island, about nine miles west of the city of Pittsburg. The dike was constructed for the purpose of concentrating the flow of the Ohio river. The petitioner was the owner and in possession of a tract of land on this island in a high state of cultivation, from which she shipped strawberries, raspberries, potatoes, melons, apples, and peaches to the cities of Pittsburg and Allegheny, Pa. The petitioner's farm had a frontage of 1,000 feet on the main navigable channel of the Ohio river, where she had a landing which was used in shipping the products from and the supplies to her farm. This landing was the only one on petitioner's farm from which she could ship the products from and supplies to her farm. The construction of the dike by the United States had the effect of substantially destroying the landing of the claimant, by preventing the free egress and ingress to and from said landing on and in front of claimant's farm to the main navigable channel of the river. The Supreme Court held that there was no physical invasion of petitioner's property, and, referring to the fifth amendment to the Constitution of the United States, providing that private property shall not "be taken for public use without just compensation," said:

"The damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequences of the lawful and proper exercise of the governmental power."

The judgment of the Court of Claims that the petitioner was not entitled to recover, and dismissing the petition, was affirmed.

In Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126, the Supreme Court held that the prohibition in the Constitution of the United States against the taking of private property without just compensation had no application to the case of an owner of land bordering upon a public navigable river, whose access from his land to navigability is permanently lost by reason of the construction, under authority of Congress, of a pier resting on submerged lands away from, but in front of, his upland, and which pier was erected by the United States, not with any intent to impair the right of riparian owners, but for the purpose only of improving the navigability of such river.

In Mills v. United States (D. C.) 46 Fed. 738, the government, for the purpose of improving the navigability of the Savannah river, erected a dam, which raised the level of the river, and this prevented the owner of adjoining rice fields from draining his canals into the river between high and low water marks, as he had previously done, but did not ac-

tually invade his premises. It was held that the injury to the rice fields did not constitute the taking of private property within the meaning of the constitutional prohibition against the taking of private property for public use without just compensation.

In United States v. Lynah, 188 U. S. 445, 23 Sup. Ct 349, 47 L. Ed. 539, the petitioner brought suit in the Circuit Court for the District of South Carolina to recover of the United States the sum of $10,000 as compensation for certain real estate which it was alleged had been taken and appropriated by the United States. The taking and appropriation consisted in building and maintaining in and across the Savannah river certain dams, training walls, and other obstructions obstructing the natural flow of said river in and along the natural bed, and so raising the level of said water above said obstructions, and causing its water to be kept back and to flow back and be elevated above its natural height in the natural bed. By the raising of the level of the river by these obstructions the water thereof had been backed up against the embankment on the river, and had been caused to flow back upon and in petitioner's plantation above the obstruction, and had actually invaded said plantation, directly raising the water thereon about 18 inches, which it was impossible to remove therefrom, and by reason of which the plantation had been practically destroyed and rendered of no value. The Supreme Court held that the improvement of the Savannah river in this case amounted to the taking of petitioner's property within the scope of the fifth amendment, and that the government was under an implied contract to make just compensation therefor.

The present case is distinguished from the foregoing cases in the fact that Sausal creek is not a navigable stream and the construction of the canal by the government was not for the benefit or improvement of that stream, but for the improvement of navigable waters in another and different locality, and it is claimed by the petitioner that the injury she suffered was the taking of her private property (the waters of Sausal creek) for a public use, and that for the taking she is entitled to just compensation. This distinction between acts of the government damaging private property on a navigable stream in the work of improving its navigability and the taking of private property connected with an unnavigable stream for public use in improving navigable waters elsewhere was recognized when the court disposed of the demurrer to the complaint, and is now referred to in considering the case on its merits, for the purpose of making clear the precise character and scope of petitioner's cause of action.

The government has diverted the waters of Sausal creek at the point where it enters the subsidiary canal, and in effect has taken and appropriated the stream below that point, and the petitioner has been deprived of its flow adjacent to and upon her premises. This is a taking, within the constitutional provision. But the question remains to be determined, what was the value of the waters of this creek at the time of their diversion, for which the petitioner is entitled to just compensation?

The petitioner's cause of action is based upon the claim of riparian ownership and appropriation of the waters of Sausal creek. This

claim is, however, subject to an appropriation made by the Contra Costa Water Company in 1874 or 1875, when it placed a dam in the creek at a point about 2½ miles from the line of the present canal. This dam the water company has maintained ever since. The pipe used by the water company for diverting the water of the creek is a seven-inch pipe. How much water is impounded and diverted by this pipe is not disclosed by the evidence, but it must necessarily carry the first flow of the winter rain and the last flow of water in the spring. The water that reached and overflowed petitioner's lands after 1874 or 1875, and prior to the diversion of the creek in the year 1900, was, therefore, not the flood waters of the entire creek, but the somewhat lesser volume after the flow of the creek had been diminished by the water company's appropriation. The evidence as to the value of this flood water to the land of the petitioner at the time of its diversion is conflicting. There was evidence on the part of the petitioner that it was of value for the silt it brought down and deposited on petitioner's land and for the wetting of the land, which caused late feed for cattle. William G Cohen, a son of the petitioner and one of her principal witnesses, testified that Sausal creek entered petitioner's land at a point indicated on a map introduced in evidence; that from this point the creek formerly ran through petitioner's premises until it reached Brickyard slough, but to obviate the tearing and ripping of the water at flood times they dug a ditch, a continuation of Sausal creek, from the petitioner's property, through property belonging to another party, and then back to petitioner's property lower down. He says this must have been in the 70's. The last grain crop was in the 70's. Prior to that time the witness says they had two dams in the creek to divert the water over petitioner's land, but after that time they did not have the dams, and as a result they did not have the benefit of the late irrigation, and the only overflow of the creek since that time has been when they have had freshets.

Testimony on behalf of the United States was that this overflow water was of no benefit to petitioner's land. The weight of evidence was that this flood water came at the wrong season of the year. It came in the winter, when it had no value for irrigation, and did not come in the summer, when it would have been of value. When the water did come, the land needed drainage, and not irrigation; furthermore, that petitioner's land has suffered no depreciation in value by reason of the diversion of the creek. From this evidence I am unable to find that the water of Sausal creek had any value to the petitioner at the time of the diversion, either for irrigation or for domestic purposes, or for the enrichment of the soil by deposit of silt. With respect to that phase of petitioner's cause of action there must, therefore, be a finding in favor of the defendant.

The next element in petitioner's cause of action is the habit of the water of Sausal creek to carry and deposit gravel during the rainy season in the bed of the creek adjacent to petitioner's premises. This gravel appears to have been washed from the banks of the creek; but, as the land along the creek has become occupied by residences, the banks have been bulkheaded at a number of places, and the evidence shows that at the time of the construction of the canal this wash of

gravel down the creek had very materially diminished. But the first question to be determined is whether the petitioner is entitled to recover compensation for the loss of this gravel, whether the quantity be more or less.

The riparian owner has no vested right in future accretions. Western Pac. Ry. Co. v. Southern Pac. Co., 151 Fed. 376, 399, 80 C. C. A. 606. The riparian owner cannot have a present vested right to that which does not exist, and which may never have an existence. Taylor v. Underhill, 40 Cal. 471; Eisenbach v. Hatfield, 2 Wash. 236, 250, 26 Pac. 539, 12 L. R. A. 632. In Chicago, B. & Q. Co. v. Porter, 72 Iowa, 426, 34 N. W. 286, two railroad companies, the Chicago, Rock Island & Pacific and the Chicago, Burlington & Quincy, had constructed their tracks along the Des Moines river, below the ordinary high-water mark, under the authority of a law of the state. The lines were practically parallel with each other and about 80 feet apart. The defendants were the owners of the land which was bounded by the river at the point opposite the lines of the two railroads, and they proposed to erect and maintain a brick building upon lands made by accretions between the two railroads. The defendants were enjoined from building upon this land. The Supreme Court of the state held that:

"The lawful appropriation of the land by the Rock Island Railroad Company cut off accretions to defendants' land and established a line beyond which no right by accretions can be acquired."

In Lyons v. United States, 26 Ct. Cl. 31, 44, the plaintiff was the owner of a tract of land bordering on Rock creek, in the District of Columbia, an unnavigable stream. It seems that during freshets Rock creek overflowed plaintiff's land, and, moving slowly over the submerged portion, deposited there sand, which, when the waters receded, was sold for building purposes. The amount of this deposit depended upon the accidents of nature, and, of course, would be diminished if the current were swift. The contractors under the government, in sinking a shaft for an aqueduct above plaintiff's land, had deposited rock upon the shore of Rock creek in such a manner as to narrow the channel of the stream and increase the speed of the current, so that it carried the sand held in suspension beyond plaintiff's land, and deposits of sand were no longer made upon his land in times of freshets. The court, in stating the case, said:

"This plaintiff asks damages because the government has limited the effects of a freshet; and this on the ground that, while freshets are generally injurious and their prevention a benefit, in his case the reverse is true, as they cover his land with sand washed away from some one else's property higher up on the stream, and from the sale of this sand he derives a profit. * * * The projected Rock Creek Park and Zoological Gardens are to be laid out at no great distance above plaintiff's property. It is not improbable that in the course of the preparation of these improvements for public use the stream may be walled in or otherwise confined more strictly to its bed, and that the banks will be so protected as, if possible, to prevent washing. Would a riparian owner below find in such work a valid ground for claiming damages because deposits of sand were no longer made upon his land in time of freshet? So the deepening of the stream below plaintiff by a neighbor desirous of protecting his own land would tend to quicken the current above and carry the sand by plaintiff while held in suspension. There are many elements of uncertainty in a claim of this description. Its value depends upon the accidents

of nature, upon the legitimate and proper use of the stream both above and below plaintiff, and the natural use of their land by riparian owners above him, and we are of opinion that the use by the government of the stream does not injure plaintiff in any tangible property right."

It follows from these authorities that the riparian owner, having no vested right in future accretions, cannot maintain an action for damages against one who lawfully obstructs or diverts the stream carrying such accretions, so that such deposits are no longer formed adjacent to her premises.

It is contended, however, on behalf of petitioner, that she is not seeking compensation for the loss of gravel brought down by Sausal creek, but for the value of the stream for which use this is an element, and that the habit of the stream to bring gravel to her premises was evidence of such value. But this habit, as we have seen, was not fixed or stable. It depended upon conditions that were so uncertain that no value can be attached to the habit.

In my opinion Sausal creek had no value in this respect at the time of the diversion, either present or prospective, for which petitioner is entitled to recover compensation. Let the findings be prepared in accordance with this opinion, and a judgment entered accordingly.

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## THE MERRILL C. HART. THE A. C. CHENEY. THE SEMINOLE

(District Court, S. D. New York. March 6, 1908.)

1. COLLISION—ANCHORAGE GROUNDS—RIGHT OF NAVIGATION.

While an exclusive use of anchorage grounds is not allowed to anchoring vessels so as to exclude other vessels necessarily going over the grounds as from wharves which would not otherwise be available, nevertheless it is not intended that such waters may be used with the same freedom as unrestricted waters, but that vessels shall keep clear of the grounds so as not to collide with vessels properly anchored there, nor embarrass those properly using the waters for purposes of navigation in connection with anchoring. Both of these classes of vessels have a prior right to the use of such waters over those not necessarily there.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 88½, 89.]

2. SAME—LIGHTS—SAILING VESSELS IN TOW ALONGSIDE.

Rule 11 of the pilot rules, relating to the lights to be carried by barges and canal boats when towed alongside, do not apply to sailing vessels which are governed by article 5 of the statutory rules for rivers and harbors (Act June 7, 1897, c. 4, § 1, 30 Stat. 97 [U. S. Comp. St. 1901, p. 2877]).

3. SAME—ANCHORAGE GROUNDS—YACHT AND TUG WITH TOW ALONGSIDE.

A collision on the anchorage grounds in the Hudson river opposite Thirty-Fourth street in the evening between a yacht going down at a speed of 12 knots an hour and a schooner in tow alongside of a tug which were stationary *held* due to the fault of both, and each held for half damages, the yacht for lack of a proper lookout, for navigating the anchorage grounds at excessive speed, for attempting to pass vessels there with insufficient margin, for failing to stop and reverse and for turning to port instead of to starboard; the tug and tow, while properly on the anchorage grounds as the schooner was about to be placed in a tow, because a colored light was not exhibited on the schooner as required by the rules.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 102.]

In Admiralty. Suit for collision.

Wheeler, Cortis & Haight, for the Seminole.
Wing, Putnam & Burlingham, for the Merrill C. Hart.
Amos Van Etten, for the A. C. Cheney.

ADAMS, District Judge. This action arose out of a collision which took place on the 5th day of August, 1907, about 9:30 o'clock P. M. between the yacht Seminole and the schooner Hart, in tow of the tug A. C. Cheney, and the latter vessel, on the anchorage grounds in the North River about opposite 34th Street.

The original libel was filed by Robins, the owner of the Seminole, alleging that the Seminole was proceeding down the North River on the New Jersey side; that when off about 44th Street, New York, those in charge sighted two white staff lights bearing about two points on her port bow which afterward proved to be the lights of the Cheney; that the Hart was made fast to the port side of the Cheney; that the Seminole proceeded down the river directing her course well to the starboard of such lights; that the Cheney thereafter veered toward the New Jersey shore, crowding the Seminole, whereupon the latter blew a signal of one whistle and ported; that an answer of two short blasts was received from the Cheney followed immediately by two more blasts; that under her port wheel the Seminole swung toward the New Jersey shore and away from the tug, but the tug swung with the schooner more and more toward the New Jersey shore and the schooner, which projected beyond the bow of the tug, finally collided with the Seminole, her jib boom striking the Seminole's fore mast, the bowsprit carrying away the Seminole's davits and port boats, and the bow of the schooner striking the Seminole's hull on the port side slightly aft of amidships. It is further alleged that the Cheney was in fault: (1) in that she attempted to cross the course of the Seminole; (2) in that she made no proper or intelligible reply to the Seminole's whistle and did not co-operate in the manœuvre indicated by the Seminole's whistle; (3) in that having the Seminole on her starboard hand, she failed to keep out of her way; (4) in that she had no proper lookout; (5) in that she took no proper and timely means to avoid collision; and that the schooner was in fault: (1) in that she carried no lights; (2) in that she had no proper lookout; (3) in that she took no proper and timely means to avoid collision.

Damages were claimed in the sum of $20,000.

The Hart duly answered and filed a libel against the Seminole, alleging that on the day in question, she was lying at anchor on the anchorage grounds off Weehawken and was taken in tow by the Cheney to be placed in a river tow, which was made fast to the Weehawken stake boats, to be towed to Yonkers; that the tide at the time was high water slack and the weather clear with a light south wind; that the Hart was made fast to the starboard side of the Cheney; that the mate of the schooner was forward acting as lookout; that the tug and schooner circled around below the tow and started up the river; that when the tug and schooner had reached a point on the

anchorage grounds somewhat below the upper stake boat, the tug starboarded her wheel and proceeded slowly westward to the tow; that while engaged in this manœuvre the Seminole came down the river at a high rate of speed and struck the schooner on the starboard bow, damaging her to the extent of $2,500. The Hart alleged that the Seminole was solely in fault in that she was not in charge of a competent master; had no lookout properly stationed and attending to his duties; was proceeding at an excessive rate of speed; did not keep off the anchorage grounds; did not give proper and timely signals to the Cheney, and did not stop and back or do anything to avoid collision.

The Cheney also duly answered and filed a libel against the Seminole, alleging that the Cheney made fast to the Hart, which was then lying at anchor off Weehawken in the North River, taking the schooner upon her starboard side for the purpose of placing her in a tow which was then making up upon the anchorage grounds at and near the stake boats, which are just below the Weehawken ferry of the West Shore railroad; that the tug and schooner then proceeded to a point near a stake boat of the Cornell Steamboat Company's towing line (the owner of the Cheney) and at that time two tows were making up consisting of tugs with vessels in tow, such tows headed down the river; that while the tugs and tows were lying within the anchorage grounds waiting for the nearest tow to move down, and about the time the tail of the tow had come to a point opposite or just below the schooner and tug, the Seminole came down the river and passed a car float on the westerly side near the buoy; that the Seminole then blew one whistle and ran into the bow of the schooner which was then lying still, doing considerable damage to the schooner; that after the Seminole blew one whistle and failed to change her course, so as to pass the tug and schooner, the tug blew alarm whistles and endeavored to back but before she could get in motion, the Seminole collided with the schooner; the Cheney also alleged that her stem was damaged in the collision to the extent of upwards of $500. The Cheney further alleged that the Seminole was solely in fault, (1) in that she was not in charge of a competent master, (2) that she had no competent lookout properly stationed, (3) that she was proceeding at an excessive rate of speed, (4) that she did not keep off the anchorage grounds and away from the tows when there was ample room so to do, (5) that she did not give timely or proper signals to the tug, and did not comply with such signals as were given, (6) that she did not do anything to avoid a collision and (7) that after indicating her course by one whistle changed her course to port.

The testimony, on the part of the Seminole, shows that she left her owner at Nyack and started down the river at the rate of 12 knots per hour, to go to her anchorage off 35th or 36th Street, Brooklyn. As she proceeded, she went to the eastward of some warships, anchored between 70th and 80th Streets, and then, it is said on her behalf, because the New York side of the river was congested with various vessels above the 42nd Street ferry, she turned to the westward. After going a short time, to about 50th Street, she saw a vessel with two staff

lights, but no other lights exhibited, and she steered to go to the right of them. She claims that after proceeding a short distance on this course, the vessel with the lights, which afterward turned out to be the Cheney, suddenly turned across the Seminole's bow and thus brought about the collision. The master, who was in charge of the vessel's navigation, marked his course on a chart of the river and showed that the place of collision was about opposite 34th Street and about two thirds of the way to the New Jersey shore. This place was well within the anchorage limits.

The master of the Cheney said that he took the Hart in tow from anchorage at a place within the anchorage limits somewhat above a point opposite 14th Street, then went down the river, turning to the eastward below the lower stake boat, the North, and reaching a point on the anchorage grounds not far from the upper stake boat, the Eureka, where he came to a stop in the water and waited for the tug Cordts, then manœuvring on the anchorage grounds preparatory to turning and proceeding up the river, to move out of the way. He further said that he was then headed to the northward and westward and had been at rest in the water for several minutes when he saw the red light of an approaching vessel, which turned out to be the Seminole; that it was then impossible for the Seminole to continue her course without colliding with the tow of the Cordts and she turned to the left and this brought about the collision with the Hart and the Cheney.

The principal question in the case is, was the Seminole justified in navigating over the anchorage grounds? It is urged on her behalf that this is of no importance because all of the colliding vessels were moving and further that:

"Navigation across the anchorage ground in the North River is not prohibited by any statute, or by any rule of court. Tugs, lighters, ferryboats, and other vessels cross to and fro on these very anchorage grounds at all hours of the day and night. The same is true of the anchorage grounds in the East River in the neighborhood of 23rd Street. It would be absurd to contend that because the law allows vessels to come to anchor at a particular place it confers upon them the exclusive right to appropriate those waters to their own use. If that were true, a regulation which legalizes anchorage in a given location would, at the same time, be an act of condemnation covering all of the dock property fronting on such anchorage ground. Manifestly that is not the case. The docks on the East River adjoining the anchorage ground are just as valuable and just as freely used by vessels approaching or leaving them as any docks in the city. It is admitted that if a vessel navigated in a location where other vessels may legally anchor, she is required to take all reasonable care to avoid such anchored vessels, but that is the sole requirement."

In the first place, it is doubtful if the tug and schooner were moving. I am inclined to believe that they were not. It is so testified by all of the witnesses on the tug and the schooner, the former claiming that when the vicinity of the Cordts' tow was reached, the Cheney stopped her headway and awaited the passing of that tow down the river. The testimony of the Seminole, if uncontradicted, would show that the tug and schooner were moving, first down the river and then suddenly across toward New Jersey. The first contention is based on the fact that no lights were seen on the vessels by those on the Seminole, excepting two staff lights and in the extremity of the col-

lision, the green light of the tug. The question of lights will be considered hereafter but it is proper to state now that the view of the Seminole with respect to anchorage grounds is not sustained by the authorities. On the contrary, it has been held that vessels ordinarily should not use the anchorage grounds for the purposes of navigation. For example in The Drew (D. C.) 35 Fed. 789, Judge Brown said:

"2. I must hold the Drew also to blame for running so far to the westward out of the usual track of steamers, and at so high a rate of speed,—from 15 to 16 miles an hour,—over a known anchorage ground, when through the violent gale of that night many vessels were likely to be at anchor in that locality."

"In the case of Steam-ship Co. v. Calderwood, 19 How. 241, 246, 15 L. Ed. 612, the Supreme Court say:

'This court has decided that neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished, and conducted with caution, will excuse the steamer for coming in collision with the barge or sailing vessel, when the barge or sailing vessel is at anchor, or sailing in a thoroughfare, out of the usual track of the steam-vessel.'

It was not consistent with reasonable prudence, nor with due regard to the safety of other vessels, for a steamer of the speed of the Drew to run so far to the westward of her usual course, at night and in a gale of wind, over, or in very close proximity to, a well-known anchorage ground for other vessels, which she must have known were likely to be lying there for shelter."

In The Ophelia (D. C.) 44 Fed. 941, the syllabus reads:

"1. Collision—Fog—Anchored Vessel.

Where a ferry-boat, in a dense fog, ran into a bark, which was anchored within the prescribed limits of the anchorage ground in the bay of New York, and whose position was well known to the pilot of the ferry-boat, held, that the ferry-boat should have kept off the anchorage ground entirely, as she could have done, and that the ferry-boat was therefore in fault for the collision."

In The Aller, 73 Fed. 875, 20 C. C. A. 79, a Circuit Court of Appeals decision for this district, the syllabus reads:

"Collision on anchorage grounds. Steamer with tug and tow.

A vessel which undertakes to navigate over anchorage grounds takes the risk of determining whether other vessels which she finds there are navigating or at anchor. Held, accordingly, that a steamship which, on leaving Hoboken, attempted to pass to the westward of a bark and tug on the anchorage grounds southeast of the Statue of Liberty, supposing them to be under way, and bound for the East river, was solely in fault for a collision with the bark it appearing that the tug was merely holding the latter up against the tide, while she was getting in her anchor, and that neither of them did anything to mislead the steamship. 59 Fed. 491, affirmed."

In The Newburgh (D. C.) 124 Fed. 954, this court held that steamer was in fault for navigating over an anchorage ground in the North River, in a fog. This case was reversed on appeal, (130 Fed. 321, 64 C. C. A. 567) not on the law, but because it was held that on the facts, the steamer was not on anchorage ground.

While an exclusive use of anchorage grounds is not allowed to anchoring vessels so as to exclude other vessels necessarily going over the grounds, as from wharves which would not be available without them, nevertheless it is not intended that the waters in question may be used with the same freedom as unrestricted waters but that vessels

shall keep clear of the grounds so as not to collide with vessels properly anchored there nor embarrass those properly using the waters for purposes of navigation in connection with anchoring. Both of these classes of vessels have a prior right to the use of the waters over those not necessarily there. The claim of the yacht that she was forced over the waters by the congested state of the channel of the river on the New York side, is disputed by the Cheney, which claims that there was not any such congestion in the channel, and this is sustained by some disinterested witnesses. It does not, in any event, appear but that the Seminole could have avoided the anchorage grounds by slowing her speed and picking her way on the New York side, and the conclusion necessarily is that she was in fault in going over those grounds at such a high rate of speed.

The theory of the Seminole was that the Cheney and tow were at first bound down the river and then suddenly changed to the westward and across the Seminole's bow, thus bringing about the collision. The Seminole's manœuvres, however, were not in conformity with such a theory. If the Seminole was an overtaking vessel and desired to pass, it was her duty (Rule 8) to signal the Cheney and obtain an assent to such passing but no such signals were given. Indeed no signals of any kind were given until the vessels were very close together, when the Seminole blew a signal of one blast to which the Cheney responded with alarm signals. No doubt the Seminole did not see that the Cheney was lying still but it does not follow therefrom that the latter did what the Seminole claimed. In fact, the observation on the part of the Seminole was defective in not recognizing the actual situation. Moreover her navigation was not marked by the degree of caution that a fast vessel under the circumstances should have observed.

The master said that he went toward the New Jersey shore because he considered that it was the proper place for him to be in following the rule of the road to keep to the right, without regard to the anchorage ground, which he considered, except for anchored vessels, as entirely open water. He further said that from above 42nd Street, he gradually worked over till within a half to three quarters of a mile of the Cheney, when he saw her two staff lights, bearing from two to two and a half points on his port bow; that he still kept that bearing until the vessels were almost together, through a turning to port on his part in following the "swing of the river," expecting to clear the tug "a good, safe navigating distance, within a hundred feet." He further said:

"I will state now, but I have never stated it before, that the schooner was on the port side of the tug. Q. That is very clear to you? A. Yes, sir. Q. So that you passed the bow of the tug before you collided with the schooner? A. I certainly did. Q. And that you are very sure of? A. Yes, sir."

The lookout also said:

"The tug was on the schooner's starboard side."

He further said:

"Q. Did you make more than one report of this light, the vessel that you subsequently collided with? A. Yes, sir, I reported it twice. Q. What was

your second report? A. My second report was again the same report that I made before, a white light; bright light on the port bow. Q. You never reported that you noticed those lights were getting nearer to your course? A. That is not my business to report; I reported 'Light on the port bow.' Q. At the time of the second report did you notice whether the light was nearer to you than it had been? A. Yes; that was why I reported it again. Q. Did you get any response from the bridge? A. Yes, sir. Q. What was it? A. 'All right.' Q. Do you mean that that was in answer to your last report? A. Yes; that was the answer that we generally get. Q. What did you get on this occasion? A. Well, that was the answer."

Other witnesses for the Seminole also said that the schooner was on the tug's port side, when in fact, as was subsequently admitted, she was on her starboard side. It shows that there was not the accurate observation of the schooner and tug as the Seminole contends for and I think she was in fault for this respect, as well as for navigating over the anchorage grounds at a high rate of speed, and for attempting to pass the vessels with too close a margin.

The faults alleged against the tug and schooner are numerous as appears above. The question of lights is perhaps the most important. The Seminole claims that the schooner failed to exhibit the lights required by law (Act June 7, 1897, c. 4, § 1, 30 Stat. 97 [U. S. Comp. St. 1901, p. 2877]), in that she failed to comply with article 5, which reads:

"Art. 5. A sailing-vessel under way or being towed shall carry the same lights as are prescribed by article two for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry."

The lights required by article 2 are the regular colored lights for navigating vessels. It is admitted that the schooner had no such lights, but it is claimed by the schooner that she had been lying at anchor and before the tug made fast she had her anchor light up; that this light was taken down by the direction of the master of the tug who was in charge of the tow. The master of the tug testified that the law does not require colored lights but does require a light to be shown on the starboard bow of the schooner where it is plain to be seen and further that in towing alongside, the exhibition of colored lights by the tow would be confusing and misleading. Such is the rule for towing barges or canal boats. Rule 11 provides:

"Barges or canal boats towed alongside a steam vessel, if on the starboard side of said steam vessel, shall display a white light on her own starboard bow; and if on the port side of said steam vessel, shall display a white light on her own port bow; and if there is more than one barge or canal boat alongside, the white lights shall be displayed from the outboard side of the outside barge or canal boat. * * *"

This contention, however, if sustained, would substitute a different provision with respect to sailing vessels from that provided by the law and in the absence of some provision indicating an intention to make the method of towing applicable to sailing vessels in tow, article 5 must prevail.

The schooner when at anchor was exhibiting a white anchor light on her starboard fore rigging which was removed therefrom and, it was said, placed on her starboard side forward by direction of the tug.

This light, if there and visible, was not seen by the Seminole, nor could she see the tug's green light until the moment of collision as it was obscured from up the river by the deck load and the furled sails of the schooner. I do not think, however, that it should be assumed that the schooner's colored light, if shown, would not have been seen. The want of a light required by law is a grave fault and to excuse its absence, better proof should be given than has been adduced here. The Seminole was, mistakenly, relying upon the tow being bound down the river, when she was in fact headed across. The green light, if seen, would probably have been the means of correcting the Seminole's error, and its absence must be deemed a contributory fault to the collision.

The Seminole was not seen by either the schooner or the tug until a moment preceding the collision. If she had been seen and her movements watched, it would have been noticed that her approach would be a dangerously close one, if it would not actually cause a collision, and a reverse movement should have been made by the tug to take her and the tow out of the way.

The master of the Seminole said that there was nothing in the river on either side of the Cheney and tow to interfere with his navigation. The testimony, on the contrary, shows that there were two large tows in the immediate vicinity of the tug and tow, which it required care to avoid. One of these tows was ahead of the Cheney and prevented her from proceeding. It was going down the river and, probably, nearly out of the tug's way when the Seminole came along but in the latter's way, and, doubtless, instead of turning to the starboard as she claims, she actually turned to port and thus ran into the schooner and tug.

The master of the Seminole also said that when about 150 yards from the point of collision he ported his wheel and blew one whistle; that he could not then have avoided the collision by stopping and backing but the collision would have been much more serious. He also said that when that distance was in consideration that he could bring his vessel to a stop in two and a half to three lengths of 153 feet, that is from 300 to 375 feet. If this vessel was 150 yards away from the tow at the time, he evidently could have brought his vessel to a stop before reaching them, instead of which he continued at full speed, in fact did not ring the bells to stop his vessel until after the collision. The engine was stopped after the collision by the assistant engineer on duty, who said the order to stop came "right after she stopped."

The Seminole urges very strongly that the photographs showing the damage to the vessels prove that the tug must have been in motion and as the vessels came together at practically right angles, the damage can be accounted for in no other way. To my mind, this contention is not persuasive. The nature of the damage would be consistent with such a theory but does not necessarily preclude it from having been received while the tug and tow were at rest and the Seminole going fast ahead.

The whole navigation of the Seminole was lacking in care and prudence and she was in my judgment mainly responsible for the col-

lision, but such fact does not excuse the others for failing to exhibit proper lights.

There will be decrees adjudging all the vessels in fault, as above indicated. The Seminole will be held for one-half the damages and the tug and schooner will be considered as one vessel and liable for the other half. Orders of reference will accompany the decrees.

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## FARMERS' FEED CO. OF NEW YORK v. INSURANCE CO. OF NORTH AMERICA.

(District Court, S. D. New York. March 21, 1908.)

INSURANCE—MARINE INSURANCE—ACTION ON POLICY—DEFENSE OF UNSEAWORTHINESS.

Where the underwriter knows the age and defective condition of a vessel, and accepts an unusual risk thereon at nearly a double premium, it is liable, notwithstanding an absence of complete seaworthiness, and is not permitted to urge the lack thereof as a defense, even though the policy required it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1049.]

In Admiralty.

Wing, Putnam & Burlingham, for libellant.
Kneeland & Harrison, for respondent.

ADAMS, District Judge. This action was brought by the Farmers' Feed Company to recover from the Insurance Company of North America, the loss on a cargo of 224 tons of brewers' dried grain, happening while being transported in the barge Lydia L. Mackay, during the navigation of the harbor of New York on or about the 11th of September, 1906. It is alleged that the barge was in all respects seaworthy and the loss, amounting to more than $5,000, was incurred by reason of the perils insured against. It is further alleged that in consideration of the premium paid, $157.50 for a period of one year from April 30, 1906, which greatly exceeded the usual rate, the respondent, after inspecting the barge, waived any warranty as to her seaworthiness. The respondent admitted the issuance of the policy and the sinking of the barge with the cargo described, but denied the other allegations of the libel. For a further defense it alleged that the barge at the time of her loading and loss was in a wholly unseaworthy condition and the sinking and loss were due thereto.

From the testimony it appears that the Mackay was a vessel of 30 or 40 years of age and was well known to the underwriter, which had a record of her as follows:

"May 9, 1905

Particulars of covered barge Lydia Mackay of N. Y. Length 110 feet; beam 32 feet, draft loaded with about 250 tons of grain is six feet six with a freeboard of three feet six. When built not known, but must be very old. She has single keelsons; inter-costal trestle work frame; full wood hanging knees, ceiled; she is strongly built and was formerly a brick scow; she has good oak wearing pieces fore and aft. Her bottom is said to have been caulked fall of 1904 and her top sides more than two months ago; her decks

have not been caulked it is said for over six years 'they are very open'. Her house is in good condition; she has some decayed wood; some knees nearly gone. For a hull risk not recommended, as she had some trouble last winter by ice, but might be a desirable risk for summer where she has so much freeboard. Owned by the Farmers' Feed Company."

When the respondent was applied to for the insurance on cargoes of the Mackay and two other barges by a broker for the libellant, the agent of the respondent, one of its underwriters, who was authorized to pass upon and accept or reject risks, said they would inspect the vessel and let the applicant know whether they cared to take the risks. The broker further testified:

"A. I called again in the course of three or four days, and they said they would write the cargo of this boat, but at 3½% rate.

Q. What did you say? A. Well, I said, 'I will try some of the other companies, and let you know.'

Q. Are you familiar with rates? A. Yes.

Q. Were you at that time and are you now? A. Yes.

Q. And have you been for the past 10 years or so? A. Yes.

Q. What is the ordinary rate on cargoes on old boats in the harbor; time policies?

Objected to unless the witness knows that there is a rate.

Q. Is there a customary and usual rate in this port for premiums on policies on cargoes on old vessels or barges, canalboats, etc.? A. I don't think there is any regular rate, no.

Q. It is a matter of agreement, in other words? A. On older vessels, yes sir.

Q. Mr. Hall told you that he would charge 3½%? A. Yes.

Q. On the cargo? A. Yes.

Q. And you said that you would look around? A. Yes, look around and let him know if we wanted the insurance at that rate.

Q. Did you go back again? A. I went back two or three days afterwards, and my recollection is that I told him that he was elected; that the company were willing to pay their rate of 3½%; and he said, as they had quoted that rate they would make the risk binding.

Q. Did he say anything about the rate then to you?

Objected to.

Q. What did he say, in full? A. I think he said that they thought of making the rates so high that it was practically impossible, and they would not get the risk; but as they had quoted that rate they would do it.

Q. What did you say about being elected? A. Meaning to convey that they were going to get the risk they had quoted on.

Q. In any of these conversations, in which was the statement made by Mr. Hall to you that the boat had been inspected? A. At the first conversation he said they would look at the boats, and let me know if they cared to quote on them; but it was never stated that they did inspect the boats. I haven't the slightest idea whether they did or not."

The underwriter for the respondent testified:

"Q. Is there no usual rate on cargoes on boats, of this same class, after five years old? A. No sir; not on cargoes.

Q. You charge anything you can get? A. We charge anything we can get.

Q. What do you get? You don't get over two and a half, do you? A. Not much.

Q. You don't get much more than you get on the hull I suppose? A. It depends.

Q. You have a great many of these cargoes insured, have you not? A. We do, sir.

Q. Is there not any standard that any business man, and owner of cargoes, can know about before she goes to you; is it a matter of individual

bargaining? A. On cargo it is pretty nearly always individual bargaining, in every case; because the nature of the cargo differs and the boats differ.

Q. Take a boat like this; brewers' grain dried in bags? A. Yes, I know it.

Q. Do you charge whatever you think you can get on the particular day when the broker comes in? A. Yes.

Q. Are there no limits? A. Well—

Q. Take a cargo on a boat from Newtown Creek, we will say, to the North River; a boat five years old, or under; is it entirely uncertain what you will charge if we come to you? A. We have our ideas, and other companies have theirs.

Q. You have a tariff? A. No sir.

Q. Haven't you a tariff of your own? A. Our own tariff, and our own office; that is, we would have our ideas; we don't call it a tariff.

Q. Well, you insured other boats of the Farmers' Feed Company besides the Lydia Mackay, did you not? A. Yes, we did.

Q. And other cargoes? A. Yes.

Q. At lower rates than three and a half too? A. I think not; I am not sure.

Q. Have you looked it up? A. No.

Q. You have no means of knowing that? A. Not without referring to the books; I couldn't possibly remember the number of risks I take.

Q. You had a report from one of your surveyors in May, 1905? A. Yes sir.

Q. Have you that here? A. It is right in this book (indicating).

Q. Will you produce it? A. Yes sir (Witness examines book and produces report asked for, at page 115).

Q. You remember Mr. Whitlock coming in to make this application? A. I do, sir.

Q. Do you remember his coming three times, as he says? A. Two or three times.

Q. Do you recall that when he first came you didn't give him a figure; do you recall that fact? A. Yes sir, I do.

Q. Did you tell him then, as he says, that you would look her up? A. Yes sir.

Q. Did you look her up? A. After he left.

Q. Is this what you meant by 'looking up'; refer to this report? A. Instead of answering your question directly I will state the case. After he left, I was going to send and find out, and as our custom is, I looked in our books and found the report; I had the report and referred to that report.

Q. And so you didn't deem it necessary to make another inspection? A. Yes sir. we declined the risk.

Q. What was the application by Mr. Whitlock? A. If I can remember, I think it was that on both the hull and cargo; I am not quite sure.

Q. What do you mean by saying you declined the risk? A. From that report of Captain Crowell we thought we would rather be without the business than have it.

Q. But you subsequently took it? A. Not the hull; but the cargo, we did.

Q. When you say you declined the risk what did you say to Mr. Whitlock, when he came in after you had looked up the report? A. I think I said we were very much obliged, but we would prefer to decline the risk; that is the substance of it.

Q. Whatever his application was—and you don't recall exactly—you declined it? A. Yes.

Q. And then subsequently he came to you again? A. Yes, he came to me again.

Q. And then you took part of the risk, did you? A. We took the cargo.

Q. When you declined the risk on the second interview with Mr. Whitlock did you state a figure? A. I expect I did.

Q. I don't understand how the stating of a rate is consistent with your statement that you declined the risk. Do you mean that the risk was so high that you thought that was equivalent to a declination? A. No, I didn't mean to convey that; when he first applied it was on the hull, and we declined that; we preferred to be without the risk on that.

Q. I thought you said when he first applied he applied on both hull and cargo, and that you declined both. A. I believe we did.

Q. And what led you to change your position with reference to it? A. If I remember correctly, I think we had a previous boat—one of the Farmers' Feed Company boats, the Mercury, I think, and Mr. Whitlock said. 'As long as you have had one boat, you might help them out by taking their cargoes, even if you don't want the boat;' I believe that it was that that influenced me to name rates on the cargo when we had already said that we would prefer to be without either hull or cargo.

Q. You don't mean that your Company had a sympathetic feeling for the Farmers' Feed Company, do you? A. It isn't often we have, but in this case—

Q. I thought it was a pure matter of business; what do you mean by saying that because you had taken another risk, and a past liability, that therefore you would add to your own burden by taking a new boat? A. The Farmers' Feed Company had four boats, and we had a line on the Mercury which was supposed to be the best boat of the Farmers' Feed Company.

Q. Supposed by whom? By you? A. Yes, by us.

Q. From your inspections? A. I can't remember that.

Q. From the reports of your surveyors? A. But we had her cargo, and as we had that boat we were asked to take the other three for the same concern.

Q. Well, your action was based ultimately on this report, in this book? A. Yes sir.

Q. That was what you acted on? A. Yes sir.

Q. And the reason you didn't send a surveyor to inspect her again, was because you thought this report sufficiently unfavorable to justify you in declining the risk; is that it? A. Quite so."

Thereafter the policy in suit was issued and contained the following, upon which the respondent relies:

"And it is warranted by the insured that the said lighter or vessel shall, at all times during the continuance of this Policy, be tight. * * *"

"It is understood and agreed that no custom, usage or waiver of any kind shall affect, control or void any condition of this policy, unless endorsed hereon in writing."

As stated above, the Mackay was an old vessel but seemed to be in fairly good condition for the carriage of cargoes except, perhaps, as to her sides near the deck, which showed more weakness than her body below a line about 3 feet from the deck. She had been carrying cargoes safely. On a trip made to the same place very shortly previous to this occasion she had transported a similar cargo without loss and doubtless would have done so in this instance if she had not been towed alongside of another barge. The accompanying barge was a light coal boat and in approaching the vicinity of the Brooklyn Bridge, the waters were rough enough to cause the coal boat to pound against the Mackay, with the result that the latter began to take in water. The coal boat was towed on the port side and the effect of the pounding was to remove a patch covering a hole near the upper wearing piece of the Mackay, and leave this hole exposed to the splashings of water between the boats, necessarily incident to the towing. Probably in this way, enough water got into the boat to cause her to careen somewhat to the starboard, and to continue to take in water until she was sunk to her deck in an hour or two, and two or three hours later to the bottom, in the vicinity of the steamer's pier, where she was consigned.

The Mackay was a weak boat as to her deck and upper sides and strictly in these respects she was defective but the respondent knew

all about her and had a record which showed her to be an undesirable risk. She was, therefore, rejected by the underwriter as to the hull but accepted for cargo with a full knowledge of her condition. The respondent had caused an examination of her to be made in May, 1905, and in the report thereof, it was said:

"For a hull risk not recommended as she had some trouble last winter by ice, but might be a desirable risk for summer where she had so much freeboard."

The risk was subsequently taken, without any new examination at a rate of nearly double that which would have been demanded if she had been a comparatively new boat, and the loss occurred, not probably in a way which the underwriter expected but in one which should have been reasonably anticipated as the method of towing was not unusual. The boat was no doubt in a condition to go in safety if she had been towed alone but when she was exposed to the pounding of another boat in the often disturbed waters of the East River, then her weakness became apparent and the sinking followed.

Strictly, she was not competent to resist the ordinary action of the waters she was required to navigate in and the respondent strongly urges that the claim should be rejected. If it were not for the knowledge the respondent had of the boat, there would be much to sustain the contention, but when it knowingly took the risk, at a high premium, I think it should be held to its bargain and not be permitted to resort to the terms of the policy to overcome the claim. It has often been determined that the words of a policy of insurance do not preclude a party from recovering upon the actual contract, even if inconsistent with the wording of the policy. Forward v. Continental Insurance Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; Wood v. American Fire Insurance Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; Thebaud v. Great Western Ins. Co., 155 N. Y. 516, 50 N. E. 284. In the last case O'Brien, J., said (pages 519, 521, 522, 524, of 155 N. Y., pages 285, 287, of 50 N. E.):

"It is no doubt the general rule that in all contracts of marine insurance upon vessels there is an implied warranty that the subject of the insurance was at the time seaworthy, or, in other words, reasonably fit and capable of making the voyage. But in this case both parties knew that the vessel was not intended for service upon the open sea. She was not built or constructed for any such purpose, but, on the contrary, for the river service. Before the defendant entered into the contract the plans and specifications with reference to the construction of the Dos Hermanos had been submitted to its agents. They put the defendant in possession of all information concerning the character and construction of the craft. The defendant's marine engineer, who had had considerable experience, assured the broker who took the risk 'that she was built for the river trade, and he did not consider that she was just the thing to attempt all weathers on the coast going around there, but if properly handled she might get there, provided she took the inland course so far as possible."

* * * * * * * * * * * *

"* * * We can discover no reason why the general rule applicable to the risks in fire insurance policies does not apply to this case. As was said by this court in the case of Bidwell v. North Western Ins. Co., 24 N. Y. 302: 'Indeed it is not easy to perceive why an insurance company, by reason of the formal words of clauses (of a general and comprehensive nature), inserted in a policy intended to meet broad classes of contingencies, should ever be

allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach eo instanti of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud."

* * * * * * * * * * * *

"* * * But the real question presented to the defendant, when the application for insurance was made, was whether this boat, as she was known by both parties to be, could make the transit from the port of departure to her destination. The defendant concluded to take that risk in consideration of a double premium, and to permit it now, after receiving the premium, to defeat a recovery, on the ground that she was not seaworthy in consequence of alleged defects of construction, known to it at the time of taking the risk, would scarcely be consistent with commercial morality."

I conclude that the libellant is entitled to recover. The decree will provide for an order of reference.

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## THE ANTHRACITE.

## THE WILLIAM E. CLEARY.

(District Court, S. D. New York. April 1, 1908.)

TOWAGE—INJURY TO TOW—LIABILITY OF TUGS ACTING JOINTLY.

Where two tugs are acting jointly in towing a vessel, and an accident happens to the tow through their negligence, both tugs are liable, notwithstanding the fact that one is acting as a helper, under the orders of the master of the other.

In Admiralty.

Alexander & Ash, for libellants.
Carpenter, Park & Symmers, for the Anthracite.
Amos Van Etten, for the William E. Cleary.

ADAMS, District Judge. This action was brought by William K. Hammond and others, the owners of the barge Sylvia, and cargo of brick laden on board, against the tugs Anthracite and William E. Cleary to recover the damages, said to amount to about $4,000, caused by the barge striking Mill Rock, while proceeding in tow, on a hawser, of said tugs from the North River to 139th Street, Harlem River, on the 27th of July, 1907. The Sylvia was the starboard boat in the last tier. The tide was flood and when in the vicinity of Mill Rock, the tugs turned toward New York to land one of the boats there and in doing so swung the Sylvia against Mill Rock, causing the damages complained of.

The answers of the tugs pleaded that there was no fault on their part but that the accident was due to another tow forcing this one toward the rock. No reliance, however, was placed upon such contention on the trial, and indeed there was no ground for it, as the other tow had passed when the swing was made.

The Anthracite does not attempt to escape liability but frankly concedes her fault. The Cleary, however, urges that the Anthracite was

the directing mind and the Cleary merely a helper without responsibility and therefore not in fault.

It appears that the Anthracite was in charge of the tow. Up to the vicinity of Newtown Creek the Cleary had been engaged in taking boats out of the tow and delivering them at their destinations. There she placed herself alongside of the Anthracite and made fast to her abaft of the latter's pilot house, so as not to interfere in any way with the view of the master at the wheel. The steering was done by the Anthracite, whose master directed the proceedings on the part of the Cleary. When the vicinity of the rock was reached, the latter was directed to hook up and doubtless the Anthracite also did so, but the efforts were without avail, and the collision took place. The master of the Cleary testified to the foregoing facts and that the master of the Anthracite had charge of the navigation of his tug and the Cleary, both tugs being engaged in pulling. The Cleary urges that as she was acting as a mere helper to the Anthracite, which was conducting the navigation, she cannot be held, citing The Connecticut, 103 U. S. 710, 26 L. Ed. 467, and The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83.

In the former case, the Connecticut was towing a large fleet of boats, assisted by the tug Stevens, and brought one of the boats of her tow in collision with the steamer Othello. One of the questions presented on appeal was should the Stevens have been held as well as the Connecticut and the Othello. In delivering the opinion of the court, Mr. Chief Justice Waite said (page 712 of 103 U. S. [26 L. Ed. 467]):

"The tug 'Stevens' was a mere helper, and subject to the orders of the 'Connecticut.' The owners of the 'Sam. Morgan' sued all three of the vessels for the loss, and upon the facts as above stated the Circuit Court gave judgment dismissing the libel as to the 'Stevens,' but holding both the 'Connecticut' and 'Othello' responsible, and dividing the loss between them. The 'Connecticut' was held in fault for not giving her signal at or before the time she changed her course, and the 'Othello' for not heeding the signal when it was given, or taking the necessary precautions against a collision before. All parties have appealed; the libellants because the 'Stevens' was acquitted, and the 'Connecticut' and the 'Othello' each because they were respectively charged with any portion of the loss.

So far as the 'Stevens' is concerned, she was clearly not to blame. She was the mere servant of the 'Connecticut,' and could exercise no will of her own. She was bound to obey orders from the 'Connecticut,' and no part of the responsibility of the navigation, so far as the approaching vessel was concerned, was on her. It was not her duty to signal the movements of the 'Connecticut,' under whose exclusive control she was. The 'Connecticut' is alone responsible for the consequences of her own faults."

That was a case where the collision happened by reason of the absence of proper signals and in that respect is unlike this case.

In The Mason, two tugs, the Mason and the Babcock, were towing the steamer Gratwick and the latter stranded through the negligence, as was found by the district court, of both tugs. The Mason was the leading tug and the dominant mind in the venture; the Babcock was guiding the steamer from astern. Judge Hazel thought that the Babcock was liable as well as the Mason, because the authorities seemed to so hold, particularly The Bordentown (D. C.) 40 Fed. 683; The Columbia, 73 Fed. 226, 19 C. C. A. 436. On appeal, however, the Bab-

cock was exonerated, the Court of Appeals in an opinion by Wallace, J., stating (page 915 of 142 Fed., page 85 of 74 C. C. A.):

"As the proof did show that the Babcock properly performed her part of the service, the responsibility for the disaster must rest on the Mason alone."

And further (pages 916, 917, 918, of 142 Fed., pages 86, 87, of 74 C. C. A.):

"The authorities cited in the opinion of the court below, and upon the argument at bar, are, The Arturo (D. C.) 6 Fed. 308; The Bordentown (D. C.) 40 Fed. 683; The Columbia, 73 Fed. 226, 19 C. C. A. 436; and Van Eyken v. Erie R. Co. (D. C.) 117 Fed. 717.

The Arturo was a case in which two tugs, belonging to different owners, while performing a towage service, stranded the tow upon a shoal; both tugs being in command of the master of one of the tugs. The decision was that both were liable because both were in fault. Judge Lowell in his opinion, after stating that, if one tug was wholly in fault, she alone would be responsible, says:

'But for their joint action, so far as it conduced to the loss, I hold them to be jointly responsible.'

The Bordentown was a case in which Judge Brown held both the Bordentown and the Winnie, tugs engaged in a towage service, liable for the fault of the master of the Bordentown. Both tugs were owned by the same owner, and the master of the Bordentown was in command of both. Judge Brown said:

'At the time when the master's fault arose the Winnie was as much a part of the moving power as the Bordentown, and was equally under the same direction. She belonged to the same owners, and from the beginning to the end she was engaged, in the owner's behalf, in the work of towing the other boats, precisely as the Bordentown was engaged. It was immaterial on board which tug the master for the time being was, or from which boat his orders were given. Both as related to the owners of the tugs, and as related to the owners of the boats in tow, the Bordentown and the Winnie, in taking the tow through the Kills, were in effect one vessel.'

In The Columbia it was held that, where the owner of a barge which had no motive power had undertaken to transport freight upon the barge, such barge and a tug, belonging to the same owner, by which the motive power was supplied, became one vessel for the purposes of the voyage, and that the owner was not entitled to limit his liability for damages caused by the negligence of the crew of either craft, without surrendering both.

Van Eyken v. Erie R. Co. was an action in personam to recover damages to the steamship Folmina from a collision between that vessel and the tug Shohola, which occurred in consequence of the breaking down of the tug's machinery while she was towing a barge. The tug and the barge were lashed together, and were both owned by the respondent, and the question arose whether the owner in limitation of liability was obliged to surrender the barge, as well as the tow. The court in its opinion (Judge Thomas) repudiated the argument that both were liable because both 'formed a common united instrument of commerce, moving as an entirety, when the tort was committed,' and held that, as the cause of the injury was the disordered steering-gear of the tug, the tug alone was liable, and the respondent was therefore entitled to limit his liability on surrendering the tug alone.

It will be observed that of these adjudications only two (The Bordentown and The Columbia) decide the question now presented; while in the other two, notwithstanding the master of the offending tug was in command of the other vessel sought to be held, exonerated that vessel. It will also be observed that in the two cases in which the vessel not in fault was exonerated, in one of them she was without motive power and was lashed to the offending tug, and in the other she was a tug engaged jointly with the offending tug in performing the towage service. In The Bordentown it was said not to be enough that both vessels were under the command of the same master, and in The Columbia the fact that each was under command of her own master was treated as immaterial."

The court then discussed the cases of the United States v. Brig Malek Adhel, 2 How. 210, 11 L. Ed. 239, The China, 7 Wall. 53, 19 L. Ed. 67, Homer Ramsdell Transp. Co. v. La Compagnie Generale Trans-Atlantique, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155, Ralli v. Troop, 157 U. S. 386, 403, 15 Sup. Ct. 657, 39 L. Ed. 742, Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, and The Barnstable, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954, and further said:

"If, as these authorities assert, the personal liability of the owner is not an element in determining the liability of a vessel in rem for wrongs or torts, the decision in The Bordentown and The Columbia, so far as they were based upon the contrary consideration, were erroneous. The observations in those cases, to the effect that the two vessels were to be regarded as one for the purposes of the joint undertaking, have not the remotest bearing upon the question of their respective liabilities in rem. A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of navigation for preventing collision; but it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves, or their several liabilities to respond for the consequences of a fault of one of them. Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault. The James Gray v. The John Fraser, 21 How. 184, 16 L. Ed. 106; Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591; The Carrie L. Tyler, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236."

This decision is of course binding here, but I do not think it governs this case. The Babcock's part of the navigation was aiding in pulling at the stern of the towed vessel, while the Mason was leading and guiding the navigation forward. It was easy to find there that the latter was solely liable. In addition to the language above quoted, Judge Wallace said (pages 915, 916 of 142 Fed., pages 85, 86 of 74 C. C. A.):

"The evidence indicates that the Mason as the pilot tug was expected to, and did, take the initiative in directing the movements of the Gratwick, but that in other respects the navigation of the Babcock was exclusively under the control of her own master, and, although the tugs were co-operating in the same general undertaking, each was acting independently in doing her own part of the work."

Here the Cleary submitted herself entirely to the commands of the master of the Anthracite and apparently joined herself to the Anthracite simply to add to the latter's power. It would seem unjust under the circumstances to deprive the libellants of their apparent right against both vesesls, which were being used for a common purpose and in effect as one vessel.

This case is within the ruling in The Arturo, cited by Judge Wallace, supra, with approval of the language of Judge Lowell, where he held, that both tugs should be held for their joint action so far as it conduced to the loss. In that case, two tugs belonging to different owners undertook to tow a barkentine, and made fast on each quarter. They backed the vessel out of the dock and she almost immediately grounded. Both were held in fault in the district court, and one of the tugs which had gone to the assistance of the other, appealed. It was said by Lowell, J., on the appeal (pages 312, 313, of 6 Fed.):

"The transaction appears to me, as to the district judge, to be, in effect, several contracts for a joint operation. If, therefore, one tug was wholly

in fault, as by a defect of her machinery or the like, she alone would be responsible. But for their joint action, so far as it conduced to the loss, I hold them to be jointly responsible. And that is this case."

* * * * * * * * * * * *

"There is no question that the navigation was so negligently conducted that, in broad daylight, with obvious conditions of wind and tide, the ship was landed upon a well-known shoal. There is none that Captain Chase" (the tug Cottingham) "should have taken a line to the wharf, or have provided, in some other of the modes suggested by the experts, for counteracting the effect of the wind and tide; nor that Captain Scollay's tug" (the tug Nabby C.) "without any fault of his, or his crew, aided to run the ship aground.

In this state of facts, both tugs are liable for the damage."

The Arturo seems to be in point. There could be no doubt that it would cover this case were it not for the fact that The Bordentown (affirmed on appeal, not reported) and The Columbia, supra, were in effect overruled by the decision on appeal in The Mason. In The Bordentown, the Winnie acted as a helper, running ahead of the tow on a hawser attached to the Bordentown. In The Mason, it was said that The Bordentown and The Columbia decisions should be regarded as erroneous, so far as they were in conflict with The Mason. It is difficult to distinguish The Bordentown from the present case. The Columbia was a barge in tow of a steamer and in that respect different. I think, however, that the principle of The Arturo should be controlling here.

Decree against both tugs, with an order of reference.

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## THE THREE BROTHERS.

## THE CLARE.

(District Court, S. D. New York. April 13, 1908.)

TOWAGE — COLLISION BETWEEN TOW AND BRIDGE ABUTMENT — LIABILITY OF TUG.

A tug was proceeding up the Harlem river with two tows on hawsers, and keeping on the Manhattan side on account of the ebb tide. As she rounded the bend approaching Kingsbridge she came upon a scow which had been lying at the bulkhead on the Manhattan side, and which in shifting her position had swung directly across the tug's course, and in maneuvering to avoid such scow one of the tows was brought into collision with an abutment of the bridge and injured. *Held* that, while properly handled, the tug must be held in fault for navigating on the port side of the river in violation of the rules; that the scow was not in fault, not being required to provide against a tow coming up that side, and being entitled to use her own side.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 17–20.]

In Admiralty.

Foley & Martin, for libellant.

Alexander & Ash, for the Three Brothers.

Wing, Putnam & Burlingham, for the scow Clare.

ADAMS, District Judge. This action was brought by Charles Fox, the owner of the scow Atlas, against the tug Three Brothers, to re-

cover the damages received by the Atlas on the 10th of January, 1907, by reason of a collision while in tow of the tug with an abutment of Kingsbridge in the Harlem River. The tow was bound through the bridge and across the Hudson River to Weehawken, New Jersey. The tide was ebb running to the westward at the rate of 3 or 3½ knots per hour and setting strongly on the Bronx side of the river. The tug was engaged to tow the barge Driscoll from 133rd Street, and the Atlas from the vicinity of 216th Street, on the Manhattan side. The Driscoll was duly taken in tow and when 216th was reached, the tug picked up the Atlas, placing her next to herself, on two hawsers of about 50 feet each. The Driscoll was put close astern of the Atlas. The tow then swung around and proceeded up the river, about 100 feet from the bulkhead, intending to pass through the space of the bridge between the middle abutment and the one on the Manhattan side. The Clare was lying, with a number of other vessels, at the bulkhead on the Manhattan side to the southward of the bridge and, in order to change her position, she swung her whole length of about 100 feet out into the river and directly across the path of the tug and tow. The tug could not see the movement of the Clare, as there is a bend in the river there and the view was obstructed by obstacles on the shore, until she was within a distance of from 200 to 300 feet. She then stopped her engines and in manœuvring to avoid the Clare, she lost control of her tow and the Atlas struck one of the abutments. Whether it was the middle or the one on the Manhattan shore is disputed. The contact caused the damage complained of, said to amount to about $1,200.

The libellant alleged as faults in the libel: (1) that it was negligent of the tug to attempt to tow two scows under the circumstances, (2) that it was negligent for her to attempt to tow two scows at the same time through the bridge, (3) that she was negligent in proceeding at an excessive speed, (4) that she was negligent in not slowing down when approaching the bridge and (5) that she was negligent in towing the Atlas on a long hawser.

Thereafter the libellant brought in the Clare under the rule, alleging as faults: (1) that she attempted to shift her berth in the strong ebb tide by hand power, (2) that she attempted to shift her berth after the tug had given the bend whistle and (3) that she was permitted to swing away from her dock and across the course of the tug.

The Clare in her answer made no allegations of fault but at the conclusion of the trial moved, and was allowed, to amend her answer by alleging that in addition to the faults charged in the libel, the tug was in fault in not keeping on the starboard side of the channel.

The testimony shows, in addition to the above facts, that when the tug approached the Atlas, the latter was lying at the power house dock, at the foot of 216th Street, with her bow down stream, loaded with ashes. The Driscoll, then in tow, was put under the up stream or bow end of the Atlas and attached with two short hawsers. The tug then made fast to the Atlas by fastening two hawsers on her stern bitts, on opposite sides, and then leading them through chocks on her rail and made fast on the stern bitts of the tug. The Atlas was a square

ended scow, her bow and stern being exactly alike, so that she towed as well one way as the other. The towing bitts and chocks on her stern were the same as those on her bow, so that it made no difference which end was first, but she was deeply loaded, and if the Driscoll had been towed astern, being light, she might have injured the cabin of the Atlas.

The bridge was a drawbridge. The draws were operated, when required, but they were so high above the water that it was not necessary to have them opened for this tow. The double swing draw rested upon an abutment in the centre of the river, around which were protection piles. The ends of the draw, when it was closed, rested upon abutments on each shore. The distance between the bulkhead lines of the river was about 400 feet, some space being taken by an undredged portion of the river on the Bronx side which only left about 300 feet available for navigation.

Owing to the bend in the river, from about north north-east to northwest, the ebb current sets strongly on the Bronx side of the river up to and beyond Kingsbridge. It was, therefore, unsafe for a hawser tow to be taken through the opening on the Bronx side during the ebb tide, as such an attempt would probably result in the tow striking the shore or the bridge abutment on that side. It was usual for tows of such character to pass through the Manhattan draw and the proper course for that purpose was to keep on the Manhattan side of midchannel and to pass the bulkhead about 100 feet away.

At the time in question, large quantities of iron to be used in the elevated structure of the subway as well as a quantity of brick and sand were piled on the bulkhead toward the southerly end so as to cut off a view from below the bend of vessels in the stream.

After the tug had been made fast, she started with her head down the stream but rounded to under a starboard helm, hooked up until she was heading up the river, when she slowed to one bell. The master was at the wheel, a lookout was stationed forward and she had an engineer on duty. The view of the master was obstructed, as above described, and as soon as he got headed up the river he blew a long bend signal. Not receiving a reply, he continued on his course a short distance when he blew another signal of the same character. He received no reply to this and assuming that his proposed course was clear, continued around the bend to a distance of about 100 feet from the Manhattan bulkhead. As he rounded the bend, he found that the Clare had swung away from the dock to such an extent that her bow was about 25 feet outside of a scow lying at the bulkhead, and her stern was out in the river so far that she was directly across the path of the tug and tow. It appears that she had finished discharging that morning and was being shifted in order that a loaded boat might be placed in the berth she had occupied and was allowed to swing across the river. When the situation of the Clare became visible to the master of the tug, he could not port his helm to go under her stern because that would have caused his tow to strike the Bronx side. He could not, under the circumstances, round to and continuing on make a collision between his tug and the Clare inevitable, he therefore stopped

his engines. At this time, the tug and the head of the tow were in the slack water of the Manhattan side, while the tail of the tow, being farther down stream, was in the strong current setting toward the Bronx shore. In this emergency he starboarded his helm and hooked up his engines, which threw the stern of the tug and the bow of the tow away from the Manhattan shore. In the meantime, the Clare was being hauled toward the Manhattan shore and the result of the combined efforts was to enable him to pass a few feet behind the Clare with his tug and tow. The strong pull, however, parted the port towing hawser leading to the Atlas and the tug was unable with the remaining hawser to properly guide the tow and the Atlas struck a stone abutment of the bridge, head, or rather stern, on, doing the damage complained of.

I think the dispute as to the abutment which was struck should be resolved in favor of the tug's contention that it was the one on the Manhattan side, rather than that in the middle. It is not of any great importance but such as it has should be determined favorably to the tug rather than the witnesses on the Atlas, who, although comparatively disinterested, were not as close observers of what took place. The middle abutment was surrounded by a rack and piling which would have prevented the contact which happened.

The testimony seems to establish the foregoing as a statement of the facts of the case and it would lead to an exoneration of the tug were it not for the admitted fact that she was navigating on the port rather than the starboard side of the channel, as required by Article 25. The collision could be accounted for by the presence of the Clare without fault on the part of the tug, unless the situation was governed by the said rule. I have no doubt that if the tug were navigating in a part of the river where she had a right to be, her explanation of the matter should be accepted as a justification of what she did. I think her manœuvres as she approached and navigated around the bend were as skillful as ordinary care required. I have no doubt either that, encumbered as she was with a hawser tow, she did everything which could be expected of her, and that it was practically impossible for her to avoid bringing the Atlas into contact with the abutment.

After, however, having given the matter the best consideration I can and making all allowances for the tug, I think that she was in fault for the collision because she was navigating on the wrong side of the river. It was her duty to navigate on the Bronx side and if she could not manage alone to keep her tow off the shore, which I believe, then she should have employed a helper tug. Or if one was not available, then the boats should have been taken through alongside, one at a time if necessary. There can be no question, I think, that by using one of these methods, the boats could have been towed without damage. It was doubtless more convenient to tow the boats in the way she tried but it was, in my judgment, a negligent manner of performing her duty to the tow.

In this view of the case, there does not appear to have been any negligence on the Clare's part. She could not be expected to provide for

the tug navigating on the wrong side of the river and was entitled to use her own side.

Decree for the libellant against the Three Brothers, with an order of reference. The petition against the Clare is dismissed.

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## JENNETT v. LOUISVILLE & N. R. CO.

(Circuit Court, N. D. Florida. June 30, 1908.)

1. MASTER AND SERVANT—INJURY TO RAILROAD TRAIN EMPLOYÉ—DEFECTIVE TRACK.

Where a railroad track becomes defective by reason of excessive rains or other unusual cause, the railroad company is not liable for the death of an employé caused by such defective track, unless the defect had existed long enough to enable it in the exercise of reasonable diligence to discover and repair the defect or to warn the employé, and it failed to do so; but unusual weather conditions may impose on the company the duty to exercise an extraordinary degree of care in that respect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 253.]

2. SAME—ENGINEER OF RAILROAD TRAIN—ASSUMPTION OF RISK FROM DEFECTIVE TRACK.

An engineer of a railroad train has a right to assume that the roadway is in safe condition, in the absence of notice to the contrary, and a mere general warning to proceed carefully because of heavy rains, with no notice of a particular defect, does not cause him to assume the risk from such defect of which he has no knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574–600.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

An engineer of a railroad train which was wrecked by running into a culvert that had been washed out or rendered unsafe by floods, resulting in his death, was charged with the duty of exercising care and caution in the running of the train, in view of the conditions which were apparent, or could have been known to him by the use of reasonable care and observation, and, if in view of such conditions he should have known that the culvert was unsafe, or was running the train at an excessive speed, he was guilty of contributory negligence, which precludes a recovery from the railroad company for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 681, 751–756.]

4. SAME—PRESUMPTION OF NEGLIGENCE.

The presumption of negligence created by the Statute of Florida in relation to the liability of railroad companies does not outweigh evidence. The statute merely casts upon the company the necessity of showing affirmatively that its agents exercised reasonable care and diligence under all the circumstances, and here the presumption ceases.

Geo. T. Morgan and Maxwell & Reeves, for plaintiff.
Blount, Blount & Carter, for defendant.

SHEPPARD, District Judge (charging jury). The case you are considering is one sounding in damages, which the plaintiff, as administratrix of the estate of Jennett, is seeking to recover of the defendant company, for the alleged wrongful death of the plaintiff's decedent, by the alleged negligence of the railroad company. The

basis of the plaintiff's claim for recovery is the negligence of the defendant. Negligence is defined by the authorities as a failure or the neglect by one to exercise that same care and caution that a reasonably prudent person would exercise at the same place and under the same circumstances.

The contention here is the negligence of the railroad company in failing to provide suitable and adequate appliances, to wit, roadbed and culvert, at the place in question, and in failing to keep it in a safe condition, and in negligently ordering and requiring the said deceased engineer to run his engine over the alleged defective culvert, and further negligence in failing to ascertain the condition of the culvert in view of the weather conditions prevailing on the day of the accident. To these several causes of action the defendant has interposed the general issue, a plea of not guilty, which denies its negligence as the cause of the accident, and consequent death of the plaintiff's intestate. In addition to this general issue, the defendant interposes several pleas, stating the negligence of the plaintiff's deceased, and tending to charge the deceased with contributory negligence, which implies that the wreck and consequent death of the plaintiff's decedent was due to his own negligence in failing to take the necessary precaution which a reasonably prudent man would have exercised, in view of the weather conditions and apparent danger from sudden and excessive rainfall. The defendant railroad company must use reasonable care, consistent with the nature and extent of its business, in keeping its roadbed and track in safe condition, and is responsible to its employés for injuries resulting from carelessness in improperly and defectively constructing its culverts, and to keep them in a proper safe condition; and if, by care and prudence, the company may know of the defects in its ways and works, track, and culvert, it is its duty to keep advised of their condition and not needlessly expose its employés to peril and danger; and if the company could, by reasonable care and prudence, have ascertained the washout before the approaching of the train, and thereby have avoided the accident, and it did not do so, it is responsible to the decedent's administratrix for the injuries resulting from said accident.

But by employing the deceased as engineer the company did not become an insurer of his life or safety. Engineers take the ordinary risk of their employment, and the defendant could not be held liable for accidents which it could not by reasonable diligence have foreseen, or, by the exercise of reasonable care and prudence, have prevented. The engineer, Jennett, by his employment by the company, did not assume the risk of defective track conditions. He had the right to assume that the track was safe, and it was the duty of the company to keep this track in proper condition. The plaintiff's intestate could not be charged with knowledge of the defect in the culvert, but, on the contrary, he had a right to assume, without investigation, that the track was in a safe condition, and the defendant company could not relieve itself of responsibility for the defective condition of the culvert by a general notification in the office at Selma that there had been heavy rains, and that the engineer should not try to make schedule time, but to run cautiously.

Mere information in advance that conditions might be bad, without stating or pointing out where the defect was or might be expected, would not be sufficient notice to relieve the company of its lack of reasonable care and diligence in failing to ascertain and inform the engineer of the location of the particular danger apprehended; and, if the conditions along the track near the wreck were such as to inform the decedent that an unusual quantity of rain had suddenly fallen, and that flood conditions were apparent, and by the exercise of reasonable care and caution he could have ascertained the washouts, or from present conditions he might have apprehended the danger of running his train over the culvert, through which was flowing an unusual volume of water, which he could have seen by looking out, and negligently failed to see same, then he failed to exercise that care and prudence which an ordinarily prudent man would have exercised under like conditions, and contributed to his own injury and death, and the plaintiff would not be entitled to recover.

But it must appear that the deceased knew, or by the exercise of reasonable care and caution could have seen, the conditions existing at the time that made it dangerous to run his engine and train over the culvert, or that he was properly warned of danger, or that the danger was patent and open to him. Before the defendant would be relieved from its failure to exercise reasonable care and caution to ascertain the condition of the culvert, and to warn the engineer of the condition of the place, it must appear that the engineer knew that the culvert had been washed out, or that dangerous conditions existed from the stoppage of the water, or that he could have seen the danger by the exercise of due care. If the plaintiff's decedent could have seen the danger, or if it was open to ordinary observation, and by the exercise of due care he could have avoided the accident, then the defendant company would not be liable in this action for the death of the plaintiff's decedent.

That Jennett, the engineer, was killed by the train being derailed in the washout by reason of a defect in the track, it could not be inferred that he had knowledge of such defect from the fact that the engineer had been in the custom of running over said track. If you believe from the evidence that the plaintiff's intestate's death was due to the negligence of the defendant company in not keeping the culvert in repair and safe condition, and that the defendant did not exercise ordinary care and diligence in ascertaining the condition of the culvert, and was negligent in making no inspection, or insufficient inspection, then you will find for the plaintiff. If you should find for the plaintiff, you should find such damages as the plaintiff has shown she might reasonably expect to be contributed out of his earnings for his life expectancy, and such other contributions for others of the family, who might be dependent upon him for support for such time as their dependency might last. This, however, is no hard and fast rule for ascertaining damages, but merely a standard by which you might be guided. Of course, in estimating what the deceased might earn, you should take into consideration his increased incapacity with increasing age, and the chances of impaired health. If you believe from the evidence that the deceased was negligent in running his train

at the rate of speed testified to at the time and place of the wreck, and under the circumstances, or that he failed to exercise reasonable care in looking ahead, and by operating the train at a moderate rate of speed and looking out he could have discovered and avoided the danger, and did not do so, and that such negligence, if it was negligence contributed to the wreck, then the plaintiff could not recover.

The master is not to be held liable as an insurer of the safety of his employés, nor as a warrantor of the instrumentalities and places furnished by him to enable his servants to accomplish his work. The law merely imposes upon him an obligation to exercise such ordinary and reasonable care and prudence as the exigencies of the situation require in providing the servant with a safe place, safe machinery, and suitable instrumentalities for his work, and, if this obligation is performed, the law absolves the master from all liability for defects therein, or the injuries happening from such defects. In an action for damages for injuries received by a servant in the employment of the master, occasioned by defects in the places of work, or instrumentalities furnished by the master, in order to authorize a finding that the master was negligent, it must be proven that the alleged defect was known to the master prior to the accident, or that in the exercise of ordinary and reasonable care, he ought to have known it; and that he either knew, or ought to have known, of the alleged defect in time to have remedied it, in the exercise of ordinary and reasonable care, or in time to have warned the servant of the defect, in the exercise of such care, before the injury. That the servant owes a duty to his master to exercise ordinary care for his own safety, and while he has a right to presume that his master has performed his duty, and is not, therefore, ordinarily bound to discover latent defects in the instrumentalities furnished by the master, yet he must notice all those patent and obvious defects which the exercise of ordinary care would enable him to discover; otherwise, his own negligence will contribute to his injury and prevent his recovery. Neither individuals nor corporations are bound as employers to insure the absolute safety of machinery, mechanical appliances, or places of work which they provide for the use of the employés; nor are they bound to furnish the best or safest or newest of those appliances for the purpose of insuring the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service by providing them with machinery and places of work reasonably safe and suitable for the use of the latter. It is only where the employer fails in his duty of precaution and care that he is responsible for an injury which may happen through a defect which was, or ought to have been, known to him, and which was unknown to the employé or servant.

In order to find a verdict for the plaintiff, the jury must be able to find from the evidence that the injury to the deceased was caused by the negligence of the defendant, or of some of its agents or servants while acting in the line of their duties to the defendant under their employment, and the negligence so found must be in some one or more of the acts alleged in the declaration to have been negligently committed, or negligently omitted. No act of negligence not alleged

ir the declaration will justify a verdict for the plaintiff, even though proven by the evidence.

If the jury should not find from the evidence that the railroad track and embankment, at the place of the alleged injury, was negligently constructed, and maintained in a weak and defective manner and condition, inadequate to bear the strain from the waters and drainage across the line of road at said point reasonably to be anticipated, and should find from the evidence that a washout occurred at said point in consequence of a heavy rainfall theretofore unprecedented, and that the defendant took reasonable and prompt precautions to ascertain the condition of said railroad track at said point by sending employés to inspect said roadbed at said point, and other points along the line of road, that said employés gave such reasonable inspection as the circumstances required, and such as a reasonably prudent person would have given under the circumstances, and that said inspection was made as often as reasonable prudence required, and disclosed no weakness or reason to apprehend weakness in said roadbed or track at said point—then the defendant will not be liable in this action, even though the rush of waters against the roadbed, caused from excessive, unprecedented and unanticipated rainfall (if such was the case), caused said roadbed to give way, and thereby cause the death of plaintiff's intestate, and you should find for the defendant. Where a railroad track becomes defective by reason of excessive rains or other unusual cause, the railroad company is not liable to the administrator of an employé for the death of the employé caused by an injury suffered by reason of the defective track, unless the defect had existed long enough to enable the company in the exercise of reasonable diligence to have discovered the defect, and repaired it, or to have warned the deceased of the defect in the exercise of such diligence, and thereby have prevented the injury. In considering the place where it is alleged that the track was defective, you should consider in connection with the testimony the weather conditions that forenoon and the excessive precipitation of rainfall, and whether such an extraordinary precipitation required the defendant to exercise extra care and caution or diligence to ascertain the condition of the track at the place of the wreck and whether such inspection as has been shown by the testimony, or the exercise of reasonable care and caution in the defendant at the place and under the circumstances. If the jury should find from the evidence that the deceased at the time of receiving the alleged injury was careless and negligent in failing to maintain a lookout, or in running his engine at an excessive rate of speed, and that such carelessness produced or contributed directly, even though slightly, to his injury, they should find for the defendant.

The damages which can be recovered in this case, if you should find for the plaintiff, are limited to the pecuniary interest of the distributees in the life of the deceased. Punitive or exemplary damages cannot be allowed; nor can physical or mental pain and suffering of the deceased, grief of his family or surviving relatives, nor loss of the society of the deceased, be considered. The elements of damage must be confined to the amount of earnings of the deceased contributed to

the support of his dependent distributees, and the savings from his net earnings. Profits from investments cannot be considered, and the damages must be based solely upon the earning capacity of the deceased, and upon his annual contributions from his net earnings to the dependent persons who would be distributees of his estate. The presumption of negligence created by the statute of Florida in relation to the liability of railroad companies does not outweigh proof. The statute merely casts upon the company the duty of showing affirmatively that its agents exercised all ordinary and reasonable care and diligence, and here the presumption ceases. If such proof is made, the presumption does not apply in weighing the evidence and reaching a conclusion.

An engineer not charged with the duty of maintaining the track or roadway of a railroad has a right to assume that the roadway is safe, in the absence of notice to the contrary. Mere general warning to proceed carefully because of heavy rains, with no notice of the particular defect, does not cause the engineer to assume the risk of a particular defect of which he has no knowledge. If the defendant and its officers and agents charged with the duty of maintaining its roadway had knowledge of weather conditions that made it probable that the safety or sufficiency of the roadway was impaired, it was their duty to make such examination and inspection as was reasonably necessary to ascertain whether it was in fact safe before sending trains over it, and Jennett, in the absence of notice to the contrary, had a right to assume that this was done.

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## UNITED STATES, to Use of WATSON-FLAGG ENGINEERING CO., v. WINKLER.

(Circuit Court, S. D. New York. June 8, 1908.)

UNITED STATES—BOND OF CONTRACTOR FOR PUBLIC WORK—RIGHT OF ACTION OF CREDITORS FOR LABOR OR MATERIALS—"COMPLETE PERFORMANCE OF SAID CONTRACT."

Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), amendatory of Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), provides that a contractor with the United States for any public work shall give a bond in usual form with the additional obligation that the contractor shall pay all persons supplying labor or material for the work; that, in case of suit thereon by the United States, any creditor having a claim for labor or materials may intervene therein and have his claim adjudicated and paid, "subject, however, to the priority of the claim and judgment of the United States"; that, in case no suit is brought by the United States within six months from the completion and final settlement of the contract, any such creditor may bring suit on the bond in the name of the United States for the benefit of himself and all other similar creditors, provided that such suit "shall not be commenced until after the complete performance of said contract and final settlement thereof and shall be commenced within one year after the performance and final settlement of said contract and not later." A contractor who had given such bond, and whose contract contained the usual provision giving the United States in case of his default the right to have the contract completed at his cost, became insolvent and abandoned the work. *Held*, that such abandonment was not a "complete

performance of said contract" which gave a right of action to creditors for labor and materials on the bond under the statute, which contemplates a completion of the work, whether by the contractor or the United States, and a final settlement to determine the prior rights and claim of the United States under the contract and the lapse of six months thereafter for the bringing of suit to enforce such rights against the bondsmen before an action can be maintained by such creditors.

At Law. Demurrer to the complaint by Metropolitan Surety Company on the ground that the same does not state facts sufficient to constitute a cause of action against the defendant.

Wetherhorn & Link, for plaintiff.

David McClure, for defendant Metropolitan Surety Company.

RAY, District Judge. This action is brought in the name of the United States for the use and benefit of the Watson–Flagg Engineering Company under Act Congress Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709).

The act, as amended, reads as follows:

"Chap. 778. An act to amend an act approved August thirteenth, eighteen hundred and ninety-four, entitled 'An act for the protection of persons furnishing materials and labor for the construction of public works.'

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the act entitled 'An act for the protection of persons furnishing materials and labor for the construction of public works,' approved August thirteenth, eighteen hundred and ninety-four, is hereby amended so as to read as follows:

" 'That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond, is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Pro-

vided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.'

"Approved February 24, 1905."

The Watson-Flagg Engineering Company is a foreign corporation. The Church Construction Company was and is a domestic corporation organized under the laws of the state of New York, and Cornelius L. Winkler is the receiver of said corporation duly appointed by the Supreme Court of the state of New York. The Metropolitan Surety Company is a corporation of the state of New York. August 26, 1905, the United States by its representative entered into a contract with the Church Construction Company by which said company was to furnish labor and materials for the construction of certain barracks at West Point, N. Y. The contract is annexed to the complaint. August 26, 1905, the Church Construction Company as principal and the Metropolitan Surety Company as a surety filed their bond in due form and pursuant to the statute quoted conditioned as follows:

"Now, therefore, if the above-bounden Church Construction Company, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Church Construction Company to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue."

The bond recited the contract generally and runs to the United States of America. It is unnecessary to recite it more fully in discussing this case. Between April 16, 1906, and March 29, 1907, the Watson-Flagg Engineering Company, at the request of the Church Construction Company, supplied it with labor and materials in the prosecution of the work under said contract worth and of the value of $3,740.98, of which $1,715 was paid leaving now due and unpaid $2,025.98. The defendants on demand have neglected and refused to pay said amount,

and the complaint charges that by reason of their refusal to pay said amount or certain installments thereof as they become due they breached said contract upon their part "and prevented complete performance thereof on the part of said Watson-Flagg Engineering Company." The complaint also alleges that the Church Construction Company became insolvent and unable to pay its debts March 29, 1907, and has ever since remained so, and that, by reason of said insolvency, it failed and neglected to pay the installments which were due and payable and breached its contract with the Watson-Flagg Engineering Company and prevented complete performance thereof by said company. The complaint also alleges that the Watson-Flagg Engineering Company fully performed on its part and became entitled to payment. The bill of complaint then alleges that March 29, 1907, the Church Construction Company abandoned the work and the contract between it and the United States, and thus rendered complete and final performance impossible, and "that no suit has ever been brought by the United States upon the said bond and obligation, though more than six months have elapsed since the abandonment of said contract as aforesaid: that the Watson-Flagg Engineering Company has duly made application to the proper department of the United States for a certified copy of the contract and bond aforesaid, copies of which are annexed as exhibits to this complaint and made a part hereof, and has duly received the same pursuant to said application before the commencement of this action; that the foregoing allegations in this paragraph contained are made in pursuance of the statutes of the United States in such cases made and provided, particularly Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709)." The statute provides: (1) That a person entering into a contract with the United States for the prosecution and completion of any public work shall execute the bond specified. Such is this case. Also (2) that when the United States brings suit any person, corporation, or individual who has furnished labor or materials used in the construction of any such public work, payment for which has not been made, shall (a) have the right to intervene and be made a party to any action instituted by the United States on such bond, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however to the priority of the claim and judgment of the United States. The United States has not brought any action on the bond of the contractor, and hence there is no intervention or right in plaintiff under this clause of the statute. If, when the United States brings action and others intervene, the full amount of the liability of the surety on the bond is insufficient to pay the full amount of such claims and demands, including that of the United States, then, after paying the full amount due the United States, the remainder of the recovery is to be distributed pro rata among the interveners. This statute then provides:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the

prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed or executed * * * for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later," etc.

It is clear that certain events must happen, certain things be done, before a right of action arises on such bond against the surety in favor of a person supplying labor and materials to the contractor in case the United States does not bring suit. What are they? First. The United States has six months from and after "the completion and final settlement of said contract" in which to bring suit on such bond. If the six months elapse after such "completion and final settlement of said contract," and the United States has not sued thereon, then such person who has supplied material for which payment has not been made may sue in the form provided. The later proviso is also explicit that, "when suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof." In short, the statute is explicit that, before any such creditor can bring suit on the bond, there must be (1) "a complete performance of said contract"; and (2) "final settlement thereof." It will be noted that the statute does not say "complete performance of said contract by the contractor." If the statute read in that way, such creditors furnishing material to the contractor would be without remedy on the bond, unless the statute is permissive merely and not restrictive of his right to sue thereon, in all cases where the contractor shall or shall have failed to fully complete the contract. Turning to the contract itself, we find this article contained therein.

"Art. 5. That in case of failure of the said party of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part shall have the power to execute the contract in open market, charging to the party of the second part any excess in cost over and above the price stipulated herein."

The statute quoted seems to contemplate that in all cases the United States having entered on the work and made a contract for its execution will see that the work is completed; that, when the United States is compelled to complete the work by reason of the failure of the contractor for any reason so to do, this is "the complete performance of said contract." It also seems to contemplate that, when the work is completed by the United States, the cost of doing the work will be ascertained, the amount paid the contractor ascertained, etc., and the amount of damages sustained by the United States ascertained, whereupon the United States may or may not sue the surety on the bond. The statute contemplates that this will be done in every case. This is what is meant by the words "complete performance of the contract"

and by the words "final settlement thereof." The statute seems to contemplate that all officers and heads of departments of the United States will do their duty and close up contracts and enforce the liability of any party indebted to it. When a bid for public work is made to be done under the Secretary of War, a written guaranty is given that the bidder will make a contract and give a bond. If the bidder fails to comply then the mode of ascertaining the damage is specified by statute. See Act March 3, 1883, 22 Stat. 487 (U. S. Comp. St. 1901, p. 2497). Again, by Act April 10, 1878, c 58, 20 Stat. 36, the Secretary of War is authorized to prescribe rules and regulations to be observed in the preparation, etc., for contracts under the War Department. These have been made and the contract in question here follows them. I assume that Congress in enacting the law of February 24, 1905, quoted, had reference thereto. In any event, the bond in question is given by the contractor to the United States, and not to materialmen, and is enforceable by the United States only, except in the cases specified by Congress. The bond and statute are to be read together. While the bond is intended for the benefit of both the United States and persons furnishing material, etc., the remedy of the latter is in the cases and in the way prescribed. The courts cannot change the statute or add to the liability of the surety. The surety contracted with reference to the statute and cannot be sued on its bond by a person who furnished material to the contractor, except in the cases and on the conditions and on the happening of the events named.

The plaintiff here has not alleged that the contract has been completely performed by anyone, or that it has been adjusted or settled, or that the claim of the United States against the contractor or surety has been ascertained or determined, or that the United States has failed to proceed to secure a full completion of the contract, a completion of the work, or a settlement or ascertainment of the liability of the surety to the United States. For anything that appears, the United States is now engaged in securing a complete performance of the contract and a final settlement thereof. I am clearly of the opinion that a failure by the contractor to complete its contract, its insolvency, whatever the cause, its abandonment of the contract, give no right of action to the Watson-Flagg Engineering Company, or right to institute or prosecute this action in the name of the United States. The United States did not institute this action. I have no doubt that Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), repeals the act of August 13, 1894. The act of August 13, 1894, says the act of 1905 "is hereby amended so as to read as follows." The latter act takes the place of the former act in its entirety and covers the whole subject. The plaintiff contends that the words "after the complete performance of said contract and final settlement thereof," or "completion and final settlement," are to be construed as if the statute read:

"After the complete performance of said contract and final settlement thereof, or after six months from the time the contract between the contractor and the government was ended, abandoned or ceased to exist."

I cannot so read the statute. But, should we construe the words to mean ended or ceased to exist, this contract is not ended nor has it ceased to exist. It is a valid existing contract. The contractor failed to perform, became insolvent, and was unable to perform and so abandoned it. "Completion and final settlement," and "complete performance and final settlement," are quite different from abandonment by the contractor.

I do not see any basis for the contention that the United States has waived its right to bring an action at the proper time. There in no such allegation. But, suppose it has, that mere fact gives no right of action to the Watson-Flagg Engineering Company against the surety company. There is no allegation that the United States has failed in any duty, or that it is not proceeding with diligence to secure a full performance of the contract by some one so as to fix the measure of the surety company's liability on the bond. I think that the amendatory act was passed for the purpose of preventing premature actions by materialmen; for the purpose of preventing actions by them until the United States has had full opportunity to secure the construction of the work and ascertain the cost of doing it according to the contract.

It follows that the demurrer must be sustained, with costs, but the plaintiff may serve an amended complaint on payment of such costs and within 30 days.

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## UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. June 5, 1908.)

No. 6.

RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION.

Under the provision of Safety Appliance Act March 2, 1893, c. 196, § 5, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3175), that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for," a railroad company is required at its peril to see that its cars are equipped with couplers in proper condition at all times when in use in interstate business, and, in an action to recover the penalty imposed for a violation of the act in that respect, it is no defense that the defendant exercised due care.

On Motions by Defendant for New Trial and for Judgment Notwithstanding the Verdict.

J. Whitaker Thompson, John C. Swartley, and Luther M. Walter, for the United States.

James F. Campbell, for defendant.

J. B. McPHERSON, District Judge. Since this case was tried, and since the motions under consideration were argued, the Supreme Court of the United States has decided the case of St. Louis, etc., Railway Co. v. Taylor, 28 Sup. Ct. 616, 52 L. Ed.——, which, as I understand the matter, decides finally the vital questions now before this court. It is true that the Taylor Case was an action against the railway company to recover damages for the death of an employé,

while the present suit was brought by the United States to recover a penalty for failure on the part of the defendant to keep certain safety appliances in good order; but the same section of the safety appliance act was construed by the Supreme Court as is now in question, and the construction there put upon it supports the instructions that were given to the jury and are now complained of, as, I think, the following quotation from Mr. Justice Moody's opinion will make clear. He said, inter alia:

"The plaintiff in error raises another question, which, for the reasons already given, we think is of a federal nature. The evidence showed that drawbars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise the lowered drawbar to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (St. Louis & S. F. R. Co. v. Delk [C. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability, under the statute as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible; but this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face, rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interest of the employé and of the public. Where an injury happens through the absence of a safe draw-

bar, there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

Upon this point the charge to the jury in the present case is as follows:

"The only question of fact therefore that will be for you to determine is whether or not this car was out of order, and whether these appliances which have been made necessary by the act of Congress were in operative condition, because if they were not, if this car would not couple automatically by impact, or if it could not be uncoupled unless somebody went between the cars in order to uncouple it, then it would be out of operative order, and the act of Congress would be violated. Whether or not the company inspected this car, were diligent and careful in inspecting it, is not a matter that you need concern yourselves about. As I regard the statute, the act requires those defects to be found at the peril of the company, and, if they fail to find them, then they are responsible for the penalty, even though they may have honestly done all in their power to do. If there is carelessness and negligence, of course, they would be responsible; but even if they put careful men on, and careful men had done their work as well as they knew how, nevertheless, if through some oversight—which even the most careful men are liable to commit—this defect was not discovered, then the company would be responsible."

Upon the authority of the Taylor Case therefore the motions for a new trial and for judgment notwithstanding the verdict are refused, and to the refusal of the defendant's motion for judgment an exception is sealed.

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## UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. June 5, 1908.)

No. 6.

RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION.

Where a railroad company has had an opportunity to inspect cars used on its line in interstate traffic, its duty to see that they conform to the requirements of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), is absolute, and it is no defense to an action to enforce the penalty provided for a violation of the act that it exercised due diligence.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

On Motion for New Trial.

J. Whitaker Thompson, John C. Swartley, and Luther M. Walter, for the United States.

James F. Campbell, for defendant.

J. B. McPHERSON, District Judge. Since this case was tried, and since the motion under consideration was argued, the Supreme Court of the United States has decided the case of St. Louis, etc., Railway Co. v. Taylor, 28 Sup. Ct. 616, 52 L. Ed. ——, which, as I understand the matter, decides finally the vital questions now before this court. It is true that the Taylor Case was an action against the railway company to recover damages for the death of an employé, while the present suit was brought by the United States to recover a penalty for failure on the part of the defendant to keep certain safety appliances in good order; but the same section of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) was construed by the Supreme Court as is now in question, and the construction there put upon it supports the instructions that were given to the jury, and are not complained of, as, I think, the following quotation from Mr. Justice Moody's opinion will make clear. He said, inter alia:

"The plaintiff in error raises another question, which, for the reasons already given, we think of a federal nature. The evidence showed that drawbars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise the lowered drawbar to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (St. Louis, & S. F. Ry. Co. v. Delk [C. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery and appliances, or consider when or how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed,

imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible; but this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face, rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interest of the employé and of the public. Where an injury happens through the absence of a safe drawbar, there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

Upon this point the charge to the jury in the present case is as follows:

"Of course, you will see at once—perhaps, you have seen already if you have been thinking at all about the case—that some difficult questions might arise as to when common carriers might be liable, and it is very easy to conceive of situations in which it would be hard to hold them liable under the strict letter of the law. For example, suppose a car started from the point of shipment in perfectly good order, and then through no fault of the carrier something happened to the coupler while the journey was in progress. Of course, under the strict letter of the law, every minute the car was in use after that time there would be a violation of the law; but, I say, that would present a hard case, and if the carrier, under the proper construction of this statute, is liable under such circumstances, of course, there is a certain hardship about the situation. But we have nothing to do with a case of that kind. That may safely be left to be dealt with when the time comes. I give you that as an illustration, and others might be easily thought of. We are dealing with the particular situation disclosed by the evidence, and the jury must confine itself to that, as I intend to do in what I have to say to you.

"Here is a case where a certain number of cars, constituting a train used in interstate traffic—and about that matter there is no controversy—are at rest for a certain length of time, in all cases for more than an hour, in some cases for, I think, several hours, but, at all events, in all of these three cases at rest for more than an hour, and therefore affording an opportunity for inspection for the discovery of defects in these automatic couplers. In a case like that I instruct you that it is the carrier's duty to find any defects that may exist, and, if the carrier fails to find them, then the carrier is liable for the penalty imposed by the statute, because, if the train is used afterwards with the coupler out of order, then, of course, under the precise letter of the statute, the carrier is using a coupler that cannot be coupled automatically by impact or cannot be uncoupled without somebody going between the cars, or perhaps neither operation can be performed as the statute contemplates. In other words, the question of diligence or carefulness on the part of the carrier in inspecting the cars has nothing at all to do with the matter now before you. The obligation is laid upon the carrier by the statute to find, in effect, any defect that may exist, when it has, as it had under these circumstances, the opportunity to discover it, and, if its inspectors do

not discover it, then the carrier is liable for those defects and for the penalty that is imposed for the use of the car having such defects."

Upon the authority of the Taylor Case therefore the motion for a new trial is overruled.

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UNITED STATES v. PENNSYLVANIA R. CO.

(District Court, E. D. Pennsylvania. June 5, 1908.)

No. 8.

On Motions for New Trial and by Defendant for Judgment Notwithstanding the Verdict.

J. Whitaker Thompson, John C. Swartley, and Luther M. Walter, for the United States.

John Hampton Barnes, for defendant.

J. B. McPHERSON, District Judge. Since this case was tried, and since the motions under consideration were argued, the Supreme Court of the United States has decided the case of St. Louis, etc., Railway Co. v. Taylor, 28 Sup. Ct. 616, 52 L. Ed. ——, which, as I understand the matter, decides finally the vital questions now before this court. It is true that the Taylor Case was an action against the railway company to recover damages for the death of an employé, while the present suit was brought by the United States to recover a penalty for failure on the part of the defendant to keep certain safety appliances in good order; but the same section of the safety appliance act was construed by the Supreme Court as is now in question, and the construction there put upon it supports the instructions that were given to the jury, and are now complained of, as, I think, the following quotation from Mr. Justice Moody's opinion will make clear. He said, inter alia:

"The plaintiff in error raises another question, which, for the reasons already given, we think is of a federal nature. The evidence showed that drawbars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise the lowered drawbar to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence, the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (St. Louis & S. F. R. Co. v. Delk [C. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the

liability of the defendant does not grow out of the common-law duty of master and servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible; but this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face, rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employé and of the public. Where an injury happens through the absence of a safe drawbar, there must be hardship. Such an injury must be irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer. it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

Upon this point the charge to the jury in the present case was as follows:

"Let me say also that there is no question in the case for your consideration concerning the measure of care or diligence that the defendant may have exercised with regard to inspection. In my construction of the statute, that is not a matter which the act of Congress makes necessary for consideration. As I understand the law, Congress has required a common carrier engaged in interstate commerce to see that these devices are in order under conditions such as are here before us. I am not speaking now of accidents that might happen to them while they were in the course of transportation, when it would be impossible for anybody to know that they were out of order or to repair them, but I am speaking of a condition that may exist while the cars are at rest, and when an opportunity is afforded for the process of inspection. That was the case here, according to the undisputed evidence. This car and the train of which it was part lay at the Mantua yards for some hours. I do not know for how long exactly. The precise time is not important; but an opportunity was afforded, at all events, for inspection. That being so, in my construction of the statute, the duty rested upon the carrier to find any defect that existed, and if the defect was there, and the carrier failed to find it, it would be liable to the penalty, even although it

made an inspection and made it by careful men, who performed their duty according to the best of their ability. The fact that they failed to find it would, while perhaps not a fault in one sense, nevertheless expose the carrier to the penalty. So that the whole case depends upon what you find the question of fact to be. Was this car out of operative condition at the time testified to by the witness? I repeat, the burden of proof is on the government to show you by clear and satisfactory evidence that it was out of order at one or both ends, and if the government has not so satisfied you, then your verdict must be for the defendant. If, however, it has satisfied you that this was out of order, that one or both ends of this coupling device were out of order, then your verdict should be in favor of the United States for the sum of $100."

Upon the authority of the Taylor Case, therefore, the motions for a new trial and for judgment notwithstanding the verdict are refused, and to the refusal of the defendant's motion for judgment an exception is sealed.

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UNITED STATES v. LEHIGH VALLEY R. CO.

(District Court, E. D. Pennsylvania. June 5, 1908.)

No. 5.

On Motion for New Trial.

J. Whitaker Thompson, John C. Swartley, and Cuther M. Walter, for the United States.

J. Wilson Bayard, for defendant.

J. B. McPHERSON, District Judge. Since this case was tried, and since the motion under consideration was argued, the Supreme Court of the United States has decided the case of St. Louis, etc., Railway Co. v. Taylor, 28 Sup. Ct. 616, 52 L. Ed. ——, which, as I understand the matter, decides finally the vital questions now before this court. It is true that the Taylor Case was an action against the railway company to recover damages for the death of an employé, while the present suit was brought by the United States to recover a penalty for failure on the part of the defendant to keep certain safety appliances in good order; but the same section of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) as amended by Act April 1, 1896, c. 87, 29 Stat. 85, was construed by the Supreme Court as is now in question, and the construction there put upon it supports the instructions that were given to the jury, and are now complained of, as, I think, the following quotation from Mr. Justice Moody's opinion will make clear. He said, inter alia:

"The plaintiff in error raises another question, which, for the reasons already given, we think is of a federal nature. The evidence showed that drawbars, which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise the lowered drawbar to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the de-

fendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (St. Louis & S. F. R. Co. v. Delk [C. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible; but this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face, rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employé and of the public. Where an injury happens through the absence of a safe drawbar, there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

Upon this point the charge to the jury in the present case was as follows:

"I have not heard any argument made to you with regard to the question of reasonable care and diligence. The question is, however, raised by one of the points that is presented to me by the defendant, and therefore I say to you in a word that the question of reasonable care and diligence that may have been exercised by the defendant is not a matter for your consideration. As I understand this statute, the railroad company is bound to discover defects, if they exist, under the circumstances as they have been offered to us upon this trial. I am not dealing with anything except the facts that are

now before us. Here is a case in which this car has been shown to have been at rest at East Penn Junction for a number of hours, and therefore when there was an opportunity to inspect upon the part of the railroad company. Now, under such circumstances, my reading of the statute is that it imposes upon the company the duty to find the defects, if defects exist, and that it must find them at its peril. If its inspectors failed to find them, then the liability for the penalty exists if the car is afterwards moved without having the defects repaired. That, as I understand, is the case for your determination. If you are not satisfied from all the evidence in the case that the government has by clear and satisfactory evidence made out that this car was hauled in a defective condition between East Penn Junction and Cementon, then you ought to find in favor of the defendant. If they have satisfied you that this car was so defective at the time when it left East Penn Junction that it could not be automatically coupled and could not be uncoupled without the necessity of somebody going between the cars to perform that operation, then your verdict ought to be in favor of the United States for the sum of $100."

Upon the authority of the Taylor Case therefore the motion for a new trial is overruled.

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UNITED STATES v. SOUTHERN PAC. CO. (seven cases)

(District Court, N. D. California. March 13, 1908.)

Nos. 1,670–1,672, 1,674, 1,675, 1,684, 1,687.

1. PENALTIES—ACTIONS—NATURE AND FORM—"CIVIL ACTION."
   An action of debt to recover a penalty given by statute is a "civil action."
   [Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1183–1193; vol. 8, p. 7603.]

2. CARRIERS—TRANSPORTATION OF LIVE STOCK—FEDERAL STATUTES—VIOLATION—ACTION FOR PENALTIES—DEGREE OF PROOF.
   Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), regulating transportation of live stock by interstate carriers, imposes a penalty for violation of not less than $100 nor more than $500, to be recovered by civil actions in the name of the United States. *Held*, that an action to recover such penalties was civil and not criminal in character, and hence the government was only bound to establish its case by a preponderance of the evidence, and not beyond reasonable doubt.

3. SAME—ASSESSMENT.
   Where an interstate carrier has been found guilty of violating Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), regulating the transportation of live stock, the duty of fixing the amount of the penalty to be recovered by the United States in such action devolves on the court.

See 157 Fed. 459.

A. P. Black, Asst. U. S. Dist. Atty.
Knight & Heggerty, for defendant.

DE HAVEN, District Judge. These actions were brought by the United States against the Southern Pacific Company to recover penalties alleged to have been incurred by the defendant under the provisions of Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), entitled "an act to prevent cruelty to animals

while in transit by railroad or other means of transportation from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia," etc., and were by order of the court consolidated and tried together. The trial resulted in a verdict in favor of the plaintiff in each of the cases, and the defendant has moved for a new trial.

1. It is claimed that the court erred in refusing to instruct the jury, as requested by the defendant, that the government was required to prove its case beyond a reasonable doubt, and in giving to the jury the following instruction:

"You are further charged, gentlemen, that the burden of proof in each one of these cases is upon the government, and that it is required to prove the acts constituting the violation of the statute by a preponderance of evidence; that is to say, the government is not required to prove its allegations beyond all reasonable doubt, but simply by a preponderance of evidence, and by a 'preponderance of evidence' is meant that evidence which, after a consideration of all the evidence, is in the judgment of the jurors entitled to the greatest weight."

An action of debt to recover a penalty given by a statute is a civil action. 1 Bishop on Criminal Law (3d Ed.) § 32; Jacob v. United States, 1 Brock. 520, Fed. Cas. No. 7,157; Stockwell v. United States, 13 Wall. 531, 20 L. Ed. 491; United States v. Elliot, Fed. Cas. No. 15,043. But, independently of the general rule stated in the cases just cited, section 4 of the act of Congress above referred to provides that the penalty prescribed by the statute for a failure to comply with its provisions "shall be recovered by civil action in the name of the United States." The actions, then, being classed as "civil actions," the court did not err in refusing to instruct the jury, as requested by the defendant, that the burden was imposed upon the government to prove the alleged violations of the statute beyond all reasonable doubt, and in giving the instruction above quoted. Lilienthal's Tobacco Co. v. United States, 97 U. S. 237, 271, 272, 24 L. Ed. 901; United States v. Brown, Deady, 566, Fed. Cas. No. 14,662; The Good Templar (D. C.) 97 Fed. 651; Roberge v. Burnham, 124 Mass. 277.

There are cases in which the contrary has been held, but in my opinion they do not state the true rule. In section 29 of Greenleaf on Evidence, it is said:

"A distinction is to be noted between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases their duty is to weigh the evidence carefully and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in a criminal trial the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law that the guilt of the accused must be fully proved."

The rule of evidence in relation to the degree of proof required of the government in the prosecution of persons charged with crime is based upon the tender regard which the law has for the right of the accused to be protected from unjust judgments which may affect his life or liberty; these rights being made more secure by the application of the rule that no person shall be adjudged a criminal, and pun-

ished as such, except upon proof which leaves no reasonable doubt of the justice of such a judgment. But in civil actions there is not the same reason for requiring such strict proof of the facts in issue, and therefore the law does not demand it.

The case of Roberge v. Burnham, 124 Mass. 277, was an action brought by a parent against the defendant to recover a penalty under a statute containing this provision:

"Whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, or allows a minor to loiter upon the premises where such sales are made, shall forfeit one hundred dollars for each offense, to be recovered by the parent or guardian of such minor in an action of tort."

Upon the trial the defendant asked the court to instruct the jury that they should find for him—

"unless upon the evidence they were satisfied beyond a reasonable doubt that the defendant, by himself or his agent or servant, committed the offense of selling liquor to a minor."

The request was refused, and the Supreme Court of Massachusetts, in sustaining the action of the court, said:

"The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights only are ascertained."

And in concluding its opinion the court added:

"It is true that this action, like all penal actions, partakes somewhat of the character of punishment; but this does not make it a criminal prosecution. When the Legislature gives to the plaintiff a civil action, partly remedial in its nature, it is to be presumed that it is intended that the usual incidents of all civil actions should attach, one of which is that proof by a reasonable preponderance of the evidence is sufficient."

Now it is to be noted that the statute under which these actions are prosecuted does not make a violation of its provisions a criminal offense, and, while it does provide "a penalty in the sum of not less than $100, nor not more than $500," for each failure to comply with its provisions, still Congress was careful to declare that such penalty should be recovered "by civil action in the name of the United States"; and, having thus declared, it must, to use the language of the court in Roberge v. Burnham, above quoted, be presumed that it was the intention "that the usual incidents of all civil actions should attach, one of which is that proof by a reasonable preponderance of the evidence is sufficient."

It is not deemed necessary to discuss objections urged against other instructions given to the jury. It is sufficient to say that in my opinion the court did not err in the instructions given, nor in its refusal to give other instructions requested by the defendant. The motion for a new trial is denied.

2. The statute provides a penalty of not less than $100, nor more than $500, for each violation of its provisions, and when there has

been a verdict in favor of the government the duty of fixing the amount of the penalty by its judgment devolves upon the court.

Upon consideration of all the evidence, the judgment of the court is that in each of the actions above numbered the United States recover from the defendant the sum of $200 and costs.

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## UNITED STATES v. COMSTOCK et al.

(Circuit Court, D. Rhode Island. May 26, 1908.)

No. 2,626.

CONSPIRACY—OFFENSES AGAINST BANKRUPT LAWS—INDICTMENT.

An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to conceal property from a trustee in bankruptcy, in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), is insufficient, where it does not use the statutory words "knowingly and fraudulently" in characterizing the offense to which the conspiracy related, or any equivalent therefor.

On Demurrer to Indictment.

See 161 Fed. 644; 162 Fed. 416.

Charles A. Wilson, U. S. Atty., and Geo. H. Huddy, Asst. U. S. Atty.

Walter H. Barney and J. J. Hahn, for defendant.

BROWN, District Judge. This is an indictment under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), for conspiracy. It charges that the defendants—

"did conspire, combine, confederate, and agree together to commit an offense against the United States, to wit, to conceal, while the said Benjamin W. Comstock was a bankrupt, from his trustee in bankruptcy, to wit, from Arthur P. Johnson, trustee in bankruptcy of said Benjamin W. Comstock, property belonging to the bankrupt estate of said Benjamin W. Comstock, and to receive a material amount of property from said Benjamin W. Comstock after the filing of a petition in bankruptcy against said Benjamin W. Comstock," etc.

The principal point on demurrer is that the indictment does not charge a conspiracy to commit any offense defined by the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and that essential ingredients of the statutory offense are omitted from the indictment. In section 29b punishment is provided upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; (4) received any material amount of property from a bankrupt after the filing of the petition with intent to defeat this act.

The words "knowingly and fraudulently" are an essential part of the statute, and describe an essential ingredient of the offense. The omission of these words, or any equivalent, is, in my opinion, fatal on demurrer.

Demurrer of John M. Peck is sustained.

## UNITED STATES v. COMSTOCK et al.

(Circuit Court, D. Rhode Island. May 26, 1908.)

No. 2,626.

CRIMINAL LAW—OFFENSES AGAINST BANKRUPT LAW—CONSPIRACY—LIMITATION OF PROSECUTIONS.

The limitation of one year imposed by Bankr. Act July 1, 1898, c. 541, § 29d, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434), for the finding of an indictment for a violation of such section, does not apply to an indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for a conspiracy to commit an offense thereunder.

On Demurrer to Pleas in Abatement.

See 161 Fed. 644; 162 Fed 415.

Charles A. Wilson, U. S. Atty., and Geo. H. Huddy, Asst. U. S. Atty.

Walter H. Barney and J. J. Hahn, for defendant.

BROWN, District Judge. The second plea in abatement avers that:

"Said indictment was found by the grand jury in this court more than one year after the commission of the supposed offense which he is in this indictment alleged to have committed."

This indictment, however, is for conspiracy under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676). This offense of conspiracy cannot be said to arise under the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424). United States v. Hirsch, 100 U. S. 33–35, 25 L. Ed. 539.

The provision of section 29d of the bankruptcy act, "A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information filed in court within one year after the commission of the offense," is inapplicable.

The third plea in abatement is substantially to the same effect.

The fourth plea in abatement avers the presence of George H. Huddy, Esq., in the grand jury room. This fourth plea is substantially disposed of by the opinion of this court in United States v. Comstock (indictment No. 2,622, opinion handed down May 11, 1908) 161 Fed. 644.

The demurrer of the United States to the second, third, and fourth pleas in abatement is sustained.

## JONES et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,497.

1. COURTS—FEDERAL COURTS—CRIMINAL PROCEEDINGS—STATE PRACTICE.
Criminal cases in the federal courts are governed by federal statutes and decisions; state statutes and decisions being inapplicable.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 908.
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. CRIMINAL LAW—LIST OF WITNESSES OR JURORS.
If a federal prisoner is not indicted for a capital offense, he is not entitled as of right to a list of witnesses or jurors.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1420–1436.]

3. GRAND JURY—DISCHARGE.
A grand jury can be discharged only by direct order of the court or by the final adjournment of the court for the term for which the jury is impaneled.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Grand Jury, § 28.]

4. SAME—MEETINGS.
In the absence of an order of court, the grand jury may meet and adjourn on its own motion, and may lawfully proceed in the performance of its duties while in existence, whether the court is in session or not.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Grand Jury, § 69.]

5. SAME—IMPROPER DISCHARGE OF JUROR.
The improper discharge of a grand juror will not vitiate an indictment, if the number necessary to find the indictment remain.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Grand Jury, § 28.]

6. SAME—ABSENCE.
The absence of one or more federal grand jurors, by reason of a failure to notify them of a meeting at which an indictment was found, was not sufficient to invalidate the indictment; there being present a sufficient number to find the indictment.

7. INDICTMENT AND INFORMATION—DEFECTS—OBJECTIONS.
While vital defects in an indictment are always available to accused, objections not affecting the real merits of the case will be overruled, under Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), providing that no indictment found or presented by a grand jury shall be deemed insufficient by reason of a defect or imperfection in form only, which shall not tend to prejudice accused.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 202–214.]

8. CONSPIRACY—FRAUD AGAINST UNITED STATES—HOMESTEAD ENTRY.
To obtain land of the government open to entry under its homestead laws by means of false proof in respect to the entryman's residence or improvements thereon, or for the use or benefit of another, is not only a fraud in fact, but a fraud on the homestead law, a conspiracy to commit which constituted a violation of Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), making it a crime for two or more persons to conspire to defraud the United States "in any manner or for any purpose."
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 60.]

9. SAME—INDICTMENT.
An indictment charged that defendants, with others, conspired to obtain from the government certain specified tracts of land open to homestead entry by procuring certain named persons to enter the same by

*Rehearing denied June 10, 1908.

means of false proof in respect to their residence on and improvement of the land, and with respect to the intent with which and the purpose for which the entries were made, and in pursuance of such conspiracy and to effect the object thereof defendants caused and procured C. to make the homestead proof in respect to the land entered by him and the final affidavit required by homestead claimants, including a statement that his family consisted of himself and wife, and that they had resided continuously on the land since first establishing residence thereon, which proof was subscribed by C. and certified by defendant W., and that each of the defendants knew that the proof was false, etc. *Held*, that the indictment was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 79–99.]

10. SAME—OVERT ACTS.

While no overt act was required to constitute a conspiracy at common law, a conspiracy to defraud the United States, denounced by Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), is not effected until an overt act is committed by one or more of the conspirators.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 38, 39.]

11. CRIMINAL LAW—LIMITATIONS.

Where an alleged conspiracy to defraud the United States, denounced by Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), contemplated various overt acts and the consequent continuance of the conspiracy beyond the commission of the first one, each overt act gave a new, separate, and distinct effect to the conspiracy, and constituted another crime, so that a prosecution was not barred by limitations until three years after the commission of the last overt act alleged.

[Ed. Note.—Commencement of period of limitations against prosecutions for continuing offenses, see note to Ware v. United States, 84 C. C. A. 519.]

12. SAME—EVIDENCE—OTHER OFFENSES.

Where an indictment for conspiracy to defraud the United States of government land by fraudulent homestead entries charged defendants with conspiring to defraud the government of lands embraced in certain homestead claims filed by certain named persons, the government was properly permitted, for the purpose of proving defendants' intent and guilty knowledge, to show that various other persons had also filed on and made final proof on various other tracts of land under the homestead laws, in pursuance of an agreement with the defendants and for their benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 825–834.]

13. WITNESSES — CROSS-EXAMINATION—DOCUMENTS—INTRODUCTION IN WHOLE OR IN PART.

Where, on cross-examination, a witness admitted making a sworn statement, the witness was not subject to examination as to whether such statements as counsel might suggest were contained in it had been made by the witness, for the purpose of contradicting him; but the entire statement was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1249–1251.]

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

S. B. Huston and Martin L. Pipes, for plaintiffs in error.
William C. Bristol, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiffs in error were defendants in the court below to an indictment based upon the provisions of section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), which reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

We may as well, also, insert here some other sections of the same statutes which are pertinent to the case as presented. They are:

"Sec. 808. Every grand jury impaneled before any District or Circuit Court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed upon the grand jury and the court shall order the marshal to summon either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose." U. S. Comp. St. 1901, p. 626.

"Sec. 811. The Circuit and District Courts, the district courts of the Territories, and the Supreme Court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary." U. S. Comp. St. 1901, p. 627.

"Sec. 1021. No indictment shall be found nor shall any presentment be made, without the concurrence of at least twelve grand jurors." U. S. Comp. St. 1901, p. 719.

In the court below the plaintiffs in error made a motion to quash the indictment against them on the ground that the names of the witnesses summoned before the grand jury were not inserted at the foot of the indictment or indorsed thereon. By a statute of the state of Oregon, where the case arose, it is provided that the indictment must be set aside when "the names of the witnesses summoned before the grand jury are not inserted at the foot of the indictment, or indorsed thereon" (section 1349, B. & C. Comp. Oregon), which provision of the state statute the Supreme Court of Oregon has held to be mandatory. State v. Pool, 20 Or. 150, 25 Pac. 375; Owens v. Snell, Heitshu & Woodard Co., 29 Or. 483, 44 Pac. 827; State v. Andrews, 35 Or. 388, 58 Pac. 765; State v. Warren, 41 Or. 348, 69 Pac. 679.

It is insisted on the part of counsel for the plaintiffs in error that the state statute and state practice of Oregon controls the federal court in that respect. In that counsel are altogether mistaken. Criminal cases in the federal courts are governed and controlled by federal statutes and federal decisions, and state statutes and state decisions are inapplicable. United States v. Reid, 12 How. 363, 13 L. Ed. 1023; Starr v. United States, 153 U. S. 625, 14 Sup. Ct. 919, 38 L. Ed. 841; Jones v. United States, 137 U. S. 211, 11 Sup. Ct. 80, 34 L. Ed. 691; Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Logan v. United States, 144 U. S. 301, 12 Sup. Ct. 617, 36 L. Ed. 429; Lang v. United States, 133 Fed. 204, 66 C. C. A. 255; United States v. Davis (C. C.) 103 Fed. 457; United States v.

Hall (D. C.) 53 Fed. 353; United States v. Stone (C. C.) 8 Fed. 239.

In the case of Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570, which arose in Alaska, we said:

"The statute of the United States provides that, when a party is indicted for treason, a copy of the indictment and a list of the jury and of the witnesses to be produced at the trial, stating the place of abode of each juror and witness, shall be furnished to such persons three days before the trial. Rev. St. § 1033 (U. S. Comp. St. 1901, p. 722). This statute has no application to this case. There is no statute which requires a list of the witnesses to be furnished to a person indicted for a misdemeanor. If the indictment is not for a capital offense, the defendant is not entitled, as a matter of right, to a list of witnesses or jurors. U. S. v. Wood, 3 Wash. C. C. 440, Fed. Cas. No. 16,756; U. S. v. Williams, 1 Cranch, C. C. 178, Fed. Cas. No. 16,709; U. S. v. Van Duzee, 140 U. S. 169, 173, 11 Sup. Ct. 758, 35 L. Ed. 399, and authorities there cited."

In Ball v. United States, 147 Fed. 32, 78 C. C. A. 126, this court also said:

"It is assigned as error that the court overruled the motion of the plaintiff in error to require the district attorney to furnish him a list of all the witnesses to be produced against him on the trial, in accordance with the provisions of section 1033 of the Revised Statutes (U. S. Comp. St. 1901, p. 722). That statute applies only to the trial of treason and capital cases in the courts of the United States. The present case was tried in a territorial court under the Penal Code and Code of Criminal Procedure. Those Codes contain no requirement that a list of witnesses be furnished the accused upon demand or otherwise. In Thiede v. Utah Territory, 159 U. S. 510, 515, 16 Sup. Ct. 62, 40 L. Ed. 237, it was held that section 1033 does not control practice and procedure in territorial courts. The court said: 'In the absence of some statutory provision, there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial.'"

In Balliet v. United States, 129 Fed. 689, 64 C. C. A. 201, the Circuit Court of Appeals for the Eighth Circuit, in passing upon a similar question, said:

"Except when a person is indicted for treason or some capital offense (vide section 1033, Rev. St. U. S.), there is no provision found in the federal statutes requiring the accused in a criminal action to be furnished with a list of the witnesses who will be produced against him, or requiring the names of witnesses to be indorsed on the indictment; and the fact that a special provision is made for advising the accused of the names of witnesses who will be produced on trials for treason and other capital offenses warrants the inference that in prosecutions for other offenses against the laws of the United States it is unnecessary to advise the accused of the names of witnesses who will be sworn. The maxim, 'Expressio unius est exclusio alterius,' clearly applies. By virtue of section 1033, supra, a person indicted for treason or a capital offense is entitled to be furnished with a list of witnesses to be produced, three days before the trial on an indictment for treason and two days before the trial in other capital cases, and, if the accused seasonably claims this right, it is error to put him on trial and permit witnesses to testify against him without furnishing him with a list. Logan v. United States, 144 U. S. 263, 304, 12 Sup. Ct. 617, 36 L. Ed. 429. But in the absence of some statute prescribing a contrary rule there is neither error nor irregularity in permitting a witness for the government to be sworn, in criminal cases other than those above mentioned, whose name does not appear on the back of the indictment or has not been furnished to the accused."

The plaintiffs in error also filed a plea in abatement, which plea was based upon this agreed statement of facts:

"The grand jury which indicted the defendants was composed of 20 members. They were all present during the taking of the testimony against the defendants, except one, F. W. Durbin, on Friday, September 1, 1905. They all voted in favor of the indictment against the defendant Potter, and all but one as against the defendant Jones, but did not return their indictment into court at that time. They thereupon adjourned until Tuesday, the 5th day of September, 1905. After they had adjourned, the United States attorney and the foreman caused a notice to be sent to them, by mail, telegraph, and telephone messages, through the United States marshal and his deputies, to meet again on Saturday, the 2d day of September, 1905. Eighteen of them met on the 2d, the said F. W. Durbin not being present; and another, Jackson A. Bilyeu, was not present because he was not notified. Durbin had been excused for an indefinite period by the foreman and the United States Attorney, on the 26th of August, and did not meet with the grand jury until the 28th of September. On the 2d of September, when 18 of them met, they found this indictment, and it was indorsed and returned into court by the foreman in the presence of the other seventeen."

It is not pretended that the court had adjourned for the term, nor does the plea negative the fact that 12 jurors agreed in finding the indictment. The contention is that the grand jury was not in legal session, because on the 1st of September it had adjourned to the 5th, and had no authority to reconvene on the 2d. We do not think there is any merit in the point. A grand jury can be discharged only by direct order of the court, or by the final adjournment of the court for the term for which the jury is impaneled. In the absence of an order of the court, certainly, the jury may meet and adjourn upon its own motion, and may lawfully proceed in the performance of its duties while in existence, whether the court be in session or not. Nealon v. People, 39 Ill. App. 481; In re Gannon, 69 Cal. 541, 11 Pac. 240; State v Reid, 20 Iowa, 413; Ulmer v State, 14 Ind. 52.

It has been many times decided that the improper discharge of a juror will not vitiate an indictment, provided that the number necessary to find it remain. U. S. v. Belvin (C. C.) 46 Fed. 381; Gladden v. State, 12 Fla. 623; Smith v. State, 19 Tex. App. 95; Portis v. State, 23 Miss. 578; State v. Wilson, 85 Mo. 134; Commonwealth v. Burton, 4 Leigh (Va.) 645, 26 Am. Dec. 337. Manifestly, therefore, the absence of one or more of the jurors, by reason of a failure to notify them of the meeting, could not work that result, provided there were present a sufficient number to find the indictment. The statutes of the Unites States, as has been seen, require a grand jury to "consist of not less than sixteen nor more than twenty-three persons," and make the concurrence of 12 of their number necessary to the finding of an indictment; but there is nothing in them to indicate any consequence to the absence of 1 or more of the jurors, provided the indictment be concurred in by 12. Said the Supreme Court of California in People v. Hunter, 54 Cal. 65, 66:

"The common law required that 24 should be summoned to attend on the grand jury; but not more than 23 were sworn, because of the inconvenience which might arise in case 12, who were sufficient to find a true bill, were opposed by other 12, who should be against a finding. Whatever number were sworn, those sworn constituted the grand jury; and it was never claimed that the death or discharge by the court of any of those sworn, provided 12 remained, rendered the action of a grand jury illegal. In 1856, the California statute read: 'If, of the persons summoned, not less than seventeen, nor more than twenty-three, attend, they shall constitute the grand jury.' St. 1852, p. 108, c.

47, § 9. Yet in that year the Supreme Court (People v. Roberts, 6 Cal. 214) held that all of the 17 need not have been present at the finding of an indictment, if 12 concurred in the finding. Among other reasons given in the opinion in support of the conclusion to which the court arrived is one drawn from the manifest inconvenience which would arise in every case, when, after the impaneling of the jury, one of the number was temporarily absent, from indisposition or otherwise; and it is added: 'In construing statutes, it is proper that some intelligence and foresight should be accorded to the Legislature, and it is the duty of the court to give such a construction as will best carry their design into effect, unless overruled by some authoritative or controlling principle of law.' If the argument ab inconvenienti can be resorted to at all, it must be admitted that it could hardly have been the intent of the Legislature that the event of the death of any of those constituting a grand jury should render invalid all that had been done by the jury previous or subsequent to that event. And, as was said by this court in People v. Butler, 8 Cal. 440, 'if 12 concur in finding an indictment, it is not perceived how a prisoner can be injured by the absence of the others who were impaneled.' In People v. Gatewood, 20 Cal. 147, hereinbefore referred to, it was decided that an indictment could be legally found by 13 members of a grand jury composed of 16 persons; 3 of the number having been challenged by the defendant and excused by the court. In that case the grand jury had been impaneled under the act of 1861 (St. 1861, p. 575, c. 505), the fifth section of which reads as follows: 'If, of the persons drawn and summoned to form a grand jury * * * there shall remain 16, and no more, they shall constitute the grand jury. If, of those summoned, * * * there shall remain less than 16, those so remaining shall be placed upon the grand jury, and the court may order the sheriff to summon from the body of the county a sufficient number of persons to complete the grand jury.' The counsel for the defense in People v. Gatewood attempted to suggest the same difference between the language of the statute of 1861 and those which had preceded it which is now claimed to exist between the language of the amended provisions of the Code and that of the sections in operation immediately before the amendments to the Code. Counsel said: 'A fair construction of the statute is, that the number of persons necessary to constitute a grand jury should be present and participate in the deliberations when an indictment is found, and more especially under the recent statute declaring that a grand jury shall be composed of 16 persons.' Yet, although the precise point was made, this court determined that no result followed the absence of 1 or more of the jurors when an indictment was found, provided 12 were present, whether the number of persons to constitute the grand jury was definitely fixed by the statute, or was by the statute left to be fixed by the court."

See, also, In re Wilson, 140 U. S. 581, 11 Sup. Ct. 870, 35 L. Ed. 513; State v. Copp, 34 Kan. 532, 9 Pac. 233; Watts v. State, 22 Tex. App. 572, 3 S. W. 769; State v. Ostrander, 18 Iowa, 435; State v. Davis, 24 N. C. 157.

To the indictment objection was taken by demurrer. By section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720) it is declared that:

"No indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding therein be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Especially after verdict should this rule be adhered to. Connors v. United States, 158 U. S. 408, 411, 15 Sup. Ct. 951, 39 L. Ed. 1033; Price v. United States, 165 U. S. 311, 315, 17 Sup. Ct. 366, 41 L. Ed. 727; Lehman v. United States, 127 Fed. 45, 46, 61 C. C. A. 577; United States v. Dimmick (D. C.) 112 Fed. 352, 354; Wright v.

United States, 108 Fed. 805, 810, 48 C. C. A. 37; United States v. Rhoades (C. C.) 30 Fed. 431, 434; United States v. Chase (C. C.) 27 Fed. 807. Vital defects in an indictment are, of course, always open to attack on behalf of the defendant thereto; but too much attention should not be given to overnice distinctions and exceptions, which do not go to the real merits of a case.

Looking at the indictment here in question, we find that it charges that the plaintiffs in error, with others, did, at a certain stated time and place within the jurisdiction of the court below, unlawfully conspire knowingly and wickedly and corruptly to defraud the United States out of the possession and use and title to certain specifically described lands, which were open to homestead entry under the land laws of the United States at the time the respective homestead filings stated in the indictment were made thereon at the local land office of the United States at Oregon City, in the state and district of Oregon, all of which said lands the indictment specifically sets out and describes, together with the names of the entrymen who made such homestead filings and the date upon which such filings by the said entrymen were made, by means of false, illegal, and fraudulent proofs of homestead entry and of settlement and improvements upon said lands, respectively, by said entrymen, respectively, and by causing and procuring said respective entrymen to make false and fraudulent proofs of settlement and improvements upon said lands, respectively, and thereby to induce the said United States to convey by patent said public lands to the said respective entrymen, without any valid or sufficient consideration therefor, said defendants, Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe, and Richard Roe then and there well knowing that each of said respective entrymen were not entitled thereto under the laws of the United States, by reason of the fact that they and each of them had utterly failed and neglected ever actually to settle or reside upon said lands for any period or periods of time whatsoever, and faithfully and honestly to endeavor to comply with the requirements of the homestead law as to settlement and residence upon or cultivation of the said lands so filed upon (by) each of them, and defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe, and Richard Roe then and there well knowing that each of said respective entrymen was entering said land so filed upon by him for the purpose of speculation, and not in good faith to obtain a home for himself, and that in pursuance of said conspiracy, and to effect the object thereof, said defendants Willard N. Jones and Thaddeus S. Potter did cause, induce, and procure said Daniel Clark (one of said alleged entrymen) on the 5th day of September, 1902, to make final proof before said Ira Wade, county clerk of Lincoln county, in the said state of Oregon, a person entitled by law to take said proof, at the city of Toledo, in the state and district of Oregon, and did then and there cause, induce, and procure the said Clark to make certain answers to certain questions concerning improvements claimed to have been made by him upon the lands so filed upon by him, and concerning his actual residence thereon with his family, and concerning the character of the said land, and his final affidavit, required of homestead claimants by law, all of which the indictment specifically set out, in-

cluding question numbered 5, which, with the answer thereto, is as follows:

"Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.) Ans. Myself and wife; yes"

—together with the certificate of Wade as such clerk to the signature and verification thereto of the said Clark, the said defendants W. N. Jones, Thaddeus S. Potter, and Ira Wade, and each of them, well knowing at the time said homestead proof was so subscribed and sworn to by said Daniel Clark that his answer to said question No. 5 so then and there made by said Daniel Clark was false, in this: that said Daniel Clark had never resided upon said land at all, either with or without his family, for any period or periods of time whatsoever; and that in furtherance of said conspiracy and to effect the object thereof the said Ira Wade did, on the 5th day of September, 1902, subscribe and execute a certificate to the aforesaid homestead proof of said Daniel Clark in these words and figures:

"I hereby certify that the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 5th day of September, 1902, at my office at Toledo, in Lincoln county, Oregon.

"Ira Wade, County Clerk."

The indictment also contained similar allegations respecting the alleged entryman Addison Longenecker, and then alleged that in furtherance of said conspiracy and to effect the object thereof the said defendant Willard N. Jones did, on the 5th day of May, 1904, cause and procure certain letters and affidavits, set out at large in the indictment, to be sent to the Honorable E. A. Hitchcock, Secretary of the Interior, by C. W. Fulton, who was then and there a duly qualified and acting senator of the United States for the state of Oregon, which letters consisted of one from Senator Fulton to Secretary Hitchcock, of date May 5, 1904, inclosing a copy of a letter of date April 23, 1904, addressed to Senator Fulton by the defendant Jones, and a copy of a certain agreement, without names, signature, or date, all relating to the lands described in the indictment alleged to have been entered by Addison Longenecker, Daniel Clark, and George F. Merrill, and to which agreement was appended this affidavit:

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

"I, W. N. Jones, being first duly sworn according to law, depose and say that the foregoing is a true and correct copy of the only agreement signed by Addison Longenecker, Daniel Clark, and George F. Merrill (also one of the alleged entrymen), and that there was no other verbal or written agreement, expressed or implied, whereby their homestead claim would inure in whole or in part to me, except as is stated in the foregoing agreement.

"W. N. Jones.

"Subscribed and sworn to before me this 27th day of April, 1904.

"Geo. Sorenson, Notary Public for Oregon."

It is said for the plaintiffs in error that, while section 5440 of the Revised Statutes makes it a crime for two or more persons to conspire to defraud the United States out of any of its land, the consummated act is not itself made a substantive offense by any statute, from which it is argued that the criminality consists in the means employed in car-

rying out the conspiracy, which must for that reason be set out with particularity.

Section 5440 makes it a crime for two or more persons to conspire to defraud the United States, whatever the manner or purpose. "In any manner or for any purpose" is the language of the statute. To obtain land of the government open to entry under its homestead laws by means of false proof in respect to the entryman's residence or improvement thereon, or for the use or benefit of another, is not only a fraud in fact, but a fraud upon the homestead law, the design of which was to afford those entitled to its beneficent provisions a home for himself and family, and not for speculation either by himself or others. This does not admit of any sort of question. When, therefore, it is charged, as it is in the indictment under consideration, that the plaintiffs in error, with others, conspired to obtain from the government certain specified tracts of land open to entry under the homestead laws, by procuring and inducing certain named persons to enter the same by means of false proof in respect to their residence upon and improvement of the land, and in respect to the intent with which and the purpose for which the entries were made, and that in pursuance of such conspiracy and to effect the object thereof the plaintiffs in error caused and procured a certain named person, to wit, Daniel Clark, to make homestead proof in respect to the land so entered by him, and the final affidavit required of homestead claimants, including the question and answer numbered 5 above set out, which proof was subscribed by Clark and certified by the defendant Wade, and that each of the defendants at the time well knew that the said proof was false, in that Clark never at any time resided upon the land so entered by him, with similar allegations in respect to the entryman Longenecker, we do not think it can be held upon any sound principle that no offense is charged. Nothing more was needed to inform the defendants of the nature and cause of the accusation against them, and the facts were so alleged as to protect them in the event of a verdict of guilty or of acquittal against any further prosecution for the same offense. The indictment, in our opinion, was sufficient.

According to the averments of the indictment, the conspiracy was formed on the 3d day of September, 1902. The indictment was returned and filed September 3, 1905. But the evidence tended to show that the conspiracy charged was formed in the year 1900, and that a number of overt acts thereunder were committed prior to September 3, 1902. There was also evidence tending to show the commission by the defendants Jones and Potter of the alleged overt acts subsequent to the finding of the indictment. By objections to the introduction of testimony, and by request for instructions, the plaintiffs in error raised the question of the statute of limitations, which we think the most serious one in the case. The rule of the common law made it a criminal and indictable offense—

"for two or more to confederate or combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual." Callan v. Wilson, 127 U. S. 555, 8 Sup. Ct. 1301, 32 L. Ed. 223, and cases there cited.

At common law no overt act was requisite; but the mere formation of such a conspiracy by two or more persons was criminal and indictable. The offense was then complete and ended. By the provisions of section 5440 of the Revised Statutes, however, the conspiracy there denounced is not effective until an overt act is committed by one or more of the conspirators. While the Supreme Court held, in U. S. v. Britton, 108 U. S. 199, 204, 2 Sup. Ct. 525, 27 L. Ed. 703, that the offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone, it also held that:

"The provisions of the statute that there must be an act done to effect the object of the conspiracy merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute."

See, also, Dealy v. U. S., 152 U. S. 546, 14 Sup. Ct. 680, 38 L. Ed. 545.

By some courts it has been held that inasmuch as the offense under section 5440 is the conspiracy, made effective by the commission of an overt act thereunder, the statute of limitations, which is three years, begins to run as soon as the first of such overt acts is committed, and that three years thereafter the entire offense denounced by the statute becomes barred. U. S. v. Owen (D. C.) 32 Fed. 534; U. S. v. McCord (D. C.) 72 Fed. 159; Ex parte Black (D. C.) 147 Fed. 832. If the conspiracy in question contemplated but the one overt act, that would undoubtedly be so. But we think it equally plain that where, as in the present case, the alleged conspiracy contemplated various overt acts, and the consequent continuance of the conspiracy beyond the commission of the first one, then each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime. Take, for illustration, a case that arose in California many years ago, reported in 64 Cal. 293, 30 Pac. 847, under the title of People v. Collins, where a murder was committed in pursuance of a conspiracy entered into by three men named, respectively, Collins, Thorne, and Crumm, for the robbing, among other things, of stages and their passengers whenever and wherever opportunity offered. In that case it appeared that, before Collins and Thorne committed the crime for which Collins was adjudged to suffer death, Crumm withdrew from the conspiracy; that is to say, he took advantage of the "locus penitentiæ," and thus avoided the penalty to which he also would otherwise have been subject. But Collins and Thorne proceeded with the unlawful and wicked undertaking, camped in the vicinity of Nevada City, Cal., held up a stage, compelled the passengers to alight therefrom, and upon the refusal of one of them to surrender his valise, containing two bars of gold bullion, one of the robbers fired upon him with a shotgun, killing him almost instantly. Months afterwards Collins was apprehended, and was finally tried, convicted, and sentenced to death. Suppose that California had a statute requiring, as does section 5440 of the Revised Statutes, an overt act to make the conspiracy effective, and that after the holding up of that one stage and the commission of that one mur-

der the conspirators, in pursuance of the same conspiracy, had held up other stages and committed other murders; would there be any sound sense in holding that no other or further crime had been committed, on the ground that the offense had been completed and ended by the first murder, the first overt act? We do not think so, for the reason that the conspiracy was a continuing one in its nature, and, so long as the conspirators continued in pursuance of it, each overt act committed by any one of them gave to the conspiracy effect and constituted an offense at the time of the commission of the act. So, in the case at bar, the conspiracy alleged contemplated the commission of various overt acts. It was a continuing conspiracy, and so long as the conspirators continued in pursuance of it, and did not avail themselves of the locus penitentiæ that section 5440 of the Revised Statutes afforded them, every overt act committed by any party to the conspiracy gave new effect to the conspiracy and constituted another crime. Such we understand to be the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of Ware v. U. S., 154 Fed. 577, at page 580, 12 L. R. A. (N. S.) 1053, where the court said, in speaking of a case similar to the present one:

"The offense denounced by section 5440 is not the mere formation, but the existence, of the conspiracy and its execution; and if, by the agreement or by the joint assent of the defendant and one or more other persons within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, the mere fact that the same parties had conspired and had wrought to accomplish the same or a like purpose more than three years before the filing of the indictment ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years."

See, also, to the same effect, Bradford v. U. S., 152 Fed. 616, 617, 81 C. C. A. 606; U. S. v. Bradford (C. C.) 148 Fed. 413; U. S. v. Greene (D. C.) 146 Fed. 803; Id. (D. C.) 115 Fed. 343; Lorenz v. U. S., 24 App. D. C. 337, 384; People v. Mather, 4 Wend. (N. Y.) 259, 21 Am. Dec. 122; Am. Fire Ins. Co. v. State, 75 Miss. 24, 22 South. 99; Ochs v. People, 25 Ill. App. 379.

The indictment in the present case charged the defendants thereto with conspiring to defraud the government of lands embraced by homestead claims filed, respectively, by certain named persons, and as tending to support the alleged conspiracy the government was permitted on the trial to show that various other persons had also filed upon and made final proof of various other tracts of land under the homestead laws, in pursuance of an agreement with the defendants and for their benefit. That there was no error in admitting such testimony was decided by this court in the case of Van Gesner v. U. S., 153 Fed. 46, 82 C. C. A. 180, and by the Supreme Court in Williamson v. U. S., 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278. Such collateral matter was admitted, as the trial court distinctly instructed the jury, as tending to establish guilty intent, purpose, design, or knowledge, and could only be so considered in connection with the charge against the defendants.

In Wood v. U. S., 16 Pet. 358, 10 L. Ed. 987, Mr. Justice Story, speaking for the court, said:

"Where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive; for a single act, taken by itself, may not be decisive either way, but, when taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

And in the case of Holmes v. Goldsmith, 147 U. S. 150, 164, 13 Sup. Ct. 288, 292, 37 L. Ed. 118, the court, in speaking upon the same subject, said:

"As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. Stevenson v. Stewart, 11 Pa. 307.' The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibily irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

See, also, Sprinkle v. U. S., 141 Fed. 811, 73 C. C. A. 285; Olsen v. U. S., 133 Fed. 849, 67 C. C. A. 21.

Another point relied upon by the plaintiffs in error arose out of the admission in evidence, over their objections, of a sworn statement made by one John L. Wells to the special agent of the government, Mr. Neuhausen. The circumstances attending the offering of that statement by the government, and its admission in evidence, were these:

Wells was a witness for the prosecution, and testified, among other things, on direct examination, that he lived in Portland, was a member of the Grand Army of the Republic, had known the defendants Jones and Potter many years, was in the real estate and insurance business, and that in the year 1900 he had talked with Potter and Jones in relation to securing soldiers' widows to file upon lands; that his first conversation was with the defendant Potter, who, the witness testified, called at his office in Portland and stated that the defendant Jones wanted to see the witness on a proposition to get some soldiers' widows to file upon some lands in the Siletz reservation, and wanted the witness to go and see Jones, which the witness did within a few days, when Jones told the witness that soldiers' widows who had never availed themselves of the right of homestead entry before the death of their husbands were entitled to 160 acres of land; that either Jones or Potter showed the witness Copp's Land Laws, where the widows were shown to be entitled to the land without settlement, and that the defendants (saying he thought both were present) wanted to know if the witness could get a few of such widows to file on the land, which he undertook to do, and within a few days got a number who said their husbands had not availed themselves of the homestead right, and

who were told by the witness to go to the office of the defendants Potter and Jones and see them in regard to the matter; that the witness then tried to find more widows to file on land, but could not do so, and then undertook to get soldiers to do so; that the witness did not know whether it was Jones or Potter who spoke to him about the soldiers, but thought it was probably Potter who spoke to him first; that Jones and Potter furnished him with a copy of a contract; that he went to soldiers and told them about the homestead proposition, and that they were to go to Jones and Potter and enter into the contract, if they wished to, or could sign the contract before the witness and he would hand it to Jones and Potter; that he thought some of them did sign before him, but that most of them signed before Jones and Potter; that he told them that if they had served two years in the army they would only have to hold the homestead about 12 or 14 months before they could prove up, and that after the final proof was made Jones would pay them $200 for their right, over and above the money expended for the land, which was to be advanced by the defendants, and for the repayment of which advances the entryman was to give to Jones a mortgage; that these statements of the witness were in accordance with what Jones and Potter told him. The witness then gave the names of soldiers to whom he made these statements, including Longenecker, and further testified that he was to receive $5 for each of the soldiers that he procured, and that he himself made a filing; that the next thing he did was to get the parties to go to the lands, which was before the filings were made, but that they went to the land office first; that he went with the persons named to Oregon City, and that the defendant Jones paid their fare and gave them the description of the land, and that some months after they had made their filings about 20 of them went to the land upon notice from Potter, who went with them and paid the expenses of the trip, and that he thought, although not positive, that the defendant Jones also went along; that he thought that most of the men went to their claims, and within a day or two the party returned to Portland; that within about six months thereafter Jones told the witness to get as many of the men as he could to go down to the land again, and that he got six or seven of the men to go, Jones paying the expenses, on which trip the parties stayed one night; that on his return from that trip the witness made a report to Jones, showing him the expenses of the trip, and gave him the number of persons who went; that they went down again the following August, 1902, and that "Lawrence, Lamphere and wife, Everson and his wife, Morrison and his wife, Hummell, Merrill, West, Gannon, and, he thought, Clark, went down, and Jones told them when to go, and said to the witness that it was time they were going down to their claims, but the bad weather started in, and that Jones gave him enough money to pay the expenses there and back; that that trip they went to the hotel and stayed all night, and the next morning got teams and went out to the claims, stayed there two days, and then came back to Toledo; that a part of them went to Newport on Monday morning, and then they came home; that he saw Jones when he got back, or a few days afterwards, and had about the same talk as he had had heretofore, and

he told Jones he had gone down there and stayed two days and two nights out on the claims, and itemized the expenses, and that there were round-trip tickets; that on that trip they stayed around there and visited each other's claims; that they did not sleep in the cabin, but outside; that there was no furniture in the cabins, except boards nailed up for a couch like, or bunk, with some straw in them; that there was about an acre cleared off of his claim, and was partly planted in potatoes and turnips and a few little apple trees, one year old apple trees of the first or second year, that was in the second year, the most of them were growing, and that there were ten or twelve of them;" that the next time they went down was in October, when Clark, Everson, Moors, Lawrence, and Gillis were in the company; that Jones asked them to go, and paid the expenses, the money for which he thought he got from Potter; that they stayed there one night and slept in the cabins; that they went back to Portland the next day, and he reported to Jones, giving him an itemized statement of the expenses; and that he told him about the same as he had told him before—that they had gone down there and visited the claims.

In connection with the testimony of the witness Wells, the prosecution offered in evidence certain of the contracts made with the men named by the witness, in the year 1900, reading as follows:

"That whereas, the party of the first part is entitled to the benefit of Act Cong. June 8, 1872, being section 2304, Rev. St., giving homesteads to honorably discharged soldiers and sailors, and desires to avail himself of the privileges granted by taking a homestead, and the party of the second part is in the possession of information relative to the existence of public lands within the state of Oregon subject to such entry: Now, therefore, the party of the second part, in consideration of the covenants and agreements on the part of the party of the first part hereinafter stipulated to be kept and performed, hereby agrees to give to the party of the first part information which will enable him to locate and file a homestead upon 160 acres of the public lands of the United States situated within the state of Oregon, and the party of the first part hereby agrees to pay to the party of the second part as compensation for such information, and for his services to be performed in the preparation of the papers and affidavits necessary in making such filing, the sum of $185, to be paid at the time and in the manner hereinafter designated. The party of the first part further agrees to employ and does hereby employ the party of the second part to build a house upon the land to be taken up under the foregoing agreement, and agrees to pay the said party of the second part therefor the sum of $100, to be paid at the time and in the manner hereinbefore designated, and also to clear and cultivate the land to be taken up under this agreement, or so much thereof as is required and for the time required by the laws of the United States in order to perfect title thereto, and to pay the said party of the second part therefor the sum of $175, to be paid at the time and in the manner hereinafter designated. And the party of the first part agrees to comply with the laws of the United States in regard to residence upon said lands, taken as a homestead. The said party of the second part hereby accepts such employment and agrees to do and perform or to cause to be done and performed, all work and labor necessary to be done and performed upon said premises in order to comply with the laws of the United States. The party of the second part hereby agrees to advance to the party of the first part, if required, the amount of fees required at the land office in order to make and perfect such filing, and all necessary expenses of the party of the first part in connection therewith, not to exceed the sum of $60, and the party of the first part agrees to repay to the party of the second part all sums of money so advanced at the time and in the manner hereinafter designated. The party of the first [second] part further agrees that after final

proof shall have been made upon said claim he will at the option of the party of the first part, procure for the party of the first part a loan not to exceed the sum of $720, to be secured by first mortgage upon said claim, and immediately upon procurement of such loan all sums of money herein stipulated to be paid to the party of the second part by the party of the first part, together with all sums of money advanced by the party of the second part to the party of the first part under this agreement, shall become due and payable and shall be paid out of the amount so secured; and it is further understood by and between the parties hereto that the payment by the party of the first part to the party of the second part of all sums of money hereinbefore designated shall be conditioned upon the procurement by the party of the second part of the loan hereinbefore mentioned, is [if] the same shall be required. In case the party of the first part shall not wish to avail himself of the loan hereinbefore mentioned, then and in that event all moneys advanced to the party of the first part by the party of the second part under this agreement, together with all sums of money herein agreed to be paid to the party of the second part, shall become due and payable as soon as final proof shall have been made upon said claim."

The witness Wells further testified that some of the contracts were signed before him, but were not executed in duplicate, and that no copy was given to the entrymen; and the witness corrected his former testimony by saying that the parties named by him filed upon the land after they first went down to see it, and that the last time they went down was in August, 1901; that there was nothing more done until the advertisement of final proof; that he had some talk with Jones and Potter in relation to the final proof, mostly with Potter; and that the only talk he had with Potter in regard to the matter was that they would be required to go to the land and make their final proof at a certain time, and that Potter gave the witness "typewritten matter in regard to the questions that would be asked," which copy is set out in the record and is a copy of the questions provided in the printed blanks of the land office in regard to testimony of such a claimant in making homestead proof.

There is much more of the testimony of the witness Wells, but enough has been stated to illustrate the point under consideration. Upon cross-examination of Wells the counsel for the plaintiffs in error got from counsel for the government the sworn statement given by Wells to the special agent for the government in relation to the matters concerning which he had testified, and asked the witness this question:

"I call your attention to this statement in what you said to Mr. Neuhausen (reading from written statement): 'According to my recollection it was about July, 1900, when Thaddeus S. Potter, who was at that time occupying an office with W. N. Jones in the Worcester Building in Portland, Or., came to me in my office at 100 Grand avenue, Portland, and stated to me that W. N. Jones had a land proposition concerning which he required to interview me.' Is that correct?"

The record proceeds:

"And the witness answered it was about correct. And the defendants' counsel, further reading from the statement as follows: 'He stated the proposition in brief to me, namely, that the aforesaid Jones proposed to advance certain money to a number of soldiers' widows who should file and prove up on homestead claims within the limits of the Siletx Indian reservation'—Mr. Potter further explained that Mr. Jones proposed to give me $5 commission for each soldiers' widow. At the conclusion of his remarks Mr. Potter stated

that Mr. Jones wished to see me in his office, and the defendants' counsel asked the witness if that was correct, and the witness answered, 'That is about correct; yes, sir.' And the defendants' counsel further reading from the said statement as follows: 'Either on the same day on which Thaddeus S. Potter interviewed me, or a day after, I called on Jones at his office in the Worcester Building, Portland, Or., and he stated the proposition to me very much the same manner as Mr. Potter had explained it to me; but he, of course, elaborated the details more carefully'—and the defendants' counsel asked the witness if that was correct, and the witness answered, 'Yes.' And thereupon the United States attorney offered the whole of said statement made to Mr. Neuhausen in evidence as a statement of the whole conversation had by the witness with Mr. Neuhausen. And in response to questions by the court the defendants' counsel stated that his purpose in reading the statement to the witness, which appears above, was to affect the credibility of the witness."

We think the statement comes within the rule of evidence, laid down in The Queen's Case, 2 Brod. & Bing. 284, 288, which case was apparently approved by the Supreme Court in C., M. & St. P. Railway v. Artery, 137 U. S. 507, 520, 11 Sup. Ct. 129, 34 L. Ed. 747, that if, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel as to whether statements, such as the counsel may suggest, are contained in it; but the whole letter must be read as the evidence of the existence of the statements. The declared purpose of counsel for the defendants being to show by isolated statements read by them from a previous sworn statement of the witness that he had therein made statements contradictory of his testimony on the trial, and thereby to affect his credibility, we are of the opinion that the court rightly admitted in evidence the entire statement, that the jury might correctly weigh the evidence of the witness.

We think no other point requires special notice, although we have given to the record and to the briefs of counsel careful consideration. By its charge the court fully and fairly instructed the jury as to the law governing the case and left to them the determination of the facts. This was as it should have been.

The judgment is affirmed.

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NOWELL et al. v. McBRIDE et al. (ENDICOTT, Intervener).

(Circuit Court of Appeals, Ninth Circuit. June 8, 1908.)

No. 1,436.

1. SPECIFIC PERFORMANCE—GROUNDS—SUFFICIENCY OF BILL.
   A bill for specific performance filed on behalf of a corporation, which alleged a contract entered into by the corporation at a meeting of the stockholders for the purchase of certain mining claims from defendants, the payment of the consideration agreed upon, and that the records of the corporation, kept and under the control of certain of the defendants, were fraudulently altered so as to exclude from the contract the most valuable of the claims in fact offered by defendants and purchased, states a cause of action and will support a decree for specific performance by conveyance of such excluded claims.

2. SAME—FRAUDULENT ALTERATION OF CONTRACT—EVIDENCE TO ESTABLISH.
   Evidence considered in a suit for specific performance, and *held* to sustain the allegations of the bill that the records of a corporation setting forth the terms of a contract between the corporation and defendants were fraudulently altered in the interest of defendants.

3. SAME—DEFENSES—LACHES.

Whether equitable relief shall be barred for laches must depend largely upon the circumstances of each case, and in a suit for specific performance of a contract for the purchase of property mere delay in bringing suit is not necessarily conclusive against the right of recovery, where there has been no change in the value of the property, and especially where the defense is based upon records which were fraudulently altered by defendants, or those acting in their interest, and they stood in a relation of trust and confidence toward complainant, or where the right to bring the suit was vested in a receiver who was personally adversely interested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 305–310.]

4. SAME—ESTOPPEL.

The failure to adverse an application by defendant for a patent to mining property did not estop a complainant from maintaining a suit for specific performance of a contract previously made by defendant to convey such property; the claim of complainant not being adverse to the patent, but under it to enforce a trust.

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

The appeal in this case is from a decree ordering the specific performance of a contract. The suit was begun on January 18, 1906. The property involved is a group of three mining claims situated near Berner's Bay, in Alaska, known as the "Johnson Group," and consisting of the Johnson, or Northern Light, the Northern Light Extension No. 1, or Emma, and the Northern Light Extension No. 2. The basis of the relief awarded was two contracts, one made between Thomas S. Nowell and Willis E. Nowell, on the one side, and Henry Endicott, on the other, and one made between the said Nowells and the Berner's Bay Mining & Milling Company. The appellee McBride is the receiver of the properties of that corporation, having succeeded F. D. Nowell and W. B. Hoggatt, who, as receivers, had begun the suit. Endicott filed a petition in intervention as a stockholder of the Berner's Bay Mining & Milling Company, which company will in this opinion be designated the "Berner's Bay Company." The appellants, besides the two Nowells, are the Nowell Mining & Milling Company, hereinafter designated the "Nowell Company," and the Alaska Nowell Gold Mining Company, to be hereinafter designated the "Alaska Nowell Company." On the issues raised upon the bill and the petition of intervention and the answers thereto the trial court, on consideration of the evidence, found the facts, in substance, as follows:

On December 15, 1897, Decker Bros., copartners in business, brought a suit against the Berner's Bay Company, the Seward Gold Mining Company, the Northern Belle Gold Mining Company, and the Ophir Gold Mining Company. Thereupon E. F. Cassel was appointed receiver of the properties of said corporation, the Berner's Bay Company. On February 12, 1898, he resigned, and F. D. Nowell became his successor. On January 3, 1906, W. B. Hoggatt was appointed as co-receiver with F. D. Nowell, and in the order appointing him the court directed that he superintend and direct the institution of a suit in the name of the receivers against the Alaska Nowell Company, the Nowell Company, Thomas S. Nowell, Willis E. Nowell, and the stockholders in said company or companies, for the recovery of the aforesaid Johnson Group of mines. The Berner's Bay Company was incorporated under the laws of Maine on October 20, 1892, with its principal place of business in Portland, Me. Its capital stock was $1,000,000, divided into 10,000 shares. Thomas S. Nowell was chosen its president, and thereafter during the transactions hereinafter referred to continued to act as such. Arthur L. Nowell, his son, was, at the organization, chosen first assistant treasurer and first assistant clerk, and continued to occupy those offices during the period covered by the transactions hereinafter referred to. Upon the organization of the company Willis E. Nowell received on November 14, 1892, $999,600 of the treasury stock, in consideration of the transfer to the corporation of certain mining claims

situated near Berner's Bay, in Alaska. Thereafter the Berner's Bay Company acquired other claims, and all of its property was operated under one management. On November 14, 1892, the Berner's Bay Company, in order to develop its property which it had bought with its capital stock, issued 200 bonds of $1,000 each, the payment of which was secured by a first mortgage on its property to the International Trust Company. During all of the times mentioned in the transactions hereinafter referred to, Thomas S. Nowell and Willis E. Nowell, his son, resided during the greater part of each year in Alaska, and in the vicinity of the Berner's Bay Company's mining property. They were the active promoters and had the management and control of the mining enterprises conducted by that company, and they spent large sums of money derived from the sale of the mortgage bonds in the development of the mining property.

Between the years 1892 and 1896 Thomas S. Nowell and Willis E. Nowell acquired by location and purchase 15 undeveloped lode mining claims in the vicinity of the claims belonging to the Berner's Bay Company, some of which were adjacent to the property of that company, and some were in such position as to be worked advantageously from the drifts and underground workings which that company had made. Three of the said mining claims so acquired by Thomas S. Nowell and Willis E. Nowell were the Johnson Group, above referred to.

During the month of June, 1896, Thomas S. Nowell owned 4,496 shares of the capital stock of the Berner's Bay Company, Willis E. Nowell owned 457 shares, and Arthur L. Nowell owned 96 shares thereof, and the said Thomas S., Willis E., and Arthur L. Nowell had the control of the capital stock of said company and acted together through one Wm. M. Payson and Arthur L. Nowell in the transactions of the meeting of June 24, 1896, hereinafter referred to.

During all the times hereinafter referred to, Willis E. Nowell owned and controlled 9,997 shares of the capital stock of the Nowell Company, and said Thomas S. Nowell owned and controlled 1 share thereof; the total capital stock of said company being 10,000 shares of the par value of $100 each. The Alaska Nowell Company had a capital stock of 50,000 shares of the par value of $100 each, of which Willis E. Nowell owned 49,996 shares.

On November 4, 1895, Willis E. Nowell became the owner of the mining claims known as the "Johnson Group," and was such owner on June 24, 1896. In the month of June, 1896, Thomas S. Nowell, on behalf of himself and Willis E. Nowell, represented to the stockholders, creditors, and persons interested in the said Berner's Bay Mining Company the advantage to that corporation of the acquisition of the adjacent and adjoining properties then owned by them in the vicinity of the property of the Berner's Bay Company; and the said Thomas S. Nowell represented to Henry Endicott, the intervener herein, who was a stockholder of the Berner's Bay Company, and to certain other stockholders of said corporation residing in Boston and in that vicinity, who were without personal knowledge of the physical situation and condition of the said property, that the said claims, and particularly the 3 claims known as the Johnson Group, were then known to be of great value, and represented that it would be of advantage to the Berner's Bay Company to acquire the same and to increase its capital stock for the purpose of purchasing the same, and to incur additional indebtedness for the prosecution and development thereof; and the said Thomas S. Nowell, on behalf of himself and Willis E. Nowell, represented to the said Endicott and said stockholders that they would sell to the Berner's Bay Company said 15 mining claims, including the Johnson Group, in consideration of the issuance to them of $1,500,000 of the capital stock of said corporation, and proposed that the said capital stock be increased by that amount, and an additional bonded indebtedness of $300,000 be incurred by said corporation, so that the proceeds arising therefrom might be used as a working capital to develop said mining property; and said Thomas S. Nowell, on behalf of himself and Willis E. Nowell, embodied such representations in a written offer, addressed to the said Endicott, bearing date June 3, 1896, in which it was stated, among other things, that "the Johnson mines which are known to be of great value and

beyond that twelve other claims which are all right in connection, and should be worked with the Berner's Bay present properties. I consider these properties that I should turn over to the company of certainly as great a value, if not more so, than the present holdings of the company. In fact I believe that the Johnson properties have more real value in the deposit than all of the present holdings of the Berner's Bay Co."

In said offer said Thomas S. Nowell further proposed to retire 46 outstanding bonds of the Berner's Bay Company, on which interest had accrued, and to purchase 292 shares of the capital stock then held by dissatisfied stockholders, all of the face value of $77,078.33, which he represented could be had for $47,948.33, provided the payment was made on or before June 15, 1896, and of that sum he offered to raise $20,000. Thereupon, prior to June 24th, said Endicott accepted said offer for himself and associates, and with the assent of Thomas S. Nowell purchased 41 of the 46 bonds described in the said offer, and paid therefor the sum of $42,736.58, and received his pro rata of the 292 shares of the stock so referred to in said proposal, and in so doing acted upon the promises and representations contained in the said offer of June 3, 1896, and relied upon the promises of Thomas S. Nowell and Willis E. Nowell to convey said 15 mining claims. Endicott executed a proxy in favor of Thomas S. Nowell, authorizing him to vote his stock at the meeting of the stockholders of the Berner's Bay Company to be held on Jnue 24, 1896, for the purpose of consummating the transaction proposed in said offer of June 3, 1896.

In pursuance of said offer, it was agreed that a meeting of the stockholders should be called to accept the same, and prior to June 24, 1896, Thomas S. Nowell gave notice of a stockholders' meeting to be called, wherein it was proposed to be determined whether the corporation should purchase the following 15 mining claims, to wit, Northern Light Extension No. 1, or Emma, Northern Light, or Johnson, Portsmouth, Seward Extension, Columbian East Extension, Bear Extension, Savage Extension, Lucky Boy, Columbian West Extension, Selkirk, Rustler, Alaska Maid, Ackropolis, Northern Star, Northern Light No. 2, and whether the capital stock of the Berner's Bay Company should be increased from $1,000,000 to $2,500,000 for the purpose of acquiring said claims, and whether the bonded indebtedness of said corporation should be increased from $200,000 to $500,000.

In pursuance of said notice, on June 24, 1896, a meeting of the stockholders was had in the city of Portland, Me., at which meeting it was voted to increase the capital stock to $2,500,000, and to deliver $1,500,000 to the said Thomas S. Nowell and Willis E. Nowell in accordance with their written offer, and to increase the bonded indebtedness to $500,000.

At said meeting Thomas S. Nowell caused to be submitted a written offer, addressed to the Berner's Bay Company, signed by himself and as agent for Willis E. Nowell, to sell, convey, or cause to be conveyed to the company the 15 mining claims named in the notice of call for the special meeting, for and in consideration of 15,000 shares of new stock of said corporation, of the par value of $100 each. That said corporation accepted said offer and paid said Thomas S. Nowell and Willis E. Nowell the proposed consideration therefor. That thereby the corporation purchased and became the equitable owner of the 3 mining claims known as the Johnson Group, to wit, the Northern Light, or Johnson, Northern Light Extension No. 1, or Emma, and Northern Light Extension No. 2, and has since continued and now is such equitable owner thereof, and said three claims constitute the consideration for the issuance of said corporate stock and the increase of said bonded indebtedness.

At some time subsequent to June 24, 1896, the corporate records of said company were so altered, changed, and falsely entered as to make it appear that in the transactions at the said meeting only the last 12 of the 15 mining claims so enumerated and set forth in said written offer and said notice of stockholders' meeting had been offered and transferred to the said corporation, and said group of claims known as the Johnson Group were wrongfully, fraudulently, and falsely made to appear on the records of said corporation as having been omitted from said offer and transfer by the wrongful and fraudulent insertion in a pretended offer of sale recorded

in the minutes of said stockholders' meeting of the words "Last twelve," and by the insertion in said minutes of a pretended false and simulated copy of an offer on the face of which appears other substantial changes both in form and substance of the said offer as originally presented and acted upon at said meeting, by which the true intent and meaning of the said transaction was wrongfully and fraudulently changed and altered so as to appear to transfer only 12 of the 15 claims, omitting the said Johnson Group. At the time that said alterations were made, and when said corporate records were falsely engrossed so as to apparently effect said change in said transaction, the books of said corporation were in the custody and control of Thomas S. Nowell and Arthur L. Nowell, at the general offices of said corporation in Boston, Mass., where the eastern business and financial transactions of said corporation were conducted. Thereafter, in pursuance of a scheme and conspiracy on the part of Thomas S. Nowell and Willis E. Nowell to defraud the said company, its creditors and stockholders, they, pretending to act under the false and fraudulent entries in said corporate books, failed and refused to convey to said company the said 3 claims known as the Johnson Group.

The said Thomas S. Nowell and Willis E. Nowell, although present in court at the trial, did not testify as to the alterations in the offer so introduced in evidence and referred to in the last preceding finding, nor did they offer any explanation in regard thereto.

On October 10, 1899, Willis E. Nowell conveyed the Johnson Group of mining claims to the Nowell Company, but said conveyance was received by that company with full notice and knowledge of the rights and equities of the said Berner's Bay Company therein and thereto. In the year 1902 the said Nowell Company applied to the United States Land Office at Juneau for a patent to the said Johnson Group, and on November 10, 1903, obtained a patent thereto. Said proceedings in the United States Land Office were had ex parte and without notice to the Berner's Bay Company or to the receivers thereof, or to Endicott, the intervener, and the title so acquired by the Nowell Company was acquired with the full knowledge on its part of the rights and equities of the Berner's Bay Company.

On November 10, 1903, the Nowell Company conveyed to the Alaska Nowell Company all of its right, title, and interest in the said Johnson Group; but said conveyance was made to the latter company without consideration and with full knowledge on its part of the title rights and equities of the Berner's Bay Company. From February 12, 1898, until January 3, 1906, Frederick D. Nowell, the son of Thomas S. Nowell, was the sole receiver of the property and assets of the Berner's Bay Company, and was a stockholder and incorporator of the Alaska Nowell Company, and until shortly prior to the commencement of the present suit the failure of the appellants to convey the said Johnson Group and the facts in connection therewith were not reported to the District Court in which the receiver was appointed. On January 6, 1906, W. B. Hoggatt was appointed a co-receiver for the express purpose of commencing the present suit, and on account of the relation existing between said Frederick D. Nowell and the parties defendant.

Since June 24, 1896, Thomas S. Nowell, Willis E. Nowell, the Nowell Company, and the Alaska Nowell Company have held the legal title to said 3 mining claims known as the Johnson Group in trust for the use and benefit of the Berner's Bay Company, its stockholders and creditors.

On said findings the court decreed the conveyance of the property in controversy to the Berner's Bay Company.

George M. Nowell and Malony & Cobb, for appellants Willis E. Nowell and others.

L. P. Shackleford, T. R. Lyons, John J. Boyce, E. S. Pillsbury, and Alfred Sutro, for appellees.

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

GILBERT, Circuit Judge (after stating the facts as above). We are unable to agree with the contention of the appellants that the bill fails to state facts sufficient to sustain the decree of the court below. It alleges: That Thomas S. Nowell and Willis E. Nowell represented to the stockholders, creditors, and persons interested in the success of the Berner's Bay Company the advantage to that company of purchasing 15 certain mining claims, the title to which was represented to be in the said Thomas S. and Willis E. Nowell, and that they would sell the same to the company in consideration of $1,500,000 of the capital stock of said company, which they suggested should be increased in that amount for that purpose; and they further proposed that an additional bonded indebtedness of $300,000 be incurred by the corporation to provide a fund for working the company's mining properties; that in pursuance of that offer it was agreed that a special meeting of the stockholders of the company should be called to acquire said mining claims on the terms proposed, and Thomas S. Nowell caused a notice to be given that such a meeting would be held June 24, 1896, to consider the said proposal to sell the corporation the 15 mining claims, naming them and including therein the three claims in controversy in this suit, and to consider the increase of the capital stock of the company from $1,000,000 to $2,500,000, for the purpose of paying for said property and to increase the bonded indebtedness as suggested; that the meeting was held, and it was then and there voted to increase the stock as proposed, and to increase the bonded indebtedness and to deliver to Thomas S. Nowell and Willis E. Nowell the $1,500,000 of such increased capital, and as the purchase price for said mining claims the company issued to Thomas S. and Willis E. Nowell the said shares of capital stock; that the true intent and meaning of the proceedings of the stockholders' meeting was to sell to the company, with the other claims, the 3 claims constituting the Johnson Group, which were alleged to constitute the principal value of the 15 claims so offered; that after the date of said meeting, and after such sale, by the insertion in the offer of sale recorded in the minutes of the said stockholders' meeting of the words "last twelve," the true intent and meaning of the transaction was wrongfully and fraudulently changed and altered; and that during the times of the said transactions all books and records of the corporation were in the custody and control of Thomas S. Nowell and Arthur L. Nowell. No demurrer was interposed to the bill. It was accepted as sufficient by the appellants and by them answered, and no objection was interposed to the reception of testimony on the ground of the insufficiency of its allegations.

It is too late now to urge that the details of the alleged fraud should have been more particularly specified. The bill states the case of a proposal to sell certain specified property for a certain specified price, the acceptance of the proposal, the payment of the specified price, and the subsequent fraudulent alteration of records so as to indicate that the property which constituted the principal value of that which was so offered and purchased was excluded from the sale. Those allegations are, under the circumstances, sufficient to sustain the decree.

Nor is the bill insufficient, as suggested by the appellants, to show that the appellees were entitled to equitable relief, for the reason that it contains an allegation that Thomas S. and Willis E. Nowell subsequently acquired from the United States a patent to the mining claims so attempted to be withheld by them. According to the allegations of the bill, and as the facts were found by the trial court, the Berner's Bay Company, through the proceedings at the stockholders' meeting, became the equitable owner of the three mining claims in controversy. From that date Thomas S. and Willis E. Nowell and their successors in interest held the title in trust for the company, and as the patent thereafter obtained was likewise held by them and their successors in interest as trustees for the company, they were not in the adverse possession of said mining claims at any time before notice was brought home to the true owners thereof of their repudiation of the trust and their hostile assertion of title against them.

Equally without merit, in our judgment, is the appellants' contention that the record is without sufficient proof to sustain the finding of the trial court that the records were fraudulently altered, as alleged in the bill. There was but one call for the special meeting of the stockholders of the corporation. That call was signed by Thomas S. Nowell, as president, by Henry Endicott, as a stockholder, and by three others. It notified the stockholders of the proposal to purchase the mining claims so offered for sale, and it enumerated them in the following order: Northern Light No. 1, Johnson, Portsmouth, Seward Extension, Columbian East Extension, Bear Extension, Savage Extension, Lucky Boy, Columbian West Extension, Selkirk, Rustler, Alaska Maid, Ackropolis, Northern Star, Northern Light No. 2. In the books of the records of the stockholders' meeting so called on June 24, 1896, what purports to be a copy of the call of the special meeting is recorded. In that record a most significant change is found in the order of enumeration of the claims, the purchase of which was to be considered at said meeting. By the change so made the three claims in controversy are placed first in the list. At that meeting Thomas S. Nowell, who held the proxies of Henry Endicott and William Endicott, was not present in person; but he was represented by William S. Payson, who held his proxy and in whose handwriting the records are written. A. L. Nowell was also present. The capital stock of the company was increased in the sum of $1,500,000. According to the record as it now appears, A. L. Nowell presented a written offer from Thomas S. Nowell, the recorded copy of which begins thus:

"To the Berner's Bay Mining and Milling Company, 30 Exchange Street, Portland, Me.—Gentlemen: I hereby offer on behalf of myself and Willis E. Nowell to sell or convey or cause to be conveyed to your said corporation the last twelve mines, mining claims and properties named in article 3 of the call for the special meeting of June 24, 1896, for the one million five hundred thousand shares of new stock of said corporation," etc.

The original offer, a copy of which so purports to be transcribed into the record, shows upon its face that it was originally drawn in conformity with the original agreement between Thomas S. Nowell

and Henry Endicott, and with the notice of the stockholders' meeting. As produced in evidence, however, it contained interlineations which had first been made in pencil and afterward written in ink. One of those interlineations very materially changed the purport of the instrument. It is the interlineation of the words "last twelve" in the line after the word "mines." As copied into the record, however, the words "last twelve" were inserted, not after the word "mines," but before it. This alteration of the original offer as it was accepted by Endicott, the intervener, and as it was proposed to the stockholders in the call for the special meeting, is in itself a very suspicious circumstance. Its effect is to leave out of the offer those claims which Thomas S. Nowell himself declared to be the only claims of the 15 offered for sale which were known to be of great value, and which had been openly offered for sale to the corporation in consideration of the stock which was issued to said Thomas S. and Willis E. Nowell. But more suspicious than the alteration of the written offer is the alteration in the record of the notice of the special meeting as the same is carried into the minutes. For what purpose was the list of the mining claims therein enumerated and offered for sale so shifted as to present the 3 claims now in controversy at the head of the group? Obviously it was for the purpose of making a record such that the original offer on which the stockholders acted and relied might be interlined and altered so as to leave out of the deal the 3 valuable claims constituting the Johnson Group. The alterations so made, under the circumstances, and in view of the fact that the records were in the hands of the Nowells, and the fact that none of the parties interested other than the Nowells and their clerk knew, as far as the evidence discloses, of the alterations at the time thereof, presents a case which called upon the appellants to make full and complete explanation. This they have wholly failed to make. They offer no explanation whatever. There is no testimony that the alterations were made prior to or at the time of the meeting, and it is shown that Thomas S. Nowell and Willis E. Nowell received the full amount of the consideration price for which they originally offered the 15 mining claims, including the 3 which they represented to constitute the chief value of the properties so offered.

Thomas S. Nowell, it is true, in his testimony, disclaimed all knowledge of the interlineations and alterations, and denied that any proposition was ever made at the stockholders' meeting to sell the 15 mining claims to the corporation; but he did not deny his letter to Endicott in which he proposed to sell the 15 mining claims to the company, including the 3 in controversy. Nor did he deny that he had signed the original notice calling the stockholders' meeting to consider the acquisition of those claims. Nor did he deny that six months after the stockholders' meeting he stated to Endicott that the reason why the claims in controversy had not been conveyed to the Berner's Bay Company was that a patent had not then been obtained for them—a reason which, we may here remark, does not appear to have been candid, for the want of a patent was no impediment to the conveyance of the claims, and in fact they were conveyed to the Nowell Company

in 1899, several years before the issuance of the patent. Nowell's testimony, so far from explaining the alterations in the record, is of such a nature, on the whole, as to cast additional suspicion upon that which arises from the condition of the records themselves. William Payson, who acted as the clerk and in whose handwriting the record is, was not called as a witness. Said the court, in Smith v. U. S., 2 Wall. 219, 17 L. Ed. 788:

"The general rule is that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration."

The appellants earnestly insist that the laches of the appellees is such as to bar their right to equitable relief. It is not shown that the values of the mining properties in controversy have increased since the time when the contract for their sale was made. As to the delay of the intervener, Endicott, in asserting his rights, his testimony is that he did not discover the fraud until some six months after the stockholders' meeting, and that at that time, in a conversation with Thomas S. Nowell, the latter informed him that the reason why the mines had not been conveyed was "that they could not convey them for they had not procured the patent yet." Endicott testified, further, that thereafter he made search for Nowell's letter to him of June 3, 1896, concerning the proposed sale of the 15 mining claims to the company, but that he could not find it until 1900, and that thereafter Nowell was making endeavors to sell the Berner's Bay and Johnson property together, and that he (Endicott) was more anxious to realize on such deal than to delay the consummation of the same by litigation over the title of the Johnson properties. But he testified that on finding the letter he sent a copy thereof to Nowell and informed him "that we consider we have at least a moral claim on the Johnson property."

So far as the other appellee is concerned, it is sufficient to direct attention to the fact that, from the year 1898 until just prior to the commencement of this suit, F. D. Nowell, the son of Thomas S. Nowell, and a stockholder in the Alaska Nowell Company, was the sole receiver of the Berner's Bay Company. As such receiver, he was the proper person to institute a suit to enforce the trust against the appellants. Owing to his relation to the appellants and his own interest in the Alaska Nowell Company, he was unwilling to bring the suit. In the fall of 1905 a reorganization committee, which had become interested in the properties of the Berner's Bay Company on behalf of a large body of creditors, became possessed of knowledge of the nature of the transactions preceding and attending the stockholders' meeting of June 24, 1896, and caused a request to be served upon the receiver, F. D. Nowell, to bring suit to enforce the specific performance of the contract for the conveyance of the Johnson Group; but he refused to comply therewith. It was not until a co-receiver was appointed and an order of the court obtained requiring the receiver to institute a suit that the present suit was commenced. Whether equitable relief shall be barred

for laches must largely depend upon the circumstances of each case. Where there is no considerable change in the value of the property involved so as to make the relief equitable, the mere lapse of time, even for a period longer than that which intervened in the present case, is not necessarily conclusive against the right of relief. Especially is this so in a case such as the present, where trust and confidence were imposed by stockholders in the president of a corporation, who, with his relatives and subordinates, had the sole control and possession of the records of the company and fraudulently altered the same so as to evade the obligation on a contract made and entered into for the conveyance to the corporation of real estate, which in equity still belongs to it and is held in trust for it.

The appellants make the contention that the issuance of a patent from the United States to the Nowell Company for the mining claims in controversy was conclusive of the rights of all parties, including the Berner's Bay Company, and that the appellees waived all claim to said property by failing to adverse the Nowell Company's application for the patent. It is sufficient to say, in answer to this, that the appellees do not claim adversely to the patent, but under it. The purpose of the present suit is to establish and enforce a trust. The statute providing for adverse proceedings on an application for a patent, says Lindley, "have reference to an adverse claim arising from independent and conflicting locations of the same ground, and not to a controversy between co-owners or others claiming under the same location." Lindley on Mines (2d Ed.) 728; Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189; Stevens v. Grand Central Mining Co., 133 Fed. 28, 67 C. C. A. 284. In the fact that an application was made for a patent by the Nowells there was nothing to indicate to the Berner's Bay Company, or to any of its stockholders, that the intention was to acquire a title adverse to them. The declaration of Thomas S. Nowell to Endicott, made some six months after the stockholders' meeting, that the reason why the claims in controversy had not been transferred to the Berner's Bay Company was that a patent had not been obtained thereto, was not inconsistent with a purpose on the part of the Nowells to obtain a patent for the benefit of the company, and in furtherance of the original agreement to transfer the claims to the company.

We find no error for which the decree should be reversed.

It is, accordingly, affirmed.

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## EDDY v. CITY AND COUNTY OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. June 8, 1908.)

No. 1,430.

MUNICIPAL CORPORATIONS—SUIT TO ENFORCE PAYMENT OF BONDS—LACHES—UNEXCUSED DELAY IN BRINGING SUIT.

A bill to charge a municipal corporation as a voluntary trustee under a legislative act which required it to levy and collect taxes within a certain improvement district, and from the fund collected to pay the interest and principal of certain bonds, of one of which complainant was the

owner, which shows on its face that the defendant ceased and refused to perform any of such required acts 25 years before the bill was filed, that no interest had been paid since that time, and that the bonds matured 8 years before suit, and alleges no facts which excuse the delay in bringing suit, discloses such laches as to defeat the right to maintain the suit and renders the bill demurrable.

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

For opinion below, see 148 Fed. 272.

On January 4, 1904, the appellant filed her bill against the appellee to charge the latter as trustee with the payment of certain bonds and coupons owned by the appellant, which had been issued under the act of the Legislature of the state of California entitled "An act authorizing the widening of Dupont street, in the city and county of San Francisco," approved March 24, 1876 St. Cal. 1876, p. 432, c. 326. The bonds were issued on January 1, 1877, and were payable 20 years after that date. To each bond were attached 40 coupons for interest for the period of six months, payable, respectively, on January 1st and July 1st of each year, up to January 1, 1897. The bill alleges that the appellant is the owner and holder of 10 of such bonds, and that all of the coupons save the first 5 are unpaid; that under the provisions of the statute referred to the appellee became a voluntary trustee of the appellant for the collection of the taxes therein provided for, and for the application thereof to the payment of the interest coupons and the bonds; that the appellee and its officers have failed and neglected to levy and collect the taxes provided for, and to provide a sufficient fund to pay the interest coupons as the same accrued, or to redeem the bonds. The bill prayed for an accounting of the sums collected as taxes under the provisions of the act, and that the appellant have judgment for the amount so due her, with interest thereon, and that the appellee be required to levy and collect taxes as required by said act sufficient to pay the sum due. To the amended bill, filed by the appellant on November 4, 1905, a demurrer was interposed for want of equity, and on the further grounds that the appellant had an adequate remedy at law, that the suit was barred by the statute of limitations, and that the appellant had lost her right to equitable relief by her laches, and that there was nonjoinder of necessary parties, in that the owners of the property subject to taxation were not made defendants to the bill.

By the act under which the bonds were issued it was provided by section 1 that the width of Dupont street might be increased, and by section 2 that the value of the land taken to widen the street, and the damages to improvements on such land, and all expenses incident to the widening of the street, were to be treated as the cost of widening the street, and were to be assessed upon the district described in the act as benefited thereby. Section 3 marked the boundaries of the district upon which was to be imposed the cost of the improvement. By section 4 the mayor, auditor, and county surveyor of the appellee and their successors in office were constituted a board of Dupont street commissioners, who were to be paid each $2,000 as compensation for their services. Sections 5, 6, and 7 prescribed the methods of apportioning the damages and imposing the benefits so to be assessed. Section 8 provided for the interposition with the county court of objections by parties interested in the land within the district to the assessment so made by the board, and authorized the court to hear the same, and to either approve the assessment or refer the same back to the board, with directions to modify the same. Section 9 authorized the issuance of the bonds and coupons, and section 11 authorized the mayor, auditor, and treasurer of the appellee to sell and dispose of bonds sufficient to realize the money requisite to meet and discharge all the expenses and damages arising from the widening of the street, the money arising therefrom to be known and designated as the "Dupont Street Fund," and authorized the board of commissioners to give notice by publication that they were prepared to pay in full all unpaid demands and liabilities as fixed by the final report of the board, and, upon receiving

from the persons entitled thereto proper deeds and quittances, the board was to give to them orders upon the treasury for the amount shown to be due according to the final report, payable out of said Dupont street fund. By section 12 it was provided that a majority of the property owners fronting on Dupont street, between Market and Bush streets, might defeat the improvement and relieve themselves from any burden on account thereof by filing a written protest within the time specified, and that unless within that time a majority of the property owners on Dupont street, between Bush and Filbert, should petition therefor, there should be no widening of Dupont street north of Bush street, and that portion would be excluded from the operation of the act. By section 13 it was provided that there was to be levied, assessed, and collected annually, at the same time and in the same manner as other taxes in the city and county, a tax upon the lands within the district sufficient to pay the interest on said bonds as the same matured, said tax to be collected out of the said land only; that, when collected, the moneys were to be paid to the treasurer of the appellee, and were to constitute a part of the Dupont street fund, and were to be paid out by said treasurer only in payment of the coupons attached to said bonds when the same became due, and there was also to be levied and assessed on the same lands, and collected at the same time and manner as other taxes, an assessment for each $100 valuation sufficient to raise one-twentieth of the principal of the bonds, which was to constitute a sinking fund for the redemption of the bonds. By section 21 it was provided as follows: "The board of supervisors of the city and county of San Francisco are hereby authorized, if in the judgment of said board it should be expedient that Dupont street should be widened in accordance with and in the mode prescribed in this act, to express such judgment by resolution or order in such form as they may deem advisable, within sixty days after the passage of this act, and in the event that such board of supervisors within said period of sixty days after the passage of this act should fail to pass an order or adopt a resolution declaring it expedient to widen Dupont street under the provisions of this act, no further proceeding shall be had or taken under this act for any purpose whatever, and said street shall remain of its present width; but if said board pass such resolution, then all proceedings thereafter shall be taken under the provisions of this act." Section 22 provides as follows: "The completion of the work described in this act shall be deemed an absolute acceptance by the owners of all lands affected by this act and by their successors in interest of the lien created by this act upon the several lots so affected, and it shall operate as an absolute waiver of all claim in the future upon the city and county of San Francisco for any part of the debt created by the bonds authorized to be issued by this act, and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds and said city and county, and this provision shall be stated on the face of the bonds."

W. T. Hume, C. M. Simpson, and John H. Dickinson, for appellant.

Wm. G. Burke, Garrett W. McEnerney, and D. Freidenrich, for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). This is a suit brought upon Dupont street bonds of the same issue as those which were involved in the decision of this court in Mather v. City and County of San Francisco, 115 Fed. 37, 52 C. C. A. 631. In that case a bondholder brought an action at law upon certain bonds in order to obtain a judgment preliminary to an application for mandamus to the officers of the city and county for the collection of

the taxes for the payment of the same. The present case is a suit in equity, the purpose of which is to charge the appellee as a voluntary trustee of the appellant for the collection of the taxes provided for in the act authorizing the widening of Dupont street, and it is the contention of the appellant that such a suit is maintainable under the authority of Warner v. New Orleans, 167 U. S. 467, 17 Sup. Ct. 892, 42 L. Ed. 239, and New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96. We find it unnecessary to decide whether the doctrine applicable to the present case is found in those decisions, or in the case of Peake v. City of New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, 35 L. Ed. 131, which is cited and relied upon by the appellee. Assuming that by exercising the option granted to it by section 21 of the act, and adopting the resolution which it was thereby authorized to adopt, the appellee became a voluntary trustee for the collection of the taxes and the payment of the same to the bondholder, we are of the opinion that the facts alleged in the bill affirmatively show that the appellant's prayer for equitable relief must be denied on account of her laches. From the bill it appears that the principal of the bonds became due and payable January 1, 1897, and that the 35 unpaid interest coupons attached thereto became due and payable semi-yearly from the year 1879 to the year 1897; in other words, at the time of the commencement of the suit nearly 8 years had elapsed since the accrual of the cause of action on the bonds, and 25 years had elapsed since the accrual of the cause of action on the first unpaid coupon. In New Orleans v. Warner, 175 U. S. 120–130, 20 Sup. Ct. 44, 48, 44 L. Ed. 96, the court said:

"Having thus voluntarily assumed the obligations of a trustee with respect to this fund, it cannot now set up the statute of limitations against an obligation which, as such trustee, it had undertaken and failed to perform. The rule is well settled that in actions by cestuis qui trust against an express trustee, the statute of limitations has no application, and no length of time is a bar. While that relation continues, and until a distinct repudiation of the trust by the trustee, the possession of one is the possession of the other, and there is no adverse relation between them. * * * To set the statute in motion the relation of the parties must be hostile, and so long as their interests are common, or their relations fiduciary, as in the case of landlord and tenant, guardian and ward, vendor and vendee, tenants in common, or trustee and cestuis qui trust, the statute does not begin to run. This language of the opinion is expressly relied upon by the appellant in this case; but it is to be observed that in the case then under consideration the court proceeded to say that the trust had never been repudiated by the city, and pointed to the fact that one of the defenses set up in the answer was that the city had applied itself with great diligence and to the full extent of its ability to improve and make serviceable the drainage work and to proceed with the collection of the drainage taxes, and did all in its power to prosecute the collection of the same. 'Indeed,' said the court, 'the whole gist of the answer is that the city has executed its trust faithfully, so far as it was possible to do so, by collecting assessments against private persons, but has not accounted for taxes assessed against itself because it is not legally responsible therefor. There is no claim throughout the answer that the city disavowed the trust.'"

Such is not the case presented upon the bill now under consideration. It is true that the appellee has not answered setting forth its attitude to the subject-matter of the suit; but it is well settled that, where the

bill shows upon its face that the plaintiff by reason of lapse of time and of his own laches is not entitled to relief, the objection may be taken by demurrer. Maxwell v. Kennedy, 8 How. 210, 12 L. Ed. 1051; National Bank v. Carpenter, 101 U. S. 567, 25 L. Ed. 815; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219.

Turning to the bill in the present case, we find therein the allegation that "at divers and sundry times since the year 1877 and the commencement of this suit" the appellant has demanded payment of the bonds and the interest coupons, and that payment has been refused; that the appellee, "in violation of the terms of said trust and its duty and obligation thereunder, did not keep and perform the conditions and obligations of said trust, and has wholly abandoned the same without notice of any kind to this plaintiff, and did not perform the duties imposed upon it as trustee as defined in said act, but, on the contrary, failed and neglected, during the time specified in said act, or at any time, to assess, levy, and collect, or cause to be assessed, levied, and collected, from the property specified in said act or otherwise, taxes sufficient to pay the interest coupons, and to redeem the said bonds." The bill proceeds to set forth the excuses proffered by the appellee for failing to fulfill the obligations imposed upon it by the act of the Legislature, which excuses are, among others, that suits were brought in 1880 to enjoin the tax collector from selling property in said district for payment of taxes assessed for the purpose of carrying out the scheme of the act. In brief, the bill presents a case where the alleged trustee had 25 years before the commencement of this suit ceased and refused to perform any of the acts required to be performed by it under the terms of the statute, and, while it alleges affirmatively that the appellee never at any time asserted to the appellant that it was not liable as trustee or otherwise upon such bonds and coupons, it makes no allegation that the default and refusal of the appellee to collect taxes and pay coupons which accrued 25 years before the commencement of the suit was not well known to her at the time. In fact, the contrary appears from the bill. The allegation is that, although the trustee repudiated the trust, it never advised her personally of that fact. This is clearly insufficient to excuse appellant's laches, and her waiting all these years before taking any step whatever to enforce her rights.

It is true it is well settled by the authorities that the statute of limitations has no application to an express continuing trust not disavowed to the knowledge of the cestui que trust. But when the trust is repudiated, and knowledge of the repudiation is brought home to the cestui que trust, the case is brought within the ordinary rules of limitations and laches. In the leading American case of Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417, Chancellor Kent expressed the rule which has since been followed in numerous decisions:

"The trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper peculiar and exclusive jurisdiction of this court."

In Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718, the court said:

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them."

That language was used in a case in which it was held that a bill in equity against persons holding a fund in trust for the common benefit of the members of a voluntary association living together as a community cannot, whether the trust is lawful or unlawful, be maintained by one who has left the vicinity and for 50 years afterwards has taken no step to claim any interest in the fund; and the court quoted the language of Lord Camden in Smith v. Clay, 3 Bro. Ch. 640, as follows:

"A court of equity has always refused its aid to stale demands, where the party slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

In 28 Amer. & Eng. Ency. of Law, 1134, it is said:

"But when the trust relation is terminated in any way, as by the open repudiation and disavowal of the trustee, or by some default on his part, or by vesting of the legal title in the cestui, or in some other way, and such termination is known to the beneficiary, then, and not until then, the possession of the trustee becomes adverse and the statute begins to run in his favor."

In Boyd v. Munro, 32 S. C. 249, 10 S. E. 963, the court said:

"For it is well settled that even in cases of express technical trusts, where a trustee does an act expressive of an intention to repudiate the trust, the knowledge of which is brought home to the cestuis que trust, the statute will commence to run at that time."

The obligation resting upon the appellee was not a mere naked trust to hold property for a cestui que trust. The trust, if there were a trust, was an active one—one which required of the appellee the prompt and diligent performance of certain prescribed acts. According to the bill it not only failed to perform these duties, but at least as early as 1881 it failed to protect the interest of its cestuis que trustent and to intervene in defense of a suit to enjoin its tax collector from collecting the assessments. All these acts, public as they were, and not alleged to have been unknown to the appellant at the time thereof, constituted a repudiation of the trust, and imposed upon the appellant the duty of timely action to protect her interests. The application of the doctrine that equity will withhold relief from those who have delayed the assertion of their rights depends upon the circumstances of each case. It does not always depend upon mere lapse of time. It involves, also, the question of change of situation which occurring during neglectful repose may render relief inequitable. The real parties in interest here, the parties to be affected by the relief which is sought, are the owners of the land included in the district made taxable for the improvement. In the years that have passed since the maturity of the bonds and coupons it is reasonable to assume that a very considerable portion of that land may have been conveyed or

incumbered and that extensive improvements may have been made thereon. There was evidently nothing of record to indicate that, when so sold or incumbered or improved, such lands were to be subjected to the taxation which the appellant now seeks to impose upon them. Every consideration of justice and equity required the appellant to move more promptly for the protection of her rights. More than a score of years before this suit was commenced she had her legal remedy by an action at law to obtain judgment upon the unpaid coupons preliminary to compelling the collection of taxes for their payment. Instead of so doing, she chose to wait until the great lapse of time and the changed situation of the parties in interest have rendered inequitable the interposition of a court of equity in her behalf.

The decree is affirmed.

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## ROCHESTER GERMAN INS. CO., OF ROCHESTER, N. Y., et al. v. SCHMIDT

(Circuit Court of Appeals, Fourth Circuit. May 9, 1908.)

No. 756.

1. APPEAL AND ERROR—REVIEW—FINDINGS OF JUDGE.
   The findings of a trial judge sitting in equity ought not to be set aside on appeal, if there is legal evidence to sustain them.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

2. INSURANCE—"SOLE OWNERSHIP"—"UNCONDITIONAL OWNERSHIP."
   Insured's ownership is "sole" when no one other than insured has any interest in the property as owner, and is "unconditional" when the quality of the estate is not limited or affected by any condition.
   [Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6545; vol. 8, pp. 7154, 7155.]

3. SAME—PROVISION FOR SOLE OWNERSHIP.
   A condition in an insurance policy that, if the insured is not the sole, entire, and unconditional owner, the policy shall be void, is reasonable and valid, and a failure to disclose the real state of the title, if not sole, etc., is fatal, though such failure is unintentional.

4. SAME—NATURE OF TITLE.
   Certain policies contained a clause that they should be void if the interest of the insured was other than unconditional and sole ownership, or if the subject of insurance was a building on ground not owned by the insured in fee. The title to the land in question long prior to the issuance of the policies had been transferred to insured's wife, and, she dying intestate, title descended one-third to insured and two-thirds to his daughters. Without objection from the daughters, insured had always treated the property as his own, having bought and paid for it originally. He paid taxes, built and controlled houses thereon, and collected rents, and at his own cost had placed on the property the building and machinery destroyed. He made no written application for the insurance and no representation with regard to the title of the land. *Held*, that the policies were void for want of unconditional and sole ownership in insured, though the condition of the title did not increase the risk.

5. COSTS—DISCRETION OF COURT—EQUITY PROCEEDINGS.
   Where certain insurers, having a valid defense to certain actions on policies at law, instituted a suit in equity to determine the respective liabilities of various companies and to enjoin the prosecution of actions at law on the policies, greatly augmenting the costs, which were imposed

on the companies in the trial court by a decree against them, which was reversed on appeal, a judgment for costs at the trial should be affirmed, and the costs on appeal divided, one-half to be paid by the insurance companies and one-half by the claimant.

Appeal from the Circuit Court of the United States for the District of South Carolina.

For opinion below, see 151 Fed. 681.

John P. Thomas and John T. Seibels (Thomas & Thomas, on the briefs), for appellants.

D. W. Robinson and W. Boyd Evans (Lawson D. Melton, on the briefs), for appellee.

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

MORRIS, District Judge. Frederick Schmidt, a citizen of Columbia, S. C., having erected an ice manufacturing plant on Main street in that city, effected fire insurance thereon, through resident insurance agents, to the total amount of $8,100 in the following companies, viz.:

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|---|---|
| Rochester German Insurance Company | $2,500 |
| Palatine Insurance Company, of London, England | 3,500 |
| Phœnix Insurance Company, of Hartford, Conn. | 1,000 |
| Agricultural Insurance Company, of Watertown, N. Y. | 1,100 |
| Total | $8,100 |

On other adjoining land of his own in the same block Schmidt had several dwelling houses and stores, a hotel, and a laundry plant, on which he had obtained insurance through J. H. Walker & Co., resident insurance agents and bankers in Columbia, and, when he began the erection of the ice plant, he promised to give them the insurance on it, and before the ice plant began operation he took to them the estimate which his erecting engineer had made of the proper amount of insurance required, and Messrs. J. H. Walker & Co. prepared the policies. They were issued in May, 1902, insuring Frederick Schmidt against loss by fire. The items of insurance were distributed as follows, each policy covering its pro rata amount: $1,350 on brick composition roof building, occupied as an ice factory, and situated in the rear of No. 722, on the east side of Main street, page 19, block 249, Sanborn's Map of Columbia, S. C. $5,850 on machinery of all kinds, pumps, and their connections, condensers, filtering apparatus, freezing tanks, including coils in storage rooms, pipes and piping, shafting, gearing, pulleys, hangers, tools, and implements, and all other machinery and implements used in and about the premises usual to an ice factory, while contained in the above building. $750 on boilers and engines, including all connections and fixtures, foundations, and settings, while in communicating addition to the ice factory. $75 on stock of ammonia while contained in the above building. $75 on stock of salt, while contained in the above building. Total, $8,100.

The fire occurred December 30, 1902. On March 12, 1903, Schmidt assigned the policies to his wife, Nora Martin Schmidt, and he died

May 10, 1903. Proof of loss having been furnished, and the companies having denied any liability for the losses, suits at law against each of the four insurance companies were instituted by the widow and assignee, on July 17, 1903, in an appropriate state court of South Carolina, and pleas were filed by the defendants denying all liability. Two of the cases were removed by the defendants into the Circuit Court of the United States for the District of South Carolina, and the other two were not removed because the amount claimed was less than the required jurisdictional amount. Subsequently, on October 28, 1903, the Rochester German Insurance Company filed in the Circuit Court of the United States this bill of complaint, setting forth the issuing of the four policies of insurance, and that each company by said policies undertook to be answerable only for its pro rata of the loss on the items mentioned; that, if the court should hold that there was any liability for the loss sustained, it should be apportioned; that each insurer was interested in the liability of the other; and that this could only be ascertained in one suit and in a court of equity. The bill of complaint fully sets out the defenses by reason of which the complainant contends that there was no liability for the loss by fire, and prays the court to take jurisdiction and determine the respective liabilities of each of the four companies, and to enjoin the said Nora Martin Schmidt from further prosecuting the actions at law, and prays that the case be referred to a master to take testimony and make a report thereof, and for other relief.

The defendant, Nora Martin Schmidt, duly appeared and demurred to the bill, upon the ground that she was entitled to have the cases she had instituted against the four insurance companies determined in a court of law, with a jury, and that the complainant and the other insurance companies had a plain, adequate, and complete remedy and defense at law. This demurrer came on to be heard before the late Circuit Judge Simonton, and he held against the contention of Mrs. Schmidt that the court had jurisdiction to entertain the bill of complaint. 126 Fed. 998. The correctness of that decision is not before us for examination on this appeal, and cannot be considered by us. However, it is proper to bear in mind that the many questions of fact raised in this case involved almost entirely the credibility of witnesses and the weight of testimony, and were of the kind most appropriately tried by a jury; and the appellants having, against the objections of the appellee, brought these issues into a court of equity, where they were most carefully considered and determined by the learned trial judge (District Judge Brawley), his findings, like the verdict of a jury, ought not to be set aside if there is legal evidence to sustain them.

The defenses pleaded by the companies were: (1) That Schmidt represented himself as sole owner of the property, when in fact he was owner only of an undivided one-third interest therein. (2) That he represented the property insured to be worth $8,100, whereas in fact it was not worth more than half that amount. (3) That the property insured was a manufacturing establishment which had ceased to be operated for ten consecutive days. (4) That the proofs of loss

sworn to by Schmidt were informal, inaccurate, and false. (5) False swearing, in stating that the origin of the fire was unknown to him, and did not originate by any act, design, or procurement on his part, and concealment and misrepresentation of material facts in regard thereto.

The special master was appointed by an order signed on March 14, 1904, and made his report on November 27, 1906; so that, instead of the continuous progress of a jury trial, there was 2½ years spent in taking the testimony. The opinion and findings of Judge Brawley cover 10 pages of the printed record, and in it he carefully considers and determines every defense made by the insurance companies, with the result that he entered a decree against the insurance companies, on the 1st of March, 1907, amounting to $6,827.18, to be apportioned pro rata among the four insurance companies. There were filed 32 assignments of error by the insurance companies, questioning every finding even of the most incidental and unimportant fact mentioned by the trial judge in his opinion; but as there was ample evidence, if believed by the trial judge, to support every disputed fact, we shall not re-examine his findings of fact.

The only vital question of law decided by the trial judge and excepted to was with regard to the insured's title to the land on which the insured ice plant was located. The title to that part of the land on which the ice plant was placed had been, years before, deeded to his wife. She had died intestate some years before the insurance was effected. The title to the land, upon her death, descended one-third to Schmidt and two-thirds to his five daughters. Without objection from his daughters, he had always treated this property as his own. He had bought and paid for it originally, had always paid the taxes on it. He had built houses on it, and controlled them, and collected the rents, and at his own cost had placed on it the building and the machinery for the ice plant. He made no written application for the insurance and no representation with regard to the title to the land. He placed the business of insuring the ice plant in the hands of the resident agents of the insurance companies, and they, without questioning Schmidt as to his title to the land, prepared the policies on the usual standard form covering the building, machinery, and merchandise. The policies contained the clause in common use in standard policies:

"This entire policy * * * shall be void * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

This express condition of the policy gives rise to a distinct question of law as to which the facts are not in dispute. The land upon which Frederick Schmidt had built the insured ice plant had been conveyed in fee to his deceased wife, and after her death, by the laws of South Carolina, he was entitled to one-third, and her five children were entitled to the other two-thirds. Does that, even though Frederick Schmidt had originally paid for the property, the title to which was conveyed to his wife, and even though he had always paid the taxes on it, and paid for the improvements he erected on it, gratify

the express condition of the policy that he was the unconditional and sole owner and that he owned the ground in fee simple?

We think that the weight of authority is that, when a policy contains this language, it is made an express condition of the validity of the policy. In 2 Clement on Insurance, p. 152, it is said:

"An insured's ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition."

In 1 May on Insurance, § 287, it is stated:

"A condition that, if the insured is not the sole, entire, and unconditional owner, the policy shall be void, is reasonable and valid, and failure to disclose the real state of the title, if not sole, etc., will be fatal, although the insured was not questioned as to that fact."

Schroedel v. Humboldt Fire Ins. Co., 158 Pa. 459, 27 Atl. 1077, was a case arising upon a similarly worded condition in a policy issued to John Schroedel. The court said:

"The uncontradicted evidence was that the title to the property was in the plaintiff and his wife jointly. This in the absence of any proof of fraud or mistake as to the insertion of the stipulations above quoted, was a flat bar to the plaintiff's recovery."

See, also, 13 A. & E. Encyclopædia of Law (2d Ed.) 233.

In Hartford Fire Insurance Co. v. Keating, 86 Md. 130–145, 38 Atl. 29, 31, 63 Am. St. Rep. 499, it is said:

"To be unconditional and sole, the interest must be vested in the insured, not contingent or conditional, nor for years or life, nor in common, but of such a nature that the insured must sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable."

See, also, Wineland v. Security Insurance Co., 53 Md. 276.

For the reason that the title of Frederick Schmidt did not gratify the express condition upon which the policy was granted, the policies never took effect, and we have no right to consider, under the circumstances of this case, whether or not the disclosure of the real title would have affected the risk or the rate of premium. Hunt v. Springfield, etc., Ins. Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381; Baltimore Fire Insurance Co. v. Loney, 20 Md. 20–36; Parsons, Rich & Co. v. Lane, In re Millers' & Manuf'rs' Ins. Co., 97 Minn. 98, 106 N. W. 485; Insurance Co. v. Cochran, 77 Miss. 348, 26 South. 932; Palatine Ins. Co. v. Dickenson, 116 Ga. 794, 43 S. E. 52; Scottish Union, etc., Ins. Co. v. Petty, 21 Fla. 399; Waller v. Northern Assurance Co. (C. C.) 10 Fed. 232, 2 McCrary, 637. As soon as (during the preliminary examination as to the loss) the actual state of the title was disclosed, the defendant companies tendered a return of the premiums received. The weight of authority is that in policies of this kind, where the consideration is entire, the contract is entire, and is void as an entirety. Bowman v. Franklin Insurance Company, 40 Md. 620–623; Agric. Ins. Co. v. Hamilton, 82 Md. 88–96, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457.

The learned trial judge, considering that Frederick Schmidt took the policy in the form in which it was tendered to him innocently and in good faith, and had an insurable interest, and had an equitable in-

terest in the building and machinery, which with his own money he had placed on the land with the silent acquiescence of his children, and that if the true state of the title had been stated it would not have enhanced either the risk or the premium, and that the company had asked for no information about the title, and had in no ways suggested to Schmidt that the matter of the title was material, came to the conclusion that, under all these circumstances, it would be unconscionable to hold that the policies were forfeited because an ignorant man had not stated an immaterial matter about which he had not been asked and of the importance of which he had no conception. It is with great reluctance that we differ with this equitable treatment of this case; but, in view of the weight of authorities dealing with policies containing the express condition in question, we feel that the law is settled otherwise, and that the ruling below cannot be sustained.

There remains a question as to the costs. By the bringing of these cases into an equity court, the costs have been greatly augmented. We think substantial equity will result from allowing the decree for costs below to remain as it was entered in the Circuit Court, and by dividing the costs in this court, one-half to be paid by Mrs. Schmidt and one-half by the four insurance companies, ratably.

Decree in favor of Mrs. Nora Martin Schmidt against the four insurance companies reversed, except as to the costs.

Reversed.

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## TAYLOR v. NORFOLK & O. V. RY. CO.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1908.)

No. 776.

MORTGAGES—FORECLOSURE—RETENTION OF JURISDICTION BY TERMS OF DECREE—RESTRAINING FORECLOSURE.

In a foreclosure suit against an electric railway company in a federal court, the receivers were ordered to institute proceedings to condemn the interest of a trustee under mortgages executed by former owners covering the right of way upon which defendant's line was built and which it had purchased from one of the mortgagors and paid for. Pending such proceedings in a state court, decree of foreclosure was entered by the federal court and the property sold, the decree providing that all questions which might thereafter properly arise thereunder were reserved, and the conveyance was made, with the benefit of all suits or proceedings which had been instituted by the receivers. Thereafter the trustee under such mortgages brought suit in a state court for their foreclosure. *Held*, that the federal court retained jurisdiction over the property and suit to such extent as to entitle it to entertain a supplemental bill by the purchaser to enjoin the prosecution of the foreclosure suit until the conclusion of the condemnation proceedings.

[Ed. Note.—Foreclosure in federal courts, see note to Seattle, L. S. & E. Ry. Co. v. Union Trust Co., 24 C. C. A. 523.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Reynolds D. Brown (G. A. Hanson and Burr, Brown & Lloyd, on the brief), for appellant.

Henry W. Anderson (D. Lawrence Groner and Tazewell Taylor, on the brief), for appellee.

Before FULLER, Circuit Justice, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge. The proceeding in which the decree appealed from was entered was in the nature of a supplemental bill or petition filed in the case of Charles E. Fink v. Bay Shore Terminal Company and Others. That was a foreclosure suit under a deed of trust made by the Bay Shore Terminal Company, in which a decree was entered for the sale of the property involved in the present supplementary proceeding, and it was sold to the Norfolk & Ocean View Railway Company, a corporation of Virginia, the present complainant. The property so sold was an electric street passenger railway, with its roadbed, rights of way, lands, buildings, bridges, and structures, power plant, cars, and equipment of every kind, beginning at a point near Ocean View, in the county of Norfolk, and extending thence southwardly to the city of Norfolk, Va., together with the franchises, powers, rights, and privileges of the Bay Shore Terminal Company and the estate, right, title, and interest of said company in and to the same. The controversy in the present proceeding has reference to a strip of land, about six miles long, extending from Ocean View to near the city of Norfolk, constituting the right of way on which the rails of the Norfolk & Ocean View Railway Company are placed and the plot of land on which its power house is erected.

The history of the title to this strip of land is as follows: The Tanner's Creek Drawbridge Company in 1865 was empowered to construct and maintain a turnpike from Norfolk to Ocean View, and by amendments to its charter was empowered to widen its road and to "sell or lease along its turnpike a right of way to any company or companies for the operation of an electric railroad and bicycle path or other similar enterprise." In 1898 the Tanner's Creek Drawbridge Company mortgaged its property and franchises to Walter H. Taylor, trustee, to secure an issue of bonds amounting to $25,000, which are still outstanding. In 1900 the Consolidated Turnpike Company acquired, with other turnpikes, the turnpike of the Tanner's Creek Drawbridge Company, subject to the $25,000 mortgage. Thereupon the Consolidated Turnpike Company mortgaged its property to said Walter H. Taylor, trustee, to secure $200,000 of its bonds, a part of which were issued and are still outstanding. Thereupon the Bay Shore Terminal Company was incorporated to construct an electric railway from Norfolk to Ocean View upon the strip of land acquired as aforesaid by the Consolidated Turnpike Company from the Tanner's Creek Drawbridge Company.

The persons organizing the Bay Shore Terminal Company were, it is alleged, and not denied, the same persons who controlled the Consolidated Turnpike Company, the boards of directors were substantially the same, and H. L. Page was president of both companies. Under these circumstances the Consolidated Turnpike Company sold to the Bay Shore Terminal Company the land and right of way in controversy. The consideration therefor was $22,500 of the bonds of the Bay Shore Terminal Company, $5,625 at the par value of the stock of the Bay Shore Terminal Company, an agreement by the Terminal

Company to build and maintain a new drawbridge over Tanner's creek, and an agreement by it to furnish without cost the electricity to operate the draw, if the same was operated by electric current. In consideration of the said bonds and stock and agreements, the Consolidated Company conveyed to the Terminal Company with general warranty the strip of land in question, being the whole length of the road to Ocean View, and provided in the deed that the bonds and stock mentioned as a part of the consideration given for the deed should be transferred and turned over to Walter H. Taylor, trustee, to be held by him under the mortgage deeds to him, to secure, first, the bonds issued by the Tanner's Creek Drawbridge Company, and, secondly, to secure the bonds issued by the Consolidated Turnpike Company. The bonds and stock were subsequently put into the custody of the said Walter H. Taylor, and subsequently they were placed in the hands of a committee who were negotiating a reorganization of the lien claims against the Bay Shore Terminal Company.

The Bay Shore Terminal Company had made a large issue of mortgage bonds, and, becoming insolvent, receivers of it were appointed in the aforementioned case of Fink v. Bay Shore Terminal Company, in which this supplemental bill was filed. A decree for foreclosure having been entered, a sale was made, and the Norfolk & Ocean View Railway Company became the owner of the property. During the proceeding under the receivership, prior to the decree for sale, the special master reported to the court as follows:

"It appears from the said deeds that the title of the Bay Shore Terminal Company to its right of way from Norfolk City Park to Ocean View, and to the said parcel of land, is incumbered by the liens of said deeds of trust. The consideration paid by the Bay Shore Terminal Company to the Consolidated Turnpike Company was paid in bonds and in work, as stated in the deed of the last-named company to the Bay Shore Terminal Company, and was at the time said deed was made, in the opinion of the special master, ample consideration for a good, sufficient, and perfect title to said right of way and parcel of land, and there is no further obligation on the part of the Bay Shore Terminal Company to the Consolidated Turnpike Company to be performed before the said Consolidated Turnpike Company shall make its deed to the Bay Shore Terminal Company perfect. The special master, therefore recommends that the receivers of the Bay Shore Terminal Company be required to demand of the Consolidated Turnpike Company such action on its part as will release the said right of way and parcel of land from the incumbrances of said deeds of trust; and, in the event said Consolidated Turnpike Company shall refuse and fail to do so, the said receivers shall be required to clear the title of the said right of way and parcel of land of all incumbrances, by condemnation proceedings or otherwise. While the receivers have not been, and may not be, disturbed in the possession and use of such right of way and parcel of land, the title to the same is a matter of such vital interest to any future purchaser or owner of the said Bay Shore Terminal Company that it should not be left with any cloud upon it."

And the court thereupon entered the following order:

"This cause came on this day to be again heard upon the papers formerly read; and it appearing to the court, from the report of Special Master R. T. Thorp, that the Bay Shore Terminal Company has never acquired title to a portion of its right of way and to the property upon which its power-house is located, the court doth adjudge, order, and decree that B. W. Leigh, H. L. Page, and J. A. C. Groner, receivers, do proceed in the proper court or courts to institute condemnation proceedings for the purpose of acquiring title to

said property, and said receivers are hereby authorized to take any and all necessary steps to institute and conduct said condemnation proceedings to as speedy a determination as possible.

"January 20, 1906. Edmund Waddill, Jr., U. S. Judge."

Thereupon the receivers did institute condemnation proceedings in the circuit court of Norfolk county to condemn any outstanding interest in the land in controversy; but a certain Arthur W. Depue, having bought some of the Consolidated Company bonds, intervened in the condemnation case, and the same is still pending and unsettled. While the condemnation case instituted by the receivers appointed by the court below was still pending in the state court, the decree for the foreclosure sale was entered and the property sold. By the sixteenth clause of the decree it was provided that:

"All questions as to the distribution of the proceeds of sale, and all questions of costs, expenses, and allowances, and all other questions not disposed of by this decree, or which may properly arise under the same, or are proper subjects for further direction, are reserved."

In the deed executed to the Norfolk & Ocean View Railway Company, a draft of which was submitted to the court and expressly approved by order of the court, it is stated that the conveyance is made "with the benefit of and subject to all suits or proceedings which have been or might be instituted by said receivers." Afterwards the said Arthur W. Depue, as owner of certain of the said mortgage bonds issued by the Consolidated Turnpike Company, instituted in the state county court proceedings for the foreclosure of the mortgage and the sale of the strip of land on which the railway sold by the court below was constructed. Thereupon the Norfolk & Ocean View Railway Company, the complainant in this supplemental case, filed its supplemental bill and petition, praying:

"(1) That said court would construe the scope and effect of its various decrees, deeds, and other acts in said suit, in so far as they affected the rights of the purchaser; (2) that the court would adjudge that a full consideration had been paid to Walter H. Taylor, trustee, for the strip of land in controversy, and remove the cloud from the title thereto caused by the several deeds of trust hereinbefore recited, and that Walter H. Taylor, trustee, might be brought before the court for that purpose, or, as an alternative relief, that Walter H. Taylor, trustee, be required to surrender the consideration in the form of bonds and stock of the Bay Shore Terminal Company received and held by him as aforesaid; (3) that the court would take such steps as might be necessary to protect the title conveyed to the purchaser under its decrees aforesaid, and to this end that it would enjoin Arthur W. Depue and Walter H. Taylor, trustee in the deed of trust aforesaid, from taking any action, in the state court or otherwise, to disturb the rights or the possession of the Norfolk & Ocean View Railway Company, acquired under decrees of the Circuit Court of the United States in the case of Finke v. Bay Shore Terminal Company, as aforesaid, until such rights could be finally determined and litigated by that court."

A temporary restraining order was granted, and subsequently, a plea having been filed by Arthur W. Depue, and answers by Walter H. Taylor, trustee, and by the Consolidated Turnpike Company, together with numerous affidavits, a hearing was had, and the court thereupon, on September 27, 1907, granted a preliminary injunction,

enjoining until the further order of the court Arthur W. Depue, Walter H. Taylor, trustee, and the Consolidated Turnpike Company from—

"prosecuting any suit against the Consolidated Turnpike Company so far as the same affects the title or ownership of the property conveyed by the commissioners of this court to the said petitioner in the above-entitled suit, or from doing any act or thing affecting the possession, use, and enjoyment by the said Norfolk & Ocean View Railway Company of that certain parcel of land between Norfolk and Ocean View occupied by said company as its right of way, being the same land which was conveyed to said company by the commissioners of this court under decree in this cause of the 17th day of February, 1907."

It thus appears that the court below held that it had jurisdiction to entertain the supplemental bill and to maintain the then status until the supplemental bill could be finally heard. The questions now before us are as to the jurisdiction of the court below to entertain the bill, and, if it had jurisdiction, as to the exercise of its discretion in granting the injunction.

It is not to be denied that in the original case, in which the decree for sale was entered and the sale made, the question of the lien of the prior mortgages on this right of way was brought to the attention of the court and was dealt with by the court. By its order of January 20, 1906, the court directed its receivers to proceed by condemnation proceedings to acquire the outstanding interest vested in Walter H. Taylor, trustee, by the mortgage deeds; and the receivers, acting by authority of the court, instituted that proceeding March 3, 1906, which was in rem, of which every one having any interest in the subject matter was bound to take notice. In those proceedings Arthus W. Depue appeared and demurred; but his demurrer was overruled, and he then answered generally. The state court then appointed commissioners, who made their report, which was excepted to by the said Depue. These exceptions, we understand, have not been disposed of, and the case remains pending.

This condemnation proceeding having been so instituted by authority of the court which had possession of the railroad property, and the railroad property having been sold as a going concern, with all its rights of way, franchises, and privileges, it seems clear that when the deed of conveyance recites that the deed conveys the right of way and land in question, "with the benefit of and subject to all suits or proceedings which have been or may be or might be instituted by said receivers," it refers to this very condemnation proceeding designed to acquire whatever remnant of title remained in the trustee to whom the title had been conveyed to secure the mortgage bonds in question. The attempt to foreclose that mortgage by the appellant was an attempt after the condemnation proceedings was instituted to render those proceedings nugatory by selling the property to be condemned, including with it the railroad which had been built on the right of way, and to complete which the court's receivers had spent several hundred thousand dollars, and for which the purchasers at the court's sale had paid $765,000.

It would seem that every equitable consideration supports the right of the court to protect its purchaser by enjoining the foreclosure and

sale of this right of way and strip of land until the condemnation proceedings are concluded. While the property was in the actual custody of the court, no foreclosure by the appellant could take place without its consent. The court directed its receivers to clear the title by condemnation proceedings but before those proceedings were concluded it sold the property; but by its conveyance it reserved to the purchaser the benefit of the condemnation proceeding, the object of which was to condemn the very mortgage interest which the appellant proposes now to enforce. It seems to us clear that it was within the jurisdiction of the court below to make its decree effective by the injunction which it granted, and that the injunction was necessary in order to protect the rights for which the purchaser, under the court's sale, paid his money. Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; Wabash R. R. v. Adelbert College, 208 U. S. 38–53, 28 Sup. Ct. 182, 52 L. Ed. 379.

Affirmed.

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## NORTH AMERICAN DREDGING CO. v. CUTLER et al.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,515.

1. COLLISION—INJURY TO PERSONS BY VESSEL—EVIDENCE.

Where it is shown that a tug with a tow was in fault for a violation of the statutory rules of navigation, and such fault was sufficient to account for an accident in which a person was injured, she has the burden of proof to show beyond a reasonable doubt that another vessel either caused or contributed to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 83, 84.]

2. SAME—LIGHTS ON TOW—DUTY TO TUG.

It is the duty of a tug with a tow to see that such tow carries a light at night; and an overtaking vessel is not required to look to the lights on the tug which she may not be able to see clearly to ascertain the fact that there is a tow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 105–123.]

3. SAME—FAULT AS CAUSE OF COLLISION—ABSENCE OF LIGHTS.

A launch going out from a harbor in the evening overtook a tug going in the same general direction, and, turning to starboard to pass under her stern, ran into a towing rope, and libelant was injured. The tug in fact had two mud scows in tow on a line, but they carried no lights which could be seen from the launch, although the tug carried towing lights. A danger signal was given by the tug a second or two before the accident, but too late for the launch to avoid it, even had it been understood. *Held*, that the accident was due solely to the fault of the tug in failing to carry lights on the scows.

[Ed. Note.—Collision with overtaking vessel, see note to The Rebecca, 60 C. C. A. 254.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California.

The appellee Cutler filed a libel in personam against the appellant, alleging that on the night of May 12, 1906, while he was working as a deck hand on the launch Francis, which was proceeding across the outer harbor of San

Pedro, the launch came up to the Sea Witch, a tug belonging to the appellant, proceeding ahead of and in the same general direction with the launch, the lights of the tug not being visible; that the lookout on the launch gave warning, whereupon the wheel of the launch was immediately ported, and she went to the starboard; that while passing the stern of the tug the launch discovered for the first time that the tug had a long tow line attached to some vessel astern; that thereupon and immediately the engines of the Francis were reversed, but too late to prevent a collision with the tow line; that by that collision the said appellee received serious bodily injuries; that the vessel in tow had no light or lookout, and the Francis had no warning or knowledge of her presence, and that the tow line was of an unsafe and dangerous length, to wit, over 800 feet. The appellant answered, alleging that the Sea Witch had two scows in tow, and that the tug and the scows had all the lights required by law properly placed and burning; that on discovering the light of the Francis approaching on the port quarter, and headed directly for the tug, the pilot of the latter blew the danger signal, and the tug's engines were stopped. The appellant thereupon interpleaded the Francis, alleging that after the tug blew the danger signal the Francis had time to port her helm, and change her course so as to avoid fouling the hawser, and that the Francis was in fault, in that she had no competent or attentive lookout, that she was running at too great a speed, that she did not seasonably port her helm, and that she did not seasonably reverse her engines. Upon the evidence taken on these issues, the District Court found that the appellant was guilty of negligence, in that the scows towed by the tug were without the lights required and prescribed by law, and that the failure of the appellant to provide and show said lights was the proximate cause of the injury to the appellee Cutler, and that the launch was not guilty of any negligence contributing thereto. It was decreed that the said appellee recover from the appellant the sum of $3,500, with costs.

Wm. M. Hiatt, J. S. Spilman, and Page, McCutchen & Knight, for appellant.

Eugene Overton and Wilbur Bassett, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The tug Sea Witch, having two loaded mud scows in tow, was proceeding from a point near the entrance of San Pedro Harbor, to a point outside the breakwater. The launch Francis was proceeding on the same general course, carrying a fishing party to Catalina Island. She had on board, including her crew, 29 persons. She was about 35 feet in length, and could be turned around in about four lengths of herself, and, going at full speed, she could turn at right angles in about 8 or 10 feet. She had lookouts posted in the bow, and a number of passengers were on the forward deck looking ahead. The approaching lights of the steamer Cabrillo were observed ahead coming in on the port side of the channel. A lookout on the Francis discovered the outline of the Sea Witch dead ahead, and passed the word to the master, who was at the wheel. The master ported his helm, and turned his bow to starboard to pass the stern of the tug, and within a very few seconds the Francis collided with the towing hawser extending from the stern of the tug to the bow of the forward barge in tow. Two or three seconds before the collision the tug blew her whistle. There was testimony that four blasts were given as a danger signal to the launch. There was other testimony that but two blasts were given, which would be the appropriate signal to the approach-

ing Cabrillo that the tug would hold her course to starboard. The appellant does not dispute the right of the appellee Cutler to recover judgment, nor does it contest the amount of the damages awarded him. It presents the question whether the Francis or the Sea Witch should answer in damages, or whether the damages should be divided. There was conflict of testimony on the question whether the barges carried the lights required by law. Probably the preponderance of the evidence is that, if she carried lights, they were placed at an insufficient height above the deck to enable the lookouts in the bow of the Francis and the passengers on the deck thereof to see them. But, even if the preponderance of the evidence were not to that effect, we should not be disposed to disturb the finding of the court below made on that branch of the case on the conflicting testimony.

It being established, then, that the appellant was at fault in not carrying the proper lights upon the scows, and that the violation of a statutory rule intended to prevent collisions was a cause of the accident, the burden falls upon the appellant to show that its default in that respect was not the proximate cause of the accident. In the City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84, the court said:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

The appellant contends that the Francis had no competent lookout, and that, in addition to this fault, her master was acting both as helmsman and engineer, while the engineer was on deck. On a careful consideration of the testimony, we are inclined to the opinion that the Francis had at least one competent lookout, nor do we find in the fact that the master was at the helm, a contributing cause to the accident. The Francis was an overtaking vessel, and, of course, the side lights of the Sea Witch were not visible to her. When the outlines of the Sea Witch were observed, the question on the Francis was which way to turn. To have gone to port would have been to go into the path of the approaching Cabrillo. There was no apparent reason why she should not turn to starboard and pass under the stern of the tug, if there were no lights visible on the scows, and there was nothing to warn her that the tug had scows in tow, or that such a course involved danger of collision.

But the appellant contends that the lights carried by the tug denoted a tow, and that, if the lookouts on the Francis had been attentive and competent, they would have known from the presence of those lights on the tug that she had a tow in charge. There is some conflict in the testimony as to the lights discernible on the tug just prior to the collision, but we may accept the testimony of the officers of the tug that she carried two masthead lights six feet apart, two side lights, and one bright light abaft the smokestack. If these lights indicated that the tug had a tow, it was incumbent upon the lookout on the Francis to know that fact and to report it immediately to

the master or to the helmsman. It seems to be the theory of the regulations adopted by Congress for the prevention of collisions in harbors, rivers, and inland waters of the United States (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2875]) that, when a vessel is towed by a tug, the tow shall carry certain lights, and that an overtaking vessel is not required to look to the lights on the tug for information that it has a tow, although the tug is required to indicate that fact to meeting vessels by carrying in front of the foremast two bright white lights in a vertical line, one above the other not less than three feet apart. A vessel overtaking a tug is not always in a position to see those lights clearly, or to discover that they are placed vertically the one above the other, and thereby to distinguish them from the lights which all sea-going steam vessels are permitted to carry. It is true that the statute permits a steam vessel when towing another vessel to carry a small white light abaft the funnel or aftermast for the tow to steer by, but this is not obligatory, and the light so carried is obviously not intended to indicate to an overtaking vessel that the tug has a tow in charge, and there would seem to be no way by which such overtaking vessel could distinguish such a light from the white light required to be exhibited by a steam vessel on perceiving that she is in danger of being overtaken by another vessel. The appellant argues that, after the warning signal given by the tug, a spoke or two of the starboard helm of the Francis would have cleared her, and avoided the collision, since it is very easy for an overtaking vessel to clear There is dispute in the evidence as to whether a warning signal was given. But, if it were, the preponderance of the evidence would indicate that it was given only about two seconds before the collision. Even if there had been ample time to respond to it, we see no reason for saying that it should have been interpreted by the helmsman of the launch as a warning that there was a vessel in tow of the tug. We find nothing in the record to justify us in disturbing the finding of the District Court that the launch was not guilty of any negligence contributing to the injury.

The decree will be affirmed.

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## IOWA MFG. CO. v. B. F. STURTEVANT CO.

(Circuit Court of Appeals, Eighth Circuit. May 25, 1908.)

No. 2,705.

1. SALES—REMEDIES OF BUYER—DAMAGES—MEASURE—DELAY IN PERFORMANCE OF CONTRACT.

   Special damages may be recovered for breach of a contract for a sale of machinery by a failure to deliver it within the time required by the contract where they are the natural and direct result of the breach, owing to special circumstances known to the parties when the contract was made, although such circumstances may not have been stated in the formal contract, and where the amount can be ascertained with reasonable certainty.

2. CONTRACTS—PROOF OF DAMAGES—DEFENSES.

   Where defendant which had contracted with a state to equip a public building with heating and lighting plants failed to complete the work

within the time required by the contract, in consequence of which the state deducted from the price the amount of liquidated damages for the delay, provided by the contract, and defendant made settlement on that basis, and there was testimony that the delay was caused solely by the failure of plaintiff to deliver certain machinery required for the work within the time agreed upon and that it had knowledge of the terms of defendant's contract, it was no defense to a claim by defendant for special damages for breach of contract that, in case it failed to recover the same, it contemplated presenting a claim to the Legislature of the state for payment of the amount withheld; there being no pretense that the state was under any legal liability therefor.

3. DAMAGES—ASSESSMENT—SPECIAL DAMAGES—QUESTION FOR JURY.
An issue as to the right to recover special damages for breach of a contract *held*, under the evidence, one for the jury.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 533, 534.]

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

Frank S. Dunshee (Clinton R. Dorn and Irving C. Johnson, on the brief), for plaintiff in error.

James P. Hewitt (Ambrose Risdon, A. C. Parker, and Craig T. Wright, on the brief), for defendant in error.

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

ADAMS, Circuit Judge. The Sturtevant Company sued the Iowa Company for a balance due on a contract for the sale and delivery of machinery. Defendant admitted the sale and delivery, pleaded a payment of $4,020 on account, and set up a counterclaim for damages occasioned by plaintiff's failure to deliver the machinery according to contract. The trial resulted in a verdict for plaintiff for the balance due on the contract, a verdict for the defendant on its counterclaim for an item of $871.90 for loss of laborers' time occasioned by plaintiff's delay, and a denial by direction of the court of defendant's further claim for an item of $1,475. Defendant prosecutes error solely on account of that denial.

Was there any substantial evidence entitling the defendant to go to the jury on that item? The facts are these: The defendant, the Iowa Company, on May 27, 1905, made a contract in writing with the state of Missouri to equip the State Normal School at Cape Girardeau with machinery and appliances for lighting, heating, and ventilating the building. The contract obligated defendant to complete and fully install the work on or before October 15, 1905, and contained a stipulation requiring the payment of $25 per day to the state for each and every day's delay in performance after the date so fixed. The learned trial judge ruled in view of the circumstances attending the case that this stipulation was enforceable as between the parties to that contract as a reasonable and proper provision for liquidated damages as distinguished from a penalty, and no contention is now made to the contrary. Defendant not being a manufacturer of the required machinery and appliances, on June 6, 1905, entered into a written contract with plaintiff, the Sturtevant Company, whereby the latter obli-

gated itself to furnish and deliver the same f. o. b. cars at Cape Girardeau within one month thereafter, that is, on or before July 6, 1905. Plaintiff failed to perform its part of the contract within the stipulated time. It shipped nothing until October, and then only a part of the machinery. The balance followed, some in November and some as late as January, 1906. On the completion of the work defendant was required to allow $25 per day, the stipulated liquidated damages for 59 days' delay, or a total sum of $1,475 which was in settlement deducted from the amount otherwise due the defendant from the state of Missouri according to the terms of the contract. The trial judge sustained objections to some of the evidence offered in support of defendant's right to recover this item from plaintiff, and all of it was ultimately by direction of the court withdrawn from the consideration of the jury.

The court assigned as grounds for its action (1) that it was not provided in the contract between plaintiff and defendant that there should be any damages in case of failure to furnish the machinery within the stipulated time; and (2) that it did not appear that defendant had been charged with this item in settling with the state of Missouri or that it had sustained any loss by reason of the delay. The first ground is clearly untenable. The rule governing the recovery of special damages for the breach of a contract has been frequently stated by this court, and most recently in the case of Taber Lumber Co. v. O'Neal (C. C. A.) 160 Fed. 596, where it is said:

"Such damages, as distinguished from those ordinarily sustained, can be recovered only when they are the result of special circumstances known to the parties at the time the contract was made, when they are the natural and direct result of a breach and when they can be ascertained with reasonable accuracy."

To the same effect are the cases of McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110, and the many other cases cited. There was, in our opinion, ample evidence tending to bring the defendant's claim within the protection of this rule.

Defendant's secretary and general manager testified that at the time of executing the contract between plaintiff and defendant he informed the plaintiff that his company was under contract obligation to finish the entire work of installing the machinery in the Normal School on or before October 15, 1905, and also that it was liable to pay $25 per day for each day's delay thereafter. This evidence taken in connection with the stipulation in the contract requiring plaintiff to ship all the machinery before July 6th tends to show knowledge by plaintiff of such special circumstances as might occasion unusual damages to defendant if the former failed to deliver the machinery in due time, and also tends to show that such damages would be the direct and natural consequences of such failure. It is of no consequence, in our opinion, that a statement of the circumstances was not contained in the formal contract itself. Knowledge of them brought to plaintiff in any manner at the time of entering into the contract served the required purpose of warning it of the special peril which might attend

the failure to keep its engagements and subjects it to the special damages likely to follow and reasonably to be apprehended from such failure. Plaintiff made the contract in contemplation of the special circumstances so known to it, and, in case of breach, is liable for the natural and proximate result thereof.

Does it so clearly appear that defendant sustained no loss by plaintiff's delay as to justify the court's action in withdrawing the claim therefor from the consideration of the jury? The evidence is uncontradicted that the defendant did not complete its work until 77 days after the limit of time prescribed in its contract with the state. The state conceded that it was itself responsible for the delay to the extent of 18 days and charged to defendant the agreed sum per day for the balance, 59 days, amounting in the aggregate to $1,475. Prima facie the failure to perform within the time limited created a liability against the defendant in favor of the state for the agreed amount of the liquidated damages; but this, of course, would not create any liability against plaintiff unless it had, with the knowledge of the special circumstances, in some way occasioned the delay. If plaintiff did so occasion the delay, it ought to be and is responsible for its consequences. The evidence is within a narrow compass. Defendant's secretary and general manager testified that the delay in getting the machinery and appliances from plaintiff within the time fixed by the contract alone caused the delay in the execution of its contract with the state. He also testified, in substance, that his company could not finish its work until the Sturtevant engines and other machinery arrived. Suffice it to say that there was evidence amply sufficient to go to the jury tending to show that the failure of the Sturtevant Company to make delivery of its machinery within the agreed time occasioned some if not all of the delay in the performance by defendant of its contract with the state.

The learned trial judge said that it does not appear that defendant has been charged with the item in question by the state, but that it does appear that plaintiff has a pending claim against the state for the item in question as the balance due on the contract price. We think this statement discloses a misapprehension of the facts of the case. The only evidence on this subject is that given by the secretary and manager. He testified that his company had a settlement with the state authorities of Missouri; that the state deducted from the contract price $1,475 in money because of his company's delay in performance; that his company settled the matter with the state on that basis, that is, on the basis of admitting that there were $1,475 due to the state as liquidated damages for failure to perform the work in time. The only indication to the contrary is a letter written by Lewis Houck, the chairman of the board of regents of the Normal School to defendant's secretary and manager under date April 19, 1907, a year and a half after the time of performance of the contract had expired. As this letter seems to be the basis of the court's rulings we reproduce it so far as relevant. It is as follows:

"In regard to the $1,475 which we deducted from your contract price as a penalty, we have done nothing, expecting that you would appear before the Legislature and make your claim. * * * The board at no time made any

promise that it would undertake to prosecute your claim before the Legislature, but did tell you, and I individually promised that I would recommend the matter to the committee on appropriations as strongly as I could and was ready to do so, but when you failed to apply or appear or have a representative at Jefferson City to urge the matter I supposed you had concluded to let the matter go. * * * I do not think there would have been the least trouble for you to have secured an appropriation for this amount from the Legislature, and of course, it will not be too late even at the next session to urge your equitable claim, but you will have to look after it personally and must not expect us to act as your agents in such a matter as that."

Conceding, but not deciding, that the Houck letter became competent evidence in connection with the examination and cross-examination of plaintiff's witness, its purport does not seem to us of any importance. The legitimate inference to be drawn from it is that defendant had at some time indicated a purpose to secure a remission of the state's claim for liquidated damages by legislative enactment. We fail to discover in such intention, if it existed, anything inconsistent with the existence of a valid claim against the plaintiff on the claim. It is frequently true that a claimant has more than one legal or equitable remedy; to say nothing of the moral obligation which oftentimes impels right thinking persons to action. Defendant's secretary and manager frankly admitted that, if he did not succeed in getting satisfaction from the plaintiff, it was his intention to try to secure favorable action by the Legislature. It is not pretended that the state was under any legal obligation to make the loss good to defendant. The claim against the state is one, if any, of imperfect obligation only and cannot in itself affect the legal liability of plaintiff to defendant one way or the other. A different result would, of course, follow if the state had acted upon the claim and remitted the damages. Then there would have been no loss sustained by the defendant by reason of the delay. Counsel for plaintiff argued orally that as the state occasioned 18 days of the delay in question, and, as plaintiff was not a party to the adjustment between defendant and the state, it was exonerated from any liability for the liquidated damages. Inasmuch as this question was not raised in the court below nor presented in the brief of counsel so as to afford defendant an opportunity to meet the contention, we refrain on this writ of error from expressing any opinion on the legal effect of such facts.

Our conclusion is that the court erred in excluding and withdrawing the evidence in question from the consideration of the jury. Whether or not the obligation of defendant to perform its work within the time specified and subject to the terms specified in its contract with the state in the way and with the results already pointed out and considered was known by plaintiff when the contract between it and defendant was executed, and whether or not plaintiff's delay occasioned any part of defendant's delay and consequent loss and damage, and, if so, how much, are, as the case now appears, questions for the jury. Notwithstanding the fact that defendant admitted that it was liable to the state for the amount in question that admission does not conclude plaintiff as to the liability. That issue with the others must be tried de novo between the parties to this suit.

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

## UNITED STATES v. KOMADA & CO.

(Circuit Court of Appeals, Ninth Circuit. May 18, 1908.)

No. 1,361 (1,783).

1. CUSTOMS DUTIES—CLASSIFICATION—SIMILITUDE—"SAKE"—"STILL WINE."
Sake is dutiable as still wine by similitude, being "similar" to that article in material and use within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), which prescribes the classification of unenumerated articles "similar * * * in material, * * * use," etc., to enumerated articles. The resemblance in material arises from the fact that the predominant substance in both articles is alcohol, and that there is a substantial similarity in their alcoholic strength; the percentage of alcohol being about 18 in sake and from 11 to 16 in still wine. The resemblance in use arises from the fact that both articles are drunk for purposes of exhilaration, and are capable of producing intoxication.

2. SAME—"SIMILAR."
In Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693) relating to articles "similar" to other articles, the term quoted is used in the sense of nearly corresponding, resembling in many respects, somewhat like, or having a general resemblance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 148.

For other definitions, see Words and Phrases, vol. 7, pp. 6515–6516.]

3. SAME—SIMILITUDE—SINGLE RESEMBLANCE—EITHER—OR.
Tariff Act July 24, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), relating to articles "similar" to other articles "either in material, quality, texture, or the use," does not require that similitude should exist in all four of the respects specified. One of these resemblances will suffice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 148.]

4. SAME—DEGREE OF RESEMBLANCE—"SIMILARITY."
The similarity required by the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), is a real or substantial similarity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 148.

For other definitions, see Words and Phrases, vol. 7, p. 6516.]

5. SAME—NATURE OF RESEMBLANCE—ORIGINAL MATERIALS.
In applying the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), relative to articles similar to other articles in "material," difference in the original materials from which the articles compared is not controlling. The law concerns itself only with the condition of the articles at the time of importation.

6. SAME—SIMILITUDE—QUESTION OF FACT.
The question whether an article is "similar" to another within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), is one of fact.

7. SAME—FINDINGS BY BOARD OF GENERAL APPRAISERS—CONCLUSIVENESS.
Findings by the Board of General Appraisers as to the fact of similitude will not be disturbed on appeal to the courts, unless clearly contrary to the evidence, or further evidence of a material character is presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 205.]

8. SAME—STATUTES—LONG ACQUIESCENCE BY IMPORTERS.
Where there is a conflict in the evidence as to the character of an imported article, much weight should be given to the fact that there has

been an earlier ruling by the Board of General Appraisers which has long been acquiesced in by importers of that article.

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

For decision below, see 148 Fed. 125, affirming a decision by the Board of United States General Appraisers, G. A. 6,182 (T. D. 26,810), which had reversed the assessment of duty by the collector of customs at the port of San Francisco.

Robert T. Devlin, U. S. Atty. (Charles J. Bonaparte, Atty. Gen., and James C. McReynolds, Special Asst. Atty. Gen., on the brief).

Stanley Jackson (Thomas Fitch and Henry C. & Oliver Dibble, of counsel), for importers.

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

DE HAVEN, District Judge. This case is before us on an appeal by the United States from a judgment of the United States Circuit Court for the Northern District of California, affirming the decision of the Board of General Appraisers as to the amount of import duty to which the Japanese beverage, known as "Sake," is subject. The decision of the Board of General Appraisers was that sake is dutiable at 20 per cent. ad valorem, as a nonenumerated manufactured article under section 6 of the Dingley tariff act (Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), and the main contention of the government on this appeal is that merchandise of this character is subject to a higher duty as a still wine by similitude, under section 7 of the act referred to, which provides:

"That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned. * * *"

It appears from the record that prior to 1894 sake was classified by the customs officers at New York as distilled liquor, and in that year a protest was made against that classification by an importer; the protestant contending that the article was dutiable as a still wine by similitude. This protest was sustained by the Board of General Appraisers. In re Woozeno, G. A. 2,789, T. D. 15,392. The government acquiesced in this ruling, and the classification fixed thereby continued without protest until March, 1902, when H. Hackfeld & Co., an importer of Honolulu, protested against such classification, claiming:

"That sake should be assessed for duty as ale, porter, or beer, by similitude, at the rate of 40 cents per gallon, if in bottles or jugs, or at 20 cents per gallon, if not in bottles or jugs, or as a nonenumerated article at the rate of 20 per cent. ad valorem."

This protest was overruled by the Board of General Appraisers (T. D. 24,410; G. A. 5,334); the board holding that sake "should be held to be so far similar to still wine as to be classed as wine by similitude. It is similar in the amount of alcohol and other constituent elements;

also in quality, general appearance, and somewhat in taste." No appeal was taken from this decision; but on April 16, 1903, the collector of customs at New York, having assessed an importation of sake for duty at 50 cents per gallon as a still wine, the importer, W. Nishimiya, filed a protest against the decision. This protest was overruled by the Board of General Appraisers, and the importer appealed to the United States Circuit Court for the Southern District of New York, and the decision of the Board of General Appraisers was reversed by that court, and sake held to be dutiable at 20 per cent. ad valorem as a nonenumerated manufactured article under section 6 of the tariff act of 1897. Nishimiya v. United States (C. C.) 131 Fed. 650. This decision was affirmed by the Circuit Court of Appeals for the Second Circuit, the court saying:

"The similarity to still wines, based upon the large amount of alcohol found in the imported merchandise, presents the strongest reason in justification of the collector's classification. * * * But sake has so many characteristics which are not found in either beer or wine, its ingredients are so unusual, and the process of its manufacture so unique, that it may fairly be held that it is nowhere described, except by the general language of section 6." United States v. Nishimiya, 137 Fed. 396, 69 C. C. A. 588.

In the case now before the court the collector of customs at San Francisco assessed the merchandise in question at the same rate as that prescribed for still wines, and, upon appeal, the Board of General Appraisers reversed this action, and held sake to be subject to duty as a nonenumerated manufactured article under section 6 of the tariff act of 1897. The United States, being dissatisfied with this decision, brought the case before the Circuit Court for the Northern District of California for review. The case was heard in that court upon the evidence adduced before the Board of General Appraisers, and additional evidence submitted by both parties under section 15, of the act of June 10, 1890 (26 Stat. 138, c. 407 [U. S. Comp. St. 1901, p. 1933]), and the decision of the Board of General Appraisers was affirmed (148 Fed. 125).

1. The question whether a nonenumerated article is similar to one named in the tariff act and for that reason subject to a like duty is one of fact. Wills v. Russell, 100 U. S. 621, 25 L. Ed. 607; Herrman v. Miller, 127 U. S. 363, 8 Sup. Ct. 1090, 32 L. Ed. 186. And the findings of the Board of General Appraisers as to that fact will not be disturbed by the court, unless clearly contrary to the evidence or when, in the proceeding for a review of its decision, evidence of a material character is presented to the court. In the present case the court has before it additional evidence not before the Board of General Appraisers, and the record is much more full and complete than that before the Circuit Court of the Southern District of New York and the Circuit Court of Appeals for the Second Circuit in the case of U. S. v. Nishimiya, above referred to. We must therefore determine the question of similitude here presented without aid from the ordinary presumption which would otherwise attach to the finding of the Board of General Appraisers, and the very great weight to which the decision of the courts, just mentioned, in the case of U. S. v. Nishimiya, would be entitled, if the record now before us was the

same as that submitted to those courts in that case. Section 7 of the Dingley tariff act provides that, when a nonenumerated article "is similar either in material, quality, texture, or the use to which it may be applied, to any article enumerated in the act, it shall pay the same rate of duty which is levied on the enumerated article which it most resembles, in any of the particulars before mentioned." One of the definitions of the word "similar" which is given in Webster's Dictionary is: "Nearly corresponding; resembling in many respects; somewhat alike; having a general likeness." We think it is in this sense the word is used in the section just quoted. The language of the statute is that each imported article not enumerated, which is similar "either in material, quality, texture, or the use to which it may be applied, shall pay the same rate of duty which is levied on the enumerated article which it most resembles, in any of the particulars, before mentioned"; thus showing clearly that the article need not be the same in all respects, but that the required similarity is shown if there is a resemblance, either in material, quality, texture, or the use to which it may be applied. And this similarity must, of course, be a real or substantial similitude in some one of the essential particulars named. Murphy v. Arnson, 96 U. S. 131, 24 L. Ed. 773; Arthur v. Fox, 108 U. S. 125, 2 Sup. Ct. 371, 27 L. Ed. 675; Waddell v. United States (C. C.) 124 Fed. 301. As neither wine nor sake has texture, the only possible resemblance between them must be in material, quality, or use.

It is claimed upon the part of the importer that there is no similarity in the material from which sake and still wine are made, as wine is a fermented product of the juice of grapes or other fruits, while sake is a product of the fermentation of rice, and made by a process similar to that employed in the manufacture of beer. This difference, however, in the original materials from which sake and wine are made is not in our opinion controlling, as the law in fixing the rate of duty concerns itself with the condition of the article at the time of importation. United States v. Schoverling, 146 U. S. 76, 13 Sup. Ct. 24, 36 L. Ed. 893; United States v. Wotton, 53 Fed. 344, 3 C. C. A. 553. The evidence discloses that there is some difference in the chemical composition of sake and still wine. This difference consists in the presence in one of a small percentage of certain substances not found in the other. The flavor of sake is somewhat different from that of wine, although in both there is an alcoholic taste. The evidence also shows that wine improves with age, while sake deteriorates. The best quality of sake will not keep for a longer period than one year. Wine may be diluted with water without spoiling it, but water added to sake will cause it to become flat within a day or two, and spoiled as a beverage. These are some of the differences in general characteristics which distinguish still wine from sake. But, on the other hand, in alcoholic strength there is a great similarity between sake and still wines, and alcohol is the principal ingredient in both sake and wine. In the particular importation involved in this case the percentage of alcohol is 18 per cent. and the evidence shows that in still wines the percentage of alcohol ranges between 11 and 16 per cent.

It thus appears that in alcoholic strength there is great similitude between sake and some still wines, and that in comparing one with the other the difference between them arises from the difference between the other ingredients, which constitute only a small percentage of their composition. The predominant substance in both is alcohol, and in our opinion, notwithstanding the difference in minor ingredients, there is by reason of the similarity in alcoholic strength a substantial similarity in the material which enters into the composition of the two articles. We think there is also a similitude in use between sake and still wine, both being drank for purposes of exhilaration, and both are capable of producing intoxication, although intoxication from the use of sake passes off more quickly than that produced by wine. The conclusion that there is a similarity between sake and still wine in the material of which they are compounded and in their use is somewhat strengthened by the facts before referred to: That in 1894 a claim was made by an importer of sake that it should be classed for duty as a still wine by similitude, the decision of the General Board of Appraisers upholding that contention, and the long acquiescence upon the part of importers in this classification. These facts tend strongly to show that in the opinon of merchants interested in the question the classification thus fixed was correct; and in a case like that before us, in which there is a conflict in the evidence, the facts referred to are entitled to great weight.

Judgment reversed.

## UNITED STATES v. RODIEK.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,503.

ALIENS—NATURALIZATION—DECLARATION OF INTENTION—RESIDENTS OF HAWAII.

The provision of section 100 of the Organic Act of Hawaii (Act April 30, 1900, c. 339, 31 Stat. 161), which authorizes the naturalization as citizens of the United States of persons who had resided in Hawaii for five years prior to its taking effect without a previous declaration of intention, was repealed by the Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 419), which establishes a uniform rule of naturalization throughout the United States, repealing all inconsistent acts, and requires a declaration of intention in all cases except of persons who have served in the army or navy.

In Error to the District Court of the United States for the Territory of Hawaii.

Robt. T. Devlin, Frank A. Duryea, and Robt. W. Breckons, for the United States.

Charles F. Clemons, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On March 28, 1907, the defendant in error, a native of Germany, presented to the United States District Court for the Territory of Hawaii his petition for naturalization. He had emigrated to the Hawaiian Islands in April, 1891, and had re-

sided there ever since. He had never, previous to presenting his petition, made declaration of his intention to become a citizen of the United States. The United States district attorney contested the petition on the ground that Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 419), requires that a declaration of intention shall have been made two years before admission to citizenship. The District Court ruled that such declaration was rendered unnecessary by section 100 of the Organic Act (Act April 30, 1900, c. 339, 31 Stat. 161), and allowed the petition.

The single question presented on the writ of error is whether the court below erred in so ruling. The organic act, providing for a government for the territory of Hawaii, declares, in section 4, that all persons who were citizens of the republic of Hawaii on August 12, 1898, "are hereby declared to be citizens of the United States and citizens of the territory of Hawaii." In section 100 it provides:

"That for the purposes of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this act."

The constitutionality of that section is questioned. The Constitution gives to Congress the power "to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." Although Congress has the power and has exercised it to confer citizenship upon individuals by special acts, or upon acquiring territory formerly belonging to a foreign power to make its people citizens of the United States, or upon the admission of a territory to statehood to make citizens of the residents thereof, the Constitution requires that in adopting a rule of naturalization or a system of procedure, whereby applicants for citizenship may upon their own initiative and the judgment of a court obtain citizenship, the rule of procedure must be uniform throughout the United States. Any special procedure prescribed for any particular district or territory in the United States would be obnoxious to this provision of the Constitution. The provision of the organic act above quoted would seem to be subject to that objection, for it applies only to residents of the territory of Hawaii and to the procedure local to the courts thereof.

But we find in Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 419), the expression of the intention of Congress to repeal the special statute dispensing with the necessity of a declaration of intention in the territory of Hawaii. The title of the act is:

"An act to establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States."

The act, after placing all matters concerning the naturalization of aliens in charge of the Bureau of Immigration and Naturalization under the direction and control of the Secretary of Commerce and La-

bor, proceeds to cover the whole scheme of naturalization, with the few exceptions hereafter to be noted. Section 3 specifies, among the courts to which exclusive jurisdiction under the act is given, the United States District Court for the territory of Hawaii. Section 4 provides that there shall be a declaration of intention made at least two years prior to admission, and provides that an alien may be admitted to become a citizen of the United States in that manner, "and not otherwise." Section 26 expressly repeals sections 2165, 2167, 2168, and 2173 of the Revised Statutes (U. S. Comp. St. 1901, pp. 1329, 1332, 1334), and section 39, c. 1012, of the Statutes at Large of 1903 (Act March 3, 1903, c. 1012, § 39, 32 Stat. 1222), and adds:

"And all acts or parts of acts inconsistent with, or repugnant to the provisions of this act are hereby repealed."

In other words, the section provides for the repeal of all prior rules of naturalization as expressed in the Revised Statutes, except section 2166, which dispenses with a previous declaration of intention after more than one year's residence in the United States, in favor of a soldier honorably discharged from service in the army of the United States, section 2169, which extends the privilege of naturalization to aliens of African nativity and to persons of African descent, section 2170, which provides that no alien shall be admitted to become a citizen who has not resided within the United States five years continuously next preceding his admission, section 2171, which excludes the admission of alien enemies, section 2172, which makes certain provisions for the citizenship of children of naturalized persons, and section 2174, which makes special provision as to admission to citizenship of alien seamen who have served three years on board merchant vessels of the United States.

The defendant in error relies on the rule that a special statute providing for a particular place, applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the Legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly, and but for the special law, include the case or cases provided for by it, citing Lewis' Sutherland, Statutory Construction, § 275; Rodgers v. United States, 185 U. S. 83, 22 Sup. Ct. 582, 46 L. Ed. 816; Ex parte Crow Dog, 109 U. S. 570, 3 Sup. Ct. 396, 27 L. Ed. 1030; and other cases. But we think that, in the present case, the intention of Congress to repeal the special law is manifest. The title of the act is indicative of the purpose to establish a uniform rule of naturalization throughout the United States. The terms of section 4 explicitly provide that naturalization cannot be had otherwise than by first making a declaration of intention two years prior to admission, and the repealing section of the act expressly repeals all acts or parts of acts inconsistent with or repugnant to its provision. The special act dispensing with the declaration of intention in the territory of Hawaii was clearly inconsistent with section 4 of the act of June 29, 1906. There is no reason to presume that in enacting the later statute Congress intended to make any special provision for the naturalization of residents of Hawaii. They were not a distinct class of residents of the

United States. There was no reason for bestowing special privileges upon them, as in the case of discharged soldiers and seamen, and they were under no disability to make declarations of their intention to become citizens. We think the intention was to adopt a new scheme of procedure in naturalization, and to make it uniform throughout the United States, and to provide for no exception as to any portion or section of the geographical territory subject to the authority given to Congress in the Constitutional grant of power to "establish an uniform rule of naturalization."

The judgment will be reversed, and the cause remanded, with instructions to dismiss the petition.

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## BRENNAN & CO. et al. v. DOWAGIAC MFG. CO.

## DOWAGIAC MFG. CO. v. BRENNAN & CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 18, 1908.)

No. 1,737–43.

1. PATENTS—INFRINGEMENT—GRAIN DRILLS—PROFITS RECOVERABLE.
   The Hoyt patent, No. 446,230, for a grain drill, is not for an addition to an otherwise complete machine, but is for a combination of elements, some of which are old, to accomplish an improved result, in which each element, whether new or old, is an essential part of the invention, and the liability of an infringer who has appropriated the combination as a whole is not limited to the profit made on any particular element, but extends to the profit made on the entire machine.

2. SAME—LIABILITY OF INFRINGER—CONFUSION OF PROFITS.
   Where no other invention inheres in a patented combination, and it is not merely for an improvement, but for a new structure, an infringer who has deliberately copied such structure cannot avoid liability for the entire profits made thereon by adding improvements of its own, which do not materially add to its sale value, and by so conducting its business as to make it impossible to separate the profits due to each.

3. SAME—ACCOUNTING.
   On an accounting for profits by an infringer, the measure of recovery is the amount of profits actually made by the defendant by the sale of the patented device, and it is immaterial that such sales would probably not have been made by complainant.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 566–576.

   Accounting by infringer of patent for profits, see note to Brickill v. City of New York, 50 C. C. A. 8.]

4. CORPORATIONS—LIABILITY OF OFFICERS OF CORPORATION—INFRINGEMENT OF PATENT.
   Where the officers of a corporation have been joined as defendants with the corporation in a suit for infringement, objection to the sufficiency of the proof to hold them personally liable should be made on the hearing; but where they have been adjudged to infringe, and it appears that such infringement was only as officers, and not individually, they should be charged only with nominal damages.

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

F. L. Chappell, for Dowagiac Mfg. Co.

Border Bowman and P. A. Staley, for Brennan & Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case comes here on an appeal and a cross-appeal from a decree rendered by the court below on an accounting for profits and damages sustained by the plaintiff, the appellant in the second of the above entitlings, resulting from the infringement of letters patent No. 446,230, granted to Hoyt February 10, 1891. The patent was sustained in respect to the claims relied upon by this court at the original hearing in 1903 (127 Fed. 143, 62 C. C. A. 257, reaffirming a like decision made in the case of Same Plaintiff v. McSherry Mfg. Co., 101 Fed. 716, 41 C. C. A. 627). We expressed the opinion that the patent embodied a highly meritorious invention, and, finding that the defendant had infringed it, decreed accordingly and remanded the cause for an accounting for the profits and damages accruing from the infringement, which appeared to have been going on for several years. The court below, on entering the decree directed by this court, ordered a reference to the master to take proofs and report in the matter of profits and damages. The proceedings before the master were very much protracted, and a large volume of evidence taken, much of which the court below thought was useless; all which, to counsel, seemingly had some bearing upon the subject was brought in. The result is that the master has reported, and the court has decreed, that the plaintiff is not entitled to recover anything beyond nominal damages. This seems an untoward ending of an apparently good cause. Congress has exercised much solicitude in securing to patentees the reward which it bestows for useful inventions. It has awarded a remedy for the profits made by an infringer, as well as the damages sustained by the patentee; and it has further provided that, in cases where the court thinks the facts warrant it, the actual damages may be increased to the extent of threefold. Rev. St. §§ 4919, 4921 (U. S. Comp. St. 1901, pp. 3394, 3395); Walker on Patents (4th Ed.) § 568.

The question we have to consider is whether the result is such as the law and the circumstances require. The master made an elaborate report, especially in regard to the law which he conceived to be applicable. With regard to the facts he states that, in response to an order made by him for a report in respect of the matter of the accounting, the usual course of proceeding (2 Bates Fed. Eq. Pro. § 759), the defendant reported, and its chief officer testified:

"That during the infringing period, in addition to the manufacture of shoe grain drills, it was engaged in the manufacture of numerous other agricultural implements and farm machinery; that the cost of production of the infringing shoe grain drills was so interwoven and intermingled with the cost of manufacture of said other farm implements and machinery that it would be impossible to separate the one from the other; that it kept no separate cost account or expense record as to its shoe grain drill business, and it would be an impossibility for any one to ascertain from its books the profits, if any, derived from the sale of the shoe grain drills which employed complainant's device."

He thereupon further reports as follows:

"No statement of profits or loss being produced by the defendant, the complainant placed its own expert, Mr. Hart, at work upon the defendant's books, and he has produced, and filed as a part of his deposition, a statement showing that during the infringing period, viz., from August, 1894, to March, 1903, the defendant manufactured and sold 9,406 shoe grain drills, embodying complainant's patent, for the gross sum of $504,094.26, and upon which it realized a net profit of $16,992.55. The methods employed by complainant's expert in arriving at his results have been criticised by defendant's counsel, and they have endeavored to point out many fundamental errors in his work. The defendant, however, not only declined to undertake this task when urged so to do, but has absolutely failed to indicate any other method than that pursued by Mr. Hart which would have arrived at a more nearly exact result; nor has it undertaken to have its books reviewed by its own expert, for the purpose of showing that the profits indicated are excessive. Absolutely mathematical exactness in work of this character is not to be expected. I am of the opinion that the method pursued by the expert was in the main correct, that his work was carefully and honestly performed, and that from the evidence presented we must accept his result, viz., $16,992.55, as the net profit accruing to defendant from the sale of infringing shoe grain drills during the period of the accounting."

With respect to profits, he states the contentions made before him by the parties thus:

"The complainant claims that it is entitled to the entire profit thus derived, and bases its contention, as I understand it, on two grounds: (a) That the Hoyt patent is not a patent for a portion of a grain drill only, but embraces the machine in its entirety. (b) That, if the patent should be construed as not sufficiently broad to cover the entire machine, then it is of such paramount importance that the entire market value of the grain drill is legally and properly attributable to the addition of complainant's patented features. Both of these propositions are strongly controverted by the defendant, and they contend that the complainant, having failed to give evidence tending to apportion the profit derived from the whole grain drill and that derived from the use of the infringing device, is entitled to recover only nominal damages."

He then proceeds to discuss the law touching the recovery of profits, and upon his conclusion of law in that regard, that the plaintiff was bound to distinguish the extent to which the Hoyt invention enhanced the profits made by the defendant in the manufacture and sale of the infringing drills, and his further statement that the plaintiff had failed to do this, he reported that there could be only a nominal recovery. The master seems to have appreciated the injustice of this result, for he says:

"That defendant derived some advantage from the use of complainant's device is evidenced by its prolonged infringement. That complainant should not be compensated for the appropriation of its property does not accord with our ideas of justice. To award the entire profits would be to disregard the law and the evidence as I find it; and, no satisfactory basis for an apportionment of the profits being indicated, the complainant is relegated to nominal damages, which I fix at the sum of $1."

And, as some atonement, he finds at the conclusion of his report as follows:

"Being of the opinion that defendant has profited by the infringement, but that the means of ascertaining the quantum are not presented by the record, I find that all items properly taxable as costs should be paid by it."

The fundamental proposition on which the report in respect to the profits rests is that the whole of Hoyt's invention and patent resides

in the spring pressure device and does not extend to other parts of the drill. From this he concludes that only this particular of the drill can be considered in estimating the profits, and that all the other parts might be lawfully made and sold by the defendant without any responsibility to the plaintiff. This is a specious argument; but it is not in accord with the established principles of law regarding patents on claims for combinations of several elements, and, when applied to this case, results in a radical error. The claims of the patent in suit are not restricted to single things, but some of them—the first, for instance—include the several elements which go to make up the seeding part of a drill, in combination. It covers them all as one whole. Every one is made material by including it in the combination. The spring devices are not thereby patented. For the purposes of the claim and the patent thereon, they are on the same footing with all the other parts of the drill, however old and common they may be. Any one might make and sell each and every part, or any lesser or larger combination of such parts, including the spring device, without infringing the patent, provided, of course, they are not intended to contribute to the making up of the entire combination covered by the patent. But one part in a combination is no more patented than another. All in association are patented.

The parts of a drill consist of a carrier, a seed box or reservoir, and the seeding apparatus. It is to the latter that the attention of inventors has been principally directed. The carrier and the seed box are old and simple. Of them it is enough to say that no one appears in this case to have any patent on them. It is pertinent to cite what was said by Mr. Justice Grier in Seymour v. McCormick, 16 How., at page 488, 14 L. Ed., at page 1024:

"It must be apparent to the most superficial observer of the immense variety of patents issued every day that there cannot, in the nature of things, be any one rule of damages which will apply equally to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted."

The case here is not a patent for an improvement upon another article, which does not cover that other article, but only the improvement made upon it. The patentee cannot in such case extend his invention over the thing improved, if the latter is patented. If not, he may appropriate it, as others of the public may. The distinction is well illustrated by the improvement of the harvester by adding a driver's seat to an otherwise complete harvester in Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024. When, therefore, the defendant sold one of the plaintiff's machines, he sold that which in all its associated parts was covered by the patent; and a Dowagiac drill, without the Hoyt patented combinations, would be but the fragment of a drill and have no distinctive character. The invention was not an addition to an otherwise complete machine.

In the cases of Elizabeth v. Paving Company, 97 U. S. 126, 24 L. Ed. 1000, and Hurlbut v. Schillinger, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011, no doubt the material employed, the blocks, the sand, the gravel, the cement, could have been put down in the usual way in some other fashion, and have been of some value as a pave-

ment, but not to the extent of excellence that one laid according to the patent would have been. Indeed, the records in both those cases show that former patents had taught how this might be done. But the patents then before the court did not adopt some earlier method of paving and then add an improvement, but they pointed out a new way of organizing the materials, which was to be substituted for the old way; and the court held in each case that the owner of the patent was entitled to recover the profits made by building the pavement in the new way. In the latter of those cases Mr. Justice Blatchford, who formulated the rule laid down in Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, delivered the opinion, and cited that case. He evidently regarded the language employed in the second alternative of the rule there stated as the statement of a broad principle, which would be applicable to cases not covered by the first.

We therefore think that the plaintiff was entitled to recover the profits made on the infringing machines. But this is not the only ground on which a decree for those profits should be justly awarded to the plaintiff. The case is not one where the defendant has inadvertently infringed the rights of the patentee. On the contrary, the trespass has been with full knowldge of the plaintiff's patent, which it knew was presumptively valid. It has made and sold these infringing drills with a purpose to imitate the patentee's construction. If it made any profits in this business, which were attributable to any contribution of its own, it has mingled them with the profits due to the plaintiff. It took no precaution for distinguishing the profits, and took such a course as to make them indistinguishable by any means which the plaintiff could pursue; and it now declares that it cannot itself distinguish them, and rests its defense upon the impossibility of showing the actual portion of the profits to which the plaintiff is entitled. This is the infringer's refuge, and in so many cases renders fruitless the patentee's right to redress for an undoubted wrong. In Docker v. Somes, 2 Myl. & Keene, 674, Lord Chancellor Brougham, when confronted with such a defense in a case involving an accounting by a trustee, said:

"When did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrongdoer's argument to stay the arm of justice grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather, let me ask, when did any wrongdoer ever yet possess the hardihood to plead in aid of his escape from justice the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, 'You had better not make the attempt, for you will find I have made the search very troublesome?' The answer is, 'The court will try.'"

In the present case the infringer's conduct has been such as to preclude the belief that it has derived no advantage from the use of the plaintiff's invention, as the master well said. In these circumstances, upon whom is the burden of loss to fall? We think the law answers this question by declaring that it shall rest upon the wrongdoer, who has so confused his own with that of another that neither can be distinguished. It is a bitter response for the court to say to the innocent party, "You have failed to make the necessary proof to enable us to decide how much of these profits are your own;" for the par-

ty knows, and the court must see, that such a requirement is impossible to be complied with. The proper remedy to be applied in such cases is that stated by Chancellor Kent in Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, 108, where he said:

"The rule of law and equity is strict and severe on such occasion. If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconveniences of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it."

This, also, was a case of an accounting by a trustee. And in a proceeding against an infringer for profits, the defendant may not inaptly be regarded as a trustee de son tort. Wales v. Waterbury, infra. And see also Wyllie v. Ellice, 6 Hare, 505; Bailey v. Bailey, 67 Vt. 494, 32 Atl. 470, 48 Am. St. Rep. 826. As was said on a former occasion, the obligation cast on the party causing the confusion cannot be less when, instead of being intrusted with the possession of property, he takes possession of it wrongfully. P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45, 57, 83 C. C. A. 157. The rule is of general application. It is stated with equal emphasis by Mr. Justice Strong in The Idaho, 93 U. S. 575, 586, 23 L. Ed. 978, where Hart v. Ten Eyck was cited as authority for it. In Wales v. Waterbury, 101 Fed 126, 41 C. C. A. 250, it was invoked by the Court of Appeals for the Second Circuit as applicable to the accounting for profits in a patent cause, as it was also by this court in the above cited cause of P. P. Mast & Co. v. Superior Drill Co. The rule has been recognized by this court in several cases, among them Smith v. Township of Au Gres, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876, and Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154, in which last case we referred to a number of cases in other jurisdictions as well as our own.

We do not by any means impugn the general rules laid down in Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, and the cases which have followed it, one of which is that, when the infringement consists in the making or using of articles improved by his own invention, the plaintiff must prove the extent of the enhancement of profits by the use of his own, as distinguished from those due to the article improved. But we are of opinion that the circumstances of this case, first, in that in the patented combination no other invention inheres, and that the combinations are not for improvements merely, but substitutes for essential congeries in a drill, and, secondly, that the infringement has been so conducted as to render a distinction of profits impossible, are controlled by principles quite independent of those involved in Garretson v. Clark, and that the plaintiff was entitled to a decree for the profits of the sales of the infringing drills. There is in this case no such real hardship as should shock the conscience of the court. The defendant loses nothing of importance but the profits which it made in the infringing business. It sometimes used some improvements of its own, but we are satisfied that they were of trifling value.

The master, for the purpose of this inquiry, made extensive reference to other kinds of drills and their relative satisfaction to the

public, the numbers of each that were sold in the territory where this infringing took place as compared with the sales of the plaintiff's drills, and seems to suppose that this had a bearing upon the question he had before him in regard to the profits to which the plaintiff was entitled. But we do not perceive its relevancy. What the plaintiff was seeking, and what the master was trying to find out, was the actual profits on the particular drills which contained the plaintiff's invention and which were made or sold by the defendant. What other drills the defendant made or sold, or what other drills were sold of other makes by other parties, was a wholly irrelevant matter. So the comparative number of its own drills which the plaintiff was able to sell in competition in the same territory, or whether it sold any at all, was a wholly indifferent matter. A patentee may withhold the exploiting of his patent in a particular territory, or he may not be able at the time to extend his business therein. But this gives no right to an infringer to invade the territory and anticipate the sales which the patentee might make when he should desire and be able to carry his invention there for a profit which is legitimately his own. But this, while it might be an answer to the suggestions made by the master, is not relevant to such a proceeding as this. The fact that the owner of a patent does not exercise his right, or cannot at the time do so to the full, gives no license to another, and the latter is liable for infringement, to the same extent as if the owner were exercising his right to the utmost. The owner has the same right as he has to any other property, which he may put to use or not as he chooses; and in such case the rule always is that, if a stranger without right seizes and uses it, he is bound to pay for such use, and it is no answer for him to say that the owner was doing nothing with it. If it be true, as has often been declared, that the exclusive right of a patentee is property, for the protection of which the public faith is pledged, it should have the same immunity from invasion, and its violation should be attended with the same consequences as in the case of other species of property. Wilson v. Rousseau, 4 How. 646, 674, 11 L. Ed. 1141; Grant v. Raymond, 6 Pet. 218, 241, 8 L. Ed. 376; Bement v. National Harrow Co., 186 U. S. 70, 88, 22 Sup. Ct. 747, 46 L. Ed. 1058; Heaton-Peninsular Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, 46 U. S. App. 146.

This patent and the Packham patent, which is the subject of another decision made concurrently with this (Dowagiac Manufacturing Co. v. Superior Drill Co., 162 Fed. 479), relate to one of the most important kinds of machinery employed in one of the great industries of the country—that of seeding grain. At the time when their infringement was going on, we are satisfied, from the records in the cases, the Hoyt shoe drill and the Packham disc drill were leading implements in the work of seeding grain in a wide extent of territory and have had their value attested by the numerous infringements which the patents have suffered. They may to some extent have since then been improved upon, and their value diminished by the progress which has taken place in most of the mechanic arts, and the time for reaping the reward for their inventions is spent. But this only en-

hances the obligation of the courts to find a way, if it be possible, to redress the wrongs done by those who have been willing to gather the fruit into their own basket. There is some evidence in the record which bears upon the subject of damages; but as we infer from the discussion in the appellant's brief, the claim for damages, as distinct from profits, is not intended to be urged, we do not consider that subject.

The decree should be reversed, with the costs of this court, and a decree entered for the complainant in the sum of $16,992.55, with interest from the date of filing the master's report.

There is a cross-appeal, on which the individual defendants assigned error because, as they say, there is no proof that they personally infringed. This is an objection which should have been advanced at the original hearing. It was then decreed that these individual defendants infringed the patent. But it was not determined to what extent the several defendants infringed. It not being shown that these individuals personally interfered in the infringement, or otherwise than as corporate officials, we think they should be charged with nominal damages of $1 only; and it is ordered that the decree as to those defendants be modified accordingly. The defendants Brennan & Co. on the cross-appeal assign as error that the court below should not have awarded the costs of suit against them. If the decree upon the merits were sustained, it would seem that taxing the costs of the suit to the defendant, the decree having been in its favor, was erroneous. It is, however, to be reversed, and the motive which led the court to charge the defendants with costs no longer avails. But the difficulty we encounter is that, while the introduction of some of the testimony seemed to the court below useless and unnecessary, the record made on this appeal does not show to what part of the testimony this criticism of the court was directed, nor furnish us the means of distinguishing between what was pertinent to the inquiry before the master and what was not. If counsel intended to press this objection here, they should have seen to it that the record should contain the data needed to decide it.

We see no alternative but to overrule it, and in this respect affirm the decree of the Circuit Court.

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## DOWAGIAC MFG. CO. v. SUPERIOR DRILL CO.

(Circuit Court of Appeals, Sixth Circuit. June 18, 1908.)

No. 1,773.

PATENTS—PROFITS RECOVERABLE FOR INFRINGEMENT—CONFUSION OF PROFITS BY INFRINGER.

Where no other patented structure is shown to have contributed to the profits of an infringer of a patent, and the infringement was deliberate and intentional, the defendant cannot avoid liability for the entire profits made on the structure by so confusing those made on the patented and unpatented parts that the proportions due to each cannot be separated or ascertained.

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

F. L. Chappell, for appellant.

Border Bowman and P. A. Staley, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an appeal from a decree founded upon an accounting of profits made by the appellant in the manufacture and sale of disc grain drills, containing the invention of the Packham patent, No. 557,868, and in infringement of the rights secured by said patent. The case came here on a former occasion upon an appeal from a decree sustaining the validity of the patent referred to in respect to the first, second, third, and sixth claims thereof, declaring the infringement thereof by the appellant, and awarding an injunction against further infringement. The decree of the Circuit Court was here affirmed, and the cause remanded for the ascertainment of the profits and damages due to the plaintiff accruing from the infringement. 115 Fed. 886, 53 C. C. A. 36. In affirming the decree, we expressed the opinion that:

"The invention constituted a distinct and valuable improvement, and was patentable for what the claims here involved fairly import."

The invention of the patent consisted of the addition of a shield to the structure of disc grain drills, which keeps the furrow made by the disc open while the seed is dropping into it, and deflects the seed under the disc while the latter holds the soil up, and upon passing lets the soil back upon the seed. The Circuit Court referred the cause to the master to take proofs and report the profits and damages.

It seems to have been contended before the master by the appellant, while engaged in the endeavor to ascertain the profits, that in manufacturing and selling the infringing drills it had employed other patents, which had enhanced the value of the drills and the price at which they were sold, and reference was made to certain patents belonging to the plaintiff. These patents had been set out in the bill, and infringement thereof charged. But they had been declared void by the Circuit Court, by a decree which remains unreversed and not appealed from. They should, therefore, have been regarded as part of the unpatented art. There was no proof which could have justified the master in the conclusion that any other invention than that of the Packham patent was present in the drills which constituted the infringement. Nor did the master find that there was any other patent involved in the infringing drills which was entitled to share in the profits than those belonging to the plaintiff which had been held void. He specified those as laying the foundation for applying the doctrine of Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, and other like cases. The fact is that the conditions assumed for the statement of the rule in the case referred to did not exist. The present case in its facts is in closer analogy to the cases of Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000, Goulds Mfg. Co. v. Cowing, 105 U. S. 253, 26 L. Ed. 987, and Crosby Valve Co. v. Safe-

ty Valve Co., 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809, and Canda v. Michigan Malleable Iron Co., 152 Fed. 178, 182, 81 C. C. A. 420, a case decided by this court, than to those of Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024, and McCreary v. Canal Co., 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817, relied upon by the appellant, in that no other patented structure is shown to have contributed to the profits.

Again, if the master had been right in supposing that other patents contributed to the profits, and that the plaintiff had not proven to what extent the profits were due to the owners of the patent in suit, and how much was due the others, the fact remained that the defendant had, in committing the infringement, confused the profits in which all were entitled to share in such a manner that neither itself nor any one else could determine the proportions due to each. Notwithstanding all the data kept by the defendant in regard to the infringing business, the master was unable to make any apportionment. Nor could any of the expert accountants who testified do more than form a conjecture. The infringement was not accidental. The defendant was all the while informed of the patent, and knew that, if it did not succeed in defeating the patent, it would be obliged to account for the profits and damages. It took the risk of confusion, and the loss must fall upon the wrongdoer, rather than the innocent party. It is as clear a case as could be instanced for the application of the rule stated and applied by this court in previous cases and by other courts in a great variety of instances where the facts indicated the fitness of its application. In another case decided at this session (Brennan & Co. et al. v. Dowagiac Mfg. Co., 162 Fed. 472) we referred to several cases upon this subject, and others are cited in our opinion in Smith v. Motley, 150 Fed. 266, 80 C. C. A. 154.

The Circuit Court was therefore justified on either of these grounds in decreeing for the plaintiff in the net sum of the profits made in the manufacture and sale of the infringing machines.

The decree will be affirmed, with costs.

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## HENDEY MACH. CO. et al. v. PRENTICE BROS. CO.

(Circuit Court of Appeals, First Circuit. May 27, 1908.)

No. 753.

PATENTS—INFRINGEMENT—FEED MACHINE FOR SCREW-CUTTING LATHES.

The Norton patent, No. 470,591, for a feed mechanism for screw-cutting lathes, limited to the details of the arrangement of the parts, as required by the prior art, is not infringed by the machine of the Newton patent, No. 787,537, in which the second series of gear-wheels, or cone gears, are not located on the feed-shaft, as required by the claims of the Norton patent.

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

For opinion below, see 155 Fed. 133.

Benjamin Phillips and William R. Wood, for appellants.

Louis W. Southgate, for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of letters patent No. 470,591, granted March 8, 1892, to Norton for "a new and improved feed for screw-cutting engine-lathes." Claims 2, 3, 4, 5, 6, and 7 are in suit, but it is agreed on both sides that a decision concerning claim 2 will dispose of the controversy. That claim is as follows:

"2. In a device of the class described, the combination, with a series of interchangeable gear-wheels, of a shaft driven from the said series of interchangeable gear-wheels, a pinion mounted to turn with and to slide on the said shaft, a driving gear-wheel in mesh with the said pinion, a second series of gear-wheels of various diameters arranged step-like on the feed-shaft and adapted to be engaged by the said driving gear-wheel, and a lever carrying the driving gear-wheel and arranged for shifting the said pinion on the said shaft and moving the driving gear-wheel in and out of mesh with the feed-shaft gear-wheels, substantially as described."

The pitch of a screw is measured by the number of the turns of its thread in an inch of the screw's length. To cut a screw of the desired pitch, the rod from which the screw is cut must receive the proper number of revolutions while the feeding mechanism carrying the tool moves an inch in the lathe. The rod is revolved at a fixed rate, and the pitch is regulated by the ratio of this fixed revolution to the movement of the feed-shaft. As the variety of pitch required in making screws is indefinite, so the speed of the feed-shaft should be indefinitely variable.

In the old practice this variation of speed in the feed-shaft had been secured by the adjustment of a series of interchangeable gear-wheels, or by the substitution of other wheels in their place. The method is described by the patentee in his testimony about the lathe which constituted the practical art at the time his invention was made:

"Q. 46. Will you please state briefly what the gear mechanism is, or is used for, which I have marked N, O, Q, on this cut? A. It is the change gears, or three of them, for cutting threads rotating the feed-shaft or the lead screw. Q. 47. And do these, in their arrangement or mounting, provide for changes of pitch or feed? A. No; they only cut one thread as mounted. It would be necessary to remove them and substitute others, or to change their position, to cut other threads, for which provision is made by removing nuts and by an adjustable radius bar."

See also the extract from Appleton's Encyclopedia, Record vol. 2, p. 109.

For convenience, the rate of revolution in the feed-shaft should be not only variable, as stated above, but also variable readily. This object the patentee sought to accomplish by a second series of gear-wheels arranged step-like or cone-fashion upon the feed-shaft. In the patent, a lever rapidly moves the driving gear-wheel in and out of mesh with the several gear-wheels of this second series. Hence the patent provides a limited quick change of speed for ordinary needs, and a slower change for extraordinary needs, acting to multiply the quick change referred to. A substitution in the first series of gear-wheels, which was mentioned in the original specification, together with an interchange, would permit an indefinite variation of the speed

of the feed-shaft. Claim 2, however, mentions only gear-wheels which are strictly interchangeable, and the difference between substituted and interchangeable wheels is clearly recognized in the patent. The quick change by means of the second series of step-like gear-wheels was old in kindred arts, and in the lathe art is shown in letters patent No. 247,764, issued to Hyde, No. 83,774, issued to Humphreys, and elsewhere. The slower change by means of the first series of interchangeable gear-wheels, as above stated, was old in the lathe art, and, according to the complainant, was the only method in that art to secure a change of speed which was in common use before the patentee's invention.

Returning to the claim in suit, we find that it has six elements, as follows: (1) A series of interchangeable gear-wheels. This was old in the art, as is admitted in the complainant's brief, and as is testified to by the patentee. (2) A shaft driven from said series of interchangeable gear-wheels. This, also, is admitted to be old in the art. (3) A pinion mounted to turn with, and to slide in said shaft. This, also, is old. (4) A driving gear-wheel in mesh with the said pinion. This, also, is old. (5) A second series of gear-wheels of various diameters arranged step-like, or cone-like, on the feed-shaft. As has been said, a cone-like series of gear-wheels was well known in many arts. The complainant contends, however, that it was never put into practical use in a screw-cutting engine lathe before the Norton invention. In some earlier patents it takes the place of the interchangeable gear-wheels above referred to. The complainant's witnesses differentiate these earlier conical gear-wheels from the patent in suit chiefly in respect of their inconvenient positions. (6) A lever carrying a driving gear-wheel, and arranged for moving this wheel in and out of mesh with the second series of gear-wheels. This is shown in the patent to Hyde, and is generally found in connection with a cone-shaped series of gear-wheels. The precise arrangement of the lever varies.

Turning to the specifications of the patent and its file wrapper, we find that they first stated that:

"The object of the invention is to provide a new and improved feed especially designed for use on screw-cutting engine lathes, to conveniently and rapidly change the speed of the feed screw according to the requirements of the screw to be cut.

"The invention consists of a series of gear-wheels, secured on the feed-shaft, and a driving gear-wheel arranged to be thrown in the mesh with each of the said series of gear-wheels.

"The invention further consists of a changing and locking mechanism for the driving gear-wheel."

The Patent Office struck out claims 1 to 6 as originally drawn. In this Norton acquiesced, and in redrawing the claims inserted "interchangeable gear-wheels" as an element therein. He himself amended the specifications by striking out the last two paragraphs just quoted, and inserted in their place as follows:

"The invention consists of certain parts and details and combinations of the same, as will be fully described hereinafter and then pointed out in the claim.

"Reference is to be had to the accompanying drawings forming a part of the specification, in which similar letters of reference indicate corresponding parts in both the figures."

In agreement with these statements, the original specifications were concerned almost altogether with the step-like series of gear-wheels. The first series of gear-wheels was dealt with in a single paragraph of the specifications and in a single claim, originally the seventh, which survived its passage through the Patent Office as the second claim of the patent as issued.

The gist of the Norton patent lies either (1) in the combination of the two series of gear-wheels to multiply the quick variation of speed in the feed-shaft produced by the cone-like gear-wheels as above described, or (2) in the detailed arrangement of the machinery.

1. If we hold the gist of the claims in suit to lie in the combination of the two series of gear-wheels, we must consider if there be patentable invention in the combination. Each had been used in a lathe to vary the speed of the feeding mechanism, the purpose which the patentee sought to accomplish. They had been seldom, if ever, used in combination, but the combination would seem to be obvious to a skilled mechanic. Indeed, in analyzing the Humphreys patent, the complainant's witness, Livermore, testified that it differed substantially and broadly from the Norton patent, "in that the change-feed mechanism comprising a cone and tumbler, and the change gear-driving mechanism, serving as a multiplier for the cone and tumbler system, are organized within the head stock of the lathe." These expressions and those which follow in the record (volume 1, pp. 143, 144), show that this witness, in seeking to differentiate the Humphreys patent from the patent in suit, relied almost altogether upon different details of arrangement, and not upon the lack in the Humphreys patent of the combination above referred to. It follows that the patent in suit, if valid in any respect, must be sustained as limited to details of arrangement.

2. If this be true, the defendant's arrangement is materially different from that of the patent in suit. It has no "series of interchangeable gear-wheels," as those words are used in the patent in suit, but a step-like series of gear-wheels, like the second series of the Norton patent. The conical arrangement of the defendant's first series of gear-wheels has a more rapid adjustment than has the patent in suit, and its capacity for variation is quite as great. Inasmuch as we have held the patent to be limited to details, it follows that the doctrine of equivalents properly applicable to the patent in suit does not bring the defendant's device within the scope of the patent, and we are therefore constrained to hold that the defendant does not infringe. United States Hog Hoisting Co. v. North Packing & Provision Co. (C. C. A.) 158 Fed. 818. We may add that the commercial success achieved by the Hendey lathe is not shown to be based wholly, or even chiefly, upon the Norton patent.

In claim 2 the second series of gear-wheels is said to be "arranged step-like on the feed-shaft." The defendant's second series of gear-wheels is not arranged on the feed-shaft, but upon a counter-shaft connected therewith. This difference was held to be material and to defeat the charge of infringement, both by the learned judge of the Circuit Court in the case at bar, and by Judge Lacombe in Hendey

Machine Co. v. Prentiss Tool Co. (C. C.) 113 Fed. 592. In view of what has been said above, we do not find it necessary to consider this question.

What has been said concerning claim 2 applies, as the complainant admits, to all the other claims in suit except claim 6, in which patentable novelty seems to be rested upon a combination of a box cover and an index plate. Further discussion of that claim is unnecessary, and was not urged at the argument.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

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RICHARDS et al. v. MEISSNER et al.

(Circuit Court, W. D. Missouri. May 4, 1908.)

No. 2,954.

PATENTS—SUIT TO OBTAIN ISSUANCE OF PATENT—ISSUES.

A suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), is for the purpose of establishing complainant's right to a patent which has been refused by the Patent Office; and, where such patent was granted to the defendant after interference proceedings complainant is not entitled in such suit to introduce evidence to prove that the patent is void for anticipation, an issue which was not, and could not have been, tendered by the bill.

On Motion to Strike Out Evidence.

See 155 Fed. 135; 158 Fed. 109.

E. Hayward Fairbanks and Gage, Ladd & Small, for complainants.

Samuel E. Hibben and Frank Hagerman, for defendants.

SMITH McPHERSON, District Judge. The motion of defendants to strike from the files certain evidence will be sustained, part of it because taken at a time beyond that fixed by the court. But the important question is with reference to evidence not covered by an issue presented by the pleadings. The bill of complaint is filed under section 4915 of the Revised Statutes (U. S. Comp. St. 1901, p. 3392). It appears from the bill that the parties had a long drawn-out and a vigorously contested hearing before the Commissioner of Patents as to who should have the patent. It was awarded to defendants. Thereupon complainants appealed to the Court of Appeals for the District of Columbia, and there it was decreed that defendants should have the patent. Not only have the facts been passed on by the Commissioner of Patents, which findings of fact according to a long line of authorities are conclusive and at an end, but the facts and law have been passed upon by a court having jurisdiction. Both parties have had their day in a court having jurisdiction of the parties and of the subject-matter, and ordinarily such would and should be the end of litigation. But that question is not now presented for decision. And whether the defeated party has a remedy by appeal to the courts, and likewise a remedy by a bill in equity, is a question only to be passed. Judge Philips in this case held that the complainants were not, after their defeats above noted, entitled to a writ of injunction, and vacated an order for a

restraining order theretofore made by another judge. 158 Fed. 109.

In taking some of the testimony now sought to be stricken out, Judge Trieber held ([C. C.] 155 Fed. 135) that such testimony should be taken to the end that defendant's patent may or may not be made to appear as void for anticipation. I am unable to agree with his conclusion.

For some reason which can only be surmised, but stated to be for the reason that it will avail complainants in an action in the United States courts in the Northern District of Ohio, complainants now in effect ask this court to decree that neither complainants nor defendants are entitled to a patent. But this court is neither seeking to control or thwart another court as to its decrees. What this court must do is to order such a decree as the issues herein made by the pleadings, and the evidence relevant to such issues may in equity require. And what are the issues? They are on the one side that complainants are entitled to a patent. Defendants controvert that issue. If complainants had alleged in their bill of complaint that neither party was entitled to a patent, such a bill would be clearly subject to a demurrer. And, this being so, it would as it seems to me be contradictory to hold that complainants can have a decree in square opposition to a bill, which, if filed, could not stand. I agree with much that Judge Trieber says. I agree that a monopoly is odious. I agree that the public has an interest in the matter. I agree that the government has the right to prevent a monopoly, except such monopolies as are authorized by law. I agree with what he says as to divorce cases. But I do not agree that the case cited by him (Hill v. Wooster, 132 U. S. 693, 10 Sup. Ct. 228, 33 L. Ed. 502) holds that evidence may be taken to support a hidden and concealed issue which issue complainants could not tender by a bill, knowing that it would be followed by a demurrer.

The evidence with reference to anticipation will be stricken out, reserving to complainants, however, the right to have such evidence taken to the Court of Appeals, in the event upon final hearing of complainants being defeated.

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## E. J. MANVILLE MACH. CO. v. EXCELSIOR NEEDLE CO.

(Circuit Court, D. Connecticut. June 12, 1908.)

No. 1,161.

PATENTS—INFRINGEMENT—MACHINE FOR FORMING NIPPLES.

The Campbell patent, No. 594,457, for a machine for forming nipples such as are employed in the building of wire spoke wheels for bicycles and similar vehicles, discloses invention of such merit and covers a machine of such value and success in operation as to entitle it to a reasonably liberal construction and fair range of equivalents. As so construed, *held* infringed.

In Equity. Suit for infringement of letters patent No. 594,457, for a machine for forming nipples, granted to Andrew C. Campbell, November 30, 1897. On final hearing.

Edmund Wetmore and Oscar W. Jeffery, for complainant.

C. L. Sturtevant, for defendant.

PLATT, District Judge. I have studied this case exhaustively and my conclusions are definite and positive; but I have neither time nor strength to give it the treatment on paper which it deserves. A few words in broad outline must suffice.

The defendant bought and used one of complainant's patented machines, and made overtures for many more, insisting, however, upon the proviso that its rights should be exclusive. The price demanded being unsatisfactory, Mr. Dayton, an expert mechanic in defendant's employ, claimed that he could save money for defendant by constructing a new machine which would avoid the monopoly of the patent. Having the patented machine before him, and knowing what it had done and could do, he undertook such construction. Has he accomplished his avowed purpose? is the question before us.

His production is in many respects a slavish copy of the patented original. The inventor must feel highly flattered by such action, and it persuades one that Mr. Dayton must have thought the machine a valuable contribution to the world's knowledge. If he has appropriated the essence of the invention, it is immaterial whether or not he has added or subtracted things which leave his machine in such shape that it will work a little better than complainant's. Giving the defendant the benefit of all he claims from his study of the prior art, the fact remains that the patented machine was the first and only one which has taken nipple blanks and so treated them automatically, in the matter of accuracy and speed, as to give to the world a machine which is practically and commercially an unqualified success. To take as a starting point the wire itself, and from it to turn out finished nipples on the same machine, would destroy the very essence of the invention, which has, under the influence of the patentee's mind, worked out so admirably. It is noticeable that the defendant has not attempted to perform such a feat as that.

In both machines here in controversy the blank comes from a hopper, and is presented to and held by the jaws of a carrier, which in complainant's machine is mounted on a horizontal shaft, and in defendant's machine on a vertical shaft. In both machines the blank, while held by the jaws of the carrier, is presented by an intermittent motion to the different tools; the time of rest being longer than the time of movement. The means of obtaining this peculiar kind of intermittent motion are identically the same in both machines, and to my mind the central and greatest merit of the invention lies right at this point. The reciprocating intermittent feed mechanism dominates, permeates, and vitalizes the entire combination; and when I say combination I mean it, for it is clear to me that the inventive thought discloses a pure combination, which can in no sense be called an agregation. If the new arrangement of old elements produces a new and useful result never before attained, it is practically certain that the mind which conceived the combination produced an invention. In Loom Co. v. Higgins, 105 U. S. 591, 26 L. Ed. 1177, the Supreme Court said that to make a loom produce 50 yards of carpet per day which had never before produced over 40 is to bring forth a new and useful result, and to do so shows invention, even if all the elements combined to produce

that result are old. The facts in that case are pertinent here, and to my mind it makes the final conclusion here unanswerable.

The patented machine is such a remarkable commercial success that justice will not be done to the inventor unless the court takes a reasonably generous view of his specifications and claims, and, when it reaches the question of infringement, gives the patent the benefit of a fair use of the doctrine of equivalents. From my viewpoint, it seems unnecessary to go any farther than that; but I am of the opinion that, if the case demanded the broadest principles which are ever applied to a pioneer patent, it would be right to use them. The group of claims headed by 35 shows a combination of elements never before brought together to produce any result, much less to aid in producing a finished nipple. There is nothing in the prior art to invoke against the novelty of such combination, except the star wheel mechanisms used in certain patents for looms and printing press machinery. It is a far cry from weaving cloth or printing paper to making nipples. The analogy is absent; but, if we assume the contrary, it certainly requires invention to take the best reference, viz., Luscomb's star wheel, with its reciprocating action, and, with it in mind, produce the mechanism described and claimed in the patent in suit and copied in defendant's machine with all the exactness of the most capable Chinaman.

Luscomb was only thinking about a periodic rotary movement, whereby the operation of one mechanism would alternate with the operation of another. His place in the prior art is doubtful, but that makes no difference. His thought, and nothing beyond, is equally apparent in the other prior art patents. Campbell's purpose was to increase the ratio of the speed of movement to the time of dwell of the carrier. This is a vital necessity in his combination, and is entirely new. The defendant has appropriated the claim baldly, in spirit and in detail. It infringes at this point beyond any doubt. The organization claims can only be avoided by the defendant by sticking in the bark and dealing captiously with words.

I do not base my conclusions upon a prior art which omits Timm and Krummel and Roberts, although with them out the argument leading thereto is intensified, because in that event there is no nipple-making machine which discloses any of the elements of the patent in suit. It would then be worse than idle to argue that it was not invention to combine old elements, which could be found scattered here and there through machines for widely different purposes. It is obvious that, if such was the situation, he has produced a new machine and a new result. On the other hand, with those patents in the art, he has produced a new machine, and reached a result which, if it is old, is certainly reached in a very much better, quicker, and surer way than it had been reached before. It requires invention under the decisions to do that.

Let me say, in passing, that the Timm and Krummel and the Roberts machines, from the moment of conception up to the time the testimony in this case closed, were never for a moment practical, successful machines. They developed into abandoned experiments, and are not of the class of inventions which can properly be brought forward as narrowing or restricting in any degree the inventor who does offer to

the world a valuable asset along the same lines. It does not negative invention for an expert, guided by the patent, to grope in the prior art, both similar and analogous, and from his gleanings put together a hypothetical machine, which to the common eye would appear to be capable of doing the work which the patented machine actually does. To do in the first instance what the expert does now required invention, as has already been suggested. The excursion of the expert is ingenious, but fruitless.

The claims at issue are 1, 2, 3, 4, 5, 13, 14, 23, 24, 25, 26, 27, 28, 31, and 35. The vitally important ones so far as my comprehension carries me, are the organization claims, viz., 1, 2, and 5, and the index mechanism claim, 35, and claim 31, which involves especially the tapping mechanism. Claim 31 shows invention of a high character, and is substantially copied by defendant. The tapping mechanism and the peculiar index mechanism are the two important parts of the novel general construction, which in my opinion contribute especially to bring about the final result obtained, viz., the speedy, accurate, safe, and sure production of marketable nipples in large quantities, whereby the average cost of nipples produced by the patented machine is so lessened as to make the defendant envious and unconscionable. The claims above mentioned are, I think, valid and infringed.

Claims 23, 24, 25, 26, 27, and 28 are permutations of claim 35, and are valid and infringed. Defendant's attempt to evade claims 23 and 24 by a forced construction of the word "adjustable" is pathetic. The patent law is interested in the substance of an invention, and not in the embroidery woven around the substantial central thought. It does not, therefore, profit the alleged infringer, after appropriating the substance, to vary the pattern which the inventor exhibited in his embroidery. Defendant's jaws are certainly adjustable. If his lacework surroundings are prettier, it does not relieve him from the trespass. These thoughts apply to the patent as a whole, not alone to these claims.

Claims 3 and 4 seem trifling as compared with the larger issues; but I think the issue should be decided for the complainant in respect of them.

An examination of claims 13 and 14 compels one to pause. They deal with the means of transferring the blanks from the hopper to the jaws of the carrier, and particularly with the element of reciprocating fingers. I am inclined to think it would somewhat stretch the patent to give the complainant the benefit of these claims. They are unimportant, because, if the ground all about them is pre-empted, it matters not that defendant would not trespass simply by using its means of transporting blanks across that sacred ground. On the whole case, the issue on those claims must be for the defendant.

Let a decree be entered, based upon these fragmentary remarks.

## THE QUEEN OLGA.

(District Court, S. D. New York. June 12, 1908.)

1. SHIPPING — CHARTER — LIABILITY FOR EXPENSE OF LEGAL PROCEEDINGS AGAINST VESSEL.

In view of the Cuban law, which requires all vessels entering a Cuban port from a foreign port to be provided with a bill of health issued in accordance therewith and granted by the Cuban consul or consular representative at the port of departure, the failure of a vessel to procure such bill of health was the proximate cause of loss and damage incurred by the vessel because of legal proceedings against her in Cuba for entering without such bill of health, and as between owner and charterer such loss must be borne by the one upon whom the duty rested to procure such bill under the terms of the charter.

2. SAME—CONSTRUCTION OF CHARTER PARTY—DUTY TO PROCURE BILL OF HEALTH.

The cost of a bill of health, required by the laws of Cuba to be procured by a vessel entering that country from a foreign port from the consular representative of Cuba at the port of departure, is a consular charge; and under a charter which required the owner to keep the ship, at his own charges, manned, equipped, and fitted to perform the service for which she was hired, and provided that the charterer "shall provide and pay for all * * * consular charges, except those pertaining to the captain, officers, or crew," it was the duty of the owner, and not of the charterer, not only to pay for, but also to procure, such bill of health, which pertained to the officers and crew.

3. SAME—BREAKDOWN CLAUSE—TIME LOST BY STRANDING.

The breakdown clause of a charter party, providing, inter alia, that in the event of stranding, preventing the working of the vessel for more than 24 hours, "payment of hire shall cease until she be again in an efficient state to resume her service," relates only to physical efficiency; and where the vessel, when again tendered to the charterer for service after a stranding, was in fact in an efficient state and seaworthy, she cannot be continued off hire until her master shall procure a survey and a Lloyd's certificate of seaworthiness.

In Admiralty. Action for breach of charter party.

In January, 1907, the Queen Olga, belonging to the libelants, was in respondent's employment under a time charter substantially identical with that set forth in Golcar S. S. Co. v. Tweedie Trading Co. (D. C.) 146 Fed. 563. The sections of the charter material to this case are the first, second, ninth, and sixteenth as printed in the case referred to. In the month mentioned the Olga was at Tampico, and there received directions from the charterer to proceed to Key West for orders. Before this direction was given there had been some letters sent by the charterer to the steamship's master indicating the probability of his ultimately going to Cuba for sugar, but the orders actually given were definitely as stated. The Olga then cleared for Key West, having a bill of health such as required for an American port. She reached, entered, and anchored in the harbor of Key West, and her master went ashore to receive his orders. They were furnished him by Taylor & Co., merchants at that port, who had no other relation with the charterer than to receive and deliver to the Olga's master a telegram signed by the charterer and reading as follows: "Steamer Queen Olga due Key West fourth order her proceed Sagua la Grande Cuba tender to Amezaga & Company." This telegram was physically delivered to the master, with a letter from Taylor in the following words: "I inclose you cable from Tweedie Trading Co. for you to proceed to Sagua. Please give pilot order for your pilotage and draught of vessel." The testimony establishes that Taylor & Co. had no other authority from the charterer than is evidenced by the above document, and that they acted merely as messengers or carriers, and received for their service the sum of $10.

The Olga's master correctly believed that it would be unlawful to enter a Cuban port without a bill of health issued in accordance with Cuban law and granted by the Cuban consul or consular representative at the port of departure. He testifies that Taylor directed him to proceed without such bill of health, and assured him that it would not be necessary, suggesting that he tell the Cuban authorities, as an excuse for not producing a proper health bill, that he had not been to Key West, but had received his orders off Sand Key (an island some eight miles from Key West proper). This statement is denied by Taylor. The Olga did proceed to Sagua without entering or clearing at the Key West custom house, and without any other bill of health than that properly procured in Tampico for an American port; and her master did afterwards falsely inform the Cuban authorities that he had received his orders at Sand Key. On arrival in Cuba the captain's fears proved well grounded, and the Cuban authorities began an action against him and his vessel for not having a Cuban bill of health. These proceedings entailed considerable expense for legal services, etc., and resulted in the infliction and payment of a moderate fine upon the master. The master testified under objection that health bills under the charter party in question had previously been furnished him by the charterer's agents, and under like objection a shipping merchant of experience has testified for the respondent that it is the duty of the shipmaster to obtain bills of health when his vessel is under a time charter in the form shown in this case.

While the Olga was entering the port of Sagua she took the ground, remained on the bottom for some time, and finally succeeded in getting off under her own steam. She then made tender to the persons named in the telegraphic orders received at Key West, such persons being the subcharterers. These subcharterers (or their shippers) refused for some time to load the steamer, insisting as a prerequisite for loading that she should be surveyed by steamship captains and a certificate of seaworthiness procured indorsed by a Lloyd's agent. A survey had been held on the Olga, but not by the persons or in the manner thus demanded by the subcharterers. When the Olga tendered for cargo, however, she was as matter of fact "in an efficient state to resume her service" under the charter party, and was also as a matter of fact seaworthy.

The questions raised by this litigation are: First, were the losses and damage (or any portion thereof) incurred by the legal proceedings in Cuba the proximate result of failure to procure a Cuban bill of health at Key West; and if such losses and damage were so proximately caused, are the same chargeable to the charterer or the owner? and, second, was the Olga off hire at the option of the charterers until she had been surveyed and a certificate procured in the manner demanded by the subcharterers or shippers; and, if the vessel was so off hire, were the subcharterers or shippers justified in their refusal to load?

Convers & Kirlin and Mr. Woolsey, for libelant.
R. J. M. Bullowa, for respondent.

HOUGH, District Judge (after stating the facts as above). Considering the strictness of Cuban law as shown by the evidence, there can be no doubt that all the expense and loss visited upon the ship for her failure to obtain a bill of health proper for Sagua was reasonably to be expected and proximately caused by such failure. Responsibility for such omission must depend upon the terms of the contract made by the parties. To be sure, a charter party is a commercial instrument, and to be liberally interpreted, while evidence of custom, if general, reasonable, and lawful, will often control the construction of doubtful clauses. There is no such evidence here. Such testimony as is offered is conflicting and tends to support no general custom, while in my

opinion the wording of the charter itself is too plain to require such assistance.

The price of a bill of health is a consular charge; and all consular charges, "except those pertaining to the captain, officers, and crew," the charterers "shall provide and pay for." Charter, § 2. This by inference is a clear statement that the owners shall "provide and pay for" consular charges which do pertain to "the captain, officers, and crew." The expression "providing for" a charge is not a happy one; but it is surely the simplest interpretation thereof to hold that what one must provide for he must procure.

Further, a consideration of the first and second sections of the charter clearly shows the reason for the line of demarkation between owners' and charterers' payments and duties. The owner is to keep his ship at his own charges manned, equipped, and fitted to perform the service for which she is hired. The charterer is to pay for every expense incident to his own business. A bill of health primarily relates and pertains to the officers and crew. It is their passport to enter their harbors of destination and there to work their vessel. Only by figure of speech is the instrument called the "ship's" bill; for, if a ship without a crew can be imagined, the reason for a health bill is gone. All this is exactly true of the omitted Cuban bill, an instrument which could not be filled out without information only to be had from the master regarding himself and his men and their sanitary history.

To have the condition of his crew duly certificated by a bill of health was therefore a duty as much owing by the Olga's master to his owners as it was to have enough men on board to work ship: and the charterers in turn had the same right to expect and presume a proper certificate of health as they had to expect and presume a healthy crew. It follows that, as between owner and charterer, it was the former's duty to provide and pay for a bill of health at Key West. That the omission was due to insistence or suggestion by charterer's agent is (1) not established by a fair preponderance of evidence; (2) if Taylor did give the order sworn to by the master, he had no authority, either real or apparent, to do so; and (3) the master had no more excuse for obeying than for following an unlawful suggestion from the same source as to the personnel of his crew.

This question is nearly a case of first impression. In The Shadwan (D. C.) 49 Fed. 379, affirmed 55 Fed. 1002, 5 C. C. A. 381, the vessel was also at Key West, and it was there impossible lawfully to procure a clean bill of health. The charterer first personally ordered the master to do an impossible thing, viz., procure a clean bill, and then ordered him to proceed to Progresso without it; that port of destination being beyond the charter limits. It was held that:

"In undertaking to send the ship to ports outside of the charter limits, it was the charterer's business, not the owner's business, to get suitable papers; and the persons employed in doing that business were the charterer's agents, whether the master or other persons." 49 Fed. 382.

If it had occurred to Judge Brown that it was the charterer's business to procure a bill of health for a vessel bound within charter limits, it was surely unnecessary to place the decision in The

Shadwan upon the fact that she was sent beyond said limits; for, if the charterer be required to provide and pay for the bill of health within charter limits, a fortiori does such obligation rest upon him when the destination is outside the same, and Judge Brown's entire discussion regarding the arbitrary insistence of the charterer is unnecessary. I think, therefore, The Shadwan is by fair inference an authority for holding that it is the duty of the master, as the agent for the owners, to keep his ship provided with bills of health while engaged on work specifically provided for by the charter party. It may be added that an examination of the record on appeal in 55 Fed. 1002, shows that the pertinent clauses in the charter party there considered were identical with those at bar.

The Nicaragua (D. C.) 71 Fed. 726, lays down the doctrine here asserted; but it cannot be said that the finding was necessary to the point involved in that case. In Lake Steam Shipping Co. v. Bacon (D. C.) 129 Fed. 823, The Shadwan is cited as holding that "ordinarily the charterer is bound to furnish a clean bill of health." The point under discussion was not involved in that case, and, as above indicated, it does not seem to me that The Shadwan asserts any such general rule.

The second question stated must also depend for solution upon the language of the charter alone, if that be possible. The breakdown clause (section 16) plainly declares that, in the event of stranding, "payment of hire shall cease until [the steamer] be again in an efficient state to resume her service"; and the only material inquiry here is when such efficient state again existed. As soon as it did exist, hire began to run again, and no further interruption of payment is to be presumed or inferred in enlargement of the contract of the parties. The Santona (D. C.) 152 Fed. 516.

This action is between owner and charterer only, and, no matter what understandings or agreements existed between charterer and subcharterer or shipper, the charterer must pay the stipulated hire, unless excused therefrom by his own contract, and none other. Accordingly the charterer contends that something else than mere physical efficiency is meant, or that some evidence of actual efficiency is required, other than the assertion of the master. That physical efficiency only is meant by a breakdown clause similar to the one at bar is, I think, clearly inferable from Hogarth v. Miller [1891] A. C. 48.

Nor will the clause in question (section 16) bear, in my judgment, any other construction. It may be difficult to get cargo insurance on a vessel just freed from stranding (of which, however, no proof is offered); but, if there be actual efficiency, that difficulty is not of the owner's making. If the parties to the charter contemplated any other reason for cessation of hire than physical inability to earn it, or intended to give any effect to the opinions or fears of third persons, they should have said so. Nor does this view work injustice or hardship; for, if actual efficiency do not exist, all parties injured by the lack thereof have their remedy against the ship, whose owners, by their tender, warranted fitness to perform. The charterers, therefore, are entitled to no reduction of hire after the date of tender as pleaded in the libel.

The libelants will take a decree, with costs, for the unpaid balance of charter hire only; the off hire period being as stated in the libel.

If the exact amount of the decree cannot be agreed upon with the aid of the memorandum herewith filed, an order of reference will be granted.

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## THE POUGHKEEPSIE.

## THE HOMER RAMSDELL.

(District Court, S. D. New York. April 10, 1908.)

ADMIRALTY—JURISDICTION—MARITIME TORTS.

A collision in a navigable river between vessels and the surface part of borings made to locate an aqueduct under the bed of the river for municipal purposes is not in any sense maritime, and a suit to recover damages for injury to such borings is not within the admiralty jurisdiction.

In Admiralty.

E. Crosby Kindleberger, for libellant.
Convers & Kirlin, for claimant.

ADAMS, District Judge. This action was brought by the Phœnix Construction Company against the steamers Poughkeepsie and Homer Ramsdell to recover damages caused to certain borings, in connection with test holes in the Hudson River, off Storm King, being made for the purpose of locating an aqueduct under the river with a view to conveying water accumulated on the west side of said river to the east side thereof, and thence to the City of New York. The libel further alleges that having obtained necessary permission from the Secretary of War of the United States, the libellant commenced work on September 10, 1906, after all owners of vessels frequently passing the place, including the steamers which were the subject of this action, had been notified that said work was to be carried on by boring into the bed of the river in its navigable part and on August 30, 1907, the drill in the boring in question, No. 10, had reached a depth of 618 feet beneath the surface of the water. This boring was composed of various lengths of wrought iron pipe surrounded by a platform on the surface. On the night of August 30th, it is alleged, the said steamers negligently came into contract with said platform and pipes and damaged them to the extent of upwards of $3,000. The usual allegation of jurisdiction followed.

An answer was duly filed denying any negligence on the part of the steamers, also denying the jurisdiction of the court. The case came on for trial March 9th, 1907, and after the opening by the libellant's counsel, the claimant's counsel moved to dismiss for want of jurisdiction. An adjournment was had for the purpose of a consideration of the question so raised.

It can scarcely be doubted that unless the admiralty jurisdiction has been extended by the decision in The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, it does not exist in a case of this kind. It was thought that such case broadened the jurisdiction so as to cover one of dredging, which theretofore had been deemed non-maritime—In re Hydraulic Steam Dredge No. 1, 80 Fed. 545, 25 C. C. A. 628—

and I so decided in a case of that nature—Bowers Hydraulic D. Co. v. Federal Contracting Co. (D. C.) 148 Fed. 290. On appeal this was affirmed upon the reasoning here—153 Fed. 870, 873, 83 C. C. A. 52. The Supreme Court, however, has recently, February 24th last, decided in The Cleveland Terminal R. R. v. Steamship Co., 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, and The Troy, 208 U. S. 321, 28 Sup. Ct. 416, 52 L. Ed. 512, that it was not intended in The Blackheath to overrule former decisions with respect to jurisdiction. It was said by Mr. Chief Justice Fuller (pages 320, 321 of 208 U. S., pages 415 of 28 Sup. Ct. [52 L. Ed. 508]):

"It is unnecessary to cite the numerous cases to the same effect to be found in the books. The rule stated has been accepted generally by bench and bar, and has never been overruled, though counsel express the hope that it may be because of our decision in The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236. In that case Mr. Justice Brown, in concurring, announced the view that the effect of the decision was to overrule what had previously been laid down in the cases we have cited. But the court held that the opinion was not opposed to the prior adjudications, and, without entering into the elements of distinction between the case and the The Plymouth, 3 Wall. 20, 18 L. Ed. 125, said (page 367 of 195 U. S., page 48 of 25 Sup. Ct. [49 L. Ed. 236]): 'It is enough to say that we now are dealing with an injury to a Government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginnning and consummated upon navigable water, and giving character to the effects upon a point, which is only technically land, through a connection at the bottom of the sea.'

The case was a libel in rem against a British vessel for the destruction of a beacon, number 7, Mobile ship channel lights, caused by the alleged negligent running into the beacon by the vessel. The beacon stood fifteen or twenty feet from the channel of Mobile River, or bay, in water twelve or fifteen feet deep, and was built on piles driven firmly into the bottom. The damage was to property located in navigable waters, solely an aid to navigation and maritime in nature, and having no other purpose or function.

In the present case damage to shore dock, and to bridge, protection piling and pier, by a vessel being forced against each of them by the vessel proceeded against, as well as damage to shore dock, abutment, protection piling, pier and dock foundation by a wash said to be due, to the increased current arising from partial damming of the stream by the three vessels, brought into such position by the alleged fault of the vessel proceeded against, was sought to be recovered. But the bridges, shore docks, protection piling, piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such.

The proposition contended for is that the jurisdiction of the admiralty court should be extended to 'any claim for damages by any ship,' according to the English statute; but we are not inclined to disturb the rule that has been settled for so many years because of some supposed convenience."

A similar question to the one involved here, was presented to Judge Thomas, in the Eastern District, in the cases of the United Engineering and Contracting Company against the N. Y. N. H. & H. Tug Transfer No. 5, against the Steamtug R. J. Moran and against the Tug Lackawanna, there being three cases tried together. The libellant was engaged in the performance of a contract for the construction of a rapid transit route form Manhattan to Brooklyn, which necessitated boring test holes in the bottom of the river, and had anchored in the East River a scow and pile driver and had erected a temporary stag-

ing or platform for drilling purposes. The various tugs, or their tows, negligently collided with the scow and staging, and actions were brought by the libellant to recover its damages. The tugs were found in fault and recovery allowed for the damages done to the vessels but denied as to the staging or platform. In the opinion, dated February 24, 1903, not reported, Judge Thomas said:

"The libelant will have a decree for the damage to the scow but not to the piles. The claimant declines to raise the jurisdictional question. The court of its own motion rejects the determination of questions beyond its jurisdiction. * * *

"The damages in no case will include injury to the piles. Although they were a part of the plant, they were not on navigable waters but were attached to, and a part of, the soil. It is immaterial that they could be drawn out and floated to some other place in connection with the scow. While the piles were in use they were intended to remain in the soil, where they furnished a solid structure for holding the boring machinery, and were no more on navigable water than a caisson employed in building piers. The fact that the scow was moored to them did not change their nature, nor did the fact that steam was carried from the scow to the drilling machine give the piles the character of the scow. It would be quite as suitable to affirm that thereby the scows took on the nature of the piles. The piles were timbers driven in the bed of the river to support the machinery used for boring, and for the time became part of the land."

I am unable to see how without the authority of The Blackheath the jurisdiction here could be sustained. The project which the libellant was engaged in is not even suggestive of maritime affairs. It was supplying water to a city and the mere fact of the means being carried under the bed of a river, with extensions through the river to the surface, did not create any maritime right, nor was it in any sense an aid to navigation, which was the distinguishing feature of The Blackheath.

The libel should be dismissed.

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WALTER BAKER & CO., Limited, v. NEW YORK, N. H. & H. R. CO.

(District Court, S. D. New York. March 27, 1908.)

1. SHIPPING—ACTION FOR LOSS OF CARGO—DEFENSES—CONTRACT GIVING CARRIER BENEFIT OF INSURANCE.
   A provision in a bill of lading that the carrier shall have the benefit of any insurance effected by the shipper is not available as a defense to an action by the shipper against the carrier for loss of the goods in transit.

2. SUBROGATION—AGREEMENT FOR SUBROGATION—IMPLIED RIGHT.
   It is not necessary that a right of subrogation should be expressed. It may be implied from the nature of a transaction.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, § 68.]

In Admiralty. Suit for loss of goods.

Horace L. Cheyney, for libellant.
William Greenough, for respondent.

ADAMS, District Judge. This action was brought by Walter Baker & Company to recover from the New York, New Haven &

Hartford Railroad Company, the loss occasioned through the sinking of 815 bags of cocoa shipped by the libellant at New York on the 21st of November, 1906, for transportation and delivery to the libellant at Milton Mills, Massachusetts, for which a bill of lading was duly issued. The contract contained the clause:

"Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property."

All of the allegations of the libel are admitted except as to the value of the cocoa. The defence relied upon is that contained in the clause above quoted, the answer stating:

"Sixth: Upon information and belief, that the libellant, prior to the shipment of said eight hundred and fifteen bags of cocoa, had effected insurance against loss or damage thereto from risks, among which the loss which actually occurred was included, to the full value thereof, and that at the time of the loss in question said cocoa was fully covered by insurance, but this respondent alleges that it has not, in accordance with the provisions of said contract with the libellant, had the benefit of such insurance, nor have the libellants given or offered to give it the benefit of such insurance."

It appears that the libellant was insured, but not that the insurance has been collected.

The respondent's contention is that the libellant should first proceed against the underwriter, and the fact of its not having done so constitutes a defence to the action. That contention, however, has been expressly negatived by the decision in Inman v. South Carolina Ry. Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612, where it was held that a similar provision in a bill of lading was not available as a defence. The court there said (pages 139, 140 of 129 U. S., page 252 of 9 Sup. Ct. [32 L. Ed. 612]):

"That defence sets up the clause in the bills of lading providing that 'the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton'; and it was averred that the plaintiffs had fully insured the cotton against the risk of fire, but that defendant had not had the benefit of such insurance, nor had the plaintiffs given or offered to give to it such benefit.

If this bill of lading had contained a provision that the railroad company would not be liable unless the owners should insure for its benefit, such provision could not be sustained; for that would be to allow the carrier to decline the discharge of its duties and obligations as such, unless furnished with indemnity against the consequences of failure in such discharge. Refusal by the owners to enter into a contract so worded would furnish no defence to an action to compel the company to carry, and submission to such a requisition would be presumed to be the result of duress of circumstances, and not binding. But the clause in question bears no such construction and obviously cannot be relied on as in itself absolving the company from liability, for by its terms the benefit of insurance was only to be had when a legal liability had been incurred, and in favor of 'the company incurring such liability.' Since the right to the benefit of insurance at all depended upon the maintenance of plaintiffs' cause of action, the fact of not receiving such benefit could not be put forward in denial of the truth or validity of their complaint."

The respondent seeks to distinguish this authority upon the ground that here there was no provision in the contract for subrogation, but it is not necessary that the right should be expressed. An insurer of goods, upon paying to the insured the amount of a loss becomes,

without any stipulation to such effect, subrogated to the assured's right of action. Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

There will be a decree for the libellant for $18,594.82, unless the respondent desires a reference to ascertain the correctness of this amount.

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In re ALASKA AMERICAN FISH CO. et al.

(District Court, W. D. Washington, W. D. June 8, 1908.)

No. 626.

1. BANKRUPTCY—MANUFACTURING CORPORATION—FISH-PACKING COMPANY—"PRINCIPALLY ENGAGED IN MANUFACTURING."

A corporation organized for carrying on the business of catching and preserving by salt and marketing salt water fish, and which owns and operates a plant for the preparing, preserving, and packing of such fish, is "principally engaged in manufacturing," within the meaning of Bankr. Act July 1, 1898, § 4b, c. 541, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), and is subject to adjudication as an involuntary bankrupt.

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

2. SAME—JURISDICTION OF PROCEEDINGS—ASSOCIATED CORPORATIONS OF DIFFERENT STATES.

A manufacturing corporation was organized under the laws of Washington, having its home office and principal place of business at Tacoma. Subsequently a second corporation was organized in California, apparently for the purpose of succeeding and taking over the business of the first. Its home office was in Oakland, Cal.; but its business was transacted in Tacoma by a manager who was also the manager of the first corporation, the business of which was continued by such joint manager without change and in such manner that the transactions and liabilities of the two corporations could not be separated. *Held*, that the District Court in the Washington district had jurisdiction to entertain a petition in bankruptcy against both corporations as joint parties; it not appearing that any prior proceedings had been elsewhere instituted.

Involuntary Bankruptcy. Heard on objections to the jurisdiction of the court. Overruled.

F. H. Kelly, for petitioners.

Charles Bedford, for respondent.

HANFORD, District Judge. This is an involuntary bankruptcy case, instituted in this court against two corporations, one being organized under the laws of the state of Washington and the other a California corporation. The home office and principal place of business of the Washington corporation is at the city of Tacoma, its business was catching, preserving by salt, and marketing salt water fish, and it owned a plant for carrying on that industry in Alaska. Fish, as a commodity of merchandise, requires the application of process for its preservation, as well as labor in packing the same in suitable receptacles for handling and transportation. Therefore I hold that the business of said corporation was a manufacturing business, within the meaning of the bankruptcy law, and that it is subject to be adjudicated a bankrupt.

The California corporation appears to have been organized with the object of becoming the successor of the Washington corporation. The evidence, although meager, indicates that there was an understanding among its promoters that it was to take over the property and assume the obligations of the Washington corporation. Its home office is at Oakland, Cal.; but the business appears to have been conducted by a manager at Tacoma, who was also the manager of the Washington corporation, and the petitioners allege that its transactions were so intermingled with the business of its predecessor that, for the protection of the rights of creditors, it is necessary to include it as a party in this proceeding, so that administration of the estate as a unit may be under the direction of one court. This ground of jurisdiction is disputed, and the case was referred to a special master to take evidence and report the same to the court. The evidence is meager, as I have remarked; but it is uncontradicted, and it indicates that the joint manager of the two corporations continued the business of the former without apparent change as to methods or employés, and that it would be difficult, if not impossible, to separate the accounts and segregate the liabilities, and that a separation of the two concerns in bankruptcy proceedings will be impracticable.

The record does not disclose any conflict of jurisdiction by reason of proceedings instituted against the California corporation in another court, and this court, having first acquired jurisdiction of the complicated concerns, may rightfully deal with them as joint parties. Collier on Bankruptcy (6th Ed.) p. 17, In re Southwestern Bridge & Iron Company, 13 Am. Bankr. Rep. 304, 133 Fed. 568.

Objections overruled.

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## MELLA v. NORTHERN S. S. CO.

(Circuit Court, S. D. New York. June 8, 1908.)

1. DEATH—PROXIMATE CAUSE.

Intestate sustained a dislocated shoulder by a fall on defendant's steamship due to defendant's alleged negligence, after which he went to a hospital, where he was given chloroform unnecessarily prior to the reduction of the dislocation. During this operation, intestate died from paralysis of the heart solely due to the chloroform; the injury not being such of itself, independent of the chloroform, as would have caused death. *Held*, that the unnecessary giving of the chloroform, for which defendant was not responsible, and not the injury, was the proximate cause of intestate's death, precluding recovery for death under Code Civ. Proc. N. Y. § 1902, authorizing a recovery of damages for a wrongful act, neglect, or default by which decedent's death was caused, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 26.]

2. COURTS—FEDERAL COURTS—RULES OF DECISION.

The federal courts are bound by the decisions of the Supreme Court of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 325.]

3. DEATH—RIGHT OF ACTION—NEGLIGENCE.

In order to render a defendant liable for wrongful death, the death must be the natural, reasonable, and probable result of defendant's negligent act which could have been foreseen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 19.]

4. SAME—CONCURRENT ACTS.

Where intestate was injured by defendant's negligence, but the injury was in no event fatal, and intestate died solely because of the unnecessary and dangerous act of the surgeon employed by intestate in giving him chloroform, for which defendant was not responsible, though done in the course or in connection with necessary surgical treatment, the injury and anæsthetic were, at most, concurrent causes of the death, for which defendant was not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 26.]

5. MASTER AND SERVANT—DEATH OF SERVANT—PRECAUTIONS AGAINST INJURY—QUESTION FOR JURY.

During the process of repairs on a vessel by an independent contractor, a hole three feet long and two feet wide was cut in a passageway, and, while two of the contractor's servants were seated at the edge of the hole, their feet extending therein, engaged in putting up a guard rail around it, intestate, an employé on the vessel, stepped into the hole and sustained a dislocation of the shoulder. *Held*, that the court properly submitted to the jury the question whether defendant was negligent in failing to further guard the hole while the men were working therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1031.]

See 127 Fed. 416.

This action is brought by the administratrix of Louis Mella, deceased, against the Northern Steamship Company, under the provisions of section 1902 of the Code of Civil Procedure of the state of New York, for the benefit of the decedent's wife and next of kin, and to recover damages for the alleged negligence of the defendant, by which it is claimed the decedent's death was caused. The defendant denied negligence, and also denied that the death of the decedent, Louis Mella, was caused by the alleged negligence, even if there was negligence, and gave evidence tending to show that such death was caused by the independent negligence of the physician and attendants at the hospital to which Mella was taken for treatment, or an operation, after the accident occurred.

Rounds & Dillingham, for plaintiff.
Breed, Abbott & Morgan, for defendant.

RAY, District Judge. The section of the Code under which this action is brought reads as follows:

"Action for Death by Negligence. The executor or administrator of a decedent, who has left him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death." Code Civ. Proc. N. Y. § 1902.

The defendant owned the steamship Northwest, running on the Great Lakes; but, as the season had not opened on the 11th day of June, 1902, she lay at the wharf in Buffalo undergoing extensive repairs. These repairs had been going on for some time and included, among other things, a change of boilers, the cutting of a hole through the main deck for passage below, the putting up of railings and certain changes in and about the culinary department, which last changes were being made at the request of Mella and to some extent under his direction. As Mella was passing along the main deck through a pas-

sage, he turned into a narrow and shorter passage on his way to this culinary department and stepped one leg into a hole. He either fell upon his left hand or elbow, or saved himself by reaching out his left hand; but, as he was a heavy man, the force of the fall was such that his left shoulder was dislocated. This was the only injury received, and the evidence was uncontradicted that this was the simplest and least complicated of the various forms of shoulder dislocations. The plaintiff alleges negligence, in that the defendant failed to furnish a safe place for Mella to work and had this hole in the short passageway mentioned unguarded, and that such passageway was insufficiently lighted.

Mella was taken to the Emergency Hospital in Buffalo, or went there of his own motion, to have the dislocation reduced. He was a large, heavy man, and some one in attendance gave him chloroform, which it is claimed reduced him to a state of coma. The dislocation was then reduced without difficulty, but Mella died under the influence of the chloroform and, as the physicians say, from paralysis of the heart caused by the chloroform. The defendant insisted and gave evidence tending to show: First, that the giving of the chloroform was unnecessary; and, second, that Mella was so negligently cared for while under its influence, no efforts being made to watch and bring him out from under its influence, that he died solely from the unnecessary administration of chloroform and the negligence of the surgeons and attendants having him in charge. The evidence was substantially undisputed that the injury and dislocation were not fatal and would not have been fatal had the patient been left entirely alone with the dislocation unreduced; that the only result would have been a partially disabled condition of the left arm.

The court charged the jury that, to enable plaintiff to recover, the jury must find that the defendant was negligent, that this negligence produced injury to Mella, and that such injury was the proximate cause of his death; also, that death must have been the natural and probable consequence of the injury or accident, and that Mella must have been free from contributory negligence which in any way and to any extent contributed to the injury, if it produced death.

The court also charged that the jury must find:

"That the cause of Mella's death was the injury so affecting his general physical condition and that of his heart, or both, that the chloroform caused death; that is, the injury caused the condition of the heart, etc., that resulted in death from the administration of chloroform."

The court also charged that, if Mella died from paralysis of the heart caused by the chloroform unnecessarily given by the surgeons at the Emergency Hospital, and that paralysis of the heart resulted solely from a diseased condition of the heart and system existing at a time prior to and at the time of the accident, then the accident and injury were not the proximate cause of death, and the plaintiff cannot recover.

The court also charged we cannot trace death to the accident and resulting injury as the proximate cause of such death, if the prior physical conditions, including the conditions of the heart, were such, immediately prior to the injury, that the said unnecessary administer-

ing and effects of the anæsthetic, chloroform, would have caused the death and did cause the death of Mella unaided by the injury or its effects. That is, if the injury had nothing to do with creating or causing or producing the physical condition that caused the chloroform to produce death. That is, if, owing to the prior physical condition of Mella—and it was in no way aggravated by the accident and injury—the chloroform so given solely caused the death, then death was not the result of the injury in any degree, and the accident and injury were not the proximate cause of death and plaintiff cannot recover.

The court also charged that the negligence must have caused death or must have aided to cause death. It is not sufficient that the negligence produced a condition not fatal which set other independent agencies at work, one of which, acting independently of the injury and accident, and acting alone, caused death. That is, it is not sufficient that negligence caused an injury not fatal; that this caused Mella to go to the hospital; that the injury caused the surgeon to operate and give chloroform; that the chloroform alone killed or caused death. The injury itself must, in whole or in part, have produced a physical condition which enabled the chloroform unnecessarily given to cause the death.

The court also charged the "proximate cause" of death was that cause which in natural and continuous sequence, unbroken by any new cause, produced death, and without which cause that death would not have occurred. Hence, if the pre-existing physical conditions of Mella were such that such giving of chloroform and its effects were alone sufficient to cause death and did cause death, and the accident and injury had nothing to do with producing the physical conditions upon which the chloroform operated or acted in producing death, then the accident and injury were not the cause of death, but the act of another person, or the acts of third persons in giving chloroform was. "Death, in this case, cannot be attributed to the accident and injury, unless you find on the evidence in the case that without their operation on Mella's physical condition death would not have happened." The court also said there must be a fair preponderance of evidence to the effect that the death of the deceased, Mella, was caused by a physical condition produced in whole or in part by the injury and without the existence of which physical condition Mella would not have died. This charge is challenged, and the plaintiff insists that if the defendant was negligent, and that negligence caused injury to Mella, and he went to the hospital for treatment and submitted to a necessary operation, and the surgeons and attendants in charge unnecessarily gave chloroform, which, operating on Mella's physical condition as it was prior to the injury, caused death, such injury was the proximate cause of such death, and that plaintiff may recover.

The court more than once charged that negligent or careless treatment by the physicians and surgeons would not defeat recovery, but also charged, in substance, that if the chloroform was unnecessarily given, and the surgeons and attendants failed and neglected to properly care for Mella and watch him and use precautions to bring him out from under its effect, and in consequence of the giving of such chloro-

form and negligent treatment and want of care while under its influence solely he died, then the injury was not the proximate cause of death; but the unnecessary giving of chloroform and the negligence of the physicians and surgeons was. In substance, the court charged that in such event death so caused was not the natural or probable consequence of the injury.

The court also charged:

"So if death was caused solely by the chloroform so given, and the physical conditions of Mella, entirely irrespective of the accident and injury, were such that the chloroform caused death, so that the injury or its effects were in no way or to any extent a producing cause of death, plaintiff cannot recover. It is not sufficient that the accident and injury made proper treatment necessary. That would be a remote cause, but not, in the case stated, the proximate cause, and for such remote cause the defendant is not liable, provided an efficient independent cause intervened and caused death."

In 1 Cooley on Torts (3d Ed.) 567, discussing the subject "Actions for Causing Death by Wrongful Act," etc., the author says:

"Proximate cause: The wrongful act, neglect, or default, must have been the proximate cause of death. But it is the proximate cause if it inflicts a fatal injury though the death that would have resulted is anticipated by an unskillful surgical operation."

He cites Sauter v. N. Y. C. & H. R. R. Co., 66 N. Y. 50, 23 Am. Rep. 18; Nagel v. Miss., etc., R. R. Co., 75 Mo. 653, 42 Am. Rep. 418; Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070; Beauchamp v. Saginaw Mining Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30.

This is not a case where the decedent was fatally injured, or where the injuries were such that they might have resulted in death. All that can be claimed is that the injuries were of such a nature that: (1) Medical and surgical treatment were necessary, the anæsthetic being necessary for the relaxation of the muscles of Mella to facilitate the reduction of the dislocation; and (2) that as such giving of chloroform was necessary and made necessary and proper by the negligence of the defendant; and (3) as the giving of such chloroform resulted in death or caused death; and (4) that therefore there was such a connection between the accident and consequent injury and the death as made the death the proximate result of the accident. This the court conceded, assuming the necessity of administering chloroform, and charged, in substance, that to defeat recovery: (1) The chloroform must have been unnecessarily given; and (2) that it, so given, operating on a pre-existing physical condition, not induced or produced in any degree by the injury, solely must have caused death. The court charged, in substance, that, even if the chloroform was unnecessarily given and caused death, still if the pre-existing physical condition of Mella was such that its operation thereon, aided in any degree by the injury, caused death, then the injury was the proximate cause of death. The court, in substance, charged that if Mella died from paralysis of the heart, as the surgeons say he did, and such cause of death, paralysis of the heart, was solely produced by the unnecessary giving of chloroform at the hospital, then the injury was not the proximate cause of death. In short, the charge was that the injury, to be the proximate cause of death, must have had something to do with causing physical condi-

tions which enabled the chloroform, if unnecessarily given, to cause paralysis of the heart and consequent death.

If the injury made the giving of chloroform necessary, if it was therefore given, if paralysis of the heart followed, and death resulted, then the injury caused the death. In such event, it is immaterial what Mella's physical condition was prior to or even after the accident.

If such injury did not require the giving of chloroform, if it was unnecessarily given, and if it, thus given, unaided by the conditions produced by the injury, caused death, then how did the injury have anything to do with causing the death, except indirectly, in that it brought Mella into the hands of the surgeon and enabled him, by giving unnecessary drugs, to cause death by such independent means? Is such a death so caused the natural and probable result of such an act of negligence, of such an injury; the injury not being a fatal one?

In 1 Cooley on Torts (3d Ed.) 566, it is also said:

"In most cases the question of the right to recover is merely a question of negligence, and is to be governed by the same principles and considerations as questions of negligence when the results were less serious."

The author (1 Cooley on Torts [3d Ed.] pp. 101, 102), in discussing "Proximate and Remote Cause," lays down three propositions, viz. (the first relates to distinct legal wrongs which in themselves constitute the invasion of the rights of others, and will not be quoted):

"(2) When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause.

"(3) If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote."

Therefore in this case death must have resulted from the negligence and injury received in the accident according to the ordinary course of events, and the cause must have been a sufficient one. Or the negligence resulting in the death of Mella, we will say, so resulted through the intervention of other causes. What causes? The unnecessary—that is, the negligent and wrongful—giving of chloroform, a poisonous agent injurious and often destructive to life as the evidence shows. Hence, if the chloroform was unnecessarily given, and it alone caused death, then the accident and injury to the shoulder caused death only in consequence of the intervention of this distinct wrongful act or omission of the surgeon and attendants at the hospital in unnecessarily giving chloroform, and so the death "shall be imputed to the last wrong as the proximate cause, and not to that which was more remote," the dislocation of the shoulder; the last cause being the sole cause of death. This is the plain holding in Wood v. Pennsylvania R. R. Co.,

177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728, where it is decided:

"In order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. If the original act was wrongful, and would, naturally according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent."

See, also, West Mahonoy Township v. Watson, 116 Pa. 344, 9 Atl. 430, 2 Am. St. Rep. 604, and Hammill v. Pennsylvania R. R. Co., 56 N. J. Law, 370–377, 29 Atl. 151, 24 L. R. A. 531.

To defeat recovery there must be two wrongs, two negligent acts, and the last, that of a third party, must be the sole cause of the death. In such case the last negligent act is the proximate cause of the injury that results in death. Hammill v. Pennsylvania R. R. Co., 56 N. J. Law, 377, 29 Atl. 151, 24 L. R. A. 531. If they co-operate in producing death, then recovery is not defeated.

Again, says Cooley, at page 99:

"It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate and not the remote cause of any event is regarded; and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. * * * If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

The result (that is, the death) must be the natural and probable consequence of the act, one which could have been foreseen in the light of the attending circumstances if the act does not amount to wanton wrong. Railway Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070; Wood v. Pennsylvania R. R. Co., 177 Pa. 306, 310, 311, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728; West Mahonoy Township v. Watson, 116 Pa. 344, 9 Atl. 430, 2 Am. St. Rep. 604; Bishop's Noncontract Law, § 42, quoted and approved in Laidlaw v. Sage, 158 N. Y. 98, 99, 52 N. E. 679, 44 L. R. A. 216; Lowery v. Manhattan R. R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12.

In West, etc., v. Watson, supra, the negligence of the town in leaving the pile of ashes in the street, and which caused the horses to run away, did not set in operation the engine on the railroad track, which ran upon and killed the horses while so running away; but the running away of the horses, caused by the negligence of the town, was

one continuous act, and but for such negligence the horses would not have been killed. There the horses were killed by the concurring results of two acts: (1) The negligent act of the town in causing the horses to run away; and (2) the subsequent act of the railroad company, a third party, not negligent in running upon them while so running away and while running upon the tracks of the company. The court said:

"The facts being undisputed, the court should have instructed the jury that the negligent act of the township was the remote and not the proximate cause of the loss of the horses, and for this loss the township was not liable."

Wood v. Pennsylvania R. R. Co., supra, is more in point, for the reason that there the defendant railroad company had control of all the agencies causing the injury. The plaintiff was on the railroad station platform, having purchased his ticket, waiting for his train. The incoming train, running at a negligent rate of speed, without giving warning of its approach, struck a woman who was crossing the track and threw her body against plaintiff and injured him. Held, that the injury was not the natural and probable consequence of the negligence, and hence the negligence was not the proximate cause of the injury to the plaintiff. It was also held that under the evidence the woman killed was negligent, and hence, as her negligence intervened and caused plaintiff's injury, even if the railroad company was running at a negligent rate of speed and without giving warning of its approach, the proximate cause of plaintiff's injury was the negligence of the woman. While the accident would not have happened, either to the woman or to the plaintiff, but for the negligence of the railroad company, still, first, the resulting injury was not the natural and probable consequence of the negligence, and, second, the negligence of the woman killed, and not that of the railroad company, was the proximate cause of plaintiff's injury.

It must be conceded, I think, that there is some conflict between this last case and Hammill v. Pennsylvania R. R. Co., 56 N. J. Law, 370, 29 Atl. 151, 24 L. R. A. 531. But this is not important, as this court followed Hammill v. Pennsylvania R. R. Co. in the case at bar. It repeatedly charged that the unnecessary giving of chloroform must have been the sole cause of death. In that case the plaintiff was rightfully on a way which the general public had the right to use, but the fee of which was owned by the defendant railroad company. The defendant's train was running negligently and struck a man, one Barry, who, carrying a basket of tools, was negligently trying to cross the tracks of the defendant. Barry was struck by the train, the tools scattered, and some of the flying tools struck the plaintiff and injured him. Held, that defendant was responsible. The act of Barry, the person carrying the tools, was not the sole or independent cause of the injury to the plaintiff. The negligence of the railroad company and the negligence of Barry co-operated at the same time to injure the plaintiff. Here were really two proximate causes of the injury, each a negligent act, concurrent in point of time and co-operating to produce such injury. The court in its opinion said (page 377 of 56 N. J. Law, page 153 of 29 Atl. [24 L. R. A. 531]):

"But it is contended that this negligent conduct of the defendant, conceding it to exist, was not the proximate cause of the injury. The contention is that the negligence of Barry, in placing himself carelessly in front of the locomotive, with the box of tools on his shoulder, was the independent and proximate cause of the injury. It is true that Barry's negligence contributed to his own death, and the trial judge instructed the jury that his negligence tended to the production of the injury received by the plaintiff, and that if Barry's negligence stood alone as an independent cause of the injury there could exist no right of recovery on the part of the plaintiff; but it was submitted to the jury whether the statutory signal was given or not, and, if not given, that was negligence on the part of the defendant, and, if it co-operated with the negligence of Barry in producing the injury of the plaintiff, a right of recovery existed; but if it did not co-operate with the negligence of Barry in producing the injury to the plaintiff, then no right of recovery in the plaintiff existed. If the injury was the result of the joint negligence of the defendant and Barry, a liability on the part of the defendant ensued. It is premised that this was a proper submission to the jury upon the evidence in the cause, and that the law as applicable was properly stated to the jury."

When the separate negligent acts of two parties, both in full operation, combine to cause an injury to a third person, either or both are responsible for the injury, and it is immaterial which negligence commenced its operations first. Washington & Georgetown Railroad v. Hickey, 166 U. S. 526, 527, 17 Sup. Ct. 661, 41 L. Ed. 1101.

In Sauter v. N. Y. C. & H. R. R. Co., 66 N. Y. 50, 23 Am. Rep. 18, an action under the statute, plaintiff's intestate received an injury, hernia, which, without the intervention of surgical treatment, necessarily would have resulted in death. It was necessarily a fatal injury. Surgeons were employed and found that a surgical operation was the only means of saving his life. They necessarily operated, and by a mistake or error in replacing the intestine pressed it into an abnormal cavity, for the existence of which they were not responsible, and, as a consequence, it was assumed, the patient died. It was contended that the injury was not the proximate cause of death. The court said:

"To bring a case within the principle claimed, the general rule is that the actual injury (causing death) must be occasioned by the intervention of some responsible third party or power. Wharton on Neg. § 134. I do not think that the mistake of the surgeon can, in any sense, be regarded as such. The employment of a surgeon was proper, and may be regarded as a natural consequence of the act, and the mistake, which it is evident might be made by the most skillful, may be regarded of the same character. * * * Here it is sought to shield the wrongdoer because the deceased failed to procure relief, although he used the usual and best available means for the purpose. He would have died without an operation. Assuming that by the mistake of the surgeon the operation was not successful, can it be justly said, in the first place, that the surgeon, and not the injury, killed him; and, in the second place, that the surgeon is to be regarded as a responsible intervening third person within the rule referred to? There is no authority that approaches such a proposition. Hence there was no error in refusing to charge that, if death was proximately caused by pressing the intestine into the abnormal cavity, the plaintiff could not recover. The court had charged that, if the hernia was not the proximate cause of death, the plaintiff could not recover, nor unless it was caused by the defendant. The court also charged that, if death was produced by the error, ignorance, blunder, or maltreatment of the surgeon, the plaintiff could not recover. The case was quite as favorable to the defendant as the case would warrant."

There was no request to charge that, if the intestine was unnecessarily or negligently or wrongfully pressed into the abnormal cavity, the

plaintiff could not recover. In effect, the court charged just that as we have seen, and that was approved by the Court of Appeals. In any event, the injury, necessarily fatal, and necessary treatment, caused death.

In the case now before the court, the jury was charged that mere error or negligence in giving necessary treatment or performing necessary operation would not defeat recovery. It was charged that if the giving of a drug of the dangerous character and nature of chloroform was unnecessary, and it solely caused death, and the injury had nothing to do with causing death, this unnecessary act, this wrong, would be the independent intervening act of a third person and the proximate cause of the death. I take it that the surgeons and attendants in a hospital are not immune from the charge of being the intervening third person causing death, and not immune from the charge of causing the death of a patient therein by their own independent and wrongful acts, even if connected with a necessary operation. If they are, then they may experiment with and upon every patient and unnecessarily give dangerous drugs and unnecessarily perform dangerous operations, and, if such drugs and operations so unnecessarily given or performed kill, are the sole cause of death, then the persons whose negligence caused a slight injury requiring some slight operation must answer for the consequences of such experiments and unnecessary operations and respond in damages for the death on the ground that their negligent act "set the surgeon and attendants in motion," or rather gave them an opportunity to experiment and try titles with death-dealing instrumentalities. All surgeons and physicians are liable to make mistakes and err in treatment or operations, and these errors or mistakes are the natural and probable consequences of negligence causing injury if such injury requires treatment. But, I take it, that the unnecessary giving of a poisonous drug and death therefrom are neither the natural nor the probable consequences of injury from negligence or of medical treatment made necessary thereby and which, of course, is a natural and probable consequence of injury. In legal contemplation, negligent parties must be responsible for injury, necessary medical treatment, or surgical operations, and mere errors of the physicians and surgeons in doing necessary things, as all these are natural and probable results, happenings; but I know of no case holding that unnecessary treatment with dangerous drugs, which the jury found this was, is either the natural or the probable consequence of injury. It strikes me that such treatment is both unnatural and improbable. If not, it ought to be so declared. Dangerous necessary treatment is a natural and a probable consequence of injury, and so are dangerous necessary operations; but the unnecessary giving of chloroform, dangerous to life, a drug that causes 90 per cent. of all deaths from the giving of anæsthetics, as the evidence shows, and consequent death from such unnecessary action, are not the natural or the probable results of accidents and injuries.

It is not natural for a physician or a surgeon to give chloroform unnecessarily, and it is not probable that he will. Injury and the giving of dangerous drugs unnecessarily and death caused solely by such unnecessary act "are not known by common experience to be naturally

and usually in sequence." Quite the contrary. So here the negligence, the dislocation of the shoulder, the going to the hospital for treatment, the unnecessary giving of chloroform, and death from the chloroform so unnecessarily given, solely, "are not known by common experience to be naturally and usually in sequence," and hence the damage or death did not, according to the ordinary course of events, follow from the wrong, the negligence. The break in natural and probable sequence comes at the unnatural and unnecessary giving of chloroform, an improbable act, an improbable consequence of the negligence and injury.

Lowery v. Manhattan Railway Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12, in no way is in conflict with these views. There the defendant negligently dropped live coals upon a horse attached to a vehicle. The horse ran away. The driver attempted to arrest his progress by turning against the curb. The horse did not stop, but ran upon the sidewalk and over the plaintiff, who was thereon, and injured him. The driver did the best he could. He may have erred in judgment, but he was guilty of no negligence, and he committed no wrong. It was necessary and proper for him to do the best he could to stop the horse. The running of the horse anywhere where there was an open space was the natural and probable consequence of dropping fire upon him. Even if the driver's act did intervene and cause the horse to go upon the sidewalk, it was an innocent act, and under rule 3 of Cooley, supra, the injury is referred to the wrongful act of the defendant, passing by the innocent one which intervened.

In Ehrgott v. Mayor, etc., 96 N. Y. 264, 48 Am. Rep. 622, the plaintiff drove into an open ditch in the street on a dark rainy night and was injured. His wagon being broken, he procured another and drove home, several miles, in the cold and rain. The jury found the plaintiff was without fault or negligence, but that the drive and exposure aggravated the injury received in the accident. I do not find here the interposition of the act of any third person. The plaintiff went home rightfully, and he did nothing to cause an injury. Injury, strain, and exposure and an aggravation of the injury from the cold and exposure which came from existing conditions of the weather, and not from the wrong of a third person, were the natural and proximate results of such an accident and injury. If, injured as he was, he had gone to a hospital, and some physician had there unnecessarily and ignorantly given him an ice bath, causing pneumonia and death, the unnecessary ice bath being the sole cause of death, would the city have been liable for such death? Would that death, caused in that way, solely by the unnecessary ice bath given by the doctor, have been the natural and probable result of such negligence of the city and the consequent injury? Would or would not the intervening, unnecessary and dangerous giving of the ice bath have been the proximate cause of death? The wrong of the city in leaving the ditch unguarded would only have become injurious, in the sense of causing death, in consequence of the distinct wrongful act of the doctor, and hence, within Cooley's third rule, the death would be imputed to that, the last wrong, as the proximate cause of death. It must be remembered that in actions under this statute "death" is the result that must follow the

negligence and be caused by it, although such negligence need not be the sole cause. It is not sufficient that the negligence cause an injury. The negligence must cause death, either instantly, or must cause an injury or disease, which injury or disease, in whole or in part, must cause death. Hence the accident and injury must be the proximate cause of the death. Death is the injury causing damage for which the administrator may recover.

Scheffer v. Railroad Company, 105 U. S. 249, 26 L. Ed. 1070, was an action under a similar statute for damages caused by death, which death was alleged to have been caused by an injury resulting from the negligence of the railroad company. It was alleged that the negligence caused injury, which injury directly caused insanity, and that such insanity caused the decedent to take his own life, and that therefore the negligence caused death. The Supreme Court of the United States held that the accident and injury were not the proximate cause of death, but that the act of the decedent was, and that the plaintiff could not recover. The court also said:

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train."

So here the unnecessary giving of chloroform, which caused paralysis of the heart, and which in turn caused the death of Mella, could not have been foreseen or anticipated in the light of the circumstances attending the negligence of defendant, if it existed. This case is cited and approved in Washington & Georgetown Railroad v. Hickey, 166 U. S. 528, 17 Sup. Ct. 661, 41 L. Ed. 1101, Accident Insurance Co. v. Crandal, 120 U. S. 532, 7 Sup. Ct. 685, 30 L. Ed. 740, and is also cited and followed in Hailes v. Texas & Pac. R. Co., 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774, where it was held:

"Where a passenger on a railroad train receives no bodily injury from an accident caused by the company's negligence, but is made insane by the excitement, hardship, and suffering resulting therefrom, the company is not liable in damages therefor, since insanity is not a probable or ordinary result of exposure to a railroad accident."

In Daniels v. N. Y., N. H. & H. R. Co., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751, it was held that, where the deceased was made insane by the accident and injury, and while so insane voluntarily committed suicide, this was such a new and independent agency of death as to prevent recovery. Here the decedent was injured August 12th and died October 3d following.

In Carter v. Towne, 103 Mass. 507, the defendant negligently sold gunpowder to a boy, who took same home, and it was placed in a cupboard with the knowledge of his aunt, who had him in charge. A week later, his mother gave him some of the powder, and he fired it off. Some days later, with his mother's knowledge, he took more of the powder and fired it off and in so doing was injured thereby. It was held that the wrongful act of selling gunpowder to such a boy was not the proximate cause of his injury. It is clear that the negligence of the mother intervened and was the proximate cause of the

injury. There the negligence of the seller of the powder set the whole train of events in motion, set the mother in motion; but her negligence was an independent act. In the case at bar, in the same sense only, the accident and dislocation, negligence and its immediate consequences, set the surgeon and attendants in motion; but in no legitimate sense did they set them in motion to do an unnecessary and dangerous thing, a grossly negligent and entirely unnecessary act which operating alone and independent of the injury caused death as the jury found.

In Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256, the court said:

"The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

Here death is the injury for which damages may be recovered, and such death must result from, be caused by, the injury more directly caused by the negligence. The one must produce the other. But here the jury found, on abundant evidence, that the accident and injury, dislocation, caused by the accident, had nothing whatever to do with causing or producing the death. The jury found that the subsequent unnecessary administration of chloroform solely caused death; that the accident and injury to the body in no way affected or aggravated the physical condition of Mella so as to cause or induce the chloroform to produce injurious or fatal effects. The chloroform unnecessarily given solely caused paralysis of the heart, and paralysis of the heart caused death. Therefore the unnecessary and consequently the negligent and wrongful act of the surgeon and attendants intervened between the negligence and injury, death, as the sole and efficient cause of such death. Chloroform, unnecessarily given, became the active, producing, and efficient and sole cause of death. It was not a mere mistake or error of the surgeon and attendants, but an unnecessary and an uncalled for act, a thing not demanded or required by the situation and condition of Mella. To have been necessary, the administering of chloroform must have been "such as would be; that cannot be otherwise." Or (2) "such that it cannot be disregarded or omitted; indispensable; requisite; essential; needful; required." Century Dictionary. And I repeat and emphasize that an unnecessary act of that character, not precautionary, but most hazardous, was neither natural

nor reasonable nor probable. It could not have been anticipated or foreseen. To be the proximate or efficient cause, it must necessarily set the other causes in operation. Says the court in Insurance Company v. Boon, 95 U. S. 117, 130, 24 L. Ed. 395:

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation."

Later in the opinion this was again emphasized, where the court said:

"In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and independent cause of loss. On the contrary, it was an incident, a necessary incident and consequence of the hostile rebel attack on the town—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power—events so linked together as to form one continuous whole."

Here there can be no pretense that the primary injury, the dislocation, necessarily set the unnecessary act, the ultimate act which directly caused the death, the ultimate injury, in motion. To say that a negligent act and comparatively slight injury, not fatal in any event, necessarily sets in motion the unnecessary act of another person which of itself, acting independently and alone, causes death, is an incongruity, an absolute contradiction, an absurdity.

The federal courts are bound by the decisions of the Supreme Court and follow them with fidelity. The Supreme Court and the Circuit Courts of Appeal in numerous cases have laid down and reiterated the rule that the final result, the death, must be the natural, the reasonable, and the probable result of the negligence, one that could have been foreseen, else the negligence is not its proximate cause. The rule has been stated in various ways, but always to the same effect.

Thus, in Railway Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256:

"It is generally held that in order to warrant a finding that the negligence, or an act not amounting to a wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

This is quoted and followed in Jarnagin v. T. P. A. of America, 133 Fed. 892–894, 66 C. C. A. 622, 68 L. R. A. 499, and in Lauterer v. Manhattan R. Co., 128 Fed. 545, 63 C. C. A. 38.

In Hoag v. Railroad Company, 85 Pa. 293, 27 Am. Rep. 653:

"The true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from the act."

In Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. (C. C.) 135 Fed. 135:

"To give a right of action for an injury on the ground of defendant's negligence, the injury must have been the natural and probable consequence of such negligence, and such as, under the circumstances of the case, might and ought to have been foreseen."

In U. S. F. & G. Co. v. Des Moines Nat. Bank (Eighth Circuit) 145 Fed. 273, 280, 74 C. C. A. 553:

"Negligence is actionable only when the loss or injury proximately results therefrom, and to be thus proximate the loss or injury must be a natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances."

In Cole v. German Savings & Loan Association, 124 Fed. 113, 119, 121, 59 C. C. A. 593, 595 (63 L. R. A. 416):

"An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that probably would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable, and such an act of negligence is the remote cause, and the independent intervening cause is the proximate cause, of the injury. * * * But the concurring negligence of another cannot transform the remote into the proximate cause of an injury, or create or increase the liability of the defendant. It cannot make an injury which was not the natural and probable result of the negligent acts or omissions of the defendant their natural and probable consequence. No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury, and no one is liable for an injury unless it was the natural and probable result of his act."

In this case the defendant was negligent in that its elevator was in a hall so dark that it was difficult to see it when at the lower floor. The door into the elevator was not fastened, was often open a little way when the elevator was at the floor above. At such times nothing but darkness was visible in the well. And no precautions were taken to keep interlopers and trespassers from the hall or from intermeddling with the elevator door. The plaintiff entered the hall and passed towards the elevator. A boy who frequently loitered about, and who had been seen to operate the elevator once and to ride upon it several times, hurried past and threw the door into the elevator wide open, whereupon the plaintiff, supposing him to be the attendant, passed in and fell to the bottom of the well, the elevator being above, and was severely injured. Held, that the negligence of defendant was not the proximate cause of the plaintiff's injury, but that the wrongful or mischievous act of the boy was. It is perfectly apparent that the negligence of the defendant, in a sense, set the boy in motion, or rather permitted him to act as he did, and that it was negligent to have him about. If the defendant had not been negligent, the boy would not have been there, and the door could not have been thrown open by the boy. If the defendant had not been negligent in failing to light the hall, the wrongful act of the boy would not have caused injury, as the plaintiff would have seen that the elevator was not there and would not have stepped in. Still, it was the act of the boy, for which defendant was not directly responsible, that immediately and directly caused plaintiff's injury. His negligence intervened between that of the defendant and the injury and directly caused it. A violation of duty by this boy and injury to others was not the natural or probable consequence of defendant's negligence and could not reasonably have been anticipated, said the Circuit Court of Appeals. So in the case at bar the unnecessary giving of chloroform, and the consequent paralysis of the heart of Mella, and the resulting death, were neither the natural, reasonable, nor probable consequences of defendant's negligence. Such

an act and such a result could not have been anticipated. Death from such a cause could not have been reasonably anticipated any more than insanity and suicide from the negligence and injury in the Scheffer Case and the Daniels Case, supra, where, in each case, the negligence of the railroad company caused injury to the head of deceased, which caused insanity, which, in turn, caused suicide or death, the injury complained of.

In People v. Cook, 39 Mich. 236, 33 Am. Rep. 380, a homicide case, the defense was: (1) That the wound was not mortal, and that death was caused by the improper administration of chloroform solely; and (2) that, even if the wound was of itself mortal, the immediate cause of death was morphine poisoning caused by an overdose of that drug, given in course of treatment, and that therefore death was not caused by defendant, and he could not be guilty of homicide. It will be seen that the question involved was the same as here presented: Was the death the result of the shooting and wound in any degree? Was it the natural and probable consequence reasonably to be apprehended or anticipated? The court charged, and the Supreme Court unanimously held, correctly:

"But if the gunshot wound was in itself mortal or reasonably calculated from its nature and extent to produce death, it would be no defense that the deceased, under better or different medical treatment, might have recovered; nor will the law justify a verdict of not guilty merely upon the ground that the medicines administered to restore or relieve the deceased, in point of truth, did co-operate with the wound in producing death. It would be enough if the gunshot wound contributed mediately or immediately to the death, but, on the other hand, if the gunshot injury was not a mortal one in itself, not reasonably calculated to produce death from its nature and extent, and death ensued, not from it, but solely from morphine poisoning, to which the injury did not materially contribute, the defendant could not in that case be convicted."

The Supreme Court also held:

"In a case where the wound is not mortal, the injured person may recover and thus no homicide have been committed. If, however, death do result, the accused will be held responsible, unless it was occasioned, not by the wound, but by grossly erroneous medical treatment."

So in the case at bar, as the direct injury caused by the negligence was not in any sense possibly fatal, Mella might have recovered in which case no death would have ensued and no cause of action would have arisen. However, as death followed, caused by paralysis of the heart, which was caused solely by the unnecessary administering of chloroform ("grossly erroneous medical treatment"), the injury in no way contributing to that result or to physical conditions which induced or aided in bringing about that result, the negligence of the defendant did not cause or produce the death, or even contribute to it. The jury was correctly charged that if it so found the facts then the negligence was not the proximate cause of the injury. The questions of fact were left to the jury.

It is not sufficient that the negligence produces a condition which opens the door to another cause. Daniels v. N. Y., etc., Railroad, 183 Mass. 397, 67 N. E. 425 (62 L. R. A. 751), where it is said:

"We are thus brought to the consideration of the question, which is often very difficult to decide, whether an essential condition precedent is the active, efficient, proximate cause of a subsequent event, or is only a producer of conditions which open the door to another cause which directly and actively produces the result."

In the case at bar the accident and injury, dislocation of the shoulder, were simply producers of conditions which opened the door, gave opportunity for the other, the efficient and sole cause of death, viz., the unnecessary giving of chloroform.

In Southern Railway v. Webb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109, it was held:

"But the better doctrine is believed to be that whether or not the intervening act of a third person will render the earlier act too remote depends simply upon whether the concurrence of such intervening act might reasonably have been anticipated by defendant."

In Seale v. Gulf, etc., R. Co., 65 Tex. 278, 57 Am. Rep. 602, it was held:

"If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authorities seems to be that the connection is not broken."

The intervening, efficient cause of death must be one reasonably to be anticipated.

In Stone v. Boston & Albany R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794, the railroad company was negligent in keeping barrels of oil on its station platform with rubbish, and in allowing both to become completely saturated with leaking oil. The plaintiff was a lumber dealer near by. One Casserly brought a load of freight to be shipped on a car standing on the track and, while at the platform on or engaged in his business, negligently threw a lighted match, with which he had lighted his pipe, under the platform, which immediately took fire, ignited the barrels of oil, which, exploding, scattered oil and fire, which almost immediately spread to plaintiff's premises, whereby his lumber and buildings were destroyed. Here the existing and continuing negligence of defendant was put in active operation by the negligent act of a third person rightfully on the premises of the defendant; but the act of Casserly, such third person, intervened between defendant's negligence and the fire and directly caused it. However, possibly and it may be probably, but for the defendant's negligence the fire which caused plaintiff's injury would not have occurred. The direct exciting cause which put the negligence in operation, made it an active injurious agent, was Casserly's negligence. The court held:

"According to this statement of the law, the questions in the present case are: Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable; that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable,

according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so. * * * Tried by this test, the defendant is not responsible for the consequences of Casserly's act. There was no close connection between it and the defendant's negligence. There was nothing to show that such a consequence had ever happened before, during the eight years covered by the plaintiff's testimony, or that there were any exciting circumstances which made it probable that it would happen. It was, of course, possible that some careless person might come along, and throw down a lighted match, where a fire would be started by it. This might, indeed, have happened upon the plaintiff's own premises, or in any other place where inflammable materials were gathered. But it was not according to the usual and ordinary course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff."

In Seifter v. Brooklyn Heights Railroad Company, 169 N. Y. 254, 62 N. E. 349, reversing 55 App. Div. 10, 66 N. Y. Supp. 1107, the deceased, by the negligence of defendant, sustained a simple fracture of the left fibula. Thereafter he died of septic pneumonia, as the jury found and as the evidence showed, which might have been caused directly by septic poisoning at the point of injury resulting directly from the injury. There was evidence of septic conditions, swellings, etc., in the limb, above the point of injury, not too remote in point of time to have been produced by septic conditions at that point; also of chills, etc., not too remote in point of time to have been caused by septic conditions of the fracture, if they ever existed. There was no evidence that a septic condition ever existed at the point of injury, except what might be inferred from the above facts and the fact that the cause of the septic conditions that did exist was not shown otherwise than by showing the fracture and that it might have caused septic conditions at the point of injury which, if they existed, would extend, etc. Experts expressed the opinion that the septic pneumonia which caused death was caused by the injury, but this was based on the theory that septic conditions did arise and exist at the point of injury of which, as stated, there was no evidence except surmise or guess or speculation, arising from the fact that such conditions sometimes arise from and are caused by such fractures. The court held that there was no evidence to support the finding of the jury that the negligence and injury was the proximate cause of the death. It adopted and reiterated the doctrine enunciated in Laidlaw v. Sage, 158 N. Y. 73, 99, 52 N. E. 679, 688 (44 L. R. A. 216):

"A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible. It is one which can be used as a term by which a proposition can be demonstrated; that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague, and indeterminate. * * * The proximate cause being given, the effect must follow. But although the existence of the remote cause is necessary for the existence of the effect (for unless there has been a remote cause there can be

no effect), still the existence of the remote cause does not necessarily imply the existence of the effect."

There the cause of death was septic pneumonia. This was the direct, immediate, efficient cause. If not cured, death followed as a necessary and probable consequence. But, given a fracture of the left fibula, and no such result follows, such a result is neither the natural nor the probable consequence. The existence of this fracture did not imply either the ultimate result, death, or the existence or causation of the immediate and efficient cause of death, septic pneumonia. If a septic condition grew out of the fracture, an unusual thing, not a natural and a well-known and probable result, then septic pneumonia might ensue and death result. Hence, in the absence of proof that such septic condition did exist or had existed at the point of fracture and thence extended to the lungs, the negligence and fracture stood as the remote cause, if any cause at all, while septic pneumonia, not a natural or probable result of the fracture, stood alone as the active, efficient, proximate cause of death.

Apply the rule in the case before this court. Death is the injury complained of. This death was caused by paralysis of the heart, which was directly caused by chloroform, which was unnecessarily given by an attendant in the Emergency Hospital to which Mella was taken for treatment. Here is the direct, immediate, efficient cause, the unnecessary act of the person or persons at this hospital. Death is a natural and, we assume, a probable consequence of such act. Given that cause and death follows. But, given a dislocated shoulder and death does not follow in any event even if the dislocation is not reduced. Neither the unnecessary giving of chloroform, nor chloroform poisoning, nor paralysis of the heart, caused by such unnecessary act follows as a necessary or probable result of the dislocation and necessary or proper surgical treatment. The eixstence of this dislocation did imply necessary surgical treatment for its reduction. That was a necessary and probable consequence, not to save life, however; but it did not imply the unnecessary giving of that dangerous drug chloroform, which, being unnecessary, was therefore not necessary, or proper, or such as must be, or such as could not be otherwise, or what could not be omitted, or what was, in such a case, indispensable, requisite, essential, needful, or required, and therefore a natural and probable consequence of the dislocation. Hence the negligence and dislocation stand as the remote cause of death, while the unnecessary giving of chloroform stands as the proximate cause thereof. In short, the fact and finding of the jury was that it was "unnecessary." Here, at the point prior to the giving of the chloroform, in considering what was reasonably necessary and probable, what was reasonably to be apprehended as a result or consequence of the negligence, in view of what followed, all idea of necessity ends so far as the actual cause of death is concerned. All that occurred thereafter, except the mere reduction of the dislocation, was unnecessary, not a natural and a probable train and succession of events following from the negligence and dislocation.

The court charged that if the primary injury and necessary treatment had anything whatever to do with causing the chloroform to cause paralysis of the heart and death, then the negligence was the

proximate cause of death. The verdict determined that it did not. There is no pretense that the act of reducing the dislocation produced or had anything to do with producing the paralysis of the heart. Neither the dislocation nor the necessary surgical treatment implied either the ultimate result, death, or the existence and causation of the immediate and efficient cause of death, paralysis of the heart caused by the unnecessary giving of chloroform. To repeat, such act, the sole cause of death, was improbable, unnatural, one not reasonably to be apprehended. Given, the negligence, the dislocation, the hospital, the surgeon and attendants, and necessary and proper treatment, and all that followed was unnecessary, unnatural, improbable, something that could not have been foreseen or reasonably anticipated in the light of the attendant circumstances. It was to be presumed and anticipated that the attendants and surgeons at the hospital would do their duty, do only what was necessary, and that they would not do a dangerous thing unnecessarily. And it is immaterial that the doing of the necessary act, the mere reduction of the dislocation, a simple act that was in no way dangerous or productive of the consequences that followed, was performed while Mella was unconscious and probably dying from the effects of the unnecessary and dangerous act which immediately preceded it. It was the unnecessary act solely which caused paralysis of the heart and death, as the evidence showed and the jury found.

Again, it may be reasonably said that the concurrent negligence of the defendant and of the decedent united to cause death. If Mella was responsible for the unnecessary and dangerous act of the surgeon and attendants in unnecessarily giving the chloroform, this is clearly so, and plaintiff cannot recover. Rider v. Syracuse R. T. Co., 171 N. Y. 139, 153, 154, 63 N. E. 836, 58 L. R. A. 125. Mella, not the defendant, selected the hospital and submitted himself to the surgeon of his own selection. If that surgeon unnecessarily gave him chloroform, it was clearly a negligent and dangerous act which imperiled Mella's life and actually caused his death. The negligence of the defendant made it necessary for Mella to go to a surgeon, but it did not make it necessary or even proper for that surgeon to unnecessarily give that chloroform. For that unnecessary act the defendant is in no way responsible. Defendant did not invite it, or have any reason to apprehend it. But if defendant's negligence made it necessary for Mella to expose himself, take chances, still Mella's agent, selected by him, committed the unnecessary and dangerous act which solely caused the death, and defendant is only responsible for the consequences of such chances as Mella necessarily took in submitting to proper and necessary treatment; such chances as the defendant should reasonably have apprehended; such as were reasonably probable. In the Rider Case, 171 N. Y., at page 153, 63 N. E., at page 840 (58 L. R. A. 125), the court says:

"There must undoubtedly be a causal connection between the negligence of the injured party and the injury itself, but his fault is deemed to be the juridical cause of the injury when it consists of such an act or omission on the part of a responsible human being as in ordinary and natural sequence immediately results in such injury. This is what is meant by the term 'proximate cause' in any inquiry as to the connection of the negligent act with the resultant injury. We may not confound the act with its execution, nor the

entire act with the last part or the final consummation, and by that means make the immediate cause the remote cause. Wharton on Neg. 1874, §§ 73. 155, 323. The defendant's responsibility could not have been determined by looking merely at the consummation of the injury, but the transaction should be viewed in its entirety, and if the deceased was guilty of negligence its effect upon the right of action could not be eliminated from the case after the first contact of the car with the wagon. We recognize fully the force of the rule that the negligence of the injured party is no defense to an action in his behalf when such negligence is connected with the accident only in some remote way and is not a proximate concurrent cause."

In short, I am of the opinion that when one person is injured by the negligence of another, and such injury is in no event fatal, the negligent party cannot be held liable for the consequences of the unnecessary and dangerous acts of the surgeon employed by the injured party, even when done in the course of or in connection with necessary surgical operations. The negligent party is responsible for all errors of judgment, mere mistakes and errors, assuming there is no negligence in employing an incompetent surgeon.

In Searles v. Manhattan R. R. Co., 101 N. Y. 661, 5 N. E. 66, approved in Laidlaw v. Sage, supra, it is held that in an action to recover damages for defendant's negligence, if "it appears that the injuries were occasioned by one of two causes, for one of which the defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause; if under the evidence it is just as probable that it was caused by the one as by the other, he cannot recover." So here, unless defendant was responsible for the unnecessary giving of chloroform which all the physicians said caused the death, assuming there was any other possible cause, as the jury found that the unnecessary giving of chloroform was the sole cause, the plaintiff's case fails. In the following cases there was negligence, injury, and death. The immediate cause of death was disease, pleurisy, tuberculosis, grippe, drowning, consumption, delirium tremens; but there was evidence, where recovery was permitted, that these diseases followed as a natural and probable consequence of the injury, and that there was an unbroken connection between the accident and injury and the disease and death, all of which the court said must be shown: Sallie, etc., v. N. Y. C. R. Co., 110 App. Div. 665, 97 N. Y. Supp. 491; McCafferty, etc., v. Pennsylvania R. R. Co., 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690 (proximate cause, grippe, or injury received, left to the jury); Weber, etc., v. Third Ave. R. Co., 12 App. Div. 512, 42 N. Y. Supp. 789 (verdict set aside); Turner, etc., v. Nassau Elec. R. Co., 41 App. Div. 213, 58 N. Y. Supp. 490; Hoey, etc., v. Met. St. R. Co., 70 App. Div. 60, 74 N. Y. Supp. 1113 (verdict set aside); Bruss, etc., v. Met. St. R. Co., 66 App. Div. 554, 73 N. Y. Supp. 256; Beauchamp, etc., v. Saginaw Mining Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; Koch, etc., v. Zimmerman, 85 App. Div. 370, 83 N. Y. Supp. 339.

In the Koch Case there was an injury to the head sufficient to cause death, but the plaintiff's intestate was found in the river, from which immersion he took cold and died from acute lobar pneumonia. It was not shown that he fell in the river because of the injury to the head. He would have died from the injury, but as the death

which did occur from another cause, one in no way induced by the injury, except as it weakened his physical condition, anticipated that which would have occurred from the injury, it was held that the injury did not cause death. The case is very much in point here. If a defendant is not responsible for the death of a person fatally injured by his negligence in a case where the fatal result is anticipated by some act of the injured party, or of a third party, not shown to be due to or induced by the negligence, as clearly he is not, how can a defendant be held liable for the death of a person injured by his negligence, such injury being in no way dangerous to life, on the ground that a surgeon, employed by him to treat the injury, unnecessarily gives him a dangerous drug which solely causes death? It would seem to reduce the whole question to the single proposition:

"Is a defendant who negligently injures another, the injury not being fatal, responsible for the fatal consequences of the unnecessary and dangerous acts of a surgeon employed by the injured party to treat such injury which fatal consequences flow solely from the unnecessary act; such unnecessary act having been performed in connection with the treatment?"

As such results are not the natural and probable consequences of the negligence and primary injury caused thereby, as reasonably to be anticipated, I am satisfied that the jury was properly instructed, and that the verdict should stand.

At a later stage the question of the defendant's responsibility for the death of Mella was raised in a different form. The fourth juror asked:

"I don't wholly grasp your honor's meaning. If, for example, it was assumed that the anæsthetic in this case, or if it were assumed that the doctor, a regular licensed physician, had improperly administered chloroform and had killed this man, would that be in connection with the original injury, or would the two be separate affairs?"

The court said:

"If at that hospital the doctor unnecessarily, carelessly, and negligently gave that man chloroform, and they carelessly and negligently neglected to take care of him and watch him and bring him out, and it solely caused death, then it is their independent act, for which this defendant is not responsible. That would be the independent act of a third party, causing the death, because you see the defendant here is not responsible for the intervening acts of a responsible third party, which came in and solely caused death."

The plaintiff's then counsel, Mr. Walsh, took an exception, and said:

"Mr. Walsh: I ask your honor to grant me an exception to that, and I ask your honor to charge that if an injury resulted to Mr. Mella by falling into the hole on the steamship Northwest, and the jury be satisfied that the defendant was guilty of negligence, and that the plaintiff was free from contributory negligence—

"The Court: The plaintiff's intestate?

"Mr. Walsh: The plaintiff's intestate was free from contributory negligence in falling into that hole, and if the injury which Mr. Mella received was such that it was proper for him to consult a physician and submit to medical treatment, and he did, and exercised the carefulness of an ordinary prudent man in selecting such physician or surgeon, and that through the carelessness and negligence of the said physician or surgeon death resulted that the defendant would not be discharged; that the negligent act of the said physician or sur-

geon would not be such an independent, intervening cause as to debar the plaintiff from recovery.

"The Court: I decline to charge that, and I will say that it would be an independent act of a responsible third person if that negligence and carelessness, as I have described it in what I have said, solely caused death, because in that event the fact that he was injured, the fact being that that was not a fatal injury, would not be the producing cause of the death. The producing cause would be the independent act of a third person, the wrong of a third person, which this defendant would not be responsible for. I will give you an exception."

The request presented the proposition that suffering as Mella was from a dislocation of the shoulder, not in any event fatal, the defendant was responsible for his death, if, having exercised proper care in selecting a physician, death resulted from the carelessness and negligence of such surgeon or physician. The court had just charged:

"If at that hospital the doctor unnecessarily, carelessly, and negligently gave that man chloroform, and they carelessly and negligently neglected to take care of him and watch him and bring him out, and it solely caused death, then it was their independent act, for which this defendant is not responsible."

The refusal to charge as requested was qualified, and, in substance, the charge was that, if the death was caused solely by the carelessness and negligence of the physician, then defendant was not responsible for such death. The court had charged that the defendant was not relieved from responsibility for the death of Mella, if the injury had anything to do with causing such death, even if the surgeon was careless and negligent in his treatment, but charged that the defendant was not responsible for the death if the careless and negligent treatment solely caused death.

The plaintiff's counsel was insistent in urging that the defendant was responsible for the malpractice of the physician or surgeon and immediately followed what has just been stated by requesting the court to charge that. The court refused, and said:

"I charge you as I have charged before. I cannot charge that as a proposition of law as stated, but I charge you this: That if the act of those physicians and surgeons in giving unnecessarily this chloroform, or giving it necessarily and properly, and then by their affirmative negligence and carelessness, want of attention, amounting to wrong on their part, solely caused this man to die under its influence, that then that was the independent act of a third party, causing death, for which this defendant is not responsible," etc.

This presents the bald proposition:

"Is a defendant who by his negligence, not wanton or willful, injures another, not fatally, responsible for the death of the person so injured caused solely by the carelessness and negligence of the physician selected by the injured person to treat the injury?"

Mistakes and errors by physicians in giving treatment are one thing; negligence and carelessness solely causing death are quite another. I have yet to learn that negligent persons, who by their negligence inflict injuries, not in any event fatal, on others, are responsible for the death of such injured persons caused solely by the negligence and carelessness of the physician called by the injured preson, provided he exercises due care in the selection. To so hold would be to say that

the negligent and careless treatment of a patient by a physician or surgeon and resulting death is the natural and probable consequence of being careless and injuring a person by such negligence. This is not the law. Wade v. City of Mt. Vernon, 123 App. Div. 796, 108 N. Y. Supp. 241, and numerous cases cited.

It is urged that there was error in what was said as to the negligence of the independent contractor. The court repeatedly and from first to last charged that the defendant was liable if it was negligent in not properly guarding or lighting the hole where Mella was injured, assuming that Mella was free from contributory negligence, and that the injury was a contributory cause of death; and, also, that the duty of guarding and lighting the hole could not be delegated, so far as Mella was concerned, even to an independent contractor. There was evidence that an independent contractor had charge of the vessel and of the repairs and changes being made. There was evidence, not contradicted, that after the hole was cut it was securely covered and protected, except when the workmen were at work at and in it. The evidence was uncontradicted that at the time Mella stepped in the hole in the deck two men engaged by the independent contractor were seated in the hole, three feet long and two wide, about, engaged in putting up a guard rail around it. To enable them to do this, they had necessarily removed the cover. The plaintiff's counsel said:

"May I have an exception to your honor's charge to the jury some few minutes ago on the assumption that it was unnecessary for the defendant to furnish any other guard when there were two workmen there?"

In reply the court said:

"I leave it to the jury. I leave it to their common sense and intelligence to say whether with a hole three feet long, if two men were working in it, that that was or was not guard enough. Was it negligence of defendant, if defendant did not put up a rail on the outside?

"Mr. Walsh: My point is that it is an exception to the charge on the facts, stating the facts and including a statement that there would be noise from the work that they were doing; it not appearing that there was any noise.

"The Court: I don't know that they said there would be, in drilling into iron, any noise. I will leave that to the jury."

Before that the court had said on the same subject:

"The Court: They could not delegate their duty of due care. The proposition is this: That the defendant should not be held liable in this case for the negligence of an independent third party with which the defendant was not connected at all. Coming back to that subject, gentlemen, in order that you may clearly understand, of course, on the question of a guard, would you expect, would reasonable men expect, that workmen that worked in that hole, if they were sitting in it—is not that guard enough, using your own common sense? A hole three feet long and two feet wide, with two men at work on the edge of it and partially in it, their bodies extending above it, and they are there at work, the machinery making a noise, and if anybody can see at all by looking, could they put up a guard there that would be more efficient than that? Of course, I leave it to you. They had a right to put up their railing. Of course, they were bound to exercise ordinary care in doing it, reasonable care, so that other people should not be injured. If they had cut a hole there and had gone off and left it uncovered in a darkish place, and somebody had come along and stepped into it, it would be a different proposition entirely. So that you should take all the evidence; and this defendant, of course, was under obligations to use precautions, such as would be expected

of an ordinarily reasonable, prudent, careful person in those regards; but it was not under obligation to stop work there, to cease work."

This is the charge as finally given on that subject, and modified what the court had before inadvertently said in reply to a request to charge. And before that the court had said in regard to the duty of defendant to guard the hole:

"All of that, gentlemen, appeals to your common sense and good judgment, because while this defendant was under legal obligation to provide a safe place for passengers and its employés in which to do their work, and to exercise reasonable care commensurate with the dangers—extraordinary care it might be under certain circumstances—to have a safe place and things in safe and proper condition, still it was not bound to have its vessel in any such condition as that before its employés went on board, if they knew it was not in that condition, if they had warning and knowledge that it was still undergoing repairs and changes and went on board with that understanding and with that knowledge. * * * There is evidence, and so far as I know it has been uncontradicted, that there was provided for that hole, when they were not working at it, a cover which completely covered it and protected all persons moving there from falling into it. Is there any evidence that it was ever left uncovered or unguarded when people were not at work at the hole, in or about it? * * * Now, gentlemen, if two men were there, seated in that hole, engaged, with the light that was there, with this machinery that they have described, in drilling holes in that floor, with light enough to see, can you find that there was any negligence on the part of the defendant in having the hole there, with those two men there in it, seated on its edges, engaged in work? Was any other guard required, anything else necessary that a reasonable man in the exercise of reasonable care would have been required to do to give notice to any one coming along in the passage that there was a place that they must look out for? Did the defendant neglect any duty it owed to its employés which it had invited on that boat at that time? * * * So, gentlemen, you must find, in order to enable the plaintiff to recover, either that the defendant was negligent at that time in not properly guarding that hole, or that it was negligent in not properly lighting that passage."

I find no prejudicial error.

The motion for a new trial is denied.

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## SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CITY OF MOBILE et al.

(Circuit Court, S. D. Alabama. May 2, 1907.)

No. 257.

1. TELEGRAPHS AND TELEPHONES — RIGHTS IN USE OF STREETS — NECESSITY OF LEGISLATIVE GRANT.

A telephone company cannot lawfully occupy the streets of a city with its poles and wires without legislative authority, granted directly by the Legislature or by the municipality in pursuance of express or implied power delegated to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 6.

Rights of telegraph and telephone companies to use of streets, see note to Southern Bell Telephone Co. v. City of Richmond, 44 C. C. A. 155.]

2. SAME—CONSTRUCTION OF STATUTE—"HIGHWAYS."

Code Ala. 1896, § 2490, which provides that "the right of way is granted to any person or corporation having the right to construct telegraph or

telephone lines within this state to construct them along the margin of public highways," confers upon a telephone company the right to construct its lines in the streets of a city, which are "highways" within the meaning of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 6.

For other definitions, see Words and Phrases, vol. 4, pp. 3291-3306; vol. 8, p. 7678.]

3. MUNICIPAL CORPORATIONS—POWER TO GRANT RIGHT TO USE STREETS—TELEPHONE COMPANIES—CONTRACT.

A city given by its charter power to establish and regulate sidewalks, streets, and avenues and appurtenances or appendants thereto, has implied authority to grant the right to a telephone company to use its streets at least to such extent that an ordinance granting such right, accepted and acted on by the company, creates a contract which is binding on the city itself, whatever may be its effect on the rights of others.

4. TELEGRAPHS AND TELEPHONES—NATURE OF RIGHT GRANTED.

A right of way upon a public street granted to a telephone company, whether by a Legislature or city council, is an easement and as such is a property right entitled to all the constitutional protection afforded other property and contracts and of which the company cannot be deprived except by due process of law.

5. INJUNCTION—RESTRAINING ACTION BY CITY—INTERFERENCE WITH PROPERTY RIGHT.

An injunction will be granted to restrain a city from removing the poles and wires erected in its streets by a telephone company under lawful authority, in the exercise of its police powers, and without a judicial determination that they constitute an obstruction which interferes with the safety or convenience of ordinary travel.

In Equity.

Hunt Chipley and McIntosh & Rich, for complainant.
B. B. Boone, for defendants.

TOULMIN, District Judge. The pleadings in this case are: The bill of complaint, the motion of defendants to dismiss the bill for want of equity, the defendants' demurrer to the bill, and their answer to the bill. The case is now submitted on complainant's motion for an injunction pendente lite, and on defendants' motion to dismiss and their demurrer to the bill.

The bill alleges, substantially, that complainant is conducting its business in the city of Mobile under and by authority of the general laws of the state of Alabama and of two ordinances adopted by said city, one on December 13, 1889, and the other on June 24, 1901, and which are claimed by complainant as contracts between it and said city. Said ordinances are attached to the bill as parts thereof, and marked "Exhibits A and B," respectively. The first section of the ordinance of December 13, 1889, is as follows:

"Be it ordained by the mayor and general council of the city of Mobile, that the Southern Bell Telephone & Telegraph Company, their successors and assigns, be and are hereby granted right of way for erection and maintenance of poles and wires with all appurtenances thereto for the purpose of transacting a general telephone and telegraph business, through, upon and over the streets, alleys and public grounds of the city of Mobile, provided, that said company shall at all times when so requested by the city authorities permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires which may be necessary for the use of the police or fire department of the city of Mobile, and further provided, that such poles and

wires shall be erected so as not to interfere with ordinary travel through the streets and alleys."

The ordinance of June 24, 1901, contains, among other things, the following:

"Section 1. Be it ordained by the mayor and general council of the city of Mobile, Alabama, as follows: That permission be and the same is hereby granted to the Southern Bell Telephone & Telegraph Company, its successors and assigns, to put down underground conduits, pipes or tubes, and operate and maintain cables, wires and electrical conductors through them, under the streets, sidewalks, public places, alleys or lanes of the city of Mobile, Alabama.

"Sec. 2. Be it further ordained, that the work of putting down underground conduits, sub-ways or pipes, in the area described as follows: Upon all streets embraced within that portion of the city of Mobile commencing at the foot of Church street at the Mobile river and running westwardly including both sides of Church street to Jackson street, thence northwardly along both sides of Jackson street to St. Louis street, thence eastwardly along both sides of St. Louis street to the Mobile river, the said Mobile river being the eastern boundary of said district, shall begin within six (6) months from the passage of this ordinance, and shall be completed within eighteen (18) months and that underground cables, wires and electrical conductors shall be drawn in same and be in operation, and all their poles now standing in said area, except those necessary for the distribution from an underground system, shall be removed from the streets within eighteen months from the passage of this ordinance. The said company, its successors and assigns, are hereby granted permission to set poles, with the necessary fixtures and electrical conductors, along and over the public streets, highways, alleys and lanes of the city of Mobile, Alabama, outside the area above described as its business may from time to time require, provided that all poles shall be neat, symmetrical and painted, and that no electrical conductor shall be placed less than twenty-three (23) feet above the surface of the ground, and iron steps shall not be placed less than eight (8) feet above the surface of the ground."

"Sec. 5. Be it further ordained, that in consideration of the rights and privileges herein granted, said company shall provide one cross-arm on each pole and space not to exceed one duct in the sub-ways constructed by virtue of this ordinance, for the free use of the police and fire alarm system of the city of Mobile, Alabama.

"Sec. 6. Be it further ordained, that the said company shall, at all times, be subject to the city ordinances now in existence, or may be hereafter passed, relative to the use of public streets by telephone and telegraph companies.

"Sec. 7. Be it further ordained, that nothing in this ordinance shall be held or construed as abridging any power the city now has, or may hereafter acquire, to require all electrical poles upon any street, alley or public place from being put under ground."

The bill alleges: That all the poles owned, used, or controlled by complainant have been erected over and along the various streets of said city and are maintained strictly in accordance with the terms and conditions of said ordinances; that said city has been given the free use of all the poles of complainant erected in said streets for its fire and police alarm wires, as well as a large number of telephones in the conduct of the public business of said city, in accordance with the provisions of said ordinances and in consideration of the rights and privileges thereby granted to complainant.

The bill also alleges that on June 24, 1901, the city of Mobile, through its general council, adopted an ordinance, being Exhibit C attached to the bill, containing, among other things, the following provisions:

"Sec. 2. The city electrician is hereby authorized, empowered and directed to superintend and determine the proper placing and adjustment of all wires

or appliances for the transmission of electric currents, and in accordance with the provisions of the following sections of this ordinance, and in such manner as shall minimize the liability of accident, fire or damage to life or property. He shall further be required to superintend, manage and operate the fire alarm and police telegraph systems; to attend all fires which occur in the city, with proper appliances for cutting wires and moving same to afford protection as far as possible to property and the lives of persons."

"Sec. 5. It shall be the duty of the city electrician to so direct the placing of poles and wires in the streets, alleys and public places of the city that the same shall cause as little obstruction as possible, either to public travel on such thoroughfares or to the private use and enjoyment of adjacent property. It shall also be his duty, and he shall have authority, to compel, the removal of superfluous poles."

"Sec. 7. It shall be the duty of the city electrician to so direct the placing, stringing and attaching of wires upon poles erected in the streets and alleys of the said city, that the same shall cause as little obstruction, either to travel in the streets or to the use and enjoyment of private property as possible; to compel the joint use of the poles wherever practicable; and in case the joint users of any such pole are unable to agree on such joint use or the rental to be paid the owner of such pole for such use the city electrician and board of public works shall fix such rate, which shall be binding upon the parties and companies interested; provided, that either party may appeal from the decision of such electrician and board as to such joint use or the amount of rental to be paid for the use of any such pole for the privilege of attaching wires thereto, to the general council of the city of Mobile."

It alleges that the board of public works referred to in said ordinance has no right, power, or authority conferred upon it, by the act creating it, to deprive complainant of its property without due process of law, or to require it to abandon its property which was being used in the conduct of its business in said city, and it alleges: That among the large number of poles erected by it along and over the streets of said city it had four poles on the east side of Claiborne street between Saint Anthony and Congress which were originally put there some eight or ten years ago, and have since that time been constantly used by complainant in its business. That said board of public works a few days prior to February 7, 1907, made an order in words and figures as follows:

"It is hereby ordered by this board that the Southern Bell Telephone & Telegraph Company shall remove their poles from said street and shall make joint use of the said four poles erected by the Home Telephone Company, by placing on each pole as many cross-arms, not exceeding six, as said Southern Bell Telephone & Telegraph Company may consider expedient in its business, together with such number of wires and cables as will be properly accommodated by six cross-arms, and the Southern Bell Telephone & Telegraph Company is hereby authorized and directed to erect its cross-arms, wires and cables on said four poles of the Home Telephone Company under the direction of the city electrician. It is further ordered that if said Southern Bell Telephone & Telegraph Company has not complied with this order within thirty days from this date, that the city electrician shall thereupon remove from said portion of Claiborne street the wires, poles and cross-arms of the Southern Bell Telephone & Telegraph Company."

That defendant Lyons, assuming to act for said board, and as mayor of said city, to enforce said ordinance of June 24, 1901, hereinbefore referred to as "Exhibit C," and the order of said board, did on March 29, 1907, direct the said city electrician, Thomas H. Chamberlain, to cut down and remove said four poles on Claiborne street, and that

said Chamberlain did cut down and remove the wires of complainant from said poles and cut down said poles, thereby destroying complainant's said property.

The bill further alleges: That when compainant undertakes, as it has a legal right to do, to replace its said poles, it will be interfered with and prevented from doing so by the defendants unless they are restrained by this court; that said ordinance of June 24, 1901, referred to as "Exhibit C," is void and of no effect, in so far as it undertakes to authorize said city electrician or said board of public works to require complainant to remove its poles from the streets of said city, and also so far as it undertakes to authorize said electrician or said board of public works to remove said poles from said streets. And the bill alleges that said board of public works has made other orders under said ordinances and threatens to interfere with the wires and poles of complainant at other places in said city, to the irreparable injury of complainant.

The bill prays an injunction against the city of Mobile, its officers and employés, said Patrick J. Lyons, as mayor of said city of Mobile, the board of public works of said city, and said Thomas H. Chamberlain, electrician of said city, restraining them from interfering with the property of complainant in said city, its wires and poles, and any and all apparatus constituting its telephone plant and system in said city, and that they be restrained from interfering with complainant, its servants and employés, in replacing its poles on the east side of said Claiborne street, and that said ordinance referred to as "Exhibit C," so far as it undertakes to authorize or empower the defendants to interfere with the poles, wires, or other apparatus constituting the telephone plant of complainant in said city, as the same is now established and maintained under the said ordinances, be declared null and void, with a prayer for general relief.

The answer of defendants is, in substance: That said ordinance of December 13, 1889, is null and void because the city of Mobile, under its charter then in force, had no authority to grant any right or franchise in the streets within the limits of said municipal corporation; that it was authorized to provide police regulations only; that it had no power, express or implied, conferred on it by the Legislature of Alabama, to grant rights of way or franchises to persons or corporations to use its streets; and that the maintenance by complainant of its poles and wires upon the same is without lawful authority and is a public nuisance per se.

The answer further is that the ordinance of June 24, 1901, referred to as "Exhibit B," is null and void because complainant did not make publication of the application to the general council of said city for the passage of said ordinance, and did not file with the clerk of said city any proposal of percentage to be paid for the use of the streets for the grant of the right of way claimed, which defendants say were, by the charter of said city then in force, prerequisites to the validity of said ordinance, and therefore defendants say no right or authority exists in complainant to erect or maintain its wires or poles in said streets. Wherefore they claim that said city has the right and power to remove said poles as a public nuisance per se.

No telephone company can lawfully occupy the streets of a city with its poles and wires without legislative authority granted directly by the Legislature, or by the municipal authorities in pursuance of express or implied power delegated to it. The authority to consent to the use of the streets of a city by a telephone company resides primarily in the Legislature of the state, but may be delegated to the municipality directly concerned. City of Knoxville v. Africa, 77 Fed. 501, 23 C. C. A. 252; Board of Mayor, etc., v. East Tenn. Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

We will first inquire as to the origin and nature of the right or privilege claimed by the complainant; second, whether the ordinance of June 24, 1901, referred to in the bill as "Exhibit C," thereto attached, operates as an interference with it; and, third, whether the court of equity has the jurisdiction to interfere by the aid of injunctive relief.

The basis of complainant's alleged right is the statute of the state of Alabama. That statute provides that "the right of way is granted to any person or corporation having the right to construct telegraph or telephone lines within this state to construct them along the margin of public highways." Code Ala. 1896, § 2490.

It appears that the municipality of Mobile had no express authority conferred upon it by its charter in force on December 13, 1889, to grant rights of way or franchises through or over its streets, and it is contended by defendants that as the city had no such express authority the ordinance passed by its general council on December 13, 1889, granting to complainant the right of way for the erection and maintenance of poles and wires, with appurtenances thereto, for the purpose of transacting a general telephone business, through, upon, and over the streets of said city, was null and void. If said ordinance was void as a grant of a franchise for the reason stated, yet it can hardly be questioned as giving consent by the city to the use of its streets by the complainant for the purposes therein mentioned, and I think was effective as a contract between the city and complainant, as I will hereinafter more particularly consider.

The defendants further contend that the complainant can claim no right under the state statute referred to, because they say that the term "highways" used in the statute refers to rural highways only, and does not embrace city streets. "By statute in most of the states, telegraph and telephone companies are given the right to construct their lines over the public highways. * * * The term 'Highways' embraces city streets within the meaning of the statutes conferring upon telegraph and telephone companies the right to occupy the public highways of the state, unless a different intent is clearly indicated. * * * As a general rule, such companies are given by statute the right to occupy all streets and highways, but it is made the right and duty of each municipality to fix the terms and conditions upon which its own streets may be used." 27 Am. & Eng. Encyc. of Law (2d Ed.) 1006.

In Dillon on Corporations, it is said:

"Sec. 518. Public streets, squares, and commons, unless there be some special restriction when dedicated or acquired, are for the public use; and the use is none the less for the public at large as distinguished from the municipality,

because they are situate within the limits of the latter, and because the Legislature may have given the supervision and control of them to the local authorities. The Legislature of the state represents the public at large, and has full and paramount authority over all public places. 'To the commonwealth here,' says Chief Justice Gibson, 'as to the king of England, belongs the franchise of every highway, as a trustee for the public; and streets, regulated and repaired by the authority of a municipal corporation, are as much highways as the rivers, railroads, canals, or public roads, laid out by the authority of the quarter sessions.'

"Sec. 519. By virtue of its authority over public ways, the Legislature may authorize acts to be done upon them, or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies, to use or occupy the streets and highways for their respective purposes. And it may be here observed that whatever the Legislature may authorize to be done is, of course, lawful, and of such acts, done pursuant to authority given, it cannot be predicated that they are nuisances; if they were such without, they cease to be nuisances when having the sanction of, a valid statute."

Municipal corporations constitute a part of the civil government of the state, and their streets are highways. N. O. Gas Co. v. La. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Abbott v. City of Duluth (C. C.) 104 Fed. 833.

If the word "highways," in its ordinary and legal significance, includes streets, and there are no other words in the statute under consideration to lessen or limit its meaning, it is held that the word includes urban as well as rural highways. There is nothing in the subject-matter of the statute of Alabama that is inapplicable to urban highways. Abbott v. City of Duluth, supra. I therefore hold that the state of Alabama, by the statute referred to, granted to complainant the right of way on the streets of the city of Mobile for the purpose of constructing thereon its telephone lines.

Moreover, my opinion is that the city had, under its charter in force on December 13, 1889, implied power to grant the right of way to complainant, as by the ordinance of that date. By its charter, authority was delegated to it to establish and regulate sidewalks, streets, and avenues, and appurtenances or appendants thereto. I think the city is given, by its charter, general control over its streets. Sections 20 and 21, Charter of December 10, 1886.

The power to grant a right of way through the streets of a town may be implied from a grant of general control over its streets. Board of Mayor v. East Tenn. Tel. Co., 115 Fed. 304, 53 C. C. A. 132; Pike's Peak Power Co. v. City of Colorado, 105 Fed. 2, 44 C. C. A. 333.

The Supreme Court of Missouri, in State v. Murphy, 134 Mo. 562, 31 S. W. 786, 34 L. R. A. 369, 56 Am. St. Rep. 515, said:

"Under its general powers to regulate the use of streets, the city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone, or electric light wires upon poles above the surface or through conduits beneath the surface of the streets, provided such structures and mechanical appliances do not materially interfere with the ordinary uses of the streets and public travel thereon."

Dillon on Municipal Corporations, § 575, says:

"The ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit or refuse the use of the streets within their limits for such purposes."

The purposes spoken of were the use of the streets by street railways.

I know of no decision to the contrary, and none has been brought to my attention except the case of L. & N. R. R. Co. v. M. J. & K. C. R. R. Co., 124 Ala. 162, 26 South. 895, which has been cited on the proposition by the defendants. I do not think that case militates against the doctrine in the authorities referred to by me. The case in 124 Ala. 162, 26 South. 895, was where the city of Mobile, without express legislative authority, had granted to defendant a franchise upon and along Water street in said city to construct and operate its railroad as a common carrier. The plaintiff was the owner of abutting land on said street and of land at the foot of the south terminus of said street, over which street and land at the terminus thereof defendant proposes to construct its said railroad, track, etc., without condemnation proceedings or just compensation to plaintiff. It was averred that the building and operation of the railroad materially obstructed said street as a public highway and constituted a public nuisance in said street. It was also averred that the action of defendant was under a pretended franchise from the city of Mobile granting it the right to construct and operate its said railroad. The court said that the case was that of an adjacent proprietor asking to enjoin a defendant from permanently obstructing a public street in such manner as to impair the usual and customary use of the same by the public and of special injury and damage to the plaintiff, and the court held that an unauthorized construction of a railroad in a street is a public nuisance that may be enjoined, and that a bill may be filed therefor by any person who would sustain special injury on account of the nuisance; and further held that, in the absence of express power conferred by the Legislature, a municipal corporation has no authority to grant a franchise of its public streets for railroad purposes and uses. The court cites, among others, Perry v. N. O., M. & C. R. R. Co., 55 Ala. 426, 28 Am. Rep. 740; Stowers v. Postal Tel. Cable Co., 68 Miss. 559, 9 South. 357, 12 L. R. A. 864, 24 Am. St. Rep. 290; Theobold v. L., N. O. & T. R. R. Co., 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564.

In the Perry Case, the Supreme Court of Alabama decided that a municipal corporation cannot, in the absence of express legislative authority, allow its streets to be used for the purpose of laying tracks across and through them by a railroad company, *to the injury of the proprietor of the adjacent lands.* (Italics mine.)

The case in 68 Miss. 559, 9 South. 357, 12 L. R. A. 864, 24 Am. St. Rep. 290, was a suit by an abutting property owner to enjoin a telegraph company from erecting its poles in front of complainant's property. The court held that the authority granted by the municipality would protect the company in its interference with the rights of the public which it represented by the local authorities, but it cannot operate to withdraw from the complainant his right of property and confer it upon the company. To the same effect is the case of Theobold v. L., N. O. & T. R. R. Co., 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564.

As I understand these decisions, the substance and effect of them are that a municipal corporation cannot, in the absence of express legislative authority, allow its streets to be used by a railroad company for the purpose of laying its roadbed and track to the injury of the adjacent owners. And such, I think, is the substance and effect of the decision in L. & N. R. R. Co. v. M., J. & K. C. R. R. Co. It is true that in the course of the opinion the court quotes from the city's charter of February 6, 1895, this language, "It may also make ordinances concerning the rights of way, regulation of street cars, street railways, and all other railroads," and says this would seem to exclude the idea of the grant of new rights of way, but restricts the power concerning such rights of way as already exist. The cases cited are, I think, clearly distinguishable from, and inapplicable to, this case. Here the city has granted the right to the use of its streets under one ordinance. It has, under another, given its permission for their use by the complainant, and it is now seeking to destroy or to impair that right, and that notwithstanding there were considerations for such grant, which have been complied with.

The defendants further contend that the ordinance of June 24, 1901, Exhibit B, is null and void because they say that complainant did not make publication of its application for the passage of said ordinance, or propose to pay a percentage for the use of the streets therein granted to it, as was required by the charter of the city of Mobile. It is enough to say, in answer to this contention, that there is nothing now before the court to show that an application for any right or permission granted by said ordinance and involved in this suit was made by the complainant. For aught that now appears, the permission therein granted to set poles with the necessary fixtures, along and over the the streets of the city outside of a certain area therein described, was given without application, but voluntarily by the city in consideration of the complainant's providing poles, space, and cross-arms for the free use of the police and fire alarm systems of said city, as is stipulated for in said ordinance. That part of the ordinance granting permission to the complainant to put under ground its pipes, wires, etc., is in no way involved in this litigation. However, from the view I take of this case, further consideration of said ordinance is unimportant.

There is another proposition in this case to which I will advert for a moment, and that is that:

"A city has two classes of powers: The one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality."

In the exercise of the powers of the former class, it is governed by the rule invoked by the defendants in this case. "But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation." Illinois Trust & Savings Bank v. City of Arkansas, 76 Fed. 271, 22 C. C. A.

171, 34 L. R. A. 518, and authorities therein cited; Pike's Peak Power Co. v. City of Colorado, supra; Safety In. W. & C. Co. v. Mayor, etc., 66 Fed. 140, 13 C. C. A. 375; 20 Am. & Eng. Encyc. of Law (2d Ed.) 1131, 1132.

The court, in the case of Board of Mayor, etc., v. East Tenn. Tel. Co., supra, said:

"The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved."

I think that the ordinances invoked by the complainant in this case are in their nature and terms contracts, in the adoption of which the city was not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of said ordinances was, not to govern its inhabitants but to obtain a private benefit for the city itself and its inhabitants. Ill. Trust & Sav. Bk. v. City of Arkansas, supra; 1 Dill. Mun. Cor. § 27. A right of way upon a public street, whether granted by act of the Legislature or ordinance of a city council, is an easement, and as such is a property right and entitled to all the constitutional protection afforded other property and contracts. City of Knoxville v. Africa, 77 Fed. 501, 23 C. C. A. 252; Board of Mayor et al. v. East Tenn. Tel. Co., supra. The city has, under the right of police regulation, the power to prevent the obstruction of the streets unlawfully; but under such power the city cannot require the removal from the streets of telephone poles and wires erected under lawful authority, where such action is not based upon any finding or claim that the poles or wires interfere with the safety or convenience of ordinary travel. There is no such claim here; but it is claimed that the poles are a nuisance per se because erected without lawful authority.

The principle is well settled that a party who is in actual possession of property, claiming under color of title, is not to be ousted except by means provided by law. A. & P. Tel. Co. v. U. P. Ry. Co. (C. C.) 1 Fed. 754; W. U. Tel. Co. v. St. J. & W. Rwy. Co. (C. C.) 3 Fed. 433. "Forfeitures of rights and property cannot be adjudged by legislative act, and confiscation or destruction without a judicial hearing after due process of law." Calhoun v. Fletcher, 63 Ala. 575. "The terms 'due process of law' are intended to protect from confiscation by legislative enactments; from forfeitures and destruction without a trial by the ordinary modes of judicial proceedings." Davis v. State, 68 Ala. 58, 44 Am. Rep. 128. "The guaranty of due process of law secures to every citizen a judicial trial before he can be deprived of life, liberty, or property." 10 Am. & Eng. Encyc. of Law (2d Ed.) 293.

We have seen from the authorities cited that the grant to the complainant was an easement and a property right or interest. That the poles and wires used under said grant were its property is not disputed, and that some of them were cut down and removed by the defendants, their agents or servants, and that others are threatened to be so cut down and removed, is not disputed. If it were claimed by the

defendants that the poles and wires of complainant interfered with the safety or convenience of ordinary travel, and were therefore a nuisance, appropriate judicial proceedings to hear and determine such claim should be resorted to.

My opinion is that the defendants cannot be permitted to oust the complainant from possession and use of its poles by cutting and removing them from their places on the streets without "due process of law." An injunction will be granted to restrain a party from deciding for himself a question involving controverted rights and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is such controversy to justify the interference of a court of equity.

My decision therefore is:

First. That the complainant had a lawful right to erect its telephone poles, and appliances connected therewith, on the streets of the city of Mobile.

Second. That the ordinance of June 24, 1901, referred to as "Exhibit C," so far as it undertakes to deprive the complainant of the easement and street rights granted under the ordinances of December 13, 1889, and June 24, 1901, and referred to as "Exhibits A and B," respectively, or to interfere with the same, impairs the obligations of complainant's contract under which said easement and rights were granted, and seeks to deprive the complainant of its property without "due process of law," and is null and void. Such rights, however, are subject to the reasonable regulations of the city municipality by virtue of its police power.

Third. That the court of equity has the jurisdiction to afford injunctive relief herein.

The motion to dismiss the bill for want of equity is denied, the demurrer to the bill is overruled, and an injunction pendente lite is granted as prayed for.

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## BURKE v. WOOD.

(Circuit Court, S. D. Alabama. April 25, 1908.)

No. 1,270.

1. CONTRACT—LEGALITY—EMPLOYMENT TO RENDER SERVICES—"LOBBYIST."
   A lobbyist is one who solicits members of a legislative body, in the lobby or elsewhere, with the purpose of influencing their votes, and a contract to render such services, or services which consist in part of lobbying, is void as against public policy, and an action cannot be maintained thereon.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 586–593.

   For other definitions, see Words and Phrases, vol. 4, p. 4201.]

2. SAME—WHAT CONSTITUTES LOBBYING.
   Plaintiff brought an action to recover for services rendered under an alleged contract with defendant in effecting or aiding to effect the sale to a city of a waterworks plant. The evidence showed, without contradiction, that during several years after the agreement between the parties plaintiff was very active in the matter, not only using his influence to induce the public to favor the project, but soliciting the mayor and

members of the city council who had power to contract for the property to purchase the same; that he obtained the calling of committee meetings, appeared before the committees; and that it was largely due to his efforts that the council finally made the purchase. *Held*, that the services so rendered were in large part at least those of a lobbyist, and that plaintiff could not recover therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 586–593.

For lobby services, see note to 29 C. C. A. 446.]

3. NEW TRIAL—GROUND—INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.

Where the evidence offered for the party for whom a verdict is rendered, conceding to it the greatest probative force to which it is fairly entitled under the laws of evidence, is insufficient to support or to justify the verdict, it is the duty of the court to set aside such verdict, and grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 142, 143.]

## On Motion for New Trial.

The defendant moves the court to set aside the verdict and grant a new trial in the above stated cause because the verdict was contrary to the evidence; because the verdict was contrary to the weight of the evidence; because the verdict was contrary to the charge of the court; because the court erred in refusing to give the general affirmative charge for the defendant. The defendant bases his motion mainly on the first and last grounds stated. The plaintiff's suit was for work and labor alleged to have been done by him for the defendant, at the latter's request, from time to time, from the year 1902 to April, 1906, and for which he claimed a large sum of money.

The defenses mainly relied on and urged by the defendant in the trial of the cause were (1) that the work and labor done by the plaintiff, and for which he claims compensation, was done for and on account of the Bienville Water Supply Company, and not for the defendant individually; and (2) that the work and labor which was done by the plaintiff was that of a "lobbyist"; that the services he rendered were "lobby services."

The evidence in the case was substantially as follows: Plaintiff, Burke, on behalf of himself, testified that in December, 1902, he was employed by the defendant, Wood, to carry out his wishes and instructions in connection with the sale of the plant of the Bienville Water Supply Company; that he knew the defendant was practically the general manager of the company, and he was employed to look out for the defendant's interest in the company. He stated that there was no agreement with the defendant about his pay further than that the matter of pay was to be left entirely to the defendant, who said he would do what was right about it. He further testified that he worked from 1902 to 1906, and that the character of work he did was to try to effect the sale of the Bienville Water Supply Company's plant to the city; that he discussed the matter with various people and with members of the council all the time, the mayor and others; that he devoted four or five years at the work whenever he had an opportunity at night or in daytime, and that he "got up the meetings and arranged the bringing about the sale," and that he felt he accomplished it. He stated that he appeared before committee No. 6 of the city council as a representative of the Bienville Water Supply Company; that he, from time to time, corresponded with the defendant, and also wrote some letters to one A. W. McCallum, whom he spoke of as the defendant's clerk and representing him, and that he thought he was secretary of the company. Burke also stated that he one time received from the defendant $860, which was disbursed by him except $240 which he got out of it; that the balance was disbursed; that he meant by "disbursed" having different people to help him; that in his work for the defendant he paid out money, which he called "disbursements"—"giving this man some money and another man some money to help him"—that he "did general work around getting up public opinion to help him to carry out his effort to effect a sale of the water

works"; that his employment was to try to show the council that the city wanted the waterworks and needed them. He said that his "principal work was with the council of the city, and to bring influence to bear on them." He stated that he kept the work up with each succeeding mayor of the city, and each succeeding council down to the time the waterworks were sold, and in that way he was instrumental in bringing about the sale.

A. S. Lyons, a witness for the plaintiff, testified that he was an alderman of the city of Mobile, and was a member of the city council during the period from 1902 to April, 1906; that during that time Mr. Burke rendered services in negotiating the sale of the Bienville Water Supply Company's works to the city, trying to bring the parties together. The witness stated that Mr. Burke was very active, and, further, that he was frank to say that he did not think the purchase would have been made by the city if it were not for Mr. Burke; that he thought he was wholly instrumental, and that, had it not been for him, the city would not have bought the waterworks. Referring to the purchase, the witness said, if Mr. Burke had not interested the city council in the proposition to take it up, the people would never have voted on it at all; that his work and labor was before the council acted on the proposition, and it was to a great degree with the council. John Craft, a witness for the plaintiff, testified that he was a member of the city council in 1902; that Mr. Burke did work looking to the sale of the Bienville Water Supply Company for several years; that he wanted witness to consent as a member of the city council to buy it; that witness was chairman of the water committee known as No. 6; that he finally brought the committee together and Burke came before it; that a resolution was subsequently introduced to bring about the purchase. The witness further testified that Burke was very active, and was after witness all the time, so persistent that at times the witness thought he was a nuisance. Jos. H. Norville, a witness for the plaintiff, testified that he was connected with the city government since 1903; that Mr. Burke was very active in trying to sell the Bienville Water Supply Company to the city. He stated he believed that it was very largely through Mr. Burke the property was purchased. He further stated that he did not mean to say it was through his magnetic influence, but from his untiring efforts from the beginning up to the time of the purchase. Wm. C. Carrell, a witness for the plaintiff, testified that he had been connected with the city administration from 1902; that Mr. Burke was very active in trying to sell the Bienville Water Supply Company works; that, in fact, it was due to his activity with the general council and mayor they were sold to the city. He testified that Burke was active all the time; that he would arrange committee meetings, at which Mr. Wood, the defendant, would sometimes attend; that Burke would arrange meetings and "handled it altogether"; that Mr. Burke was continually after the mayor and the council to purchase the waterworks, to get them to vote for it. Witness stated he thought Mr. Burke's influence exerted more power than the public opinion of the city of Mobile on the council. Pat J. Lyons, a witness for the defendant, testified that he was mayor of the city of Mobile and had been since 1904; that Mr. Burke was very active about the city buying the Bienville Water Supply Company works; that whenever a measure relating to that subject came up he would seek out the members of the council to get their influence to support any measure that was in favor of the purchase; that he would stop the members on the street and talk to them about it; that he took up the subject with him a good many times; that he was persistent in seeking out the members of the council personally, and talked with them about the matter. The defendant, Wood, testified, in his own behalf, that at the time Burke's services began he, Wood, was the treasurer and general manager as to the operation of the Bienville Water Supply Company's plant; that he had ceased to be connected with the company at the time the sale of the plant was consummated. He further testified that he made no contract with Burke for his services in the matter of the sale of said waterworks, but that Burke several times spoke to him regarding his desire to be of some use in selling the works to the city of Mobile; that he told Burke that, if the waterworks were sold to the city, the Bienville Water Supply Company would be glad to acknowledge his assistance if

he left the fixing of any compensation entirely with him, who was the treasurer of the company. He further testified that Burke was not employed in any way by him, but he was told by him, if he was of service in selling the plant by talking with citizens and creating a public sentiment in favor of the purchase by the city, the company would give him some money when the sale was completed. He stated that Burke of his own volition sought to bring the city and the company together in the matter, and was not employed to do so. Witness further stated that he paid Burke the money ($860) mentioned by him because he said he needed some money.

The defendant introduced in evidence a number of letters written by the plaintiff, Burke, to the defendant, Wood, and also several letters written by Burke to A. W. MacCallum, beginning with a letter dated June 20, 1902, and running down to September 12, 1905.

In the letter of June 20, 1902, to Wood, Burke says: "As inclosed you will find report of council, had they acted this report I send you as recommended by committee No. (6) would have been acted on favorably, but will be acted on at the next regular meeting which is July 15th, 1902, which favorable action is warranted. I could have had called a special meeting for the purpose of having the matter passed, but preferred to wait for the regular meeting."

June 21, 1902, in letter to Wood, he says: "Inclosed you will find official documents which will corroborate my previous communications mailed you. As I am moving slowly and surely, I now await the Genl. council meeting so that his Hon., the mayor, will communicate you direct. I want to say the time has come for you to make deal."

July 4, 1902, he writes to Walter Wood, president, as follows: "To confirm my previous communication, I have now and ready to report of Mr. Craft's arrival as chairman committee. Have also seen the committee as a whole, and they are now ready and have instructed me to notify you that they are ready and waiting on you, and to advise me what day during the coming week you will put in appearance. In this connection, permit me to suggest that I want you to come at once, as I want to be in readiness to have committee's action approved for meeting Genl. council 15th inst."

August 22, 1902, he writes Walter Wood, president, among other things, as follows: "I cannot write you as I wish, but I am satisfied a pointer to you would be greatly to your interest if I could see you. What I now write you will please retain it as confidential as the meetings were executive sessions."

November 9, 1902, he writes to Wood, president of Bienville Water Supply Company, among other things, as follows: "In this connection permit me to say that my funds is entirely exhausted, and, as I have use for same without mentioning what kind of use it is to be applied, a check from you would be very acceptable. In the meantime you will be advised of further progress as matter proceed."

November 20, 1902, he writes to Walter Wood, president, in referring to a remittance of $50, saying: "Now, Mr. Wood, I want to say that you well know that the amount is an unreasonable remittance, for which I am to apply the same, particularly at this time in finishing up and to get across the danger line."

Same letter: "Therefore I cannot use the small sum mailed, and will await your further advice in the matter. In the meantime whether you increase the amount or not, I will finish my work and use that energy I possess, and continue to have the influence as in the past to bring about the desired result. Had I the funds, I would not apply to you."

June 18, 1904, he writes in reference to making deal, and says, among other things: "I can personally advise as to matters and facts that I can't write about. * * * Important that you should be here at once."

September 12, 1905, Burke writes to A. W. MacCallum, saying, among other things, in reference to the sale sought to be made: "However, I reconciled my friends in the council, and after good work they became calm, and now I can inform you that I have the majority of the council, and will bring it up at the November meeting, and will show you that I alone, without the aid of any one, except the council, can sell, and accomplish the sale."

Same letter: "I am now better than ever, and you will see who has done

the work. The council stands to-day for me as follows: Mayor Lyons, Thos. E. Smith, A. S. Lyons, H. T. Inge, Max Michael, D. P. Brown, W. T. Holt, A. Oberhaus, W. C. Carroll, Joseph Norrille. Will have Craft and Tacon in line at November meeting."

Gregory L. & H. T. Smith, for plaintiff.
Bestor, Bestor & Young, for defendant.

TOULMIN, District Judge (after stating the facts as above). The counsel for the defendant in his argument on this motion limited his contention in support of the motion to two grounds, to wit: That the verdict was contrary to the evidence relating to the character of the work and labor done by the plaintiff, and to the charge of the court thereon; and that the court erred in refusing to give the general affirmative charge for the defendant. The contention on the part of the defendant is that the evidence clearly showed that the work and labor done by the plaintiff, compensation for which he claims in this suit, was work and labor done by him as a lobbyist, and that any services rendered by him in his efforts to sell the Bienville Water Supply Company's property were principally lobby services; and it is insisted on the part of the defendant that on the undisputed evidence in the case no other conclusion could have been justly or reasonably reached.

What is a "lobbyist"? A lobbyist is defined to be one who frequents the lobby or the precincts of a Legislature or other deliberative assembly with the view of influencing the views of its members. Sometimes defined as a person who hangs around legislators, and solicits them for the purpose of influencing legislation. "To lobby" is to solicit members of a legislative body, whether in the lobby or elsewhere, with the purpose to influence their votes. Webster's Dict.; Worcester's Dict.; Century Dict. tit. "Lobby-Lobbyist." "To lobby" is for a person not belonging to the Legislature to address or solicit members of the legislative body, in the lobby or elsewhere away from the house, with a view to influencing their votes. Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co., 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601. "Lobbying services" are generally defined to mean the use of personal solicitations, the exercise of personal influence, and improper or corrupt methods, whereby legislative or official action is to be the product. A contract for such services is void, and cannot be enforced. Dunham v. Hastings Pavement Co., 56 App. Div. 244, 67 N. Y. Supp. 632, 634; Trist v. Child, 88 U. S. (21 Wall.) 441–448, 22 L. Ed. 623; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539. According to the lexicographers and the decisions of the courts, we find that lobbying signifies to solicit members of a legislative body, in the lobby or elsewhere, with the purpose of influencing their votes; and the authorities hold that a contract for lobbying is void as against public policy. Authorities, supra. The Supreme Court of the United States, in Trist v. Child, supra, said:

"In our jurisprudence a contract may be illegal and void because inconsistent with sound policy and good morals. But Lord Mansfield has said: 'Many contracts which are not against morality are still void as being against the maxims of sound policy.'"

The court held that within the condemned category of contracts is one to pay for procuring a contract from the government. The court further held that, where legal and valid services are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys the good, and they perish together. Trist v. Child, supra.

As I understood the contention on the part of the plaintiff in the argument on this motion, it was that the work and labor done by him was not as a lobbyist, in that the city council was not a legislative body, at least, so far as its action in connection with the purchase of the Bienville Water Supply Company's works was concerned; that the council acted in that matter as the agent or representative of the people of the city of Mobile to execute their wishes and authority in relation to said purchase thereto expressed and conferred by their votes, and hence the plaintiff's work with the council did not come within the purview of the policy forbidding lobbying. That the council of a city or corporate town is the local Legislature of that city or town I take it will not be questioned. A legislative body is any body of persons authorized to make laws or rules for the community represented by them. A legislative body is one capable of or pertaining to the enactment of laws. A legislator is one who makes laws for a state or community. It is a matter of judicial or common knowledge that the council enacts laws; establishes rules of action. They are called ordinances, but they are no less laws. There is no question that the council had legislative authority to purchase waterworks, and by one act of the Legislature of the state to purchase these particular works. It is, however, not contended by the learned counsel for the plaintiff that it did not have authority to purchase the waterworks, but it is suggested that the action of the council had to be approved or ratified. I do not so understand the law applicable to this case. Under the general powers conferred by the charter of the city of Mobile of 1901, considered in connection with the subsequent legislation of the state, I think the council had the right to purchase the waterworks without submitting the matter to the vote of the citizens of Mobile for approval. But, while the city had the right to purchase, through its council, the waterworks, it had no authority to issue bonds with which to pay for them, unless such issue of bonds be first authorized by a majority vote of the qualified voters of the city. The proposition required to be submitted to the voters of the city was the bond issue only. It may be true, doubtless was true, that it was necessary in this instance to issue bonds in order to make the purchase determined on by the council and mayor effective, but it is not apparent how that in any way affected the right of the council to make the purchase. Without the authority of the voters to issue bonds, the city may have lacked the ability to consummate the purchase, but it in no way, as it seems to me, affected its right or authority to purchase the waterworks. The legislative department of the city of Mobile is vested by its charter in a mayor and general council. That charter provides that it shall be the duty of the council to prevent crimes, and protect the rights of persons and property, to guard the public health, etc. How can this be done without the enactment of laws for the purpose? The council is authorized to

contract for, build, or purchase waterworks. How can it act in such case except in its legislative capacity, either by the adoption of an ordinance or resolution? Its legislative action is evidenced by its ordinances and resolutions, which are its laws.

Now, the question arises: Was the principal work and labor done by the plaintiff in his efforts to effect the sale of the Bienville Water Supply Company's works done by him as a "lobbyist"? Were his services in the matter principally "lobby services"? These questions must be answered by the evidence in the case. In my opinion they are affirmatively answered by the evidence of the plaintiff himself, and by his letters which were in evidence, corroborated and emphasized by the testimony of members of the council and the mayor of the city who were witnesses in the case. In referring to his efforts to effect the sale, the plaintiff testified that he discussed the matter with members of the council all the time, the mayor and others; worked whenever he had the opportunity, at night or in daytime, for several years; got up the meetings, and appeared before committee No. 6 (shown to be the water committee of the council); "arranged the bringing about the sale, and felt that he had accomplished it." He also did general work around, getting up public opinion to help him to carry out his efforts to effect a sale. He further testified that his "principal work was with the council of the city and to bring influence to bear on them"; that "he kept the work up with each succeeding mayor and each succeeding council down to the time the waterworks were sold," and "in that way was instrumental in bringing about the sale." In letter of June 20, 1902, to the defendant, the plaintiff says:

"This report I send you, as recommended by committee No. 6, will be acted on the next regular meeting. * * * I could have had called a special meeting for the purpose of having the matter passed, but preferred to wait for the regular meeting."

In letter of July 4, 1902, to the defendant he writes reporting the arrival of Mr. Craft as chairman of committee, and says:

"Have also seen the committee as a whole, and they are now ready and have instructed me to notify you. * * *"

In letter of November 20, 1902, to the defendant, referring to a remittance from defendant, plaintiff says:

"Whether you increase the amount or not, I will finish my work and use that energy I possess, and continue to have the influence as in the past to bring about the desired result. Had I the funds, I would not apply to you."

In letter September 12, 1905, to A. W. MacCallum, the plaintiff says:

"I reconciled my friends in the council, and after good work they became calm, and now I can inform you that I have the majority of the council, and will bring it up at the November meeting, and will show you that I alone, without the aid of anyone, except the council, can sell, and accomplish the sale. * * * I am now better than ever, and you will see who has done the work. The council stands to-day for me as follows: [naming 10 persons; and adds] Will have Craft and Tacon in line at November meeting."

Witness A. S. Lyons testified:

"Mr. Burke rendered services in negotiating the sale of the Bienville Waterworks. He was very active, and I am frank to say I don't think the pur-

chase would have been made if it was not for Mr. Burke. I think, if Mr. Burke had not interested the city council in the proposition to take it up, the people would never have voted on it. His work was to a great degree with the council."

Witness Craft said:

"Mr. Burke did work looking to the sale of the Bienville Water Supply Company. He wanted me to consent as a member of the city council to buy it. I was chairman of the water committee known as No. 6. I finally brought the committee together, and Mr. Burke came before it."

Witness stated that "Burke was very active and was after him all the time."

Witness Norville testified that:

"Mr. Burke was very active in trying to sell the Bienville Water Supply Company to the city. It was very largely through Mr. Burke the property was purchased from his untiring efforts from the beginning to the time of purchase."

Witness Carrell testified that:

"Mr. Burke was very active in trying to sell the Bienville Water Supply Company's works; in fact, it was due to his activity with the general council and mayor they were sold to the city. Mr. Burke was active all the time. Mr. Burke would arrange committee meetings and was continually after the mayor and the council to purchase the waterworks; to get them to vote for it. I think Mr. Burke's influence exerted more power than the public opinion of the city of Mobile on the council."

Witness Pat J. Lyons testified that:

"Mr. Burke was very active about the city buying the Bienville Water Supply Company works. Whenever a measure relating to that subject came up, he would seek out the members of the council to get their influence to support any measure that was in favor of the purchase. He would stop the members on the street, and talk to them about it. He took the matter up with me a good many times, and was persistent in seeking out the members of the council personally and talking with them about the matter."

This was substantially all the evidence relative to the work and labor done or services rendered by the plaintiff.

The court, among other things, charged the jury:

"If you believe from the evidence that there was a contract made by the plaintiff with the defendant under which the plaintiff was to procure by lobbying services, if possible, the making of a contract of purchase by the city of Mobile, through its mayor and council, of the Bienville Water Supply Company's waterworks, and for which services the plaintiff was to be paid, then the court charges you that such contract would be void as against public policy, and the plaintiff cannot recover on said contract; or, if you believe from the evidence that there was no such express contract, but that the plaintiff did, at the request of the defendant, perform work and labor, and render services for him, in the effort to effect a sale of the Bienville Water Supply Company's waterworks, and you further believe from the evidence that the work and labor so done by the plaintiff was done as a 'lobbyist' and the services rendered were 'lobby' services, then the court charges you that the plaintiff cannot recover for the work and labor so done; and the court further charges you that if this suit is brought to recover compensation for work and labor done as a 'lobbyist,' and for services other than 'lobby services,' rendered by him, and these services were blended with the services as 'lobbyist,' the plaintiff cannot recover in this case. Pay for 'lobby services,' or for work and labor done as 'lobbyist,' irrespective of an express contract therefor, is not recoverable in a court of justice."

The court further charged the jury in substance as follows:

"A 'lobbyist' is one who frequents the lobby or the precincts of a Legislature or other deliberative assembly with the view of influencing its members, by personal solicitation, the exercise of personal influence, or by improper methods, whereby legislative or official action is to be procured. To 'lobby' is to try to influence such members, and to solicit their votes, whether in the lobby or elsewhere. 'Lobby services' are defined to be solicitations by persons supposed to have personal influence with the members of a legislative body to procure certain legislative action."

The jury returned a verdict for the plaintiff for $4,000.

We have seen that a "lobbyist" is a person who solicits members of a legislative body, in the lobby or elsewhere, with the purpose of influencing their votes, one who hangs around legislators for the purpose of influencing such legislators whereby legislative action is to be procured; and that "lobby services" are personal solicitations with members of a legislative body to procure certain legislative action; to solicit votes from such members, whether in the lobby or elsewhere, for said purpose. I think the evidence abundantly shows that the plaintiff solicited members of the council in the lobby or precincts of their place of assembly, and elsewhere, with the purpose of influencing their votes in support of a measure to purchase the Bienville Water Supply Company's works; that he personally solicited their votes in that behalf, and exerted an influence over them in their legislative action in the premises. And my opinion is that the evidence establishes, beyond controversy, that the principal work and labor done by the plaintiff in his efforts to sell said waterworks was done by him as a "lobbyist"; and that his services rendered in connection therewith were principally "lobby services." There is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner than according to the rules of the common law. Const. U. S. Amend. 7. The only mode known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried. Lincoln v. Power, 151 U. S. 438, 14 Sup. Ct. 387, 38 L. Ed. 224. Where the evidence offered for the party for whom a verdict is rendered, conceding to it the greatest probative force to which, according to the laws of evidence, it is fairly entitled, is insufficient to support or to justify the verdict, it is the duty of the court to set it aside and grant a new trial. Southern Pac. Co. v. Hamilton, 54 Fed. 468, 4 C. C. A. 441; Pleasants v. Fant, 22 Wall. (U. S.) 120, 22 L. Ed. 780.

In my judgment the verdict in this case is manifestly against the evidence and the charge of the court; and a more thorough examination and consideration of the evidence, tested by the law of the issue, than was afforded me during the progress of the trial, has satisfied me that the court erred in refusing to give the general affirmative charge requested by the defendant. Justice, therefore, requires that the verdict be set aside and a new trial granted. And it is so ordered.

## SLOSS IRON & STEEL CO. v. SOUTH CAROLINA & G. R. CO.

(Circuit Court, D. South Carolina. June 17, 1908.)

1. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

The objection to jurisdiction in equity on the ground that complainant has an adequate remedy at law should be taken on the threshold of the case, and where the defendant has answered to the merits, taken a consent order of reference, and the evidence has been taken before the objection is made, the court will retain the case if at all justified in exercising jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Equity, §§ 173, 174.]

2. SAME—GROUNDS OF JURISDICTION—MISTAKE OF FACT.

Complainant entered into a contract with the receiver for a railroad company through the manager to supply coal for the use of the company at stated prices for one year, with the option to complainant to renew the contract for two years more. Within a few months the railroad was sold to defendant, which continued its operation under the same manager without visible change, and during the remainder of the year, although, owing to widespread strikes, coal had largely advanced in price, complainant continued to deliver coal, which was received and settled for by defendant at the contract price; the parties acting under a mutual mistake of fact in supposing that such deliveries were made under the contract. At the end of the year complainant elected to extend the contract for two years, but defendant refused. *Held*, that complainant was entitled to relief in equity on the ground of mistake, to have the settlements set aside, and to recover the difference between the contract price and the market price of the coal so delivered and received through mistake.

In Equity. On final hearing.

Smythe, Lee & Frost, for complainant.
J. W. Barnwell, for defendant.

PRITCHARD, Circuit Judge. On the 28th day of July, 1893, the South Carolina Railway Company, the company which owned the property afterwards held by the South Carolina & Georgia Railroad Company, and from whom the latter purchased, was in the hands of a receiver in the United States court; D. H. Chamberlain being such receiver, and C. M. Ward being general manager in practical charge of the road. On the day named, C. M. Ward, on behalf of the railroad company and the receiver, entered into a contract with the Sloss Iron & Steel Company for the purchase of the coal requirements of the railroad company for one year from August 1, 1893. This contract was for the requirement of the South Carolina Railway Company, at 85 cents for run of mines, and 92 cents for screened coal, delivered f. o. b. the mines of the company in Alabama.

The contract was regarded at that time as a very favorable one for the receiver and the railway company, inasmuch as it was considerably below the current prices for coal then prevailing. The contract contained several clauses of a special character, which will appear upon an inspection of the same. Among others was the stipulation that the bills should be paid promptly at given periods. There was a further provision for the suspension of it in case of strikes or other

unavoidable accidents. There was also a privilege to the coal company to the effect that it should have the right to renew the contract in all its terms for one or two years as it might elect.

The proceedings which were then pending terminated in a decree of the United States Circuit Court directing the property then in the hands of the receiver to be sold. This sale was effected and the property sold to the parties, who afterwards formed the South Carolina & Georgia Railroad Company. The transfer was made on or about the 12th day of May, 1894, but for some time afterwards the management of the road was continued in the hands of C. M. Ward as general manager, to whom was intrusted practically the entire management and operation of the road. The Messrs. Parsons were the purchasers, and they afterwards formed the South Carolina & Georgia Railroad Company; Charles Parsons, Sr., becoming its president, and Charles Parsons, Jr., becoming its vice president. The railroad was continued and operated as a going concern without any notice of change, so far as the public was concerned, in its actual physical management.

In May, 1894, coal was extremely scarce, owing to a strike which was then in existence. Ward, the general manager, continued to order coal under the contract, and the Sloss people continued to send it, notwithstanding the strike, and although coal was selling for very much more than the contract price. The Sloss people did not regard the strike as sufficiently affecting them to justify their taking advantage of it and, at some inconvenience to themselves, continued to supply the coal. Both parties, as a matter of fact, regarded the contract as existing, and they both acted according to it, under this mistake. About the 14th day of July, 1894, the Sloss Company notified the South Carolina & Georgia Railroad Company that it elected to take advantage of the clause of the contract, and would extend the contract in all its terms for two years from the date of its expiration, to wit, August 1, 1894. Charles Parsons, Jr., the vice president, replying to this letter, some time between July 21st and July 26th, denied the right of the coal company to elect to continue this contract for another year, and stated that, although he had been informed that the contract existed, it terminated on August 1st absolutely, and he refused to be bound by the extension and renewal. The uncontradicted testimony shows that he had been fully apprised of the contract and was acting under it.

The Sloss Company insisted that it had the right to continue the contract for two years, and, upon the positive refusal of the other side to be bound by it, they then instituted a suit in the United States Circuit Court. This suit was against the South Carolina & Georgia Railroad Company. It alleged the receiver's contract, and the further fact that the new parties were bound by it, and it asked, on the law side of the court, a judgment of a twofold character: First, for the amount of the interest due on the delayed back payments; and, second, for the damages it had suffered by reason of the refusal of the railroad company to extend the contract for two years. The Circuit Court held that the jury should render a verdict for the interest on the delayed payments, because the purchasers under the decree of court were

responsible for that, but that the purchasers were not charged further with carrying out the contract, which terminated by its own force in May, although both parties had been, by mistake of facts and law, continuing to act under it.

The suggestion was made by the court, however, that, while the receiver's contract was not of its own force binding upon the purchasers, the latter might have acted in such a way with regard to it as to have made it their own contract, or rather had made, as it were, by conduct expressed or implied, a new contract in the terms of the old contract, but that this, however, did not appear in the suit then brought. Accordingly, and acting on this suggestion, which appears in the opinion in the first suit, the Sloss Company filed a second suit on the law side of the court. This suit alleged the receiver's contract, and the facts as above referred to, but further declared that, with full knowledge of all the circumstances, the purchasers (that is, the South Carolina & Georgia Railroad Company) had so acted with regard to the contract as to practically adopt it as their own. The Circuit Court held that a nonsuit should be granted, because while both parties evidently thought and believed, as a matter of fact, that the contract was outstanding, and received and delivered coal under it, there was nothing to show an intention to make and adopt for themselves a new contract in the terms of the contract of the receiver.

This ruling of the Circuit Court was also in the record when the case went up to the Circuit Court of Appeals. In that court this judgment was affirmed, and this decision will be found in 29 C. C. A. 50, 85 Fed. 133. The Circuit Court of Appeals affirmed the ruling of the Circuit Court and held that all the parties were animated by a "mutual mistake of fact"; that the parties thought a condition of affairs existed which really did not, and they bought and sold the coal under a contract which they supposed was then existing, although it did not exist. It was also stated that the case brought by the plaintiff was a hard one, being for damages and for supposed profits which would have resulted if the contract had been renewed, and that the court was not disposed to assist the Sloss Company in a suit of that character. It was stated, however, that the suit was not on the equity side of the court for the correction of any error arising out of the supposed mistake.

The opinion of the Circuit Court of Appeals was filed February 28, 1898, and there was then brought, in June, 1898, the present and third suit. This suit was brought on the equity side of the court, and it is insisted that it is in harmony with the views entertained by the Circuit Court of Appeals in the cases to which reference has heretofore been made. It alleges the previous suits, and the fact that all the parties were acting under a mistake of facts. That, there being this mutual mistake, the coal had been delivered and had been received at very much lower prices than prevailed at the time of said delivery and receipt, and at very much lower prices than the coal company would have sold, and the railroad could have bought, during that period. That this being so, and there being an entire mistake with regard to the matter, the coal company was entitled to the difference in price which would have obtained had the coal been bought under

another contract, or at prevailing market prices. That there were some 8,000 tons of coal sold during the period, and it asked the difference between the contract price and the actual price and value of the coal at that time, together with interest upon such difference, either from the date of delivery of the coal or else from the date of the actual demand, whether before or at the time of the filing of the last suit.

It should be further added that, when the receiver turned over the property to the purchasers, a large amount of the coal delivered during the previous period was unpaid for, and, of course, much additional indebtedness arose for the coal afterwards delivered to the railroad company, and payments for this were made from time to time, extending over a period of many months (all along from the spring of 1894 to the fall of 1894); checks being sent and the coal estimated at the contract prices, under the impression that the parties were acting under the contract. The clerks who made out these bills and sent these checks had no knowledge or contemplation at any time of the condition of affairs with regard to the contract and of the proposed dispute between the two organizations. The payments were made in the ordinary course of business, and neither the checks nor the receipts specify any particular bill, but were payments from time to time, and they covered and paid in full for the entire shipments of coal as per bills and prices rendered.

This suit was brought soon after the decision of the court in the second case, as the record will show. Owing, however, to the death of his honor, Judge Simonton, and afterwards the disability of his honor, Judge Brawley, to hear the case, and to other causes, the matter has been delayed from time to time. However, the cause has been pending actively, and since the order of reference taken some time ago (without objection on either side) has been promptly conducted with due respect to the convenience of counsel on both sides in accordance with the order of reference of his honor, Judge Brawley, directing how the testimony should be taken and the case argued and heard.

Upon the foregoing statement of facts, the plaintiff insists: That in conscience and in law it should be paid the actual value of the coal at the time it was delivered to the railroad company and at prices which would have been charged had not both parties supposed they were, as a matter of fact, acting under the old contract; that, inasmuch as the courts had decided that the new parties were not bound by the contract, the Sloss Company could not get the benefit of the extension of the contract, it certainly should be entitled to the full price for its coal, which would have never been delivered and received at the lower prices had not both parties been mistaken in believing that "as a matter of fact" they were acting under the old arrangement. To accomplish this result, the complainant filed its bill in equity to set aside the settlements and prices for coal, and then after this to obtain the allowance by the court of the difference between the price at which the coal was charged and paid for and its real market value at the time. At the hearing, it was contended by the defendant that this should be a case at law, and that a court of equity had no juris-

diction. The court has carefully considered this contention and is of opinion that the same is untenable. Suits of this character are cognizable in equity, and errors such as are here set up and settlements made under such circumstances will be set aside and relief then fully granted to those who have suffered by such errors and settlements.

It is contended by the defendant: That this error could be corrected in an ordinary suit on the law side of the court; that there is a remedy at law. There must not only be a remedy at law to take the cause out of the equity court, but such remedy must be complete and adequate, and, further, this objection should be set up "on the threshold," in the language of the cases. In cases where this is not done, the court will examine the facts and retain the case if it is at all justified in doing so. Tyler v. Savage, 143 U. S. 80, 95, 97, 12 Sup. Ct. 340, 36 L. Ed. 82; Perego v. Dodge, 163 U. S. 160, 166, 16 Sup. Ct. 971, 41 L. Ed. 113; Pollock v. Farmers Co., 157 U. S. 429, 554, 15 Sup. Ct. 673, 39 L. Ed. 759; Walla Walla Co. v. Water Power Co., 172 U. S. 12, 19 Sup. Ct. 77, 43 L. Ed. 341; Boyce v. Grundy, 3 Pet. (U. S.) 210, 7 L. Ed. 655. The bill filed by complainant fully sets out the facts of mutual mistake resulting in loss to the complainant and seeks to set aside the settlements made, which settlements would necessarily be a bar to the plaintiff's recovery in the law court until so removed. It appears from the record that the defendant did not file any demurrer to the jurisdiction on this ground, but has fully answered on the merits, pleading settlement, and that it also took a joint consent order of reference to have the case tried on the equity side of the court on testimony and has joined in the taking of testimony and appeared before the court for a hearing on the merits. In view of these circumstances, it is now too late to plead at the hearing for the first time that the plaintiff's remedy is at law. The court therefore holds that it has jurisdiction and will examine into and determine the matters involved in this controversy.

The first question presented for consideration is: Were these sales of coal at the time they were made, and the prices and the settlements following them, made under mutual mistakes of fact as to those prices? There can be little doubt, from the testimony, that the purchase and delivery of coal at the lesser prices, between May 12, 1894, and July 20, 1894 (the period in question), was done through a mutual mistake of fact, both parties believing they were acting under the old contract of the receiver, and, further, that such coal would never have been sold and delivered nor thereafter so paid for had not this erroneous belief and mistake of facts existed. This view is corroborated by the testimony of the agents and officers of the defendant itself. This mutual mistake of fact thus having existed, and in consequence of which the parties were caused to act as they would not have otherwise done, the result of such mutual mistake will be corrected. The prices will be reformed, the settlements will be opened for such purpose, and a proper allowance will be made in order to do justice to the party injured by the errors. U. S. v. Barlow, 132 U. S. 271, 280, 281, 10 Sup. Ct. 77, 33 L. Ed. 346; Metcalf v. Williams, 104 U. S.

93, 96, 26 L. Ed. 665; Baltzer v. R. & A. R. R., 115 U. S. 634, 645, 6 Sup. Ct. 216, 29 L. Ed. 505; Williams v. U. S., 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82.

There has been no change in the position of the defendant, and no valid reason has been stated in the pleading or argument of defendant, nor does any such appear in the record, which would cause the complainant to forfeit the right to have the old prices and settlements opened and the true values ascertained. An inspection of the record discloses no action of the complainant which would bar its equity. Indeed, it might be urged, on the other hand, that when Mr. Parsons, the vice president of the defendant company, repudiated the renewal clause of the contract about July 20, 1894, he should also have repudiated the prices of the contract and offered to settle at current prices. This he did not do. It clearly appears that this mistake and the settlement thereafter under it was mutual, and, if any one failed in conduct, Mr. Parsons and the railroad were in default, as they were receiving the benefits of the error, getting coal when it was high and almost impossible to obtain.

Nor does the strike clause interfere, because it does not appear to have been the cause; but the strike clause is not to be considered, inasmuch as the receiver's contract was no longer in force. Nor should the defendant be permitted to urge the delivery and obtain the coal during the strike period, and then claim the strike clause. This would be injustice, if not fraud. After carefully considering all the facts and circumstances, the court is of opinion that the complainant is entitled to relief.

The only question in the case, then, which seems to remain, is this: What did the plaintiff lose, and what did the defendant gain, by this mutual mistake of fact and misunderstanding with regard to these matters? Indeed, the defendant's counsel openly stated in his argument that, leaving out the jurisdictional feature, this was the only subject of inquiry remaining. In other words, the sole question now remaining is: What was the difference in the value of the coal at that time, what could the Sloss people have obtained for, say, 6,012 tons of coal, the amount in question (between May 12 and July 20, 1894), and what would the defendant have had to pay for it during the period named?

But this would seem, first, to be measured by the value of the coal at that time at the mines of the Sloss Company at Birmingham, Ala., or if coal could not have been obtained there at all, and there were no sales of coal, then the prices at Charleston, with proper allowance for freight. The testimony shows that during the period referred to above no coal was being sold at all, nor could have been bought at Birmingham, and, if on the market, it would readily have brought very high prices. Mr. Barsons, the president of the defendant company, states they had to pay "very much higher prices when they did not get coal under their contract." Mr. Ward, the defendant's general manager, who was in a position to know (as he had to make the purchases of coal), testified: That coal could scarcely be obtained at all; that he could only obtain it at Charleston from the North, and

could not obtain it elsewhere, and therefore paid for it $4.25 per ton as against the Sloss contract of $2.95, a difference of some $1.30 per ton. So, also, with the testimony of the others, which shows this very much higher price for coal prevailing until the latter part of July, when prices began again to decline. Moreover, this obtained equally as to screened coal and "run of mines," the distinction between which seems to have been practically obliterated in this time of coal scarcity.

Taking all these uncontradicted facts and the testimony into consideration, and adopting most conservative figures, the court is of opinion that the difference in price was at least 95 cents per ton, exclusive of any interest allowance, which interest the court does not see fit to give.

Accordingly, the court will open and set aside the old transactions done in evident error as they were, and will fix the amount of the allowance at $5,711.40, the product of 6,012 tons of coal at a difference of 95 cents per ton.

A decree will therefore be entered in accordance with the views herein expressed.

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## LINDSEY et al. v. HUMBRECHT.

(Circuit Court, N. D. Georgia. May 9, 1907. On Final Hearing, June 9, 1908.)

No. 15.

1. FRAUDS, STATUTE OF—SUFFICIENCY OF WRITING—CONTRACT FOR SALE OF LANDS.

A written contract for a sale of lands, prepared by the purchaser named therein, signed by the vendors at his request, and deposited in escrow with deeds conveying the property to him, and letters and telegrams previously sent and signed by the purchaser, *held* to bear such internal evidence of their connection with each other as to constitute together a memorandum in writing signed by him sufficient to bind him under the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 188.]

2. SAME—PART PERFORMANCE.

Where, after a verbal agreement for the purchase by defendant of lands owned in severalty by complainants and the preparation of a written contract therefor, which was signed by complainants, at the suggestion of defendant and for his benefit, one of the complainants executed a deed conveying his lands to the other, and the latter executed a deed conveying all the lands to defendant, which deeds, together with the contract were deposited in escrow, such acts constituted such part performance by complainants as to take the contract out of the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 296.]

3. SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LANDS—TITLE OF VENDOR.

To entitle vendors to enforce specific performance of a contract for the sale of lands, they must show their ability to give a merchantable title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 258.]

4. VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—TITLE OF VENDOR—MERCHANTABLE TITLE.

Complainants contracted to sell to defendant a large number of lots of land represented by them to be valuable because of mineral deposits contained therein. In a suit for specific performance, it appeared that as to a considerable number of the lots complainants had no paper title, but relied on title by adverse possession, that as to a large number the title was in another, although after commencement of the suit they procured the execution of a deed to them which was placed in escrow, and that as to a large number they did not own the mineral rights, *held*, that they could not give such a merchantable title to the property as to entitle them to a decree for specific performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 245–248.

Marketable title, see note to New York Life Ins. Co. v. Lord, 40 C. C. A. 592.]

In Equity. Suit for specific performance of a contract for the sale of lands. On demurrer to bill.

Bunn & Bunn, James & Hutchins, and Arnold & Arnold, for complainants.

Dodd & Dodd and Dorsey, Brewster, Howell & Hyman, for defendant.

NEWMAN, District Judge. The demurrer to the bill in this case presents the question as to whether certain papers set out constitute together such a memorandum in writing as will bind the defendant to a contract for the sale of land, and, further, whether the facts alleged are sufficient to show such part performance on the part of the complainant as to require the defendant to perform the contract.

A telegram set out in the bill is as follows:

"Dallas, Ga., 5—11, 1906.

"R. O. Pitts, Com'l Bank, Cedartown, Ga. Compelled to be home Saturday. Will take the land at seven. Wire me Atlanta train 32. Has Lindsey accepted? Victor J. Humbrecht."

And the following:

"Cedartown, Ga., May 11th, 1906.

"Victor J. Humbrecht, c/o Seaboard train 32, Atlanta. Lindsey accepts your offer of seven per acre. R. O. Pitts."

And this letter:

"R. O. Pitts, Esq., Pres. Commercial National Bank, Cedartown, Ga.—Dear Sir: I am inclosing you my check for $10,000 to be put to my credit. I have just arrived, and must leave immediately for my home in Atlantic City. Kindly acknowledge receipt of this, and I will advise you Monday when I will be able to go down and close arrangements.

"Yours very truly, Victor J. Humbrecht."

And this letter of May 14, 1906:

"R. O. Pitts, Esq., Pres. The Com'l Bank, Cedartown, Ga.—Dear Sir: In reply to your letter of 11th inst. will say that I shall leave Philadelphia on next Monday night, the 21st inst. reaching your town early Wednesday morning. In the meantime, Mr. Lindsey can have an agreement prepared, say $5,000 to be paid on that date, and $15,000 more when titles are examined and deeds prepared, (which I suppose will take up some little time, according

to the number of conveyances), and the balance in one, two or three years, or sooner if desired. * * *

"Yours very truly,

Victor J. Humbrecht."

Also letter of May 19, 1906:

"R. O. Pitts, Esq., Prest. Com'l Bank, Cedartown, Ga.—My dear sir: Kindly credit the enclosed check for $10,000 to my account. I will reach your town on Tuesday evening instead of Wednesday morning, as I expected. Hoping to see you on my arrival, I am

"Yours very truly,

Victor J. Humbrecht."

A copy of an agreement is set out in the pleadings between Mrs. N. C. Lindsey and George W. Lindsey of Polk County, Ga., and Victor J. Humbrecht, party of the second part, of Philadelphia, Pa. The agreement is signed only by Mrs. N. C. Lindsey and G. W. Lindsey, and is attested by W. H. Trawick, and R. O. Pitts, N. P., Polk county, Ga. The contract, in substance, sets out that Mrs. N. C. Lindsey and G. W. Lindsey own a large tract of improved and unimproved lands in Polk county, Ga., containing 137 40-acre lots; a part of said land being owned by Mrs. Lindsey in her own right, the remainder by G. W. Lindsey the tract of land being identified by a drawing or map attached to the agreement. It is further recited that the Lindseys had on that day agreed to sell and convey unto Humbrecht the entire tract of 137 lots as numbered in the map attached, the conditions of the sale being the consideration of $7 an acre, exclusive of the right of way of the East & West Railroad, terms $10,000 cash, or within 30 days from date, and the 30 days being to give an opportunity to Humbrecht to examine the title to the property; $10,000 when the entire tract is delivered to Humbrecht, the remainder of the purchase money to be paid on or before two years from date, with interest at the rate of 7 per cent. from January 1, 1907, or such time as Humbrecht received possession; the Lindseys to account to Humbrecht for the interest on $10,000 at 7 per cent. from date until they should deliver possession of the entire tract to Humbrecht. The Lindseys are to have taken up and canceled all mortgages, judgments, and liens before any cash is paid. G. W. Lindsey is to execute a deed to Mrs. Lindsey for his lots, and Mrs. Lindsey is to execute her warranty deed to Humbrecht conveying to him the entire 137 lots. All the papers above described were to be delivered in escrow with the Commercial Bank of Cedartown, Ga., attached to a copy of the agreement. It is further agreed that Humbrecht shall have 30 days to examine the title of all the lots, provided so much time shall be required; and, provided the same is clear of all mortgages, judgments, and liens and outstanding recorded title superior to that held by the Lindseys then the Commercial Bank is authorized to deliver to Humbrecht the two deeds named—that is from G. W. Lindsey to Mrs. N. C. Lindsey and Mrs. N. C. Lindsey to Humbrecht—and to deliver to the Lindseys the mortgage, the note, and one of said checks for $10,000 the second check for $10,000 to be delivered as soon as possession of the premises is delivered to Humbrecht. The examination of the title to the land to be in good faith. The bill alleges that the deeds from Lindsey to Mrs. Lindsey and from Mrs. Lindsey to Humbrecht (profert

of which is made) were executed and deposited in escrow in the Commercial Bank, with the agreement.

Do these letters and telegrams and the contract and deeds bear internal evidence of their connection with each other so as to bind Humbrecht to the alleged contract for the sale of the land in question? In the first telegram Humbrecht proposes to take the land "at seven." The answer is: "Lindsey accepts your offer of seven per acre." The letter of May 14th, signed by Humbrecht, says "Lindsey can have an agreement prepared," and afterwards the contract referred to above was signed by the Lindseys, and R. O. Pitts was one of the witnesses, and W. H. Trawick the other witness. In his letter of May 14th Humbrecht says he will pay $5,000 when the agreement is prepared, and $15,000 more when titles are examined and deeds prepared, balance in one, two, and three years, being practically $20,000 cash, balance on time. On May 12th he had sent $10,000, and on May 19th he sent $10,000, making $20,000 sent to Pitts. Undoubtedly, judged by the papers alone, this $20,000 was sent for the purpose of carrying out the arrangement to buy the land of the Lindseys. It seems to me reasonably clear that these papers, taking their contents, and without any extrinsic evidence, would be sufficient to show that they referred to each other, and that the first telegram from Humbrecht indicated that he would take the land afterwards embodied in the agreement from the Lindseys at seven dollars an acre, and the Lindseys, not only by Pitts' telegram of May 11th, but by signing the agreement and executing the deeds deposited in escrow, indicated their acceptance of the offer.

It is well settled by authority that the writing required by the statute may consist of more than one paper, and, if taken together without extrinsic evidence it is sufficient to show the character of the contract, its terms, and the lands or interests therein conveyed, it is a good memorandum in writing. In the case of North & Company v. Mendel & Bros., 73 Ga. 400, 54 Am. Rep. 879, while the decision was against the sufficiency of the writing in that case, I think the language used in the opinion by Justice Hall shows that, if the papers had been as in this case, the contract would have been upheld:

"We are of opinion that this memorandum, taken by itself or in connection with the telegram, does not satisfy the requirements of the statute. Without such evidence it would be impossible to connect those papers as forming parts of the memorandum of the agreement relied on. The statute does not require that all the terms of the contract should be agreed to or written down at one and the same time, nor on one piece of paper; but, where the memorandum of the bargain is found on separate pieces of paper, and where these papers contain the whole bargain, they form such a memorandum as will satisfy the statute, provided the contents of the signed papers makes such reference to the other written paper or papers as to enable the court to construe the whole of them together as containing all the terms of the bargain. If, however, it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the signed paper to show a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain, so as to satisfy the statute"—citing 1 Benjamin on Sales, § 220, and note 24.

There is a slight variation between the terms of the agreement as set out in Humbrecht's letter of May 14th and that contained in the agreement signed by the Lindseys. I do not know that this is material, however. The difference is that in Humbrecht's letter he says:

"Mr. Lindsey can have an agreement prepared, say $5,000 to be paid on that date and $15,000 more when the titles are examined and deeds prepared, and the balance in one, two, or three years, or sooner if desired."

In the agreement signed by the Lindseys it provides:

"Terms: $10,000 cash or within thirty days from date, the thirty days being to give opportunity to Humbrecht to examine the title to the property; $10,000 when the entire tract is delivered to Humbrecht, the remainder of the purchase money to be paid on or before two years from date."

Really the terms contained in the agreement signed by the Lindseys are more favorable to Humbrecht than the terms he proposed in his letter. In this letter he makes the entire $20,000 payable when titles are examined and deeds prepared, and in the agreement only $10,000 is to be paid at this stage of the transaction, the other $10,000 when possession is delivered. The other difference is that in the letter he says "balance in one, two, or three years, or sooner if desired," and in the agreement signed by the Lindseys it is "on or before two years from date." Having said in his letter "sooner if desired," he can hardly have ground of complaint with "on or before two years." These differences are hardly so material or important as to prevent the paper signed by the Lindseys from being a substantial acceptance of Humbrecht's terms stated in his letter. In my judgment all these papers taken together show such a memorandum in writing signed by the party to be charged therewith as binds him under the statute of frauds as now contained in the statute laws of Georgia.

Another view of the case is this: Complainants allege in an amendment to the bill as follows:

"On May 22, 1906, said Humbrecht came to Cedartown, and immediately thereafter all the details of the purchase and sale of said property of the said Lindseys, heretofore described, were agreed on by defendant and petitioners. Upon said agreement being reached, defendant reduced the terms thereof to writing, and sent such writing by his attorney to petitioners for their signatures, and he did thus have them to execute the memorandum of the trade. All the terms of such sale are contained in such writing or memorandum prepared by defendant and herein copied. Petitioners charge that the name of defendant was inserted in said memorandum by him in such a manner and for the purpose of authenticating the whole instrument and making the same binding upon himself."

While there is some conflict in the adjudged cases, there is considerable authority to the effect that it is immaterial where the name of the party to be charged appears in the memorandum, provided it was so placed for the purpose of charging or binding himself. It is true that the statute (Civ. Code 1895, § 2693) requires the writing to be "signed by the party to be charged therewith," or some person by him lawfully authorized. Requiring a paper to be signed would seem to indicate that the name should be placed at the end of the paper. But the allegation in the amendment to the bill, "that the name of defend-

ant was inserted in said memorandum by him in such manner and for the purpose of authenticating the whole instrument and making the same binding upon himself," is admitted, so far as it is well pleaded, by the demurrer; and, unless the instrument itself contradicts this, and indicates that it is still to be signed by Humbrecht after the Lindseys had signed it, it may raise an important question in this case. About this, however, no opinion is expressed at present. Independently of the foregoing, I am satisfied that whether the writing be such as to bind Humbrecht under the statute of frauds to a compliance with the alleged contract for the purchase of the land in question there is such a part performance on the part of the Lindseys as takes the case out of the operation of the statute.

It is alleged in the bill and conceded by the demurrer that part of the lots of land in controversy were owned in severalty by Mr. G. W. Lindsey and part by Mrs. N. C. Lindsey, and in compliance with Humbrecht's suggestion and for his benefit, in order to put the title in more convenient and better shape for transmission to him, that Lindsey conveyed to Mrs. Lindsey all of his lots of land, and that she thereupon made a deed of her own lots and those thus conveyed to her by her husband to Humbrecht, and put the deeds in escrow in the Commercial Bank of Cedartown. This, in my opinion, is such a part performance as would make it a fraud on the Lindseys for Humbrecht to withdraw from the contract.

I have only considered and disposed of two grounds urged in argument: (1) That there was no such memorandum in writing as would bind Humbrecht; and (2) there was no such part performance as would take the case out of the statute of frauds.

The demurrer will be overruled.

## On Final Hearing.

This case has been referred to a standing master, who has filed his report, to which exceptions have been taken, the exceptions argued, and the matter submitted. The report of the master deals carefully and specifically with the various questions raised by demurrer, and which were considered and determined in the opinion filed when the demurrer was overruled. These questions were considered then, of course, in the light of the allegations made in the bill. The master has considered them and decides them in connection with the defendant's answer and the evidence submitted in the case.

It is claimed by counsel for complainant that the master's findings are contrary to the views expressed by the court in the opinion filed overruling the demurrer. It is unnecessary to determine whether that is true or not, and to go over the questions heretofore considered in view of one of the findings made by the master in his report. He finds that the complainants have failed to exhibit in evidence a good and sufficient marketable title to the land in question to authorize a decree in their favor.

The report of the master on this subject is as follows:

"We now come to the next, and last, question made by the pleadings, to wit, the willingness and ability of complainants to perform their part of

this alleged contract. On the hearing before the master, the greatest possible latitude was allowed the complainants upon the question of their title, and the character of the title which they were able and willing to convey to the defendant in pursuance of the contract. Every muniment of title and substantially all of the oral testimony as to possession offered by the complainants were admitted in evidence to illustrate this point. Much of this testimony was admitted over strenuous objections of counsel for the defendant. The evidence shows that complainants' title is in inextricable confusion. Many of the deeds to several of the lots have been lost. There is no paper title to a number of them, and Mr. Lindsey testifies that an abstract of his titles could not be made. As heretofore observed, the defendant was attracted to this property by an advertisement in the Seaboard Magazine, which is set out in his answer, and which was authorized by the complainant Lindsey something over a year prior to the negotiations between these parties. While the complainant Lindsey repudiated some of the statements in said advertisement, and although it contains some extravagant statements, still, from complainant Lindsey's own testimony it was substantially correct. Among other things, which complainant testified was correct, in said advertisement, was that the property 'contained extensive deposits of very high grade brown hematite ore.' The property was advertised at $7 per acre, and the opinion of the representative of the magazine, who claims to have examined it carefully, was that the mineral rights alone were worth this amount. [The advertisement was introduced and admitted in evidence, and marked as an exhibit, but has been mislaid. It is set out in the defendant's answer.] Complainant did not own the mineral rights to a number of the lots in controversy. Defendant insisted that he wanted whatever mineral rights there might be, if he bought the lots. Defendant insisted that it would be in his way for some one else to have these mineral rights, if he wanted to make a townsite there and have an abstract of title made. Defendant Humbrecht insisted all along upon the mineral rights, if he bought the property, and complainant Lindsey told defendant that he would do all he could to get the titles to said mineral rights. Complainant Lindsey further testified that he signed the papers knowing that he did not own the mineral rights; that, when the papers were drawn up, the mineral rights were put in as though he owned them; and that he signed the paper knowing that he did not own them. At the time this alleged contract was said to have been made, the title to about 35 of the lots of land in dispute was in J. M. Veach Company. Complainant Lindsey conveyed this property on September 13, 1893, and the land has been returned for taxation in the name of Veach Company since 1895. There are 10 lots to which there is no paper or color of title whatever. Out of these, there are five lots which the complainants did not get possession of under any title or claim of right whatever. There was a railroad right of way which was discussed during the negotiations, but nothing was said about the unusual easement rights which were included in the contract that complainant Lindsey had with the railroad. Nothing was said to defendant Humbrecht during all of the negotiations about the title to the Veach lots, or about a large debt which complainant Lindsey owed his wife. The evidence shows that complainant Lindsey owed debts which were liens upon the property, amounting to something near $24,000, including a mortgage and judgment held by his wife. It is true that since this alleged contract Mr. Lindsey has obtained deeds to some of the mineral rights, and these deeds have been obtained since this suit was filed in Polk superior court. It is also true that J. M. Veach Company has signed a deed conveying the 38 lots to complainant Lindsey, but this deed was executed after this suit was commenced, was never delivered, but filed in escrow. The title claimed by complainant Lindsey is based mainly on adverse possession either seven years under color of title or 20 years without color of title. As to a great many of these lots, the character of complainant's possession is unsatisfactory, and of a transitory nature, and, while it may be that complainant can produce satisfactory evidence of his title, that submitted to the master was not of such a character. Coming down to the execution of the two deeds, one from Mr. Lindsey to his wife, and the other from Mrs. Lindsey to the defendant, I am decidedly of the opinion that the

deed made by Mr. Lindsey to Mrs. Lindsey is voidable, if not void, and can be repudiated by Mrs. Lindsey, if she desires to do so. The cases referred to in a former part of this report from the Georgia Court of Appeals, as well as the Supreme Court, clearly indicate that such a conveyance, to be valid, must have the sanction of an order of the judge of the superior court of the county. In addition to this criticism, the deed from Mr. Lindsey to his wife has never been delivered, and the deed from Mrs. Lindsey to the defendant has no consideration expressed therein, and these are the deeds that the complainants set forth as their title and their part performance of this contract. While I have no doubt that these complainants, on account of their age, their high character and standing, and their long residence in the community in which they live, will never be disturbed in the possession and enjoyment of their property, yet, from all the evidence submitted, I find that the title offered by the complainants to the defendant is not a merchantable title, and such a one as a court of equity would force upon an unwilling vendee."

It does not appear from this record so far as I have been able to ascertain, that Humbrecht made any question about the title of the Lindseys to the land in controversy, or that he declined to go on with the trade on that ground. Notwithstanding this, it seems clear that in a proceeding like this, for specific performance, it would be necessary for the complainants to show that they had a good title to the land, and would be able to convey the same to Humbrecht; that, is a "marketable title" as it is frequently called in the books. The title should be such as not only to enable the purchaser to hold the land without question, but to sell it without difficulty if he desires. It is true that as to parts which are simply incumbered by mortgages or other liens and as to such parts as only lack the paper evidence of title, and which could be cured, a purchaser might not be justified in refusing to complete the transaction on the ground of lack of good title in the seller. In this case, however, in view of the facts found by the master with reference to the title and its condition, it can hardly be said to be in such condition that the defendant should be required to stand by and await an effort to perfect it. I understand that mere captious objections ought not to be allowed to prevail, or perhaps objections to the title to a very small portion of the land where the title to the great body of a large tract like this is perfect. That is not true, however, of this title. The reasonable objections to it go beyond this in my judgment. While it is doubtless true, as the master finds, that the Lindseys may hold this land as long as they live without objections, and that their descendants might hold it without interruption indefinitely, still, if it should be forced upon Humbrecht, and he desired to sell it, and it should be put in the hands of scrutinizing attorneys, it is perfectly clear that the title would be rejected. In view of this the necessary conclusion is that the complainants have not made out such a case in this respect, without considering the other questions involved, as to justify or authorize a decree in their favor.

The defendant is entitled to a decree dismissing the bill, with costs to be apportioned as suggested by the master.

## UNITED STATES v. SIOUX CITY STOCK YARDS CO.

(Circuit Court, N. D. Iowa, W. D. July 13, 1908.)

No. 451.

1. CARRIERS—TRANSPORTATION OF LIVE STOCK—RAILROAD COMPANIES.
Where defendant stock yards company, as authorized by its articles of incorporation, constructed and maintained railroad tracks on acquired real estate and owned or leased and operated engines and cars for hire, by which it transported live stock brought to the Sioux City market by other interstate railroad companies between their terminals and the stock yards, and also hauled such of the products or freight of the packing houses from one to the other, as required, and cars loaded with fuel or ice to such houses from the different railroads entering the city, it was a railroad company or common carrier other than by water within the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), prohibiting any railroad or common carrier other than by water, whose road forms a part of a line of road over which animals shall be conveyed from one state to another, from confining the same for a longer period than 28 consecutive hours without unloading, etc.

2. SAME—"COMMON CARRIERS."
A "common carrier" of personal property is one who undertakes for hire to transport from place to place the goods of others who may choose to employ him for that purpose, including a terminal railroad company owning no cars of its own and transporting only the railroad cars of other companies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1, 462–478.

For other definitions, see Words and Phrases, vol. 2, pp. 1313–1319; vol. 8, p. 7607.]

3. SAME—STATUTES—CONSTRUCTION.
The 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]) provides that no railroad or common carrier other than by water, whose road forms any part of a line over which cattle shall be conveyed from one state or territory into or through another state or territory, shall confine the same longer than 28 consecutive hours, except that on the written request of the owner the time of confinement may be extended to 36 hours, and section 3 declares that any carrier knowingly and willfully violating such provisions for every such failure shall be liable to a penalty of not less than $100 nor more than $500. *Held*, that but a single penalty is incurred for confining live stock beyond the period of 28 or 36 hours, so that the time of confinement beyond that period is not material, unless it be for another period of 28 or 36 hours.

4. WORDS AND PHRASES—"WILLFULLY."
The word "willfully" has various meanings, and is used to denote the quality of an act, or the intent with which it is done. It is frequently used in the sense of intentionally, willingly, designedly, or with set purpose. When used in criminal statutes, it usually means with a malevolent purpose or motive, with a wicked or criminal intent, especially if the forbidden act is one that is wrong in itself or involves moral turpitude; but if the forbidden act is not wrong in itself, or does not involve moral turpitude, the word is then used in the sense of intentionally or purposely, so that when the act is so done it is done willfully. The word, however, should be given that meaning only which the context indicates was intended. [Citing Words and Phrases, vol. 8, p. 7468 et seq.]

5. CARRIERS — TRANSPORTATION OF LIVE STOCK — TWENTY-EIGHT HOUR LAW—CONSTRUCTION—"KNOWINGLY AND WILLFULLY."
The 28-hour law (Act June 29, 1906, c. 3594, § 3, 34 Stat. 608 [U. S. Comp. St. Supp. 1907, p. 919]) declares that any railroad or common carrier other than by water, which "knowingly and willfully" fails to comply with the

provisions of the act, for every such failure shall be liable for and forfeit and pay a penalty of not less than $100 or more than $500. *Held*, that the statute is not criminal in the sense that a violation thereof constitutes a crime, and hence the words "knowingly and willfully" should not be construed to require the confinement of transported animals beyond the prescribed period with a malevolent purpose on the part of the carrier to cruelly torture them, but only to require that the animals be knowingly and intentionally confined beyond the prescribed period.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 3939.]

6. SAME—EVIDENCE.

Defendant's railroad constituted a part of a line of railroad over which live stock was transported under an interstate shipment to defendant's stock yards. At the time the cattle were delivered to defendant by the connecting carrier, they had all been kept in the cars without being unloaded for rest, water, and feed for more than 36 hours, in violation of Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), which fact was disclosed by the waybills, which were not delivered to defendant until after the cattle were in defendant's custody. The next and only place where the cattle could have been unloaded and watered was at defendant's yards at destination, where defendant delivered the cattle with all reasonable dispatch with the facilities it had for handling them. *Held*, that defendant had not "knowingly and willfully" failed to comply with the provisions of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607), and was therefore not liable for a penalty for its violation.

## At Law.

Action to recover the penalty provided for a violation of the 28-hour law.

The defendant is an Iowa corporation, the general nature of its business as authorized by its articles of incorporation being, among other things, to acquire, own, and operate stock yards at Sioux City, in that state, to receive and care for live stock, and buy and sell the same on commission or otherwise, to acquire and hold real estate, and erect thereon any and all yards, fences, pens, or other structures necessary for such purposes, to construct and maintain railroad tracks, and to own, lease, or operate engines, cars, and steam, electric, or other railroads upon and across such property for just compensation. Its capital stock is $2,500,000, and its affairs are managed by a board of directors chosen from the stockholders. It has acquired grounds at Sioux City and erected thereon the necessary structures and buildings to enable it to receive, care for, ship, and otherwise handle live stock of all kinds, and the packing house products of the different packing houses located at Sioux City, and to receive from and deliver to the various railroads entering Sioux City, some six or seven in number, all engaged in interstate commerce, all such property brought to, and taken by them from, that city. For this purpose it has constructed and owns about seven miles of railroad tracks upon its grounds adjacent to its yards and buildings and the packing houses in Sioux City, and owns and operates three locomotive engines with its own crews for the transportation of cars from the tracks of the different railroad companies upon and over its own tracks to and from the consignees and shippers of such live stock and packing house products; and all of such property shipped into or out of Sioux City by railroad, and all live stock that is to be fed and watered by the different railroad companies entering Sioux City, is taken by the defendant from said railroad companies, and hauled by it with its own engines, over its own tracks, to its yards, and delivered to the consignee, or fed, watered, or otherwise cared for and returned to the proper railroad company. The greater part of its business of carrying is in transferring cars loaded with live stock from the different railroads to the consignees of such property at its yards, and from the shippers thereof and of the packing house products to the railroad companies, and it does this for all of such railroad companies and shippers at Sioux City. In fact, no such property can be shipped to or from Sioux City by railroad except from defendant's yards and over its tracks, which are connected by proper transfer

tracks with those of the different railroad companies. The cars may be delivered, however, to and from all such shippers within a distance of about 1½ miles from the terminal tracks of the different railroad companies. The defendant issues no shipping receipts or waybills, but receives from the railroad companies the waybills of the stock shipped to Sioux City, weighs the cars before and after they are unloaded to enable them to compute the amount of freight, and returns them to the railroads. It owns no cars other than its engines, and shippers wanting cars for outgoing shipments order them from the railroad over which they desire to ship. The defendant takes such cars from the railroad companies to the chutes of the shipper ordering them, loads the cars, hauls them over its tracks, and delivers them to the proper railroad company, which issues the usual railway receipts therefor to the shipper. For its services in so carrying or transferring cars and property, the defendant receives a stipulated sum from the railroad companies from whom it receives, and to whom it delivers, the cars handled by it. It also carries products of the different packing houses to and from each other in Sioux City, as they require, and coal and ice to them from the different railroads, and the packing houses pay it for such services.

March 30, 1907, the Chicago, Milwaukee & St. Paul Railway Company, one of the railroads entering Sioux City and engaged in interstate commerce, received at Mapleton, Minn., 72 head of cattle to be carried and delivered to Clay Robinson & Co., dealers in live stock at Sioux City. The cattle were loaded in two cars at 6 o'clock p. m. of that day, and were carried by that company to Sioux City, where they arrived at 5:40 o'clock a. m. of April 1st, and were delivered by it to the defendant at 6:35 a. m., and by the defendant to Clay Robinson & Co. at their chutes at defendant's stock yards about 9 a. m. of the same day. The shipper by proper writing requested that the cattle be confined without unloading for rest, food, and water for a period of 36 hours. They were not unloaded and fed or watered, either by the Chicago, Milwaukee & St. Paul Railway Company or the defendant after they were loaded at Mapleton, and before their delivery to Clay Robinson & Co. The government alleges that defendant is a railroad company, and a common carrier other than by water, whose road connects with that of the Chicago, Milwaukee & St. Paul Railway Company, and that it knowingly and willfully confined the cattle in the cars for a longer period than 36 hours without unloading them for food, water, and rest, as required by law, and asks judgment for the penalty provided therefor.

The defendant answers that it is not a railroad company, or a common carrier, and that it had nothing to do with the handling of the cattle until after the expiration of the 36-hour period, following the time they were loaded upon the cars at Mapleton.

F. F. Faville, U. S. Atty.
Milchrist & Scott, for defendant.

REED, District Judge (after stating the facts as above). Upon the foregoing facts two questions are presented for determination: (1) Is the defendant a railroad company, or common carrier other than by water, within the meaning of the act of Congress commonly known as the 28-hour law? (2) If it is, has it incurred the penalty provided for a violation of that law?

So far as necessary to be now considered, the act of Congress provides:

"Section 1. That no railroad, express company, car company common carrier other than by water, * * * 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, * * * into or through another state or territory * * * 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 cannot 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 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. * * *

"Sec. 2. * * *

"Sec. 3. That any railroad, express company, car company, common carrier, other than by water, * * * who knowingly and willfully fails to comply with the provisions of the preceding section shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. * * *" Act June 29, 1906, c. 3594, 34 Stat. 607, 608 (U. S. Comp. St. Supp. 1907, pp. 918, 919).

The defendant's articles of incorporation clearly provide that it may acquire real estate, construct and maintain railroad tracks thereon, and own or lease and operate engines and cars upon and over the same for just compensation. It has acquired real estate and constructed some seven miles of railroad tracks thereon, and owns three locomotive engines which it operates with its own employés upon such tracks in hauling cars of all railroad companies entering Sioux City loaded with live stock destined for the market at that place, and all cars loaded at that place with live stock or packing house products consigned to other markets. It also carries or hauls over its tracks, by means of its locomotives, such of the products or freight of the packing houses from one to the other at Sioux City as they may require, and cars loaded with fuel or ice to such houses from the different railroads entering Sioux City. That it is not the business of an ordinary stock yards company to do this, and that it acts as a railroad company in so doing, cannot be doubted. It may be that its principal business is that of conducting a stock yards and dealing in live stock, but that is no reason why it may not operate a railroad. As incident to the successful operating of its stock yards, the transfer in car load lots of its own live stock and that of other shippers and dealers in such property and the products thereof at its yards, to and from the different railroads entering Sioux City, is absolutely necessary, and to effect such transfer it acts as a railroad company and operates a railroad under its articles of incorporation. The fact that it operates its road only within a distance of 1½ miles, the distance from the terminal tracks of the other railroads at Sioux City, to its yards, and the different chutes or places of loading and unloading cars, is wholly immaterial. Its character as a railroad company is established when it does the business of a railroad, and in a manner in which a railroad is usually operated, and not from the length of its road or tracks. It is therefore a railroad company and acts as such in the transfer of the cars of the other railroad companies to and from its stock yards, and to each other when required, and its road forms a part of the line of the several railroads over which live stock of all kinds is shipped from points outside the state of Iowa and delivered to dealers in such

property at Sioux City, and by them to the other roads to be carried to markets outside the state of Iowa. That its roadbed and tracks constitute a railroad apart from its locomotives or other equipment, see Lake Shore, etc., R. R. Co. v. United States, 93 U. S. 442–454, 23 L. Ed. 965.

Defendant is also a "common carrier" of personal property, which is defined to be:

"One who undertakes for hire to transport from place to place the goods of others who may choose to employ him for that purpose." The Niagara v. Cordes, 21 How. (U. S.) 7–22, 16 L. Ed. 41; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397–437, 9 Sup. Ct. 469, 32 L. Ed. 788; Cownie Glove Co. v. Merchants' Dispatch Co., 130 Iowa, 327, 106 N. W. 749; Jackson Iron Works v. Hurlbut, 158 N. Y. 34–38, 52 N. E. 665, 70 Am. St. Rep. 432; Gordon v. Hutchinson, 1 Watts & S. (Pa.) 285, 37 Am. Dec. 464; Kimball v. Rutland, etc., R. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Story on Bailments, §§ 495, 496; Moore on Carriers, p. 18 et seq.

One may be a common carrier of railroad cars only, as well as of other personal property. Peoria R. R. Co. v. Chicago, etc., R. R. Co., 109 Ill. 138, 50 Am. Rep. 605; Moore on Carriers, p. 45, § 14, and note.

But though defendant was not a public or common carrier within the technical meaning of that term, and carried over its tracks only the cars brought by the Chicago, Milwaukee & St. Paul Ry. Co. to Sioux City, its road would still form a part of a line of railroad over which live stock was brought from outside the state of Iowa to the market at Sioux City, and is literally within the terms of the act of Congress in question. To bring its road within the meaning of that act, it is not necessary that it be operated under an arrangement for its common control or management with that of the Chicago, Milwaukee & St. Paul Railway Company, or with those of any of the other roads entering Sioux City. It is enough that its road forms a part of a line over which live stock is brought from points without the state of Iowa to the markets in that state. See United States v. Colorado & N. W. R. R. Co. (C. C. A.) 157 Fed. 321, 323, 325.

Has the defendant incurred the penalty provided by law for confining these cattle longer than 36 hours? It is urged with apparent confidence by counsel for the government that it has. In addition to the ultimate facts before stated, the testimony shows that the train which brought these cattle to Sioux City was due to arrive at that place at 3:45 a. m. of April 1st, that it did not arrive until 5:40 a. m., and the cars containing the cattle were not delivered to the defendant until 6:35 a. m., or 35 minutes after the expiration of the 36-hour period immediately following the time the cattle were loaded at Mapleton. The waybills delivered to defendant showed that the cattle were shipped from Mapleton at 6 o'clock p. m. on March 30th, and attached to these was the written request of the owner of the cattle for their confinement for a period of 36 hours. Including these two cars, there were delivered to the defendant by the various railroad companies between 6 and 6:35 a. m. of April 1st, 83 cars of live stock, all of which were delivered at the chutes of the different consignees as soon as the

facilities for handling that number of cars would permit, and before 9 o'clock a. m. This was not an unusual number of cars to be delivered in one morning, and defendant had facilities to handle, and frequently handled, 150 or more cars in one morning; but in such instances the cars would be delivered to it at different times within a period of two or three hours, and it was an unusual occurrence to have 83 cars delivered within 35 minutes. Two cars, a half dozen, or perhaps more, could have been delivered at the chutes of Clay Robinson & Co. within 20 or 30 minutes after they were received by the defendant, and the contention of the government is that the delivery of the 83 cars to the defendant within 35 minutes, though unusual, is no excuse for not delivering the cars in question to the consignees within a very short time after the defendant received them, and that by its failure to deliver them until 9 o'clock it has incurred the penalty provided by the act. Conceding that the two cars might have been sooner delivered, then others of the cars would necessarily have been delayed, and, according to the contention of the government, the penalty might have been incurred by delaying them. A sufficient answer, however, to this contention is: (1) That the cattle had been confined more than 36 consecutive hours from the time they were loaded upon the cars when they were delivered to the defendant; and (2) that the evidence fails to show that defendant "knowingly and willfully" confined them, or participated in so doing, for the period, or any part thereof, of 36 hours immediately following their loading at Mapleton. The preceding carrier therefore had fully incurred the penalty provided by law for so confining them before it delivered the cattle to defendant. It is true that the statute provides that, in computing the time that the cattle were confined without unloading, the time during which they have been so confined on connecting roads shall be included. But a single penalty is incurred for confining live stock beyond the period of 28 or 36 hours, and the time of its confinement beyond that period is not material, unless it should be for another period of 28 or 36 hours, when it might be claimed that another penalty had been incurred—a question, however, not now determined. If defendant had received the cattle before the expiration of the period during which it was permissible to confine them, though but a short time, knowing that they had not been unloaded for the required rest, food, and water, and had then willfully confined them beyond the period, there might be reason for urging that, as it was not required to receive them when there was not sufficient time and opportunity to unload them within the required period, and it had not in fact unloaded them, it had incurred the penalty. But that question is not presented by this record, and it need not be considered, or determined, until it is. In this case the cattle were placed upon the transfer track for defendant about the same time or shortly before the waybills were delivered to it, and not until it received the waybills did it know, so far as the testimony shows, when the cattle were loaded, or from what place they were shipped. This was the first and only information defendant had of the time the cattle were loaded or shipped. There is no presumption that the cattle had not been unloaded, fed, and

watered within the required time by the preceding carrier. The presumption, rather, is that that carrier had performed its duty under the law. True, it is stipulated that the cattle had not been unloaded for food, water, and rest before they were delivered to defendant; but it is not stipulated, and there is no proof, that defendant so knew when it received the cattle. It would incur the penalty only when it "knowingly and willfully" confined them, or participated in confining them, longer than the prescribed period. The meaning of these words, as used in the statute, has been discussed. The word "willfully" has various meanings, and is used to denote the quality of an act, or the intent with which it is done. It is frequently used in the sense of intentionally, willingly, designedly, or with set purpose. Century Dictionary. When used in criminal statutes, it usually means with a malevolent purpose or motive, with wicked or criminal intent, especially if the forbidden act is one that is wrong in itself, or involves moral turpitude. Spurr v. United States, 174 U. S. 728–734, 19 Sup. Ct. 812, 43 L. Ed. 1150. If the forbidden act is not wrong in itself, or does not involve moral turpitude, the word is then often used in the sense of intentionally, or purposely, and when the act is so done it is done willfully within the meaning of the statute. Armour Packing Co. v. United States, 28 Sup. Ct. 428–437, 52 L. Ed. ——, affirming 153 Fed. 1–23, 82 C. C. A. 135. The word should be given that meaning only which the context indicates should be given to it. Words and Phrases, p. 7468 et seq.

The statute in question is not a criminal one in the sense that a violation of it constitutes a crime. A penalty is imposed for the violation, which is to be recovered by civil action in the proper Circuit or District Court of the United States. The primary purpose of the statute, as indicated by its title, is to prevent cruelty to animals while being transported by railroad or other means of conveyance. It may also have been to prevent damages to the owner by reason of such confinement. But, in either event, the penalty, or liability for damages, if any, is incurred only when the stock is confined, "knowingly and willfully," beyond the prescribed time, and when so confined the penalty at least is incurred. It does not seem that it was intended to require proof that the animals were confined beyond the prescribed period with a malevolent purpose upon the part of the carrier of cruelly torturing them, or of doing damage to their owner, before the penalty is incurred. To require such proof would largely thwart the purpose of the statute, for seldom, if ever, could it be adduced. The more reasonable interpretation is that, if the stock is knowingly and intentionally confined beyond the 28 or 36 hour period, the carrier, receiving it within and confining it beyond that period incurs the penalty provided by the statute. If a railroad company should load stock at one of its stations, when, by the schedule or ordinary running time of its train upon which it is loaded, it cannot reach a place where they may be unloaded and given the required rest, food, and water within the prescribed time, and they are not in fact given such rest and food, it may well be held to have knowingly and willfully—that is, intentionally or purposely—violated the statute, though it had no purpose or mo-

tive of torturing the animals or doing damage to the owner. When defendant received the waybills of the cars in question, it, no doubt, could have learned, by inquiry, that the cattle had not been fed and watered since they were loaded at Mapleton; but the cattle were then in its custody and, if it had so learned, it would not have relieved them to have turned them back to the preceding carrier. In fact, the testimony shows that the next place, and the only place in Sioux City, where they could have been unloaded and watered, was at defendant's yards, and that defendant delivered them at those yards with all reasonable dispatch with the facilities it had for handling them. It cannot therefore reasonably be held that the defendant acted willfully in confining the cattle after it received them, or that it participated in confining them any part of the time for which the penalty sought to be recovered was incurred.

The conclusion therefore is that, while the defendant is a railroad company and a common carrier other than by water, whose road forms a part of a line of railroad over which live stock is carried from points without the state of Iowa and delivered to the markets at Sioux City, within that state, the testimony fails to show that it has incurred the penalty for confining these cattle contrary to the provision of the act of Congress.

The petition should therefore be dismissed, and it is accordingly so ordered.

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## DOLLAR v. LA FONCIERE COMPAGNIE.

(District Court, N. D. California. April 15, 1908.)

1. INSURANCE—MARINE INSURANCE—GENERAL AVERAGE EXPENSE.

If the taking of an injured vessel to a port of necessity for repairs is for the benefit of both owner and insurer, the expense is a general average charge, to which both are bound to contribute, although there is no cargo liable to contribute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1251.]

2. SAME—INJURY OF VESSEL—TOWAGE TO PORT OF NECESSITY FOR REPAIRS.

A steamer, insured under a term policy providing that the insurer should not be liable for any particular average loss not amounting to 5 per cent. net, proceeded to Gray's Harbor for a cargo of lumber for San Francisco, and when entering the harbor broke her rudder, which rendered her unseaworthy. It was agreed between owner and insurer that San Francisco was the nearest port where she could be properly repaired, and by agreement she was loaded with lumber and towed to such port. *Held*, that the expense of such towage was a general average charge, to which the insurer must contribute; the voyage being deemed one of necessity, notwithstanding the fact that it was in completion of the original voyage.

[Ed. Note.—General average, see note to Pacific Mail S. S. Co. v. New York, H. & R. Min. Co., 20 C. C. A. 357.]

In Admiralty. Suit on policy of marine insurance.

Page, McCutchen & Knight, for libelant.

Andros & Hengstler, for respondent.

DE HAVEN, District Judge. This is an action to recover upon a policy of insurance issued by the defendant to the libelant, January 20, 1903, insuring his interest in the steamer Grace Dollar for the term of one year from loss by reason of perils of the sea; the insurer, however, not to be liable for any particular average loss not amounting to 5 per cent. net. The case was submitted to the court upon an agreed statement of facts, from which it appears:

"While the policy was in force, viz., on August 31, 1903, the steamer Grace Dollar sailed in ballast for Hoquiam, a loading port in Gray's Harbor, there to load a cargo of lumber and to bring the same back to San Francisco. While entering Gray's Harbor, the master, without fault on his part and by reason of a sea peril, missed the channel and touched bottom, thereby severely injuring his vessel's rudder. A jury rudder was fitted on, and she was able to make the harbor under her own steam. From there she was towed to Hoquiam, where she was filled with lumber in her forward part, so that her stern was brought out of the water high enough to allow of her being beached and a better jury rudder fitted. She was thereafter beached, a jury rudder was fitted, and she was again towed off, and then taken to Wood's Mill, in Gray's Harbor, where she loaded a full cargo of lumber; the insurers having consented to towage to San Francisco in her disabled condition provided she should take a cargo of lumber. On September 13th she started for San Francisco in tow of the steam tug Rivala, at which port she arrived in due course.

"There was no opportunity or facility at any of the points named, except San Francisco, to obtain the repairs necessary to make the ship seaworthy. Like facilities existed at Portland, Or., but by agreement between the parties San Francisco was accepted as the nearest port at which this could be done, and under this agreement the vessel proceeded as aforesaid to San Francisco instead of Portland. Gray's Harbor is a safe place at which a vessel may lie protected against the weather at all times."

Upon her arrival at San Francisco the damage sustained by the vessel was repaired, and the cost thereof and also the towage charges were paid by her owners. Thereupon an adjustment was made, in which the cost of towage to San Francisco was treated as a general average charge. The libelant, having paid the charges according to the adjustment so made, seeks to collect the amount thereof from the defendant. The defendant denies liability on the ground that the cost of towage was not properly a general average charge, but a particular average expense not equal to 5 per cent. of the value of the vessel. In the agreed statement of facts it is further stipulated:

"If the said expense of towage to San Francisco be in law a particular average charge, the libelant's proportion of the amount of this and other charges of a particular average nature is less than 5 per cent. net of the amount insured by respondent's policy, and libelant under such conditions has no claim for loss thereunder, by reason of the limitation of clause 1 of the policy, which provides that no claim of partial loss or particular average shall in any event be paid under said policy unless amounting to at least 5 per cent. net. If the said towage expense was properly stated in the said adjustment as a general average charge, the insurers, including the respondent, would be liable under the policy for the amount thereof, and in such event the respondent's liability under the said policy for its proportional share of all general average expense is the sum of $41.25."

From the foregoing statement of facts it will be seen that the question for decision is whether the towage expense, under the circumstances stated, is in the nature of a general average expenditure, or whether it is to be deemed a particular average expense; and I am of opinion that under the facts agreed upon it is a general average

charge, for which the defendant is liable upon its policy, under the rule declared in Potter v. Ocean Ins. Co., 3 Sumn. 27, Fed. Cas. No. 11,335. That was an action to recover upon a policy of marine insurance containing a clause which provided that the insurance company was not to be liable "for wages or provisions, except for general average," and one of the questions involved was the right of the insured to recover the expense incurred by the vessel for wages of crew and provisions in seeking a port of necessity for repairs. It appeared upon the trial of the case that the insured vessel sailed from New Orleans with a cargo to be landed at Tampico. In the course of the voyage both of her masts were carried away by a severe squall. The vessel, however, arrived at Tampico and delivered her cargo. The necessary repairs to enable her to prosecute any further voyage could not be there obtained, and she returned to New Orleans, where the repairs were made; and upon this point her master testified that his return to New Orleans was not in the regular course of the projected voyage, but solely for and from the necessity of the repairs made there, as the nearest and most convenient port for that purpose. In returning from Tampico to New Orleans the vessel carried no cargo. The court instructed the jury:

"That, if it was found that the return to New Orleans was in the regular course of the voyage, then their verdict on that point ought to be for the defendant; if, on the contrary, it was a new voyage of necessity for repairs, then their verdict on that point ought to be for the plaintiff."

There was a verdict for the plaintiff, and this was sustained by the court; and in so doing, after stating that the jury had found that the voyage to New Orleans "was a voyage of necessity for repairs to a proper and convenient port," the court said:

"In the present case the insurance was not upon any particular voyage; but it was on time. Unless the owner had a right to repair the bark so as to perform other voyages within the year at the expense of the underwriters, he must have had a right to abandon to the underwriters for a total loss; for in her crippled condition the bark was incapable of any further employment. The going to New Orleans, therefore, was not an act solely for the benefit of the shipowner, but was for the benefit of the underwriters also, to save them from a total loss. The plaintiff was bound to repair, if he could, and to seek some convenient port for that purpose; and the expenses of going thither were properly incidental expenses to the repairs, in the nature of a general average, to replace the bark in the condition in which she was before the accident."

This case is authority for the propositions: First. That it is not essential to a general average charge that there was cargo upon the vessel liable to make contribution on account of the expenditure claimed as a general average charge; that if only the owner and the insurer are benefited by the expense incurred in taking the injured vessel to a port of necessity for repairs, the latter, upon the principles of general average, is bound to contribute his proportionate share of such expense. Second. That, although a vessel may be in a port and in no immediate danger of loss, yet if she is unseaworthy, and it is necessary for her to seek another port for the purpose of necessary repairs, required in order to put her in a seaworthy condition, the expense incurred by the

vessel in going to the port of necessity constitutes a general average charge.

It is true that in the case just cited the return of the insured vessel to New Orleans was not in the regular course of the voyage intended by her, while in the case at bar the Grace Dollar in returning to San Francisco completed the voyage which she had in view when she sailed for Gray's Harbor; but I do not think this difference in the facts makes the rule followed in Potter v. Ocean Insurance Company inapplicable to the present case, for these reasons: When lying in Gray's Harbor, in her crippled condition, the Grace Dollar was unseaworthy as a result of the damage which she had sustained on her voyage, and the libelant had the right to take her to the nearest and most convenient port for necessary repairs at the expense of the insurers, or to abandon her to the defendant and other underwriters as a total loss. If she had been towed to Portland, the nearest port where she could have been repaired, and a port not in the regular course of the voyage contemplated by the Grace Dollar when she left San Francisco, the expense of towage would have been clearly a general average charge, under the rule followed in Potter v. Ocean Ins. Co., above cited. But it was agreed between the owners and the defendant that San Francisco was to be deemed the nearest port where repairs could be made, and under this agreement the vessel was taken to San Francisco for repairs. In view of this agreement the defendant is estopped from now asserting that the harbor of San Francisco was not the nearest and most convenient port to which the Grace Dollar could have been towed for repairs, or that the towage was for the purpose of enabling her to complete the voyage originally intended, and not for the benefit of the insurers as well. Under the agreement the return of the Grace Dollar from Gray's Harbor to San Francisco, with the assistance of the tug by which she was towed, is to be deemed a new voyage of necessity to the nearest and most convenient port for repairs, and the reasonable expense incurred in reaching the port so agreed on constitutes a general average charge. The fact that before leaving Gray's Harbor she took on a cargo which is not liable to contribute to the expenses of the towage is not material. The carriage of this cargo did not increase the expense of the towage, and it appears from the agreed statement of facts that the defendant, in consenting that the vessel might be towed to San Francisco in her disabled condition, did so upon the condition that she should take on a cargo of lumber. This condition was doubtless insisted upon because there was less liability of the vessel foundering if loaded with lumber than if she should proceed to sea without such cargo. It was not intended by the parties that the carriage of this cargo should in any manner affect the right of her owners to recover from the insurers their proportionate share of the expense of towing the vessel to the port agreed on.

Let a decree be entered in favor of the libelant for the sum of $41.25, with interest from August 31, 1905, and costs.

## THE EL RIO.

(District Court, S. D. Alabama. April 3, 1908.)

No. 1,166.

1. TOWAGE — CARE REQUIRED OF TUG — LIABILITY FOR INJURY TO TOW—"COMMON CARRIER."
   A towing tug is not a "common carrier" nor an insurer, and is bound only to the exercise of reasonable skill and care taking into consideration the fact that it contracts as an expert and is bound to know the channel and its usual currents and dangers and to avoid obstructions which ought to be known to men experienced in its navigation.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 4.
   For other definitions, see Words and Phrases, vol. 2, pp. 1313–1319; vol. 8, p. 760.]

2. SAME—BURDEN OF PROOF.
   The mere occurrence of an accident to a tow raises no presumption of negligence against the tug, and the burden is on the complaining party to show a lack of ordinary care.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 34.]

3. SAME—EVIDENCE CONSIDERED—TOWAGE OF LOG RAFTS.
   A tug which undertook the towage of three rafts of logs tied up in a river *held* not chargeable with negligence for the breaking up of one of the rafts by the current of the stream when the tow was being made up, but liable for the breaking of one of the other two by striking against a tree while being towed, on the ground that the tow was not properly made up, and that the tow line was too long for safe towing.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 15, 20.]

In Admiralty. Libel and cross-libel.

Stevens & Lyons, for libelant.
Roach & Chamberlain, for claimant.

TOULMIN, District Judge. In this case, as has been said in another:

"The difficulty arises not in the law, but in the ascertainment of the facts from the evidence, which in cases like the present is usually conflicting."

This one furnishes no exception to the rule.

The law is well settled that a tug is neither a common carrier nor an insurer, nor is the highest degree of skill and care exacted of her. She is bound to exercise reasonable skill and care in the performance of the duty assumed, and failure therein is gross fault creating liability for injury. A tug is liable only for ordinary care, as measured by prudent men of that profession. The mere occurrence of an accident raises no presumption of negligence against the tug, and the burden is on the complaining party to show a lack of ordinary care. The burden of proof is put upon the libelant to satisfy the court upon the evidence presented and upon the reasonable probabilities of the case that the tug was guilty of the fault charged through failure to exercise ordinary skill and care. The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; The Lady Wimett (D. C.) 92 Fed. 399. The ordinary care required of those engaged in the profession of towing is a high one, for they hold themselves out as experts. They must know the channel

and its usual currents and dangers and the proper method of making up tows. A tug is liable for striking upon obstructions in the channel which ought to be known to men experienced in its navigation. The A. R. Robinson (D. C.) 57 Fed. 667; The Margaret, 94 U. S. 494, 24 L. Ed. 146; Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477; The Webb, 14 Wall. 406, 20 L. Ed. 774. The burden is upon the libelant to prove that the tug failed to tow the rafts with that degree of skill which prudent navigators usually employ in similar circumstances. Authorities supra.

The libelant alleges and contends that the tug was guilty of great negligence, want of skill and care in that: First, the master of the tug was unskilled and incompetent to properly command and handle the tug while attempting the towing; second, that said master negligently undertook to tow said rafts at a time and under conditions which made such undertaking dangerous and hazardous to said rafts; and, third, that said master failed to use reasonable skill, diligence, and care in the manner in which he commanded and handled the said tug and tow after said tug took hold of said rafts to tow the same.

As to the first contention, the court finds that the libelant has not met the burden resting on it to make good this contention. Its proof is, in my opinion, wholly insufficient to sustain the charge that the master of the tug was incompetent to properly command and handle the tug while attempting the towing.

As to the second proposition, the court finds no satisfactory proof that the master of the tug negligently undertook to tow said rafts at the time and under conditions then existing. The claim is that the conditions were such as made the undertaking dangerous and hazardous to said rafts, in that the water in Middle river, in which the rafts were moored, was somewhat higher than usual, and that the current was unusually strong and rapid. There was no direct proof that there was any extraordinary danger or hazard in undertaking to tow the rafts at that time and under the conditions mentioned. In fact, the evidence is that a tug or tow of rafts left the same locality the evening before under similar conditions as to water and current and without disaster or special hazard so far as appears from the evidence. Besides, so far as the two rafts, which the tug took in tow, were concerned, the condition of the river as to water and current had no effect. It caused no loss or accident to them. But the force of the current in the river had a disastrous effect on the inner raft of the three rafts, all of which were tied to the river bank, by carrying it from its moorings, breaking it up, and scattering the logs composing it about the river for some distance below its starting point.

It is alleged in the libel that this raft was tied to the bank by a line or rope, and that this line was broken by the force of the current, and the raft thus loosened was driven from its situation, broken up, and scattered. The contention of libelant in the evidence and on argument is that the raft was tied to the bank, and that when the tug proceeded to fasten its tow line to the middle and outside rafts with the view of making up its tow, the master of the tug ordered the men who were on the rafts to let go the line with which the rafts, including the inner one, were tied to the bank, and by the tug's removing the

two outside rafts the inner one became exposed to the full force of the current, and thus the disaster to said inner raft occurred; the two men on the raft having obeyed the said order of the master. It is contended that this order of the master was not only an improper order at the time and under the circumstances, but evinced great want of skill and care. The two men on the rafts were men sent by libelant with boat and gear to go upon the rafts to assist in handling them and to remain on them while being towed that they might be properly protected and cared for. These men were witnesses for libelant, and their evidence was the basis for the contention last referred to. The master of the tug denied that he gave the order to the men on the rafts to untie the inner raft from the bank, as testified to by them. On the contrary, he testified that he ordered them to tie and make fast to the bank the inner raft if it was not already so tied, and to let loose the other two rafts from the inner one as he was going to pull them out and drop them down to a safer place to make up his tow, where he would tie them and return for the third raft. He contradicts the two witnesses referred to in other material respects, and in this was corroborated by the engineer of the tug.

The third contention is that the master failed to use reasonable skill, diligence, care, and caution in the manner in which he handled the said tug and tow after the tug took hold of said rafts to tow the same. My opinion is that this contention is well made, and that the master of the tug, in allowing the small raft of the two he had in tow to collide with the tree, as shown by the evidence, was guilty of negligence. That he failed to exercise due care and caution in towing the rafts in that part of the river where the collision occurred, I think, is clear. He testified that his tow line was from 150 to 200 feet long, and that the rafts were towed side by side, and not one behind the other, as the evidence showed was the proper and usual way. The evidence also showed that there were many bends in the river, and that the collision occurred in a bend. The evidence also showed that good pilotage required a much shorter tow line to be used in towing rafts in that river than the one used in this instance; that towing around these bends the tow could be handled and controlled better and more successfully by a line of 50 or 60 feet. The weight of the evidence showed that the line was about 150 feet. The libelant's two men who were on the rafts testified that the collision was caused by having too long a tow line, although it was, in their opinion, only about 60 feet. And the evidence tended to show that there was plenty of room in the river to the westward of the tree for the tug and tow to have passed without trouble. The master of the tug testified that 15 or 20 logs were lost out of the raft by its collision with the tree.

The evidence shows that the tug delivered to the libelant 137 logs for which the respondent in his cross-libel claims the contract price of 22 cents a log; and also claims for the use of his tug in picking up these logs, being some of those which were lost out of the two rafts which had been broken. There was no evidence of the number of logs in either of the rafts. The libelant claims he lost 142 logs. The evidence showed that at least 137 logs were picked up and delivered to libelant by respondent's tug, and that 97 were likewise picked up

and delivered by one Chamberlain and for which libelant paid Chamberlain $38.75. How many of these logs came out of each raft was not ascertained. The raft which remained intact containing 124 logs, and which was never delivered by the respondent's tug to the libelant, and was subsequently taken by the libelant from the point where it had been left by the tug, was at libelant's cost towed to its destination.

As I understand libelant's claim, it is for the value of 142 logs which he claims were lost by the negligence of the tug's master, and he also claims the expenses incurred in recovering other logs than those delivered by respondent's tug, admitting his liability to the tug for 137 logs delivered by her at 22 cents a log. The tug's owner claims not only this sum, but also hire for the use of the tug in picking up and saving the said 137 logs. The claim last mentioned is based on an alleged agreement and promise of one Meaher that the said owner would be paid extra for the tug's service. Meaher was an employé of libelant to whom the master of the tug reported the disastrous condition of things and asked for advice or instructions. Meaher denied having made any such agreement or promise as alleged, but testified that he stated to the owner and master that the tug should return and endeavor to save the logs; that the tug was responsible for them; that he could not promise that the tug should be paid extra for the service; that he had no authority to do so, but that to aid them in the work he would furnish them some men and gear, which he did; that this was all he agreed to do, and this he did. He had no authority to bind the libelant and did not assume to do so.

The proof is not sufficient, in my opinion, to show with any degree of clearness a want of ordinary care and skill on the part of the tug so as to entitle the libelant to damages for the loss of the logs from the raft called the "inside raft," being the one next to the bank, as to which there is conflict of evidence whether the tow line of the tug was or was not at any time fastened to it; and also whether the master of the tug did or did not order the line on said raft to be made fast to the bank or to be loosed therefrom. Moreover, my opinion is that the libelant's men, who were on the rafts for the purpose of protecting and caring for them, should have seen the necessity of tying the inner raft to the bank, if not already securely fastened. I think this was their duty, under the circumstances shown, irrespective of an order from the master of the tug.

I do not think that the cross-libelant should recover hire for the tug.

I find that the libelant owes the tug the sum of $53.89. I also find the libelant paid Chamberlain $38.75 for the logs picked up by him and delivered to libelant. I further find that the libelant incurred expense in towing the raft of 124 logs to its destination, which service the respondent undertook to perform and abandoned, thus breaking its contract, and, while the amount of that expense is not definitely shown, I take it 22 cents a log is a reasonable amount to be allowed from evidence in the case, aggregating $27.28, which I award the libelant as damages. Thus I find libelant entitled to $66.03, and the cross-libelant entitled to $53.89. Deduct $53.89 from $66.03, and it leaves a balance due libelant of $12.14, for which a decree will be entered.

OROVILLE & N. R. CO. v. LEGGETT et al.

(Circuit Court, N. D. California. May 21, 1908.)

No. 14,602.

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.
The question whether there is a separable controversy warranting a removal of a cause must be determined by the state of the pleadings and the record of the case at the time of the application for removal, and not by the allegations of the petition therefor, or the subsequent proceedings which may be had in the Circuit Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 115.

Separable controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Min. Co., 35 C. C. A. 155.]

2. SAME—CONDEMNATION PROCEEDINGS—OWNERS OF SEPARATE INTERESTS IN SAME PROPERTY.
An action in a state court to condemn right of way over a tract of land, the fee of which is owned by a defendant who is a citizen of the same state as plaintiff, does not involve a separable controversy between plaintiff and a nonresident defendant, joined as having a leasehold interest in all or a part of the tract, which entitles the latter to remove the cause into a federal court, although he may be entitled to a separate award of compensation covering his interest.

On Motion to Remand to State Court.

Wm. H. Devlin, for plaintiff.

Roger Johnson, for defendant Nevada Gold Dredging Company.

W. E. Duncan, Jr., for defendant James H. Leggett.

A. F. Jones, for defendants Bank of Rideout, Smith & Co. and Boston & California Dredging Company.

FARRINGTON, District Judge. This action was brought in the superior court of the state of California for Butte county by Oroville & Nelson Railroad Company, a California corporation, against James H. Leggett, Boston & California Dredging Company, a Maine corporation, Nevada Gold Dredging Company, a Nevada corporation, Valley Contracting Company, a California corporation, Bank of Rideout, Smith & Co., a California corporation, John Doe, Richard Roe, James Brown, and Peter Smith. The object of the suit is to condemn and appropriate for railroad purposes a strip of land situated in Butte county, Cal. On petition of the Nevada Gold Dredging Company the cause was removed to this court November 4, 1907, on the ground that it presents a separable controversy between that defendant and plaintiff. The defendant Leggett now moves to remand the case, because, as he contends, it involves no such controversy. The motion is resisted, not only by the dredging company, but also by plaintiff. No answer has been filed.

This court has no jurisdiction on the ground of diverse citizenship, because plaintiff and several of the defendants are citizens of the same state. It is not pretended that a federal question is involved, and therefore the jurisdiction of this court depends upon the existence of a separable controversy between plaintiff and the said dredg-

ing company. It has been held repeatedly that, in determining the existence of such a controversy, the court will look only to the record as it stood in the state court at the time the petition for removal was filed. "The cause of the action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." Alabama So. Ry. Co. v. Thompson, 200 U. S. 206, 215, 26 Sup. Ct. 161, 163, 50 L. Ed. 441. "The question whether there is a separable controversy warranting a removal to the Circuit Court of the United States must be determined by the state of the pleadings and the record of the case at the time of the application for removal, and not by the allegations of the petition therefor, or the subsequent proceedings which may be had in the Circuit Court." Wilson v. Oswego Township, 151 U. S. 56, 66, 14 Sup. Ct. 259, 263, 38 L. Ed. 70; Thomas v. Great Northern Ry. Co., 147 Fed. 83, 85, 77 C. C. A. 255; Offner v. Chicago, E. & R. Co., 148 Fed. 201, 202, 78 C. C. A. 359; Shane v. Butte Electric Ry. Co. (C. C.) 150 Fed. 801; Moon on Removal of Causes, § 141, p. 402.

It is averred in the complaint:

"That plaintiff is informed and believes, and therefore alleges, that the defendant James H. Leggett claims to own and is the owner of the tract of land hereinbefore particularly described, and also the larger tract of which it is a part; that each of the defendants Boston & California Dredging Company, Valley Contracting Company, and Nevada Gold Dredging Company claims an interest or estate in said tract of land * * * and in said larger tract of which it is a part as lessees of said defendant James H. Leggett."

The defendant Bank of Rideout, Smith & Co. holds a mortgage on said strip of land and on the larger tract of which it is a part. The remaining defendants claim interests in the land in question, the nature and extent of which are unknown to plaintiff.

That portion of the removal section of the judiciary act which is pertinent reads as follows:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." 4 Fed. St. Ann. p. 312.

The controversy between citizens of different states which is contemplated by this act is one "which can be fully determined as between them." "By the settled construction of this section, the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit." Torrence v. Shedd, 144 U. S. 527, 530, 12 Sup. Ct. 726, 727, 36 L. Ed. 528. This is especially true where the complaint presents but a single cause of action.

In the present case, the complaint simply shows that the land sought to be condemned is one tract all owned by defendant Leggett, that three of the defendants have leasehold interests therein, and that one has a mortgage lien thereon. The interest of each lessee and of the mortgagee may constitute a separate and distinct estate which will

justify, and ultimately demand, a separate and distinct award; but, nevertheless, the object of the suit is to condemn the entire tract. There is but a single cause of action. The relief sought against the leaseholders and the bank is but an incident to the main issue, and the fact that one of the leases may concern the dredging company alone does not render the action divisible. The plaintiff had a right to join as defendants all parties who claim an interest in the land in question, and thus extinguish in one action all adverse interests, and avoid further litigation. The plaintiff seeks complete, not partial, relief, and a decree which will adjudge to each defendant the value of his interest in the land.

The whole subject-matter of this action, as set out in the complaint, cannot be fully determined between plaintiff and the dredging company without the presence of other defendants, because the interests of Leggett and the bank extend to every part of the land, and both, like the plaintiff, are citizens of California. The fact that defendants can file separate answers, tendering distinct and varying issues relating to their respective estates in the one tract of land, does not create separable controversies within the meaning of the statute.

In Bellaire v. Baltimore & Ohio Railroad Company, 146 U. S. 117, 119, 13 Sup. Ct. 16, 36 L. Ed. 910, suit was brought by the city of Bellaire to condemn a strip of land 160 feet long by 60 feet wide. Of this strip the Baltimore & Ohio Railroad Company was in possession under a lease from its codefendant. The lower court held that the value of the leasehold was an interest wholly distinct and apart from the interest of the defendant who owned the fee, and that it constituted a separable controversy. The Supreme Court, however, held that:

"The object of the suit was to condemn and appropriate to the public use a single lot of land, and not (as in Union Pacific Railway v. Kansas, 115 U. S. 2, 22, 5 Sup Ct. 1113, 29 L. Ed. 319) several lots of land, each owned by a different person. The cause of action alleged, and consequently the subject-matter of the controversy, was whether the whole lot should be condemned, and that controversy was not the less a single and entire one because the two defendants owned distinct interests in the land and might be entitled to separate awards of damages. Kohl v. United States, 91 U. S. 367, 377, 378, 23 L. Ed. 449. The ascertaining of those interests, and the assessment of those damages, were but incidents to the principal controversy, and did not make that controversy divisible, so that the right of either defendant could be fully determined by itself, apart from the right of the other defendant, and from the main issue between both defendants on the one side and the plaintiff on the other."

Where the object of the suit is to condemn and appropriate to public use separate and distinct tracts of land, each owned by a different person, each constitutes a separable controversy. Deepwater Railway Co. v. Western, etc., Co. (C. C.) 152 Fed. 824, 826; Railroad Co. v. McKell (C. C.) 75 Fed. 34.

In the case last cited the fee to the entire tract of land sought to be condemned was in McKell. McKell had leased a portion of the tract to one of his codefendants, who, in turn, had sublet to another. Plaintiff and McKell were citizens of different states. Plaintiff and McKell's tenants were citizens of the same state. Judge Jackson held

that as to the portion of the land which had not been leased there was a separable controversy between plaintiff and McKell which might be removed to the federal court. It should be noted here that none of McKell's codefendants had any interest in that portion of the land not leased. If the dredging company were the owner of a separate and distinct portion of the tract of land in question, and no other defendant had any interest therein, we should have a state of facts similar to those in Railway Co. v. McKell, but no such state of facts is disclosed either by the complainant or by the petition for removal.

It is alleged in the petition:

"That the cause of action set up in said suit against your petitioner is a severable controversy, separate and distinct from that alleged against any other defendant; * * * that said suit is brought by plaintiff to condemn and take for public use a certain tract of land described in the plaintiff's complaint therein; and that your petitioner claims and owns a separate and distinct part thereof and estate therein and is entitled to have found and adjudged to it a separate compensation for said taking."

The petition does not define with any degree of certainty or precision the character or location of the portion of the land claimed by the dredging company. The fact that it claims a distinct part or estate is not inconsistent with the existence of a like claim in another defendant to the same piece of land, and the allegation of ownership of a separate and distinct part and estate of that tract of land does not exclude the idea that some other defendant may have a mortgage lien or a leasehold interest in the same tract which is claimed by the dredging company. 2 Lewis on Eminent Domain, § 335.

It is contended that under the rule announced in Railway Co. v. McKell, supra, there is a severable controversy as to the dredging company, because in its petition for removal that company says it is interested with Leggett in only a part of the land described in the complaint. I do not so understand the conclusions of Judge Jackson. What he does decide is that there is a separable controversy as to that portion of land owned by McKell in which his codefendants have no interest. The separate controversy is between plaintiff and McKell, not between plaintiff and McKell's tenants.

This conclusion leads us to another important consideration. In order to justify a federal court in assuming jurisdiction in a case like this, there must not only be a separate controversy, but removal must be sought by a defendant actually interested in the separate controversy. This follows from the language of the statute relating to removals, which confers the right of removal only upon the defendant or defendants actually interested in the separable controversy. Moon on Removal of Causes, § 151; Rand v. Walker, 117 U. S. 340, 345, 6 Sup. Ct. 769, 29 L. Ed. 907.

In the case last cited it was argued that the order to remand was erroneous because the bill showed a separable controversy between plaintiff and certain of the defendants. Chief Justice Waite said:

"As to this it is sufficient to say that neither of the parties to this controversy, if it be separable—a question which we do not decide—have petitioned for removal, and the right to remove a suit on the ground of a separable con-

troversy is, by the statute, confined to the parties actually interested in such controversy."

There is nothing in the pleadings, or even in the petition for removal, which justifies the court in assuming that the interest of the defendant Leggett and the lien of the bank do not extend to that very part of the tract in question which the dredging company claims. Both Leggett and the bank are therefore necessary to a complete settlement of the controversy. The fact that they are citizens of the same state as the plaintiff bars the jurisdiction of this court.

The cause will be remanded to the state court.

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## In re McLOON.

(District Court, D. Maine. July 1, 1908.)

No. 172.

1. BANKRUPTCY—"ACTS OF BANKRUPTCY"—CONVEYANCE WITH INTENT TO DEFRAUD CREDITORS.

   To constitute an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a(1), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), by conveying property with intent to hinder, delay, or defraud creditors, there must have been an actual fraudulent intention which impeaches the bona fides of the transaction.

   [Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

2. SAME—INTENT TO PREFER CREDITOR—"ACT OF BANKRUPTCY."

   An alleged bankrupt executed a mortgage of property to her son to secure him for advances made at the time and to be thereafter made to pay debts which she then owed. The mortgage was not recorded for several months, but she testified that she did not know such fact, but supposed it was recorded, that she considered herself solvent and expected to pay all of her creditors and made the mortgage to obtain further time and prevent a sacrifice of her property, and it was shown that between the time of the giving of the mortgage and the filing of the petition in bankruptcy her indebtedness was reduced, and that no new debts were contracted unless secured at the time. At the time of giving the mortgage the son was not a creditor. *Held*, that the giving of the mortgage was not an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a(1,2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), either as a transfer made with intent to hinder, delay, or defraud creditors or to prefer a creditor.

In Bankruptcy. On involuntary petition.

Alan L. Bird and Joseph E. Moore, for petitioning creditors.

Arthur S. Littlefield and Albert S. Woodman, for alleged bankrupt.

HALE, District Judge. This case comes before the court upon the question of adjudication. Has the respondent committed an act of bankruptcy? The petition alleges:

"First. That said Adelle M. McLoon did convey, transfer, execute, and make a mortgage to Albert C. McLoon of Rockland, aforesaid, on the 9th day of September, A. D. 1905, as appears on the face of the deed, but which is acknowledged on September 9, 1906, and recorded in the Knox registry of deeds at Rockland on the 31st day of December, A. D. 1906, at 9:30 o'clock in the forenoon, in Book 139, p. 356, the aforesaid date of record being within four months prior to the date of the filing of this petition, of several pieces and par-

cels of real estate being then the owner thereof, that is, all her real estate in said county in whatever town and wherever situated, as more particularly described in said mortgage, with intent to hinder, delay, defraud her creditors, did make, execute, and transfer all her said property by mortgage aforesaid to Albert C. McLoon.

"Second. That said Adelle M. McLoon did execute and make a mortgage to Albert C. McLoon of Rockland, aforesaid, of all of her real estate in said county of Knox, in whatever town and wherever situated, as more particularly described in said mortgage, bearing date on the 9th day of September, A. D. 1905, as appears on the face of the deed, but which deed is acknowledged on September 9, 1906, and recorded in the office of the register of deeds in and for said county of Knox, at Rockland, on the 31st day of December, A. D. 1906, at 9:30 o'clock a. m. in Book 139, p. 356, the aforesaid date of record being within four months prior to the date of the filing of this petition, said Adelle M. McLoon being then insolvent, and then well knowing that she was insolvent, and being then indebted to said creditors and to Albert C. McLoon of Rockland and to divers other creditors, with intent to prefer over the other creditors said Albert C. McLoon who was then her creditor as aforesaid, did make and execute and transfer said property by mortgage as aforesaid."

The third allegation of an act of bankruptcy is general.

1. Did the respondent execute the mortgage to her son, Albert C. McLoon, with intent to hinder, delay, and defraud her creditors, as alleged in the first paragraph of the petition?

This allegation is drawn under section 3a (1) of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), which provides:

"Acts of bankruptcy by a person shall consist of his having conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them."

The intention which is brought into question by this act must be an actual intention. In Lansing Boiler Works v. Ryerson, 128 Fed. 701, 63 C. C. A. 253, in speaking for the Circuit Court of Appeals for the Sixth Circuit, Judge Severens said:

"The test of the conveyances intended by subsection 1 of section 3 is that of the bona fides of the transfer, for it is the well-settled law that a conveyance made in good faith, whether for an antecedent or present consideration, is not forbidden by such statutes, notwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."

In Richardson v. Shaw (in an opinion recently reported, but as yet unpublished) 28 Sup. Ct. 512, 52 L. Ed. ——, the Supreme Court held that there is nothing in the bankrupt act which prevents an insolvent person from disposing of his property, provided his dealings are conducted without any purpose of defrauding his creditors or giving a preference to any of them. In speaking for the court, Mr. Justice Day cites with approval Cook v. Tullis, 18 Wall. 332, 340, 21 L. Ed. 933, where Mr. Justice Field said:

"There is nothing in the bankrupt act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to

one over another. His dealing will stand if it leave his estate in as good plight and condition as previously."

In the case before me, the respondent testifies that she made the transfer to her son in good faith, supposing that she was solvent; that, just before she made the transfer, one of the banks which is now a petitioning creditor, solicited payment of some of her indebtedness which had become due; that she thereupon made the transfer to her son, to secure him for making the payment to the bank, and for the general purpose of securing him for advancements which he should make to pay her creditors, she believing then, and still believing, that her estate is sufficient to pay them in full; that she looked to her son to advance what might be necessary to prevent a sacrifice of her property, and to satisfy her creditors, until such time as sufficient money could be raised to pay them in full. In pursuance of the intention of the respondent and her son, her indebtedness has been reduced between the date of the giving of the mortgage, September 9, 1905, and the date of the filing of the petition in bankruptcy. No further debts were contracted during that time, unless the indebtedness was secured at the time it was incurred. The mortgage was not recorded at the time it was given, nor for some months after; but the testimony of the respondent is that she supposed it was recorded, and that she was surprised when she found it had not been recorded. It is in proof that on April 10, 1906, she gave her son a very comprehensive power of attorney, although not a general one. That paper is in evidence. The son testifies that, before this power of attorney, there had been another one "not nearly so strong"; but it is not put in evidence, so that the only power of attorney before me is the one dated April 10, 1906. I speak especially of this power of attorney, because it might be urged that, although she herself did not know that the mortgage was not recorded, still she would be estopped to set up this lack of knowledge in her own behalf if, at the date of the mortgage, there was an existing power of attorney to her son by which she made it possible for him, in her behalf, to withhold the mortgage from record, and thus make it a secret mortgage as against creditors whose debts should afterwards be incurred; but, as I have said, the mortgage is of an earlier date, and there were no unsecured debts incurred after it was made. The facts in this case do not show such failure to record a mortgage as can be held to be a part of a scheme to hinder, delay, and defraud creditors. In the Shaw Case (D. C.) 146 Fed. 273, the delivery of the mortgage was secret, and there was a distinct and affirmative understanding that the mortgage was not to be recorded. This court further discussed the question of the effect of a secret and unrecorded mortgage. In the Hanson Case, 155 Fed. 342, 352, this court held such state of facts to constitute a part of a conspiracy to defraud. In the case at bar, the testimony falls short of proving that the mortgage was secret, and that it was kept from record by a corrupt design upon the part of the respondent. The facts in the case induce the conclusion in my mind that the mortgage was not made with intent to hinder, delay, and defraud any part of her creditors, but with the general intention of paying all her creditors.

2. Section 3a(2) of the bankrupt act provides that an act of bankruptcy by a person shall consist of his having "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors."

The second allegation of this petition is drawn under the foregoing provision of the bankrupt act. In Richardson v. Shaw, supra, Mr. Justice Day, in his opinion, said:

"The bankrupt act, in section 60a, provides: 'A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition, or after the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.' A 'creditor' is defined to include any one who owns a demand or claim provable in bankruptcy. Section 1, subd. 9, Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419). It is essential therefore, in order to set aside the alleged preference, that Shaw & Co. at the time of the transfer should have stood in the relation of creditor to the bankrupt."

In the case before me, when Mrs. McLoon sought the assistance of her son to aid her in paying her creditors, he himself was not a creditor. The testimony shows that his aid was solicited in paying her creditors.

In the Andrews Case, 144 Fed. 922, 75 C. C. A. 562, it has been held by the Circuit Court of Appeals in this circuit that the intention to prefer must be an actual intention, and not an attributed one, and that it cannot be presumed from the fact alone that the debtor knew he was insolvent when he made the payment of the pre-existing debt. In Stevens v. Holway Company (D. C.) 156 Fed. 90, this court had occasion to cite the Andrews Case, and to quote the language of Judge Putnam. In the case now before the court, the testimony is persuasive that the debtor did not know that she was insolvent, and that she did not, in the language of Judge Putnam in the Andrews Case, "have knowledge of the essential facts which tend to produce the resulting consequences." The testimony convinces me that she sought the aid of her son, who was not a creditor; that she made the transfer to him with the intent, not to prefer a portion of her creditors, but to pay all of them.

I am forced to the conclusion that the petitioners have not sustained the burden upon them of showing that the alleged bankrupt has committed an act of bankruptcy.

The petition is therefore dismissed, with costs to the respondent.

## POND et al. v. NEWELL.

(Circuit Court, D. Massachusetts. May 20, 1908.)

No. 78 (Old No. 1,728).

CORPORATIONS—STATUTORY LIABILITY OF DIRECTORS FOR ILLEGAL INDEBTEDNESS—REMEDY FOR ENFORCEMENT.

Under Gen. Laws R. I. c. 180, which by section 15 limits the indebtedness which may be lawfully incurred by a corporation to the amount of its capital stock, and, in case such limit is exceeded, makes the directors at the time jointly and severally liable for the excess, and section 21, which provides a remedy for enforcement of such liability by an action of the case by any creditor against any one or more of such directors, such remedy is exclusive, and a bill in equity cannot be maintained in a federal court in another state against a director based on such statutory liability.

In Equity.

Barney & See, for plaintiffs.

Frederick B. Byram, Seeber Edwards, and Edwards & Angell, for defendant.

COLT, Circuit Judge. This is a bill in equity brought by certain creditors in behalf of themselves and all other creditors to enforce an alleged liability of the defendant as a director in the W. W. Aldrich Company, a corporation organized under the laws of Rhode Island.

The bill alleges that "by reason of the directors of said the W. W. Aldrich Company permitting the indebtedness of said company to exceed the amount of its capital stock actually paid in, said directors and each of them, including the said Oscar D. Newell, have under the law in that behalf made and provided made themselves jointly and severally liable to the extent of such excess for all the debts of said company then existing or contracted while they respectively continued in office and until the debts shall be reduced to the amount of the capital stock of such company paid in."

The first question we have to determine is whether, under the Rhode Island statutes, a bill in equity will lie for the enforcement of this liability.

The liability of directors for the debts of a corporation in excess of the amount of the capital stock actually paid in arises under section 15 of chapter 180 of the General Laws of 1896 of Rhode Island:

"Sec. 15. The whole amount of the debts which any such corporation shall at any time owe shall not exceed the amount of its capital stock actually paid in; and in case of any excess, the directors under whose administration it shall happen shall be jointly and severally liable, to the extent of such excess, for all the debts of the company then existing, and for all that shall be contracted as long as they shall respectively continue in office, and until the debts shall be reduced to the amount of the capital stock of such company paid in."

Section 21 of this chapter provides a special form of remedy. This section reads as follows:

"Sec. 21. Whenever any of the officers of any manufacturing company shall be liable, by the provisions of this chapter, to pay the debts of such company

or any part thereof any person to whom they may be so liable may have an action of the case against any one or more of the said officers, and the declaration in such action shall state the claim against the company and the ground on which the plaintiff expects to charge the defendant personally, and such action may be brought, notwithstanding the pendency of an action against the company for the recovery of the same claim or demand, and both of the actions may be prosecuted until the plaintiff shall obtain the payment of his debt and the costs of both actions."

In Legg v. Dewing, 25 R. I. 568, 569, 57 Atl. 373, the Supreme Court of Rhode Island held that the only remedy provided by statute was an action of the case under section 21 of chapter 180, the concurrent remedy by bill in equity which formerly existed having been repealed by an act of the General Assembly passed April 20, 1876, Pub. Laws 1873–78, p. 300, c. 555. In its opinion the court said:

"The right to hold the director personally for the debts of the corporation only exists by virtue of the statute, and hence the complainant is limited to the mode of relief there given (Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520; Smith v. Tripp, 14 R. I. 112; Almy v. Coggeshall, 19 R. I. 549, 36 Atl. 1124; Colt v. Sears Commercial Co., 20 R. I. 323, 38 Atl. 1056; Willoughby v. Allen, 25 R. I. 531, 56 Atl. 1109), which is by action of the case against one or more of the officers who are liable. Chapter 180, § 21. Section 22 does indeed allow a bill in equity to be brought to enforce the liability of stockholders; but, as we have said, we do not find any such case sufficiently stated in the bill, and no such choice of remedies is given by section 21. Section 20 of chapter 128 of the Revised Statutes of 1857, appearing later as section 21 of chapter 142 of the General Statutes of 1872, which gives a remedy in equity in such a case, was amended by Pub. Laws 1873–78, p. 300, c. 555, April 20, 1876, so as to exclude a suit in equity against an officer of a corporation as such."

It is true that, where the state statutes provide no remedy for the enforcement of this liability, the only appropriate remedy in the courts of the United States is by a bill in equity. Stone v. Chisolm, 113 U. S. 302, 308, 5 Sup. Ct. 497, 28 L. Ed. 991; Hornor v. Henning, 93 U. S. 228, 230, 23 L. Ed. 879. It has also been held in Massachusetts that, where the state statutes provide concurrent remedies at law and in equity, the only remedy available is in equity. Merchants' Bank v. Stevenson, 10 Gray (Mass.) 232, 235; Merchants' Bank v. Stevenson, 5 Allen (Mass.) 398, 400, 401; Cochrane v. Reed, 13 Allen (Mass.) 455, 456.

These cases, however, have no application to the case at bar, because the statutes of Rhode Island have provided a remedy, and have limited that remedy to an action at law under section 21; and it is well settled that where the liability and the remedy are created by statute, the remedy provided is exclusive of all others. Pollard v. Bailey, 20 Wall. 520, 527, 22 L. Ed. 376; Middletown Bank v. Railway Company, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803. In Pollard v. Bailey, the court said:

"The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But, where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

The complainant contends that this court in the case at bar should follow the Massachusetts rule. This position, however, is clearly un-

tenable. The W. W. Aldrich Company is a Rhode Island corporation, and this liability can only be enforced in the mode prescribed by the statutes of Rhode Island. Upon this point it is only necessary to cite the language of Mr. Justice Gray, speaking for the court, in Fourth National Bank v. Francklyn, 120 U. S. 747, 758, 7 Sup. Ct. 757, 763, 30 L. Ed. 825:

"In all the diversity of opinion in the courts of the different states, upon the question how far a liability, imposed upon stockholders in a corporation by the law of the state which creates it, can be pursued in a court held beyond the limits of that state, no case has been found in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders.

"The provisions of the Rhode Island statutes, which made the stockholders of the Atlantic De Laine Company liable for its debts, were coupled with provisions prescribing the form of remedy, which still remains in force, except so far as they have been modified by the latter statute of the same state. By the decisions of this court, as well as by those of the courts, both state and federal, held within the state and district of Rhode Island, and of the highest court of Massachusetts, where these provisions had their origin and their first judicial construction, this liability can be enforced only in the mode prescribed by the statutes of Rhode Island. The present suit, therefore, not being a bill in equity, or an action upon a judgment against the corporation, which are the only forms of remedy authorized by these statutes, but being an independent action at law upon the original liability of the stockholder, cannot be maintained, and the Circuit Court rightly so held."

Since the remedy by bill in equity for the enforcement of this liability was repealed by the act of April 20, 1876, and since, as was said by the Supreme Court in Legg v. Dewing, no choice of remedies is given by section 21 of chapter 180, it follows that the present bill must be dismissed.

Bill to be dismissed, with costs.

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CONANT et al. v. KINNEY.

(Circuit Court, D. Rhode Island. June 24, 1908.)

No. 2,829, Law.

INTERNAL REVENUE—SUIT TO RECOVER TAXES PAID—INTEREST.

The facts that an internal revenue collector is required by Rev. St. § 3210 (U. S. Comp. St. 1901, p. 2082), to pay all taxes collected into the treasury daily, and that provision is made by sections 989 and 3220 (U. S. Comp. St. 1901, pp. 708, 2086), for paying judgments recovered against a collector out of the treasury, do not make a suit against a collector to recover judgment for the amount of a legacy tax illegally exacted and paid under protest one against the United States, so as to preclude the recovery of interest, and interest is recoverable in such case from the date of the payment.

Edwards & Angell and Frank H. Swan, for plaintiffs.
C. A. Wilson, U. S. Atty., for defendant.

BROWN, District Judge. This is an action against the collector for the recovery of a legacy tax paid under protest.

The demurrer of the defendant was overruled by opinion of this court filed March 23, 1908, following the decision of the Circuit Court of Appeals for this circuit in Gill v. Austin, 157 Fed. 234, 84 C. C. A. 677. The question is now raised whether the judgment should be for the amount of the tax paid under protest, without interest, or whether plaintiff is entitled to interest, and, if so, whether from the date of the payment of the tax, March 31, 1904, or from September 14, 1905, six months after the date of the filing of plaintiff's appeal.

For the United States it is contended that the suit is in legal effect a suit against the United States. In support of this contention reference is made to section 3210 of the Revised Statutes (U. S. Comp. St. 1901, p. 2082), which relates to the payment of taxes into the treasury; also, to Philadelphia v. Collector, 5 Wall. 720–733, 18 L. Ed. 614, and Com'rs v. Buckner (C. C.) 48 Fed. 533.

The plaintiff relies upon Erskine v. Van Arsdale, 15 Wall. 75, 21 L. Ed. 63 (cited in Schell v. Cochran, 107 U. S. 626, 2 Sup. Ct. 827, 27 L. Ed. 543), as exactly in point. The plaintiff also refers to United States v. Sherman, 98 U. S. 565, 25 L. Ed. 235.

In reference to the certificate of probable cause, which prevents the issuance of execution against the collector, the court said, in United States v. Sherman:

"When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government, but not until then. Before that time the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given."

In Clapp v. Mason, 94 U. S. 589, 24 L. Ed. 212, a judgment with interest was affirmed.

It is stated by counsel for the plaintiff that in Gill v. Austin, 157 Fed. 234, 84 C. C. A. 677, interest was allowed from the date of the exaction of the tax. Counsel for the United States argues that section 3220 of the Revised Statutes (U. S. Comp. St. 1901, p. 2086), contains no provision for the payment of interest upon the refund. The following language, however, seems broad enough to cover interest:

"Also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal taxes collected by him, with the costs and expenses of suit, also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector or inspector, in any suit brought against him by reason of anything done in the performance of his official duty."

The opinion in Com'rs v. Buckner (C. C.) 48 Fed. 533, at page 542, contains the following remark by the learned judge:

"I am inclined to the opinion that the law as announced in Erskine v. Van Arsdale, 15 Wall. 75, 21 L. Ed. 63, has been somewhat modified as to interest on taxes illegally collected. See United States v. Bayard, 127 U. S. 260, 8 Sup. Ct. 1156, 32 L. Ed. 159; Stuart v. Barnes (C. C.) 43 Fed. 281."

United States v. Bayard does not seem to me to be at all in point. There the claim was strictly a claim against the United States; here

the claim is against the collector, for a tax collected by him without legal authority. The provision of section 989, that a certificate of probable cause may be given by the court to prevent the issue of execution against the collector, shows the intention of Congress to relieve the collector, not of individual liability to judgment, but merely from the execution which would follow according to ordinary legal procedure.

That the statute requires the collector to pay into the treasury moneys received by him for taxes, and that provision is made for paying judgments against the collector out of the treasury, is, in my opinion, insufficient to convert a suit against the collector into a claim against the United States so as to preclude the right to interest. I am further of the opinion that the general rule as laid down in Erskine v. Van Arsdale, 15 Wall. 75, 21 L. Ed. 63, that interest is payable from the date of the exaction of the tax, is the true rule and is supported by the weight of authority.

Judgment may be entered for the sum of $108,061.78, with interest at the rate of 6 per cent. per annum from March 31, 1904, to the date of entry of judgment.

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## In re KETTERER MFG. CO.

(District Court, M. D. Pennsylvania. June 29, 1908.)

No. 964, in Bankruptcy.

BANKRUPTCY—SALE OF PROPERTY BY TRUSTEE—RIGHTS OF PURCHASER.

A bankrupt corporation was the owner of a valuable lease on the property which it occupied subject to a mortgage on the fee given by the lessor. The lease contained a provision giving the lessee the right to apply the rent in payment of the taxes on the property and the interest and principal of the mortgage, and so far as rent had been paid it had been so applied. The trustee sold the leasehold; there being at the time a certain amount of rent due in part accruing before the bankruptcy and in part from the trustee during his occupancy. *Held*, that such provision of the lease was for the protection of the bankrupt's leasehold interest, and that the purchaser took such leasehold with respect to the mortgage in the condition it stood at the time of the sale and could not insist on the application of the unpaid rent on the mortgage as against the lessor who had duly proved his claim therefor.

In Bankruptcy. On certificate from J. E. Vandersloot, referee, sur exceptions to account of trustee.

See 156 Fed. 719.

C. E. Ehrehart and Sidney E. Smith, for the exceptions.

C. J. Delone, for trustee, opposed.

ARCHBALD, District Judge. At the time of its bankruptcy, March 2, 1907, the Ketterer Manufacturing Company was the owner of a valuable leasehold on certain property in West Hanover, Pa., where it carried on its business, which was disposed of by the trustee at public sale, September 10, 1907, for $11,500; the sale being finally confirmed November 7th following. This leasehold was subject to a

mortgage, given on the fee, by C. P. Ketterer, the lessor, to the Hanover Savings Fund Society for $10,000, on which there was due at the time of the sale the sum of $7,500 principal without interest. By the provisions of the lease it was agreed that the rent, which was $1,000 a year, payable in semiannual installments of $500 each, "shall be deposited by the said lessee [the Ketterer Manufacturing Company], or its successor, in the Hanover Savings Fund Society Bank, or in some other bank in the borough of Hanover to be agreed upon, to the credit of a special account, to be known and carried as the C. P. Ketterer rental account, and that the said account may and shall be liable to be drawn upon by the said lessee herein or its successor, to pay, first, all taxes upon the said premises hereby leased, second, to pay the interest on a certain mortgage for $10,000 which is a lien against the said premises, now held by the said Hanover Savings Fund Society, and, third, to pay the balance of said account upon the property of the said mortgage until the same is fully paid."

There was due for the rent of the leased premises on March 2, 1907, the date of the petition in bankruptcy, the sum of $592.70, and from then to December 1, 1907, when the purchaser went into possession, the further sum of $750, making a total of $1,342.70. This amount, by order of the referee, at the instance of the present owner of the leasehold, has been directed to be paid over by the trustee to the Hanover Savings Fund Society, to be credited on the mortgage, in compliance with the terms of the lease. This payment is resisted by C. P. Ketterer, the lessor, who has made due proof of his claim for rent, and the propriety of it is the question to be disposed of.

The clause of the lease which is relied on was, no doubt, inserted for the protection of the lessee, in order to secure payment, within the life of the lease, of the mortgage to which it was subject, and it had so far been carried out at the time of the trustee's sale that the mortgage had been reduced to $7,500. The purchaser's rights attached at that time, and are governed by conditions as they then existed, by which he must be assumed to have been guided in his bidding, and they cannot be carried back of or beyond that. He is entitled to have the lease lived up to from that time on, but he is not concerned with whether it has been or not before that, at least not so far as regards the application of the rent to the payment of the mortgage. If nothing, for instance, had been so applied, so that $10,000 was due upon it, instead of $7,500, he would have to take the situation as it stood and could not ask to have it remedied. The mortgage is not against the leasehold, but the fee, and, except as it is an incumbrance which if foreclosed would avoid the lease, the amount due upon it does not affect the value of the lease, which depends solely on the rent reserved as compared with the rental value of the premises. Practically, therefore, it is of no moment to the lessee what is the amount of the mortgage, or how fast it is paid off, so long as it does not threaten him, of which, as now reduced at least, there seems to be no danger. But, even if there were, the mortgage being $7,500 when he bought, he must take the estate with that burden, and is not in a position to ask that the unapplied rent which had accrued before he came in shall be applied for his benefit, to the detriment of others. It is possible

that the trustee could have asked for the application, or the court, at his instance, could have ordered it, as affecting the value of the leasehold, in order to get a better price for it, but before the sale, always, and not after it, in the interest of the purchaser, to enhance his bargain. Of the $1,342.70 involved, $592.70, as we have seen, was due to the lessor at the time of filing the petition, and, except as bankruptcy intervened, could have been realized by distress out of the goods on the premises, thus becoming a preferred claim to be first paid out of the proceeds, and the rent, $750 having accrued during the occupancy of the receiver and the trustee, is to be taken care of as a part of the expenses of administration; both going to the lessor, as the owner of the premises, except as the provisions of the lease might have, but have not, been invoked against him. With its disposition, the present holder of the lease, coming in subsequently, has no right to interfere. He simply goes on from the time he bought; the right of all parties being fixed at that time, according to which they must now be enforced.

The order of the referee is therefore reversed, and the sum of $1,342.70 is directed to be paid to C. P. Ketterer on the claims for rent which he has proved.

The exceptions to the item of $1,000 allowed to C. J. Delone as attorney for the trustee must also be sustained. Judging by the services rendered, with which I am familiar, $500 is abundant compensation, and that will be the amount to be paid.

The case will therefore be sent back to the referee, with directions to revise the account of the trustee in conformity with the views expressed in this opinion.

And it is so ordered.

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## TAYLOR v. WEIR.

(Circuit Court, E. D. Pennsylvania. July 14, 1908.)

No. 11.

1. CARRIERS—EXPRESS COMPANIES—LOSS OF FREIGHT—LIMITED LIABILITY.

Plaintiff shipped a package of furs, worth $2.000, by defendant express company. Plaintiff marked no value on the package and gave none in her communications to the express company; but the box had been previously used, and a $150 valuation was marked thereon, and this amount was stated by the express company in the receipt as the value of the package. Plaintiff accepted the receipt without demur, and after the loss of the package made no claim of mistake in valuation, but claimed the right to recover the full value of the furs in spite of the limitation of liability contained in the receipt. *Held*, that plaintiff's recovery was limited to $150.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 663–667, 708–710.]

2. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—SUBSTITUTION OF PARTIES.

Suit having been originally brought in a state court against the Adams Express Company, service of the writ was threatened by motion to quash, whereupon plaintiff successfully moved to substitute W., the president of the express company, as the defendant. The cause was then removed to the United States Circuit Court on the ground of diversity

of citizenship. *Held*, that the record would not thereafter be amended, at plaintiff's instance, either as a matter of right or discretion, so as to substitute the express company for defendant W. for the sole purpose of defeating the federal court's jurisdiction.

Motions by Plaintiff for a New Trial, and Also to Amend and Remand.

S. Morris Waln and Thomas Biddle Ellis, for plaintiff.
John L. Evans and Thomas De Witt Cuyler, for defendant.

J. B. McPHERSON, District Judge. Upon the undisputed evidence in this case, all of it having been offered by the plaintiff herself, I should have felt bound to set aside any verdict in excess of $150 and interest. As it seemed to me therefore, a binding instruction to bring in the only verdict that was warranted by the evidence was not only justified but required. By an oversight, $50 was named as the proper amount, instead of $150; but this was afterwards corrected with the defendant's consent.

The testimony showed clearly that the plaintiff prepared a package for shipment by Adams Express, containing furs that she now asserts to have been worth about $2,000. She herself did not mark any value upon the package, and gave none in her communications to the company in which she asked them to send for the furs. Neither did she authorize any one to put a value upon the package, and was evidently content to take her chance of its safe carriage to New York at the rate charged by the company for packages upon which no definite estimate has been placed by the shipper. The package was called for during her absence from the apartment house where she was residing, and, in accordance with her instructions, was handed to the driver by a servant of the house. The box in which the furs were placed had been previously used for another shipment by express, and a valuation of $150, which was then marked upon it, was still visible, although the plaintiff had crossed the figures out. Apparently supposing this valuation to be still intended to apply, the expressman adopted it, noting that sum upon the receipt that he then made out, and was paid the proper rate upon such valuation. When the plaintiff came home in the evening, the receipt came into her hands, and she accepted it without demur. Clearly she had no intention of valuing the furs at what she now says was their real worth, but was content to save the money that she would then have been obliged to pay, and send them as an unvalued package. Even after the lapse of a week, when the failure of the furs to reach the consignee indicated that they might be lost, she did not claim that there had been any mistake about the shipment or the valuation, and, so far as appears, she never has made such a claim. She made none at the trial of the case, but took the position that she was entitled to recover in spite of the limitation of liability contained in the receipt (which is in all respects identical with the receipt that was under consideration in MacFarlane v. Adams Express Co. [C. C.] 137 Fed. 982), and sought to avoid the effect of Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, by asking the court to permit the jury

to find that she did not consent to such limitation. In a given condition of the evidence, the question of consent might be so disputable that a jury alone could determine it; but, as I have already said, the evidence here seems to me so clear as to forbid any other inference to be drawn than her consent to the valuation of $150. On the authority of Hart v. Railroad Co., the motion for a new trial is refused.

The motion to amend the record so as to substitute the Adams Express Company for Levi C. Weir, president, who is the present defendant, is made for the sole purpose of defeating the jurisdiction of the Circuit Court. In the common pleas, where the suit was originally brought, the Adams Express Company was named as defendant; but, as the service of the writ was threatened by a motion to quash, the plaintiff herself successfully moved to substitute Levi C. Weir, president, as the defendant. The cause was then removed to this court on the ground of diversity of citizenship, and the record supports the order of removal. No reason has been offered that compels the Circuit Court to renounce its jurisdiction by allowing the amendment now asked for, and certainly the application makes no appeal to the court's discretion.

The motion to amend and remand is also refused.

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## GAWNE v. BICKNELL.

(Circuit Court, D. Maine. July 9, 1908.)

No. 70.

1. CONTRACTS—ACTIONS—PARTIES—DEFENDANTS—JOINDER—PERSONS WHO MUST BE JOINED.
   In all actions on contract, every person must be made a defendant who is subject to legal liability.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1604–1614.]

2. TORTS—JOINT AND SEVERAL LIABILITY.
   In actions of tort, the injured party may proceed against all the wrongdoers jointly, or he may sue one or more separately.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Torts, § 29.]

3. ELECTION OF REMEDIES—ACTS CONSTITUTING.
   Where plaintiff in an action of tort sues all the defendants jointly and has judgment, he cannot afterward sue any one of them separately, and, if he sues any one of them separately and has judgment, he cannot afterward sue them jointly; the prior judgment against one being in contemplation of law an election to pursue the several remedy.

4. MASTER AND SERVANT—DUTY OF MASTER.
   The master's duty to provide a reasonably safe place and appliances and competent fellow servants, as well as all the other duties resting on the master, arise by operation of law because of the relation of master and servant, and not by virtue of the contract of employment.

5. SAME—INJURY TO SERVANT—ACTION—PARTIES DEFENDANT.
   In an action against a master for injuries to a servant, it being unnecessary to state or prove the employment contract only to show incidentally the existence of the relation of master and servant, plaintiff was not bound to join all the members of the firm by whom he was employed, but was entitled to sue any one of the members thereof separately.

William H. Gulliver, for plaintiff.
Albert S. Woodman and Arthur S. Littlefield, for defendant.

HALE, District Judge. This is an action of tort in which the plaintiff seeks to recover for personal injuries. The case now comes before the court upon a plea in abatement, wherein the defendant sets up:

"That the liability in said writ declared on, if any such liability there is, is the liability of him, the said Bicknell, jointly with one Edwin L. Morris, who is still living, and who, at the time of the commencement of said suit, was and still is a resident within the jurisdiction of this court, and who then did and now does reside at Rockland, Knox county, state of Maine and district of Maine, and not the liability of the defendant alone."

To this plea in abatement the plaintiff demurs. The plaintiff's declaration alleges that he was an employé of the defendant. The defendant urges that the relation of master and servant existed between the plaintiff and his employer by virtue of a contract of employment; that the employment was not by the defendant alone, but by the defendant together with his partner; that, under the contract of employment, the plaintiff was not the servant of Bicknell, the defendant sued, but of Bicknell and Morris, copartners; that while, as a general rule, such plea is not maintainable in an action of tort, this rule does not apply to all actions which are tort in form, but that:

"If a tort action grows out of the violation of a contract, and it is necessary to establish the contractual relation in order to recover, then a plea in abatement of nonjoinder will apply, as well as though the action were in form contract."

The case, therefore, presents an interesting question in the law of pleading. It is elementary law that in all actions of contract every person must be made a defendant who is "subject to the legal liability," but that in actions of tort the injured party may proceed against all the wrongdoers jointly, or he may sue one of them separately. It is claimed by the defendant that this case comes upon the border line between the above two propositions, that the rules of joinder relating to actions in tort apply strictly only to such actions, and that, where an action on the case is brought for the nonfeasance of a contract, and where the contract is the basis of the suit, then, if a joint contractor be not included, the defendant may plead such nonjoinder in abatement. The learned counsel for the defendant cites 1 Chitty on Pleading (16 Am. Ed.) p. 129, in which the rule is laid down that in such cases it is not competent to the plaintiff "to alter or obviate the rules of the law with regard to the parties to be sued upon the contract, merely by varying the form of action where in substance it is founded on the agreement."

In Wright v. Geer, 6 Vt. 151, 27 Am. Dec. 538, upon which great stress is laid by the defendant, the contract was distinctly the basis of the suit. It was necessary to allege such contract in order to prevail. The duty resting upon the defendant in that case was a duty not created by law. It arose out of the contract for building. Thus the contract became an essential part of the declaration. In that case the court distinguished between a duty arising out of the contract,

and a duty created by the law, as will appear by the following language of the opinion:

"There are cases where the duty arises from the nature of the employment, and no contract is necessary to be stated or proved; thus in the case of a common carrier the law imposes the liability, and it is only necessary to state the employment of a carrier as such. No express contract is necessary. The rule may be illustrated by the following case: Suppose a carrier receives compensation for carrying goods and agrees to call at a given place and receive them, and neglects to do so. Here is no liability imposed by law, and he can be made liable only upon the express contract. But, if he received the goods and failed to deliver them, the ground of liability is different, and no express contract need be stated. The same rule would doubtless hold in a case of a surgeon."

In the case at bar the contract between the master and servant is not at law the basis of the suit. The duty of the defendant to provide a reasonably safe place and appliances, and competent fellow servants, as well as all the other duties resting upon the defendant, are duties arising by operation of law, and because of the relation of master and servant. They do not arise out of any contract of employment. It is not necessary to state or prove a contract. It is necessary only to state that the relation of master and servant exists. The law imposes the liability. There is nothing in the case to take it out of the doctrine of the courts of this state and of the federal courts that the injured party may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately; but, if he sues them all jointly and has judgment, he cannot afterwards sue any one of them separately. And, further, it must be said that, if he sues any one of them separately and has judgment, he cannot afterwards seek his remedy in a joint action; because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy. The rule of the federal courts is stated in Sessions v. Johnson, 95 U. S. 347, 348, 24 L. Ed. 596.

The rule is elaborated in Atlantic & Pacific R. R. v. Laird, 164 U. S. 399, 17 Sup. Ct. 122, 41 L. Ed. 485, where it was urged that the suit of an injured passenger against a railroad company partook of the nature of an action upon contract because the passenger must rely upon his contract of carriage as the basis of his suit. In speaking for the Supreme Court, Mr. Justice White said:

"The doctrine is very clearly expressed in Kelly v. Metropolitan Railway Company, 1 Q. B. 944, where the Court of Appeals held that an action brought by a railway passenger against a company for personal injuries caused by the negligence of the servants of the company while he was traveling on their line was an action founded upon tort. In reading the judgment of the court, A. L. Smith, L. J., said: 'The distinction is this: If the cause of complaint be for an act of omission or nonfeasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship irrespective of contract to take due care, and the defendants are negligent, then the action is one of tort.' * * * There was a duty shown independently of contract. * * * The action therefore was ex delicto, and the defendants, being joint tort-feasors, might have been sued either separately or jointly at the election of the injured party."

The same rule is enforced in Gudger v. Western, etc., Co. (C. C.) 21 Fed. 81, 84; and in the late cases: Knuth v. Butte, etc., Co. (C. C.) 148 Fed. 74; Shane v. Butte, etc., Co. (C. C.) 150 Fed. 801, 809.

In the case before me, the plaintiff will, of course, be obliged to prove that the relation of master and servant existed. But the contract between the master and the servant is not a vital allegation with reference to the alleged wrong. It does not form the basis of the suit. It is not a part of the gravamen of the charge. It is merely a matter of inducement in the line of proof, and does not change the law that the injured party may proceed against one or all of the wrongdoers.

The demurrer to the plea in abatement is sustained.

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## In re MERRILL & BAKER.

(District Court, S. D. New York. August, 1907.)

BANKRUPTCY—LIENS—COLLATERAL SECURITY—COLLECTIONS MADE BY BANKRUPT AS AGENT FOR CREDITOR.

Where a corporation pledged book contracts, on which sums were due to it in installments, to a bank as collateral security for its notes, but was authorized by the bank to make collections on such contracts through its collection department, all collections made thereon were made as agent for the bank, and pro tanto extinguished the lien of the bank on the collateral, which, on the bankruptcy of the corporation, was enforceable only to the extent of the amount then remaining due on the notes, after crediting thereon the amount of all such collections, whether actually paid over by the bankrupt or not.

In Bankruptcy. On motion to confirm report of special master.

A corporation pledged to a bank as collateral security to its notes certain contracts for the sale of books on which sums were due to it in installments. The contracts were turned over to the bank, which, however, by a written instrument authorized the officers of the corporation to collect the contracts, and with the knowledge and consent of the bank such collections were made through its collection department. The corporation was adjudged a bankrupt, having at the time turned over to the bank all collections made, except the sum of $290.66, which it had used in its business. The trustee thereafter made further collections exceeding the amount due on the notes, and the bank filed a petition claiming the proceeds of such collections to the amount due on its notes, after crediting the sums turned over to it by the bankrupt. The special master reported in favor of the allowance of such claim.

W. Benton Crisp, for City National Bank of Goshen.
George Zabriskie, for trustee.

HOUGH, District Judge. The bankrupt became the agent of the City National Bank for the collection of the amounts due on the book contracts in question. Payment to Merrill & Baker was payment to the national bank, and pro tanto extinguished the notes secured by collateral. The bank is entitled to the amount due on the notes at the time of bankruptcy. Neither it, nor any agent, had a right to collect more. Anything collected beyond that amount by the trustee is his, as was the right to collect such overplus. The bank is not entitled to the $290.66 in dispute. No interest will be given beyond such as the trustee may have actually received. There is no reason

why petitioner should bear the expenses of this litigation. He should recover the taxable expense of the proceedings and a docket fee.

Report modified accordingly.

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## Ex parte FUDERA.

(Circuit Court, S. D. New York. June 24, 1908.)

1. EXTRADITION — PROCEEDINGS FOR EXTRADITION TO FOREIGN COUNTRY — EVIDENCE.

   For the purposes of extradition, one who, in his absence, has been convicted in contumaciam of a criminal offense in a foreign country, is to be regarded only as charged with, and not as convicted of, the offense.

2. SAME—SUFFICIENCY OF EVIDENCE UNDER TREATY WITH ITALY—HEARSAY.

   Article 1 of the extradition treaty of 1868 between the Kingdom of Italy and the United States (Act March 23, 1868, 15 Stat. 629), which provides for extradition from one country to the other of persons charged with crime in the demanding country, "provided that this shall be done only upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed," does not warrant the return to Italy of a person there charged with murder, where the only evidence presented of his connection with the offense is hearsay.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Extradition, § 16.]

Habeas Corpus.

Marx, Houghton & Byrne, for petitioner.

Gino G. Speranzo, for demanding government.

WARD, Circuit Judge. This is a petition of Vincenzo Fudera, in the custody of the United States marshal for the Southern District of New York, under the application of the Italian Ambassador for the extradition of one Girolamo Asaro on the charge of murder, to be discharged under a writ of habeas corpus. The papers sent forward by the Italian government show that on October 4, 1896, Giuseppe Costa of Castellammare del Golfo was murdered. July 12, 1898 a warrant of arrest was issued in Italy for the apprehension of Girolamo Asaro, "charged with participating in intentional premeditated homicide in that with the intent of killing and with premeditation he, together with others, directed one Buccellato Martino, since dead, to murderously shoot on the night of October 4, 1896, in Bada street (territory of Castellammare), one Giuseppe Costa, thereby killing him instantly." December 3, 1898, Girolamo Asaro was convicted in his absence in contumaciam of having contributed to the murder of Costa by directing one Buccellato Martino to commit the unlawful act, and sentenced to life imprisonment.

Article 1 of the extradition treaty of 1868 between the United States and the Kingdom of Italy (Act March 23, 1868, 15 Stat. 629) provides that each party shall deliver up to the other "persons who, having been convicted of or charged with the crimes specified in the following article (of which murder is one) committed within the jurisdiction

of one of the contracting parties, shall seek an asylum or be found within the territories of the other, provided that this shall be done only upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." One who has been convicted in contumaciam in foreign countries is to be regarded not as convicted of, but only charged with, the offense. Moore on Extradition, art. 102.

The petitioner contends that no evidence has been offered, as required by the treaty, which would justify a magistrate of this country in committing Girolamo Asaro for trial if the crime had been committed here. The only testimony on the subject is that of a policeman and of certain Royal Carbineers as to the result of investigations carried on by them in respect to the murder of Costa, expressed in the following language:

"We have found that the fugitive, Asaro Girolamo of Mariano, 38 years old, Buccellato Martino of Civanni, 20 years old, and the landowner, Ingaglia Stefano of Giuseppe, 26 years old, all of Castellammare, met a few days before committing the crime, in the store of Ingaglia, which is situated on Busuri street, and then and there decided to rid themselves of Costa Giuseppe, as they considered him friendly to the police force, members of which often met at his house near the mill in Baria street. They drew lots, and it fell to Buccellato Martino to put the decision into effect."

This is the sole evidence of Asaro's connection with the murder committed by Buccellato Martino, and it is pure hearsay, upon which he could not have been committed for trial in this country if the murder had been committed here.

Without considering any other question raised, I think the petitioner is entitled, according to the express provision of the treaty, to be discharged; but to give an opportunity to the demanding government to appeal from this decision, if it be so disposed, an order may be entered providing that he be enlarged upon recognizance with surety for appearance to answer the judgment of the appellate court, provided an appeal be taken within 10 days from the entry of the order.

## ALASKA-TREADWELL GOLD MINING CO. v. CHENEY.

(Circuit Court of Appeals, Ninth Circuit. June 10, 1908.)

No. 1,514.

1. APPEAL AND ERROR—QUESTIONS CONCLUDED BY DECISION—SECOND WRIT OF ERROR.

Where, after a verdict for a plaintiff suing as administrator, a motion in arrest of judgment was sustained and judgment entered dismissing the action on the ground that plaintiff's appointment as administrator was void, which judgment was reversed by the appellate court, and a judgment on the verdict directed which was entered, the only question concluded by such decision of the appellate court was that of the validity of plaintiff's appointment, and the defendant may maintain proceedings in error after the entry of the final judgment to review questions which arose on the trial and which could not have been considered by the appellate court on the prior hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 48.]

2. MASTER AND SERVANT—ACTION FOR DEATH OF SERVANT—EVIDENCE OF NEGLIGENCE.

Plaintiff's intestate was killed while working in defendants' mine shaft by the falling upon him of a bucket loaded with ore weighing about five tons. The bucket was hoisted by means of a wire cable which ran over a sheave wheel above the shaft to a drum. Such wheel had been previously broken and patched, and again broke at the time of the accident, allowing the cable to drop upon its shaft when it parted. There was evidence that the wheel should not have been repaired, and that it was dangerous, and, in fact, the second break was through the rivet holes made in putting on the patch. There was also evidence that the cable was likely to break if dropped from the wheel with its load. *Held*, that such evidence tended to show that the breaking of the wheel was the cause of the accident, and warranted the submission of the case to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1016.]

3. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission in evidence of drawings representing a sheave wheel, where the breaking of such a wheel was alleged to have caused the death of plaintiff's intestate, was not prejudicial error, although they were not accurate drawings of the wheel in question where such fact was stated to the jury, and they were used only to illustrate the testimony of witnesses and where an accurate drawing made to scale was introduced by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153–4160.]

4. EVIDENCE—OPINION EVIDENCE—COMPETENCY OF EXPERTS.

A machinist who had worked for several years in connection with the making, installing, and operation of hoisting machinery was competent to testify as an expert as to the danger of using a broken sheave wheel in a mine hoist, and the proper way to repair such a wheel, although he had never repaired one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2349.]

5. TRIAL—MISCONDUCT OF COUNSEL—ACTION OF COURT.

Improper remarks were made by counsel for plaintiff in a suit against a corporation respecting the wealth of the defendant and the persons who composed it are not ground for the reversal of a judgment for the plaintiff by an appellate court, where, on objection being made, they were promptly withdrawn, the court directed, and later instructed the jury to

disregard them, and counsel for defendant proceeded to argue and submit the case without further objection or exception to the action of the court, or its failure to take other or different action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 316.]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

Malony & Cobb and John Flournoy, for plaintiff in error.

Z. R. Cheney, R. W. Jennings, and L. S. B. Sawyer, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error, who is administrator of the estate of Ole Linge, deceased, was plaintiff in the court below, where he brought the action to recover damages for the death of Linge by reason of the alleged negligence of the plaintiff in error, the Alaska-Treadwell Gold Mining Company. The case was tried with a jury and a verdict for the plaintiff was returned. The defendant moved for a new trial on various grounds, and also for an arrest of judgment upon the ground that it was conclusively shown by the evidence that the appointment of the plaintiff as administrator of the estate of Linge was void. The motion for a new trial was denied, and the motion in arrest of judgment was granted. Judgment was thereupon rendered dismissing the action, to which judgment the plaintiff sued out a writ of error and brought the case here, where the judgment was reversed, with directions to the District Court to enter judgment in favor of the plaintiff in the case for the amount named in the verdict, with legal interest from the date of the rendition of the verdict. 148 Fed. 808–811. Upon the going down of the mandate the judgment here directed was entered by the trial court, and was, of course, final and conclusive as between the parties thereto in respect to the question that was litigated, and in respect to any and every question which might have been raised and determined in this court on the hearing of the former writ of error. Guaranty Co. of North America v. Phœnix Ins. Co. of Brooklyn, 124 Fed. 170, 59 C. C. A. 376; James v. Germania Iron Co., 107 Fed. 617, 46 C. C. A. 476. But, as the only question that was in fact litigated or that could have been raised or determined by this court on the hearing of the former writ of error was the question in respect to the validity of the plaintiff's appointment as administrator of the estate of the deceased Linge, it is plain that that is the only question upon which the judgment of this court on that writ of error had any bearing. As a matter of course the defendant to the suit could not have obtained a writ of error to reverse the first judgment of the District Court, nor could it have assigned any cross-errors thereon for the reason that it was in no way aggrieved thereby; on the contrary, that judgment was wholly in the defendant's favor, for it dismissed the action absolutely. When the judgment to which the present writ of error goes was entered by the court below in pursuance of the mandate of this court issued upon its judgment given on the hearing of the first writ of error.

the questions now presented for consideration were first opened to the plaintiff in the action. See Guaranty Co. of North America v. Phœnix Ins. Co. of Brooklyn, supra, where the subject was fully considered by the Circuit Court of Appeals for the Eighth Circuit, and where the conclusions above announced were amplified and sustained by numerous authorities. The plaintiff's intestate was at work sinking the main shaft of the Treadwell mine, and was about 800 feet below the surface. The shaft was perpendicular. Ore was being hoisted through the shaft from the 440 foot level by a skip and hoisting apparatus. The skip was a large iron bucket, and, together with its frame and its usual load, it weighed approximately five tons. It was hoisted by means of a cable to a point 60 feet above the mouth of the shaft, at which point the cable ran over a sheave wheel, and thence to a drum around which it was wound. While the skip with its load was being drawn to the surface the sheave wheel broke, the cable parted, and the loaded skip fell, carrying away two bulkheads below, and killing the plaintiff's intestate. In the complaint three grounds of negligence were alleged: First, the use of an old and weak cable; second, the use of an old, weak, much used and broken sheave wheel; and, third, the omission to provide sufficient bulkheads in the shaft. On the trial there was no proof of negligence as to the first and third of the grounds so alleged. The trial court in charging the jury assumed that a reasonably sufficient bulkhead was constructed, and that a reasonably sufficient cable was provided, and submitted to the jury the question of the negligence of the plaintiff in error in using its sheave wheel.

It is contended that the trial court erred in denying the motion of plaintiff in error to instruct the jury to return a verdict in its favor, and it is urged that there was no evidence to go to the jury to show that the accident resulted from any defect in the sheave wheel, or that there was negligence in its use. Upon a careful consideration of the evidence, we think the contention is not sustained. It was in evidence that a short time before the accident a piece from 12 to 14 inches long had been broken out of one of the flanges of the wheel, and that the wheel had been repaired by placing a piece of iron on the outside thereof below the break, upon which the broken piece was put back and riveted. There was evidence that the wheel was made of cast iron. There was evidence of expert machinists that the wheel should not have been repaired at all, and that its use as repaired was dangerous. There was the testimony of the employé who was sent down to clear out the bottom of the shaft after the accident that he found a piece of the perimeter of the broken wheel about two feet long, with "a patch on the cast iron piece and a broken spoke." Nor was there lack of evidence to show the causal connection between the defect in the wheel and the accident. There was testimony that one end of the break went through the rivet holes which had been made when the wheel was previously patched, and testimony that the second break was "on account of the patch not being put on in the right way." There was testimony to show that, if the perimeter of the wheel were broken, the cable would naturally drop, and would be likely to break. In view of all this testimony, there was no room for the application of the doctrine of Patton v. Texas Pacific Ry. Co., 179 U. S. 658, 21

Sup. Ct. 275, 45 L. Ed. 361, viz., that where it is shown that one or two or more acts caused the accident, for some of which the defendant is, and for some of which it is not, liable, the jury is not permitted to guess between them, and "find that the negligence of the employer was the real cause, when there is no satisfactory foundation for that conclusion"; for there is in the record testimony as to facts which, if credited, do furnish a reasonable explanation of the accident. Counsel for plaintiff in error in his motion for an instructed verdict admitted that the breaking of the wheel was "the primary cause of the accident." It was shown that the fracture of the wheel would cause the cable to slip and to drop to the shaft, and that the cable would be likely to break, and it is in evidence that the wheel broke at the point where it had been previously patched, and there was expert evidence that it should not have been used at all after having been broken in the manner indicated in the testimony.

Error is assigned to the admission in evidence of the deposition of Knute Hansen. The deposition had been read to the jury on the former trial of the cause. When it was offered on the second trial, the objection was made that no sufficient foundation was laid for its introduction, in that it was not shown that the witness was over 100 miles away from the place where the court was held. Section 657 of part 4 of the Alaska Code provides that, before such a deposition can be used, "proof shall be made that the witness did reside beyond the service of a subpœna, or that he still continues absent, or infirm, as the case may be." The record shows that, in answer to the objection to the introduction of the deposition, testimony was taken first of the deputy marshal, who testified that three or four days before he made inquiries for Knute Hansen in Juneau, Douglass, and Treadwell for the purpose of serving a subpœna on him, but that he could find no one who knew anything about him, but he admitted that he had not inquired at the mines in the Basin, whereupon the court said, "I think at least you should show he is not in any place in the vicinity of Juneau," and directed that the deputy marshal telephone to see if the witness were not in the Basin. Another witness was called who testified that Hansen was not working in the Basin; that he had left the previous summer, and the witness had not seen him since; that he had received a letter from him saying that he went down to Copper Mountain; that he had never seen him around Juneau since, nor heard of his being there; that he could not say whether Copper Mountain was within 100 miles or not. On this showing the court admitted the deposition. We discover no error in that ruling. The court must have had knowledge of the surrounding country and of all the places mentioned by the witnesses, and we must assume that he reached his conclusion on proof sufficient to show that reasonable effort had been made to find the witness, and that he did reside beyond the reach of a subpœna.

The plaintiff in error contends that it was reversible error to admit in evidence certain drawings of the sheave wheel made by witnesses for the defendant in error; that these drawings are not made according to scale, and are so made as to indicate that the wheel was more weakly constructed than it was in fact. The drawings so made did

not purport to be correct representations of the wheel. They were admitted in evidence as a part of and as illustrating the testimony of the witnesses, and in offering them counsel expressly stated that they were offered as illustrating the witness' testimony showing the general nature of a sheave wheel. "I am willing," he said, "that the court instruct the jury, and I ask the court to instruct the jury now that this is not to be taken as a drawing of the sheave wheel in question." If there was error in the admission of these drawings so admitted not to be correct, it was certainly cured by the introduction in evidence by the plaintiff in error of carefully prepared drawings of the wheel made according to scale and measurement, the accuracy of which was not disputed.

It is contended that W. C. Angell, who testified as an expert as to the safety of mechanical appliances, was not shown to possess knowledge of the customs and usages of the business to which his testimony related. The witness on his own testimony was a machinist by occupation, had served an apprenticeship of four years with Golden State Miner's Iron Works of San Francisco, manufacturers of hoisting machinery, sheave wheels, etc., after which as journeyman with said concern for two years he did general work of all kinds, handling sheave wheels and hoisting machinery generally, and had for a period of five years been a machinist in a mine in Alaska similar to the Treadwell mine, and had for two years been a machinist at the Treadwell mine engaged in erecting the stamp mills of the plaintiff in error, and had had other experience in the line of his occupation. He testified that he understood how the strain comes on hoisting machinery, and that he had worked on the sheave wheels at the Treadwell mine, and had installed the hoist at Treadwell in the year 1898. Notwithstanding this evidence of his qualifications as an expert, it is argued that for want of evidence that he had knowledge and experience as to the customary and usual method of repairing a sheave such as the one in question he was not shown to be qualified to say, as he did, that it ought not to have been repaired at all, and that "it is an awfully hard thing to repair a wheel of this kind and bring it back to its original strength," and that, if it were repaired, the proper way would be to have a piece of sheet steel extend underneath the frame, around on both sides, clear around the circumference of the wheel and rivet it. We do not agree with counsel for plaintiff in error that, before any witness could give such testimony as an expert, he must have had experience in repairing a sheave wheel. An expert machinist, with the general experience and training which the witness was shown to have had, should be assumed to have the knowledge requisite for the repair of old machinery, even if he had had no actual experience in repairing the particular device in question, and we think there was no error in permitting the witness to testify from such knowledge and experience as to the danger of using a broken sheave wheel or as to the proper method of repairing the same.

Error is assigned to the refusal of the court to give to the jury certain requested instructions. But, as the court properly instructed the jury on the points involved therein, no substantial right was denied the plaintiff in error in such refusal.

The bill of exceptions shows that Z. R. Cheney, the defendant in error, in arguing the case to the jury, used the following language:

"That the defendant, the Alaska-Treadwell Gold Mining Company, was owned by the wealthy Rothschilds of England, who are gathering the wealth of this country and sending it abroad, and that, if the jury should return a verdict for the full amount prayed for, namely, $10,000, such amount would not equal 1 per cent. of the annual income of the defendant."

To this argument and statement the defendant by its counsel objected and excepted, and the court thereupon sustained the objection, and directed that no such argument be used. Whereupon said counsel for plaintiff immediately stated to the jury that he wished to withdraw said remark and requested the jury not to consider it, and the court both at that time and in its charge instructed the jury that it must disregard that and all other remarks of counsel which were not borne out by the evidence. No honorable attorney would deliberately make such a statement to a jury. The misconduct was gross. It was made one of the grounds of a motion for a new trial, but the trial court in view of the prompt withdrawal of the remarks, and its own instruction to the jury not to consider the same, and the nature of the evidence in the case, held that it was not a sufficient ground for setting aside the verdict.

The assignment which directs our attention to the misconduct of counsel is that the court erred in refusing to grant a new trial on that ground. This, of course, is insufficient to bring the matter before this court, for the ruling of the trial court on a motion for a new trial is not assignable as error. But, under the power which we possess under our rules to notice a plain error not assigned, we are disposed to enter into the consideration of the question, and, first, we inquire, what is the error which is here complained of? In order to exercise our appellate jurisdiction, error must have been committed by the trial court either in ruling or refusing to rule upon some question arising in the course of the trial. In this case the court promptly made its ruling. In 2 Encyc. of Plead. & Prac. 755, it is said:

"In order that a party may avail himself in an appellate court of an objection for misconduct of opposing counsel in the argument of a case, he must not only interpose a seasonable objection, as has just been stated, but he must then press the court to a distinct ruling, and, if dissatisfied therewith, enter an exception, otherwise there is nothing presented for review."

The same is said in substance in 2 Cyc. 713. In Crumpton v. United States, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958, the court said:

"It is the duty of defendant's counsel at once to call the attention of the court to the objectionable remarks and request its interposition, and, in case of a refusal, to note an exception."

In Dunlop v. United States, 165 U. S. 486–498, 17 Sup. Ct. 375, 41 L. Ed. 799, the court said:

"In such cases, however, if the court interfere and counsel promptly withdraw the remark, the error will generally be deemed to be cured."

In Sawyer v. United States, 202 U. S. 150–167, 26 Sup. Ct. 575, 50 L. Ed. 972, the court said:

"The remark of the district attorney was not appropriate argument and should not have been made, but we see nothing more that could have been

done than was done by the court as soon as the objection was made by counsel for the plaintiff in error. Counsel in summing up to the jury are under some excitement, and naturally may make a remark or statement which is improper, but there is on that account no ground laid for setting aside a verdict, where, as in this case, the court held it was improper, and the counsel withdrew and apologized for it."

In Weeks v. Scharer, 129 Fed. 333, 64 C. C. A. 11, the Circuit Court of Appeals for the Eighth Circuit, in a case where counsel in argument made an unwarranted statement of facts not testified to, said:

"This matter may be dismissed from further consideration with the observation that the attention and action of the court were at once invoked, and the court promptly sustained the objection and directed the jury to disregard the improper statement."

There are undoubtedly cases of such flagrant abuse of the privilege of counsel that no admonition by the court will cure the error. The improper remarks of counsel may be of such a nature that, notwithstanding their withdrawal and the court's instruction to disregard them, the jury, while honestly endeavoring to discharge their duty, and believing that their verdict is not influenced thereby, may nevertheless be unable to divest their minds of the impression so illegally and unfairly produced. But the question here is: At what point in the trial did the trial court err or fail to perform the duty which rested upon it? Its first and obvious duty was to instruct the jury not to consider the objectionable remarks. This was done. Was it also incumbent on the court of its own motion, without suggestion of counsel, to dismiss the jury and to proceed no further with the trial? Certainly such an error may be waived by opposing counsel, and we think it is too clear to require discussion that it is a waiver if he proceed with the case without further pressing the objection and take his chances on the verdict of the jury. In United States v. Alexander (C. C.) 119 Fed. 1015, Judge Newman, on ruling on a motion for a new trial, well said, with reference to the improper language claimed to have been used by the assistant district attorney in his argument to the jury:

"When the attention of the court was called by one of defendant's counsel to the use of this language, that these expressions were uttered, and the court stated to counsel in the presence of the jury in the most emphatic way that the language was improper and ought not to have been used, no further action by the court was requested and no exception was taken. On the contrary, defendant's counsel seemed entirely satisfied with the action of the court at the time. If further action by the court had been desired, it should have been requested, and, if refused, an exception noted."

And we hold in this case that, if counsel for the plaintiff in error was not satisfied that the error was cured by the withdrawal of the objectionable remarks and the admonition of the court, he should have objected to further proceeding with the trial or should have moved the court to discharge the jury, and, if the ruling were adverse, he should have saved an exception thereto, and that, as the record is here presented, there is no reversible error.

The judgment is affirmed.

ROSS, Circuit Judge (dissenting). I dissent for this reason: The bill of exceptions shows that one of the attorneys for the plaintiff,

and who, from the name, seems also to have been the administrator of the estate of the deceased, used this language in arguing the case to the jury:

"That the defendant, the Alaska-Treadwell Gold Mining Company, was owned by the wealthy Rothschilds of England, who are gathering the wealth of this country and sending it abroad, and that, if the jury should return a verdict for the full amount prayed for, namely, $10,000, such amount would not equal 1 per cent. of the annual income of the defendant."

The record proceeds:

"To which argument and statement the defendant, by its counsel, objected and excepted, and the court thereupon sustained the objection and directed that no such argument be used, whereupon said counsel for plaintiff immediately stated to the jury that he wished to withdraw said remark and requested the jury not to consider it, and the court, both at that time and in its charge, instructed the jury that it must disregard that and all other remarks of counsel which were not borne out by the evidence."

This conduct of counsel for the plaintiff constituted, it seems, one of the grounds of the motion made by the defendant for a new trial, and, in the opinion of the trial court rendered in the case and set out in the record, we find this:

"After counsel for the plaintiff made the remark, as charged by defendant, counsel excepted thereto. Not only did counsel for plaintiff withdraw the statement and request the jury not to consider it, but the court both at the time, and in its charge emphatically instructed the jury that it must disregard that and all other remarks of counsel which were not borne out by the evidence. The practice of injecting remarks of that character into arguments before the jury is all too prevalent at this bar, and is most pernicious. The court has repeatedly cautioned various counsel upon this subject, pointing out the impropriety and unfairness of it. No permanent good can come of it. A perversion of justice always results, and the bar should cease to follow it. In this instance, however, the statement of counsel for plaintiff and the instruction of the court were such that it would be improper to set the verdict aside. Certainly is this true when the evidence as to the earning capacity, life expectancy, etc., are sufficient in themselves to support the verdict. This ground then cannot avail to secure a new trial, however great may have been the unfairness and impropriety of the language used."

While the rule is well settled that it is not for the appellate court to consider whether or not the amount of damages awarded by the jury was, under the evidence, excessive, it is proper, in considering the possible effect upon the jury of the grossly improper conduct of counsel in this case, to note the fact that the amount of damages awarded by the jury could not have been greater than it was, for it was the full amount sued for, to wit, $10,000. The well-established rule is also to be remembered that:

"The presumption always is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable." Union Pac. R. Co. v. Field, 137 Fed. 14, 69 C. C. A. 536; U. S. v. Gentry, 119 Fed. 75, 55 C. C. A. 658; Moores v. Bank, 104 U. S. 625, 26 L. Ed. 870; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; Railroad Co. v. O'Brien, 119 U. S. 103, 7 Sup. Ct. 118, 30 L. Ed. 299; Mexia v. Oliver, 148 U. S. 675, 13 Sup. Ct. 754, 37 L. Ed. 602; Railroad Co. v. O'Reilly, 158 U. S. 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; Peck v. Heurich, 167 U. S. 629, 17 Sup. Ct. 927, 42 L. Ed. 302; Railroad Co. v. Holloway, 114 Fed. 465, 52 C. C. A. 260; Association

v. Shryock, 73 Fed. 781, 20 C. C. A. 3; Railroad Co. v. McClurg, 59 Fed. 863, 8 C. C. A. 322; Deery v. Gray, 5 Wall. 807, 808, 18 L. Ed. 653; Smith v. Shoemaker, 17 Wall. 639, 21 L. Ed. 717.

I am unable to understand how the court below could permit a verdict to stand in view of the conduct of counsel which it characterized as "pernicious," and from which it expressly declared "a perversion of justice always results." It seems to me that a trial which is not fair and impartial is a mockery of justice, and that an appellate court should not sustain the judgment in which such a trial resulted, when brought up for review upon a record which affirmatively shows the unfairness. I say the record in this case affirmatively shows the improper conduct because the bill of exceptions contained in the record, and which was settled and signed by the trial judge, expressly recites the conduct and states that the defendant objected and excepted thereto at the time. Nothing more in my opinion is needed for the correction of the error. But, if an assignment of error be considered essential, that also is found in the record in these words:

"The court erred in refusing to grant defendant a new trial of this cause on the ground of the misconduct of counsel for plaintiff in his argument of the cause to the jury which vitiated said verdict and made it improper and erroneous to render a judgment thereon."

It is true that that assignment was filed in support of a motion for a new trial, and that we cannot review an order refusing a new trial. But the assignment, which is a part of the record, goes beyond the verdict and also assigns as error the entry of the judgment because of the misconduct of the plaintiff's counsel, which in my opinion is quite sufficient even if it be conceded that any assignment of error was necessary.

I hold that the judgment should be reversed because of such gross misconduct of the counsel for the plaintiff. Whether or not the Rothschilds of England are wealthy, and whether or not they are gathering the wealth of this country and sending it abroad, had no connection whatever with any issue on trial before the court and jury. The manifest and sole purpose of counsel could only have been to throw into the scales of justice grossly improper extraneous matter, the direct tendency of which was to inflame the passions and prejudice of the jurors against the defendant, thus absolutely preventing the fair and impartial trial of the issues to which, and only to which, each side was justly and legally entitled. To what extent such extraneous and improper matter may have influenced the verdict that was returned—for the maximum amount that could have been awarded the plaintiff—it is impossible for any one to say.

The judgment in the case of Mountain Copper Co., Ltd., v. Van Buren, 123 Fed. 61, 59 C. C. A. 279, which was also an action for damages, was reversed on another ground, but in concluding the opinion in the case we said:

"But we think it proper to refer to another point presented by the plaintiff in error as ground for reversal growing out of a statement by one of the counsel for the plaintiffs in the action, in his closing argument to the jury, to the effect 'that an accident insurance company was defending the case.'

It is not pretended that there was any evidence tending to show that such was the fact. It is true that, upon objection and exception made and taken to the remark of the plaintiffs' counsel, the court directed him to desist from that line of argument, and instructed the jury to disregard the statement. It is not necessary to decide in this case whether this impropriety on the part of counsel should or should not of itself call for a reversal of the judgment, but it is well to call attention to the gross impropriety of bringing into the trial of any case matter wholly unconnected with it, the direct tendency of which may well be to prejudice one of the parties, and the extent of which it is not always, if ever, possible to measure."

In Cudahy Packing Co. v. Skoumal, 125 Fed. 477, 60 C. C. A. 306, the Circuit Court of Appeals for the Eighth Circuit said:

"It goes without saying that a trial judge has the power, and is always at liberty of his own motion, to reprimand counsel when they make use of language or indulge in a line of argument that is improper, unfair, or that is calculated to arouse the prejudice of jurors, or divert their attention to extraneous matters, or to issues that are foreign to the case; and no trial judge should hesitate for a moment to exercise such power, although his intervention is not solicited."

In Mitchum v. State of Georgia, 11 Ga. 634, it was said:

"When counsel are permitted to state facts in argument and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said in answer to these views that the statements of counsel are not evidence, that the court is bound so to instruct the jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and, if they in any degree influence the finding, the law is violated, and the purity and impartiality of the trial are tarnished and weakened. If not evidence, then without doubt the jury have nothing to do with them, and the lawyer no right to make them. * * * To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency is tested."

In Brown v. Swineford, 44 Wis. 293, 28 Am. Rep. 582, it was said:

"The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the Circuit Courts in jury trials to interfere in all proper cases of their own motion. This is due to truth and justice. And, if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court."

In State v. Hannett, 54 Vt. 89, the court said:

"Counsel in their arguments to the jury are bound to keep within the limits of fair and temperate discussion. The range of that discussion is circumscribed by the evidence in the case. Any violation of this rule entitles the adverse party to an exception which is as potent to upset a verdict as any other error committed during the trial."

I think the judgment should be reversed, and the case remanded to the court below for a new trial.

## COLUMBIA VALLEY R. CO. v. PORTLAND & S. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,500.

1. COURTS—JURISDICTION OF FEDERAL COURT—FEDERAL QUESTION.

A bill by a railroad company, alleging that it acquired a right of way for its road over government lands under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), and is proceeding to construct its road thereon, but did not complete the same within the time limited by the act, and that defendant, claiming that its rights have thereby been forfeited, has taken possession of a portion of such right of way, presents a question of the construction of the statute as supplemented by Act June 26, 1906, c. 3550, 34 Stat. 482 (U. S. Comp. St. Supp. 1907, p. 553), which gives a federal court jurisdiction of the suit regardless of the citizenship of the parties.

[Ed. Note.—Federal jurisdiction in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purch Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

2. RAILROADS—RIGHT OF WAY OVER PUBLIC LANDS—FORFEITURE.

Act June 26, 1906, c. 3550, 34 Stat. 482 (U. S. Comp. St. Supp. 1907, p. 553), provides that every grant of right of way over public lands theretofore made to a railroad company under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), "where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired shall be and hereby is declared forfeited to the United States to the extent of any portion of such located line now remaining unconstructed and the United States hereby resumes the full title to the lands covered thereby freed or discharged from such easement," subject to an exception where construction of the road was progressing in good faith at the time of the approval of the act. *Held*, that such act was a legislative adjudication of forfeiture, which became effective at once, without judicial proceedings, as to all lands within its terms.

3. SAME.

The fact that at the time such act was passed a suit brought by a railroad company against a third party to determine its rights in such a right of way was pending could not change the effect of the act on the lands involved of which the court was bound to take judicial cognizance.

4. EQUITY—PLEADING—AMENDED BILL.

An amended bill, unlike an amendment to the original bill, speaks from the time it was filed, and not from the filing of the original bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 567.]

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

The appeal in this case is taken from a decree of the Circuit Court dismissing the appellant's bill. On February 2, 1906, the appellant filed its bill, alleging: That it was a railroad corporation organized under the laws of the state of Washington; that it claimed a right of way over certain public lands of the United States under the provisions of the act of Congress approved March 3, 1875 (Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568]), entitled "An act granting to railroads the right of way over public lands of the United States"; that it had in all things complied with the requirements of said act, and had made its survey and maps of the proposed railroad with the approval of the Secretary of the Interior, whereby it acquired a right of way to construct a railroad 200 feet in width over certain designated government subdivisions of the public lands of the United States; and that in the year 1905, the appellee, without the consent of the appellant

entered upon certain of said premises, and under a pretense of ownership undertook to construct thereon a railroad. The prayer of the bill was that the appellee be enjoined from occupying the premises and from constructing its railroad thereon. To this bill a demurrer was sustained for want of jurisdiction. Thereupon an amended bill of complaint was filed adding to the averments of the original bill certain allegations as to the title under which the appellee claimed the right to enter upon the premises, and the defense which the appellee would make to said amended bill, alleging that, in determining the respective rights of the said parties and their priorities, it would be necessary to construe certain acts of Congress and the act of March 3, 1875. On a demurrer to the amended bill, it was held that a case was presented involving a federal question, but the demurrer was sustained on the ground that the appellant had an adequate remedy at law. A second amended bill was filed containing certain additional allegations, the purpose of which was to show that the appellant had ground for equitable relief in the premises. The appellant alleged that it had actually begun the construction of its railroad in good faith and was in the actual possession of its right of way over lot 1, section 35, lots 1 and 2, section 33, and lots 2 and 3, in section 32, all in township 3 north of range 9 east of the Willamette Meridian, and lot 4, section 35, township 3 north of range 8 east of the Willamette Meridian. The bill then proceeded to allege the wrongful entry by the appellee upon a part of the right of way so described on public lands of the United States, with full knowledge of the location of the appellant's railroad, as surveyed and marked thereon, and that the appellee is engaged in excavating the ground thereon and making fills, cuts, and embankments, with the intention to construct and operate a line of railroad in such a way as to substantially and effectually impede the construction of the appellant's proposed road. A demurrer was interposed to the second amended bill on the ground that it did not appear therefrom that there was jurisdiction in the Circuit Court, and for want of equity, and for the reason that it was in the nature of a supplemental bill of complaint to the original bill filed herein. The demurrer was sustained, and the bill was dismissed.

W. W. Cotton and Ralph E. Moody, for appellant.

Charles H. Carey and James B. Kerr, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). This is a suit between two rival railroad companies, both created under the laws of the state of Washington. The jurisdiction of the Circuit Court over the controversy depends upon the question whether there is involved the construction of an act of Congress. The appellee contends that the only suggestion of such a question discoverable in the second amended bill is the allegation therein contained as to the nature of the defense which it was expected the appellee would interpose, citing Shoshone Mining Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864; Boston, etc., Mining Co. v. Montana, etc., Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626; Blackburn v. Portland, etc., Co., 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276; Joy v. St. Louis, 201 U. S. 332, 26 Sup. Ct. 478, 50 L. Ed. 776. But we think there is sufficient set forth to show that the determination of the appellant's own rights in the premises necessarily involves the construction of Act Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568). The appellant specifies at length the acts which it had performed in compliance with that statute, and shows that it relies thereon for its priority in right to the appellee to possess and occupy the right of way and construct its road thereon. It is

sufficient to confer jurisdiction upon the Circuit Court if the party plaintiff sets up a right to which he is entitled under a specific act of Congress which he alleges the party defendant denies him. If the appellant in this case had alleged the location and completion of its road under the act of March 3, 1875, within the time limited therein, the addition of mere allegations of the invasion of its right of way by the appellant would not have shown that the construction of the act was involved. But here it appears from the allegations of the bill that the appellant is in the act of building a road under the provisions of the act, that the road has not been completed within the time limited thereby, that nevertheless the appellant is proceeding in good faith to construct the same under the authority so given, and that its right so to do is denied by the appellee on the ground that all rights acquired by the appellant have been forfeited. This is not a case therefore where a federal question is presented only by way of anticipating the defendant's defense. It is a case in which it appears from the bill that the complainant's own right to the possession of the disputed premises depends upon the construction of an act of Congress. It devolved upon the appellant to show by what right it claimed the roadway. It could not allege a patent or grant, for it had none. It could only set forth the facts upon which it relied. Accordingly, it alleged the act of Congress and its own acts of compliance therewith, and in the very stating of the facts it tendered a question of law, a question of the construction of the act of March 3, 1875, and Act June 26, 1906, c. 3550, 34 Stat. 482 (U. S. Comp. St. Supp. 1907, p. 553), upon which depended its right to the possession of its surveyed and platted right of way. The demurrer itself challenged the right of the appellant to relief, on the ground that noncompliance with the law and forfeiture were shown upon the face of the bill, and the whole argument presented in this court upon the demurrer, aside from the jurisdictional question, is confined to the discussion of the question of the forfeiture of the appellant's rights. Said the court, in Wilcox v. M'Connell, 13 Pet. (U. S.) 516, 10 L. Ed. 264:

"Whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States."

In Starin v. New York, 115 U. S. 248, 257, 6 Sup. Ct. 28, 31, 29 L. Ed. 388, the court said:

"The character of a case is determined by the questions involved. Osborn v. Bank of United States, 9 Wheat. 738–824, 6 L. Ed. 204. If from the questions it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States."

See, also, Cook v. Avery, 147 U. S. 384, 13 Sup. Ct. 340, 37 L. Ed. 209; Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005; Spokane Falls, etc., Railway Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79; McCune v. Essig, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237.

In approaching the question whether the appellant stated in the second amended bill a case for equitable relief, it is necessary, first,

to consider the effect of the act of June 26, 1906, entitled "An act to declare and enforce the forfeiture provided by section 4 of the act of Congress approved March 3, 1875." 34 Stat. 482. The act of March 3, 1875, had provided that, if any section of a road located under its provisions should not be completed within five years after location, "the rights herein granted shall be forfeited as to any such uncompleted section of said road." The act of June 26, 1906, provided as follows:

"That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An act granting to railroads the right of way through the public lands of the United States,' where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to, the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby freed discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds: Provided, that in any case under this act where construction of the railroad is progressing in good faith at the date of the approval of this act the forfeiture declared in this act shall not take effect as to such line of railroad."

The question arises whether this act operated ipso facto to forfeit the right of the appellant to any section of its located road not completed within five years from the date of the location. The appellant denies that it has that effect, and contends that, in addition to the act, there must be a judicial ascertainment of forfeiture by a procedure in the nature of an inquest of office, citing Fairfax v. Hunter, 7 Cranch, 603, 3 L. Ed. 453, Smith v. Maryland, 6 Cranch, 286, 6 L. Ed. 225, and United States v. Repentigny, 5 Wall. 211, 18 L. Ed. 626, and argues that, while an act of Congress declaring forfeiture unconditionally may be sufficient where no facts are to be ascertained, the forfeiture here, under the act of June 26, 1906, which is to be enforced only where the road has not been constructed within the five years following the location, or where the construction of the railroad was not progressing in good faith at the date of the approval of the act, leaves two important questions to be decided before the forfeiture is to take effect. But these questions so suggested are questions of fact of the nature of those which are to be determined in any case where the inquiry is whether particular rights under a grant have beeen forfeited under the provisions of a forfeiture act. The act itself takes the place of the adjudication of forfeiture and of the inquest of office. It is the "legislative assertion of ownership of the property for breach of condition." It is itself the entry of the grantor for condition broken.

The provisions of the act of forfeiture involved in the case differ in no essential feature from those which were construed in United States v. Tennessee & Coosa R., 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452, and Farnsworth v. Minn. & Pac. R. R. Co., 92 U. S. 49, 23 L. Ed. 530, cited below. In Schulenburg v. Harriman, 21 Wall. 44, the court, in discussing the manner in which the reserved right of a

grantor might be asserted for breach of a condition subsequent, said that, if the grant were a private grant, the right must be asserted by entry or its equivalent; but that, if it were a public grant, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at the common law, finding the fact of forfeiture and adjudging the restoration of the estate, "or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriation of the property or that it be offered for sale or settlement."

In Farnsworth et al. v. Minn. & Pac. R. R. Co., 92 U. S. 49–66, 23 L. Ed. 530, the court, after discussing the mode of ascertainment and determination of forfeiture by judicial proceedings, and its advantages in the prevention of consequent litigation, said:

"But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture where that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee—such as an act resuming control of them, and appropriating them to particular uses, or granting them to others to carry out the original object—will be equally effectual and operative."

In United States v. Northern Pacific Railroad Company, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836, the court held that the failure to complete the railroad within the time limited in a congressional grant of a right of way over the public lands was a condition subsequent not operating as a revocation of the grant, "but as authorizing the government itself to take advantage of it and forfeit the grant by judicial proceedings or by an act of Congress resuming title to the land."

In a similar case (Atlantic & Pacific Railroad v. Mingus, 165 U. S. 413–433, 17 Sup. Ct. 348, 41 L. Ed. 770), the court approved the language above quoted from the opinion in Farnsworth v. Minn. & Pac. R. R. Co., and applied it to the forfeiting act of July 6, 1886 (24 Stat. 123, c. 637), which declared all lands adjacent to and coterminous with the uncompleted portions of the main line of the road to be "forfeited and restored to the public domain."

The appellant cites the case of United States v. Tennessee & Coosa Railroad, 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452; but, as we understand it, the decision is directly against the appellant's contention. The court in that case considered Act Sept. 29, 1890, c. 1040, 26 Stat. 496 (U. S. Comp. St. 1901, p. 1598), which provided that:

"There is hereby forfeited to the United States, and the United States hereby assumes the title thereto, all lands hereinbefore granted to any state or to any corporation to aid in the construction of a railroad opposite to and coterminuous with the portion of any such railroad not now completed and in operation, for the construction and benefit of which such lands were granted and all such lands are declared to be a part of the public domain."

And it held that it did not affect lands opposite a completed road, and that such lands were not thereby forfeited or resumed, but the purport of the decision was that lands opposite uncompleted portions of the road were forfeited.

But the appellant contends that the act of June 26, 1906, is not to be considered on the demurrer to the second amended bill, for the reason

that the suit was commenced some months prior to its enactment, and cites McCool v. Smith, 1 Black, 459, 17 L. Ed. 218, a case in which the court recognized the common-law rule that a party can recover in ejectment only upon a title which subsisted in him at the time of the commencement of the action. But that is a rule which has no application to the question here presented. It does not follow that, because a plaintiff may not recover upon a title which he acquired after he commenced the action, recovery shall not be defeated by a termination of the title pending the suit. At common law the termination of the interest of the plaintiff in the subject-matter of the action abated it. 1 Chitty, Pl. 25; Elliot v. Teal, 5 Sawy. 249, Fed. Cas. No. 4,396. And the same is true of a suit in equity. Tappan v. Smith, 5 Biss. 73, Fed. Cas. No. 13,748; 2 Daniell, Ch. Pr. § 1518. If the act operated to forfeit the appellant's right of way, it cut off all its right to equitable relief as against the appellee. The efficacy of the act to accomplish that result is in no way impaired by the fact that the suit had been commenced before it took effect. The appellant could save none of its rights to its located roadway by the mere act of suing the appellee before forfeiture was declared. The effect of the forfeiting act is the same as would be an allegation in a supplemental bill setting forth the fact that since the commencement of the suit the appellant had forfeited its title to the subject-matter of the controversy. The court below in ruling upon the demurrer could not disregard the act. It was a law then in force, and had the effect to terminate all rights acquired by the appellant, unless it appeared from the allegation of the bill that the appellant had brought itself within the saving clause therein contained.

The forfeiture act excepts from its operation all cases in which, at the date of its approval, the construction of a railroad is progressing in good faith. The appellant contends that in the second amended bill there are two averments which show that its road is within the terms of this proviso. These averments are, first, the allegation, in paragraph 12, that at all time since its incorporation the appellant "has been and now is actively engaged in prosecuting the said enterprise." But this is clearly insufficient. The appellant may have been actively engaged in prosecuting the enterprise, and at the same time it may have done no act of construction of a railroad.

The other averment is in paragraph 13. It is that the appellant "is now, and has been for some time prior hereto, actually and actively engaged in the building and construction of a grade for its railroad therefor and thereon, and is now expending, and has heretofore expended, large sums of money in and for said construction and has completed the grade upon some portion thereof." The question is: At what time does this averment speak? The original bill had been filed on February 2, 1906. The second amended bill was filed on September 17, 1906. In neither the original bill nor the amended bill was there any allegation of any act done in the direction of the actual construction of a railroad. It first appears in the second amended bill that the appellant "is now, and for some time prior hereto" has been, engaged, etc. The appellant invokes the general rule that amendments germane to the bill relate back to the time when the bill was

filed, and are considered as incorporated into and a part of the original bill. That rule is well established by the authorities. Gaylord v. Ft. W., M. & C. R. R. Co., 6 Biss. 286, Fed. Cas. No. 5,284; Carey v. Hillhouse, 5 Ga. 251; Hurd & Sewall v. Everett, 1 Paige, Ch. (N. Y.) 124; 16 Cyc. 350. The theory of chancery practice is that the original bill always remains in force and effect except as to portions thereof which are struck out by amendment, and that amendments averring additional facts may be filed and added thereto as to matters which occurred before the filing of the original bill; but that, when so filed, the amendments relate back to the time of filing the original bill and are incorporated therein, and that all matters occurring subsequent to the filing of the original bill affecting the complainant's right to relief must be presented by a supplemental bill. But in the present case, the appellant did not file amendments to its original bill. Its second amended bill is a new bill setting forth all the facts on which the appellant's alleged right to relief depends. The paragraph which contains the matter on which the appellant now relies begins by alleging that the appellant "was at the time of the institution of this suit, and is now, in the actual possession of its right of way," etc. This is the appellant's own designation of the time at which the amendments speak. It shows that the "now" referred to was the date of the filing of the second amended bill, and the same construction must be given to the immediately succeeding allegation that the appellant "is now" actively engaged in the building of a road. The allegation that "for some time prior hereto" it had been engaged in such construction may mean a day, or it may mean a week, before the filing of the bill. It cannot be construed as referring the time of the commencement of the work back to the commencement of the suit or back to the date of the forfeiting act. The justifiable inference is that the reason why the pleading was thus guardedly expressed in the present tense was that the appellant could not truthfully allege that the construction was begun before the date of the forfeiting act. This new matter so alleged in the second amended bill might have been struck out on motion of the appellee; but remaining, as it does, in the bill, and tested by a demurrer, it is insufficient to show that any portion of the road was excepted from the operation of the act declaring a forfeiture.

The decree of the Circuit Court is affirmed.

NOTE.—The following is the memorandum decision of Hanford, District Judge, on application for injunction and on demurrer to amended bill of complaint, filed September 5, 1906.

HANFORD, District Judge. This cause has been argued and submitted upon the complainant's application for a preliminary injunction and upon a demurrer to the amended bill of complaint, which alleges as the sole ground of demurrer that this court has not jurisdiction of the subject-matter of the suit. The parties are both corporations of the state of Washington, both proposing to build a railroad on the north side of the Columbia river, and the complainant claims title to a right of way crossing public land of the United States, acquired by compliance with the act of Congress granting to railroads the right of way through public lands, approved March 3, 1875 (18 Stat. 482, c. 152 [U. S. Comp. St. 1901, p. 1568]). The fourth section of the act provides that in case of nonuser for a period of five years the right of way granted shall be forfeited, and the bill shows affirmatively that the complainant has not commenced the construction of its proposed railroad, and that the proceed-

ings by which it claims to have acquired the right of way were completed more than five years before the date of the commencement of this suit. The bill also avers that the defendant has wrongfully entered upon said right of way, and with teams and laborers is actively engaged in constructing the bed for a railroad; that the defendant disputes the complainant's claim of title, and asserts an adverse and superior claim to the same right of way; and by specific averments shows that there is a controversy, the adjudication of which necessarily requires an interpretation of the act of Congress above cited, and especially the five-year limitation clause, and refers to other United States statutes which may affect the decision of the case.

I am convinced that the amended bill sets forth a controversy involving questions of federal law, and that this court would have jurisdiction of the case if grounds for equitable relief existed. Viewed in the light most favorable to complainant, the prayer of the bill is unrighteous; that is to say, it is contrary to natural justice for the complainant to hold all of the right of way, 200 feet wide, which it has not earned, and be permitted to obstruct another railroad company having the ability and will to render the public service which is the consideration for the grant. Manifestly the purpose of the grant was to facilitate the building of railroads, and the provisions of the third section of the act plainly show a legislative intention to guard against the possibility of the grant being perverted so as to create a monopoly.

There is a different reason, however, for holding that the suit is not cognizable in a United States Circuit Court, viz.: (a) The suit is in equity. (b) The principles of equity, and section 723, Rev. St. U. S. (U. S. Comp. St. 1901, p. 583), positively prohibit the maintenance of suits in equity where a plain, adequate, and complete remedy may be had at law. (c) The object of the suit is to protect a dry, legal title to real estate by a party out of possession, which title is disputed, and an adverse claim of title is asserted by the defendant in possession, so that the complainant has a plain, adequate, and complete remedy at law in the form of an action to recover possession, which is maintainable at law, and the recognized appropriate form of proceeding to obtain an adjudication of a controversy with respect to the legal title to real estate.

The complainant is not in court asking protection in the actual prosecution of the building of a railroad upon a right of way of which it has taken actual possession. On the contrary, it appears affirmatively by the complainant's pleadings that construction has not been commenced, and that the defendant is in possession of the right of way. These facts differentiate the case from Denner & R. G. R. Co. v. Alling, 99 U. S. 463, 25 L. Ed. 438. Only a dry, legal title is claimed, and that title is disputed by the defendant, it claiming the same property by a title adverse to the complainant; and there is another suit pending, brought by defendant, to secure an adjudication of the adverse claims of the respective parties, and it is not pretended that irremediable mischief, going to the destruction of the substance of the estate, is being done. Hence there is no ground for an injunction, which is the principal relief prayed for. Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116. The defendant being in possession, if the complainant has the legal title, as it claims, an action of ejectment, in which the parties would have a right to a jury trial, is the proper form of procedure, and affords an adequate and complete remedy. Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; M., K. & T. Ry. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377; New Mexico v. U. S. Trust Co., 172 U. S. 171, 19 Sup. Ct. 128, 43 L. Ed. 407.

I can conceive of a case in which an injunction might be properly issued to restrain a competitor from vexatiously interfering in proceedings to acquire a right of way for a projected railroad, and I concede that controversies involving only equitable or inchoate rights of rival companies with respect to right of way franchises may be cognizable in equity. An instance which I have in mind is the case of Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co. (C. C.) 27 Fed. 770. In the statement of that case Judge Shiras said: "There is but one controversy in the cause, and that is: Which company has the prior, and therefore better, right to the occupancy of the premises in dispute, for the purposes of constructing and operating its line of railway?" And I agree fully with that part of the opinion of the learned judge, in which he said: "It is certainly equitable that a company, which in good faith surveys

and locates a line of railroad and pays the expense thereof, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages; but, as against a railroad company, it may have a prior right and better equity."

When only equitable rights constitute the subject of a lawsuit, the parties have recourse only to a court of equity, and courts of equity are established for the express purpose of adjudicating such rights. The case last cited has a resemblance to the case at bar in this: that the matter in dispute was the right of way for a projected line of railway; but the two cases are in contrast, because in this case the complainant has invoked the jurisdiction of a court of equity, as I have before stated, to protect a dry, legal title to real estate, when it was unnecessary to appeal to a court of equity, there being no obstacle in the way of obtaining adequate relief, and substantially the same relief, by an action in a court of law. In deciding the question submitted, the court cannot assume that there are equitable rights to be adjusted, but is bound, in rendering a decision, to treat the averments of the bill of complaint with respect to the complainant's title and the defendant's possession as true.

The amended bill suggests that it is necessary to sue in equity to avoid a multiplicity of suits; but the facts pleaded do not support that conclusion. The agents and servants of the defendant engaged in constructing its railroad would not be necessary parties to an action at law to recover possession. By reason of privity, a judgment against the defendant would be as conclusive upon them as a decree in this case in which they are not parties. 2 Ballinger's Ann. Codes & St. § 5518 (Pierce's Code, § 1154). All of the right of way situated within this judicial district is a unit, and there need be but one action to secure a complete adjudication of the whole controversy between the parties to this case. If detached sections of the right of way should be deemed subjects of separate causes of action, cognizable in different counties, still only one action would be necessary, because the Code of Civil Procedure of this state provides that an action may be prosecuted in the county in which the subject, or some part thereof, is situated, and that several distinct causes of action may be joined in one complaint. 2 Ballinger's Ann. Codes & St. §§ 4852–4942; Stevens v. Ferry (C. C.) 48 Fed. 7.

The complainant's application for an injunction is denied, and the demurrer to the amended bill of complaint is sustained.

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## LARKIN v. CITY OF ALLEGHENY.

(Circuit Court of Appeals, Third Circuit. May 25, 1908.)

No. 26.

1. MUNICIPAL CORPORATIONS—POWERS—GRANT OF USE OF PUBLIC GROUNDS.

   Under the various acts of the Legislature of Pennsylvania relating thereto, as construed by the Supreme Court of the state, the city of Allegheny has authority to grant to a railroad company the right to use, for the purpose of erecting a railroad passenger station in part thereon, a portion of the ground set apart as commons by Act Sept. 11, 1787 (2 Smith's Laws, p. 414), providing for laying out the town, and afterwards granted to the city to be used for public purposes.

2. SAME—ENJOINING EXECUTION OF CONTRACTS—FORMAL DEFECTS.

   Act Pa. March 7, 1901, p. 29, for the government of cities of the second class, in providing, inter alia, that the city solicitor shall prepare and indorse his approval of the form upon all contracts made with the city, and that such contracts shall be signed by the city recorder and the head of the proper department, is directory only, and relates to contracts by which the city assumes pecuniary liability; and in any event the fact that the form of a contract authorized by the city councils to be executed by the proper officials, granting rights in public grounds,

has not been approved by the city solicitor, or that it has not been signed by the head of the proper department, affords no ground for enjoining its execution in proper form and by proper officers at suit of a taxpayer.

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

J. M. Stoner, for appellant.

W. S. Dalzell, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The appellant and complainant below, being a citizen of the state of New York and an owner of real estate in the city of Allegheny, in the state of Pennsylvania, and as such a taxable in that city, filed her bill in the Circuit Court of the United States for the Western District of Pennsylvania, to restrain, by injunction, the said city of Allegheny, a corporation and citizen of the state of Pennsylvania, its officers and servants, from executing a certain contract set out in said bill with the Pennsylvania Company, afterwards the intervener in said suit, and "from conveying, releasing or otherwise impairing the title" of the said city to certain real property, by deed or any other instrument of writing executed and delivered to the said company. The contract sought to be restrained was embodied in an ordinance passed by the legislative authority of the said city of Allegheny, the material parts of which were, as follows:

"Section 1. Be it ordained and enacted by the select and common councils of the city of Allegheny, and it is hereby ordained and enacted by the authority of the same, that the proper officials of the said city be and they are hereby authorized and empowered in the name and on behalf of the said city of Allegheny, to make and enter into a contract with the Pennsylvania Company, lessee of and operating the railway of the Pittsburgh, Ft. Wayne & Chicago Railway Company, in the form following, to wit:

"Contract.

" 'This agreement made this ——— day of ———, A. D. one thousand nine hundred and five, between the city of Allegheny, hereinafter called the city, as first party, and the Pennsylvania Company, lessee of and operating the railway of the Pittsburgh, Ft. Wayne & Chicago Railway Company, hereinafter called railway company, as second party, witnesseth:

" 'Whereas, by an ordinance dated October 12, 1853, the Ohio & Pennsylvania Railroad Company, predecessor in title to the said Pittsburgh, Ft. Wayne & Chicago Railway, was granted a right of way through certain lots in the city of Allegheny, and the same right of way was continued through the commons to Federal street; and whereas, the Pennsylvania Company, lessee of and operating the Pittsburgh, Ft. Wayne & Chicago Railway, has in accordance with its contract with the city of Allegheny dated the 1st day of November, 1901, and for the safety, security and convenience of the public, duly elevated the grade of its tracks over and across Federal street in said city, and partly as a result of such track elevation and partly on account of the growth and development of the city, there has arisen a necessity for a larger, better and more modern passenger station at Federal street; and whereas, the Pennsylvania Company being desirous of conforming fully to the requirements of said city in respect thereto, has duly submitted plans for a passenger station of such character and size as would be a credit to the city and in every way satisfactory to the public and the company, except that in order to better serve the convenience of both, it is desirable that the general waiting rooms, etc., thereof should be larger and more commodious and the driveway and approach thereto wider, and it is greatly to the interest

of the public and of the city that such a station thus wholly suitable and satisfactory should be constructed and maintained at this point; and whereas, in order to properly attain such result it is necessary for said Pennsylvania Company to occupy and use for building purposes a small portion of said right of way hitherto granted as aforesaid and also the narrow strip of the common ground or South Park remaining between the new south line of Stockton avenue, as lately widened by said city and the line of the grant made to the said Ohio & Pennsylvania Railroad Company by said ordinance dated October 12, 1853, which said strip of land has been so reduced in width by said city as to be no longer in any way adapted to or valuable for park purposes:

" 'Now therefore, this agreement witnesseth: That for and in consideration of their respective covenants hereinafter set forth, it is agreed by and between said parties as follows, to wit: First. That so far as their right to so do exist the city hereby grants to the Pennsylvania Company as lessee and the Pittsburgh, Ft. Wayne & Chicago Railway Company as lessor, their successors and assigns, the right to occupy and use for the relocation and reconstruction of the passenger station, buildings, sheds, tracks, driveways and other appurtenances suitable for the accommodation of their business in connection with the proposed new station at Federal street, that part of the south common ground or South Park described as follows,' " etc.

The bill avers that the proposed alienation of the strip of land described in said contract is wholly without authority of law, and charges that the right and title vested, or attempted to be vested in the said railroad company, pursuant to said ordinance and the execution of said agreement, would be a fraud upon complainant and other taxpayers of said city, and prays equitable relief: (1) That the rights of the city of Allegheny in the property described and proposed to be alienated, be declared and affirmed; (2) that the city of Allegheny, its officers and servants, be restrained, by injunction, from executing the contract set out in the foregoing ordinance, etc.

After the filing of the bill, the said Pennsylvania Company was, upon its petition, allowed to intervene as a party defendant, and made answer to the bill. The defendant, the city of Allegheny, filed no answer. Subsequent to the answer of the intervener, the complainant filed an amendment to her bill, adding averments to the following effect: That an act of the state of Pennsylvania for the government of cities of the second class provided that the city solicitor shall prepare all contracts to be made with the city, or any of its departments, and indorse on each his approval of the form thereof, before the same shall take effect; that the said act further provided that all such contracts shall be in writing, signed and executed in the name of the city by the city recorder and head of the proper department; that the said city is a city of the second class; that in this instance the proper department was the department of public works, and that the head of the same did not sign and execute in the name of the said city of Allegheny, or otherwise, the contract mentioned in the bill of complaint; that its city solicitor did not in fact prepare the contract mentioned in the bill of complaint, nor indorse thereon his approval of the form thereof.

To this amendment, the intervener filed a demurrer, which was overruled by the court below, without prejudice however to the demurrant, and "with leave to raise all the questions of law made by said demurrer at the final hearing of the cause." The court below

adjudged that the contract proposed was within the power and authority of the city of Allegheny to make, and that the objections made to the validity of this particular contract, raised by the averments of the said amendment, were, in consideration of the frame of the bill, without merit, and did not warrant the injunction prayed for. The bill was therefore dismissed, and the case has been brought before us by the appeal of the complainant.

The questions here involved, as raised by the assignments of error, are, as stated by the appellant: First. Has the city of Allegheny the right and authority to enter into the contract in question? Second. Were the facts, as stated in the amendment to the bill, to wit, that the contract was not prepared by the city solicitor, nor his approval of the form thereof obtained, and that the same was not signed by the head of the proper department of said city, sufficient to support a decree for an injunction, as prayed for in the bill?

The first question, viz., as to the power and authority of the state to make such a contract as was here proposed, can be disposed of by a brief statement as to the provisions of certain acts of the Legislature of the state of Pennsylvania, touching the title, authority and control of the city of Allegheny to and over the land here in question, and the decisions of its Supreme Court in regard to the same. By the act of March 12, 1783 (2 Smith's Laws, p. 62), appropriating certain lands for the redemption of certain certificates of state debt, a tract of 3,000 acres was reserved by the state opposite Fort Pitt, now part of the city of Pittsburgh. Another act was passed September 11, 1787 (2 Smith's Laws, p. 414), under which the state authorities were empowered to lay out and survey a town in lots with a competent number of outlots for the accommodation thereof; they were likewise directed to reserve out of said lots, for the use of the state, so much land as they may deem necessary for a courthouse, jail, market house, etc., and without the town 100 acres for a common pasture. The town of Allegheny was laid out in pursuance of the act, and the lots were sold and the reservation made for the common of pasture, each lot holder becoming entitled by his patent to the privilege in the common of 100 acres, the title to which remained in the state. "The state owned the land—the lot holders the servitude of pasturage. Both these titles were legal ones and not merely equities, requiring a trustee for their protection. The lot holders could assert their rights in a court of law, in their own names. The state was not constituted a trustee for their protection. She held the land for herself, subject alone to the easement granted to the lot holders. She had, therefore, a perfect right to convey her title, such as it was, to others. In the exercise of this privilege, the Legislature passed the act of April 13, 1840 (Acts 1840, p. 308, § 13). By that act, 'the right of the commonwealth to all the lands within the limits of the city of Allegheny, excepting such parts as had heretofore been appropriated by grant and authority of law, was granted and vested in the city of Allegheny for such public uses as were recited in the act of the 11th of September, 1787, and such public uses as the select and common councils might from time to time direct and ordain. Provided, that no part of the land allotted by the 4th section for a com-

mon shall be applied to any other purpose without releases first being had and obtained from such persons as might by law grant a right to the holder or any part of said common.'" Mayor of Allegheny v. Ohio & Penna. R. R. Co., 26 Pa. 355.

After the language just quoted, the court in the case cited decides that the city councils of Allegheny were authorized by said act to make a conveyance of a portion of said common to the railroad company, for the purpose of constructing its railroad over the same, and that such a conveyance was for a public use, within the meaning of the authority conferred on the city councils by the act above referred to. The court further decides that there is nothing in the proviso which in any manner invalidated the grant, though the grantee took the land subject to any easement of pasture rightfully belonging to any of the owners of the outlots. But, as the court says, the city is not a trustee for the owners of such easements, and they were not parties to the suit, and that in the then proceeding the court had nothing to do with the rights of the lot holders to the privilege of pasture. "When they complain of any violation of their rights, it will be time enough to consider and decide upon them."

But the court found further warrant for the asserted authority of the city councils to grant the land in question to the railroad company, in the act of April 11, 1848, licensing the Ohio & Pennsylvania Railroad Company, which was an Ohio corporation, to operate in the state of Pennsylvania, and providing that:

"If it shall be necessary to occupy any public way or ground, it shall be competent for the municipal or other officers or public authorities owning or having charge thereof, and the railroad company, to agree upon the manner, terms and conditions on which the same may be used or occupied."

And the court decides that the ground in question was public ground, within the meaning of these enactments. All the rights and powers of the Ohio & Pennsylvania Railroad Company, by various acts of the Legislature, became vested in the Pittsburgh, Ft. Wayne & Chicago Railroad Company, and the Pennsylvania Company, the intervener in the present suit.

It has been decided that this right of common, appurtenant to the said outlots, was a common of pasture, the right to take the herbage by the mouths of cattle. Long since, large portions of this common have been devoted to other purposes, sometimes with the express consent, but oftener with the passive acquiescence of the lot holders referred to. In addition to such encroachments, under the authority of an act of the Legislature, the city council of Allegheny appropriated the commons for park purposes, by an ordinance passed May 6, 1858. Under such conditions, existing for so long a period, it would seem to have been impossible that any common of pasture could have been enjoyed on any portion of the original 100 acres so set apart by the act of 1787. No appreciable damage, therefore, of which the court could take notice, could come to any of these lot holders at the present time, by reason of any depreciation of or interference with a right of common of pasture. As far back as 1855, Chief Justice Lewis, speaking for the Supreme Court of Pennsylvania, in Bell v. Ohio & Pennsylvania R. R. Co., 25 Pa. 161, 64 Am. Dec. 687, says:

"This is a bill by one who claims common of pasture in certain land called the South Common, in Allegheny City. * * * The South Common, before the grant to the railroad company, was a strip of land of the width of 144 feet. It has not been inclosed. It has been as open to the public at large as to the commoners themselves. The herbage is about as abundant as that which might be found in a recently disinterred street of Herculaneum. The plaintiff's right to take the herbage by the mouths of his cattle is of no appreciable value."

It is unnecessary, however, to further consider any claim on the part of the plaintiff, based upon her right as the owner of an inlot to maintain her bill against the city of Allegheny. Whatever may have been her position in the court below, her counsel in this appeal admits that the "appropriation of said lands by the authorities of the city for use as a public park, extinguished the right of the lot holders to common of pasture therein." She insists, therefore, upon her claim to enjoin the said city solely upon her status as a taxable of the same.

The right of the owner of taxable real estate in a corporate city, to restrain the corporation from an illegal disposition of corporate property, or of any abuse of its authority which may directly affect the pecuniary interests of such taxable, may be admitted. It seems to us, however, in the present case, that it is not open to serious question, that the city councils of Allegheny were fully authorized by the acts of the Legislature already referred to, to make the contract with the Pennsylvania Company, set out in the bill of complaint. It seems perfectly clear that it was a grant for public uses, and for that reason within the power of the city authorities to make, as expressly conferred upon them by the Legislature of the state of Pennsylvania. Not only so, but the contract in question purports on its face to be for the consideration of an express covenant on the part of the Pennsylvania Company, at its own expense, to erect and maintain passenger stations, sheds and approaches, obviously for the convenience of the public and for the betterment of the public service furnished by said company. To this conclusion we would be compelled, independently of the two cases already cited, in which the Supreme Court of the state has declared such uses as these contemplated by the contract in question, to be public uses, within the meaning of the acts of the Legislature above referred to. The record contains no evidence that such occupation by the railroad company will amount to a nuisance, per se or otherwise, nor is there any claim to that effect, or that there was any bad intention, or want of good faith in the making of the proposed contract.

This brings us to the remaining question raised by the assignments of error, viz., whether the fact that the ordinance or contract proposed thereby had not been prepared by the city solicitor, nor his approval of the form thereof obtained, and the fact that it was not signed by the director of the proper department of the said city, are sufficient grounds upon which to grant the injunction prayed for. The Pennsylvania act of March 7, 1901 (Acts 1901, p. 29), for the government of cities of the second class, provides as follows:

"The city solicitor shall be the legal adviser and act as attorney and counsel for the city and all its departments and officers, prepare all con-

tracts to be made with the city, or any of its departments, and endorse on each his approval of the form thereof, before the same shall take effect, and be the custodian of all such papers and records as may be designated, and perform such other duties appertaining to his department as may be required by law or ordinance."

We think, with the court below, that these provisions concerning the duties of the city solicitor are directory and ministerial. The power of contracting in the name of the city, and of imposing contractual obligations upon it, was certainly not intended to be conferred on the city solicitor by the provision referred to. It is true, the form of the written contract is required to be approved by him before it takes effect, but this requirement does not invest him with the power to say what contracts shall or shall not be made by the city, or to veto one that has been made by its proper representatives. We think that the character of the contracts which he is to prepare, and the form of which he is to approve, and which are required to be signed and executed in the name of the city by the city recorder and head of the proper department, sufficiently appears from article 15 of the said act, which reads as follows:

"Section 1. All contracts relating to city affairs shall be let to the lowest responsible bidder, after reasonable notice. When the contract exceeds two hundred and fifty dollars such notice shall be by advertisement; when less than that amount, advertisement may be dispensed with. Contracts shall be let as heretofore in each of the cities of said class as heretofore, but all bids shall be received and opened publicly by the committee or official entrusted with the awarding of the contract, at a time to be designated in the advertisement or notice to bidders, and the figures shall be stated to the bidders then present. All contracts shall be in writing, signed and executed in the name of the city by the city recorder and head of the proper department. No contracts shall be entered into or executed directly by the councils or any committee thereof. All contracts shall be countersigned by the controller and filed and registered by number, date and contents in the city recorder's office, and attested copies furnished to the controller and the department charged with the work."

Evidently these provisions refer to those contracts relating to current city affairs, which are required to be "let to the lowest responsible bidder"; contracts imposing pecuniary obligation upon the city for work done or materials furnished. They evidently do not include or touch the right of the select and common councils by ordinance to direct and ordain to what public uses the property vested in the city should be put, or nullify the provision of the act of 13th of April, 1840, above recited, by which express authority was conferred upon the select and common councils of the city of Allegheny for that purpose. Conceding, for the sake of the argument, that the city solicitor is required to indorse his approval upon the form of such an ordinance or contract before it takes effect, it is to be obesrved that it is only as to the form of the contract, and not its substance or policy, that he is required to approve, and therefore, if he refuses to approve the form, he would be expected and required to indicate in what respect of form it was defective, and prepare a written contract which would carry out the will of the contracting power in a form approved by himself. Whether he could be compelled by a writ of mandamus to exercise such discretionary and ministerial pow-

er as is thus reposed in him is a question not now necessary to be determined. The same may be said of the purely ministerial duties imposed by article 15 of the act of 1901, upon the city recorder and head of the proper department.

These, however, are, as said by the court below, academic questions in the present case. The ordinance proposing the contract on the part of the city of Allegheny with the Pennsylvania Company, and quoted at length in the bill of complaint, is entitled "An ordinance to authorize the proper officials, for and in behalf of the city of Allegheny, to enter into a contract with the Pennsylvania Company," etc., for certain purposes. The only prayer of the bill, besides that which asks the court to declare the rights of the defendant in the property described in said ordinance, and the prayer for further relief, is the prayer that the defendants, the city of Allegheny, its officers and servants, be restrained by injunction from executing the contract set out in the foregoing ordinance, and from conveying, releasing or otherwise impairing the title of the said Allegheny City to said property.

We have already seen that it was within the competence of the city councils of Allegheny, under the authority with which they were clothed by the act of 1840, to dispose of the ground in question for the purposes set forth in their ordinance. By what particular officials the written instrument, evidencing the contract made by the councils should be executed, is a subordinate question, but the suggestion that the proper officials, whoever they may be, should be prevented, by injunction of the court, from executing a contract which the court has determined was one in the power of the city councils to make, hardly needs a serious answer. If, hereafter, the written contract should be executed by an improper officer, or be otherwise open to criticism for defect in form of execution, there will be a time and place for the consideration of these matters.

The prayers contained in this bill are clearly inadmissible, and the decree of the court below, dismissing the same, is hereby affirmed.

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## BARNARD v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,499.

1. PERJURY—HOMESTEAD CLAIMS—PROOF—OATH—AUTHORITY TO TAKE—UNITED STATES COMMISSIONERS.

Rev. St. § 2294, as amended by Act Cong. March 4, 1904, c. 394, 33 Stat. 59 (U. S. Comp. St. 1901, p. 467), authorizes proof of homestead claims to be made before United States commissioners in the land district in which the lands are situated, and section 5392 (U. S. Comp. St. 1901, p. 3653) declares that every person who having taken an oath before a competent officer in any case in which the law of the United States authorizes an oath to be administered that he will testify truly, etc., willfully and contrary to his oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. An indictment for perjury in support of a homestead claim, sworn to before a United States commissioner, alleged that the commissioner was an of-

*Rehearing denied June 10, 1908.

ficer who was authorized by the laws of the United States to administer an oath and take testimony in such proceeding, and was then and there engaged in taking testimony on the application of W. to make final homestead proof, etc.; that it thereupon became material that the commissioner should be informed by the testimony whether W. had settled and resided on the land in good faith; and that, to prevent the commissioner from knowing the true facts, defendant willfully, corruptly, and falsely testified to facts specified which he did not believe to be true. *Held* that, under such allegations the court would take judicial notice that the commissioner had competent authority to administer the oath to defendant in the particular proceeding, and that the indictment was not, therefore, defective for failure to allege the commissioner's authority to administer the oath on which the perjury was based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 76–79.]

2. SAME—MATERIALITY.

The indictment also sufficiently alleged that defendant's testimony so given before the commissioner was material.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 82–89.]

3. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

In a prosecution for perjury committed by defendant in support of W.'s homestead claim, oral statements made by W., indicating that he did not reside on the homestead claimed by him during the time stated in his homestead proof, and during the time defendant testified W. had an established residence on the land, was admissible as res gestæ.

4. SAME—OTHER OFFENSES—DESIGN—KNOWLEDGE—SYSTEM.

In a prosecution for perjury alleged to have been committed by defendant in support of W.'s homestead claim, evidence that witness took up a homestead on public lands in the same section of the state where W. made his claim, and that, though witness never resided on the land, defendant was a witness in his behalf when he (witness) made proof of his residence on the homestead, was admissible to show knowledge, design, and system on defendant's part in furnishing evidence in support of fraudulent land claims.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 825–834.]

5. SAME—WRIT OF ERROR—EVIDENCE—PREJUDICE.

Accused was not prejudiced by the admission of proof in support of his homestead claim, in which he swore that he had continuously resided on land other than the place where he actually resided for the purpose of affecting his reputation for truth and veracity which a witness for accused had previously testified had been good; such homestead proof not being contradicted in any particular.

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

The plaintiff in error was charged by indictment in the Circuit Court of the United States for the District of Oregon with the crime of perjury in delivering his testimony as a witness in the matter of the application of one Charles A. Watson to make final proof upon a homestead entry of public lands of the United States in the district of Oregon. The indictment charged that the defendant "came in person before James S. Stewart, who was then and there the duly appointed, qualified, and acting United States commissioner for the district of Oregon, and who was then and there an officer who was authorized by the laws of the United States to administer an oath and to take the testimony of witnesses in the matter of the application of a claimant to make final proof upon a homestead entry of public lands of the United States lying within The Dalles land district of the United States in the said district of Oregon, and the said James S. Stewart, as such United States commissioner for the district of Oregon, was then and there engaged in taking and hearing testimony in the matter of the application of Charles A. Watson, late of said

district of Oregon, to make final proof in support of his homestead entry." The indictment describes a tract of public land of the United States upon which it is charged Charles A. Watson had theretofore made a homestead filing in the land office, and was then and there engaged in making final proof in support of his homestead entry; that the defendant "then and there * * * subscribed his name to certain testimony, which had then and there been given by him before said James S. Stewart, as such United States commissioner for the district of Oregon, in the matter aforesaid, and that said testimony so then and there subscribed by him was read to him before being so subscribed, and was then and there sworn to by him as true before said James S. Stewart, as such United States commissioner for said district of Oregon." It is alleged that it then and there became material that the said James S. Stewart, as such United States commissioner and the register and receiver of the United States land office at The Dalles, should be informed and know from and by such testimony "whether the said Charles A. Watson had settled and resided upon and improved or cultivated the said lands so described, as required by the homestead laws of the United States, and, if so, when such settlement and residence began and how long it continued, and what was its character, and whether it commenced in the year 1898 and continued for five years thereafter, and especially whether the said Charles A. Watson had resided continuously on said land for a period of five years since first establishing residence thereon, and for what period or periods said Charles A. Watson had been absent from said lands since making settlement thereon, and for what purpose he was so absent, and whether said Charles A. Watson had cultivated said land, and how much thereof he had so cultivated, and for how many seasons he raised crops thereon, and what improvements were on said land, and what was their value." It is charged that the said defendant was thereupon in due manner sworn by the said James S. Stewart and made oath before him of the truth of the matters contained in said testimony so submitted by him, and to prevent the said James S. Stewart, the United States commissioner, and the said register and receiver of the United States Land Office, from knowing the true facts concerning his residence upon and cultivation and improvement of the said land, willfully, corruptly, and falsely, and contrary to his said oath, did depose and swear, as in his testimony set forth, of and concerning the material facts aforesaid, and did state and subscribe material matters which he did not then believe to be true. The testimony of the defendant by question and answer is set forth in full in the indictment, from which it appears that the defendant made oath that he knew Charles A. Watson and the land embraced in the homestead entry; that Watson settled upon the land and established his residence there in the spring of 1898; that he was unmarried, had resided continuously on the homestead since establishing his residence thereon, except that he made a trip to the Willamette Valley in July, 1902, for the benefit of his health and returned in October, 1902; that defendant lived about eight miles from the settler's place, and in riding after his live stock he frequently rode past Watson's place and stopped at his house; that the settler had cultivated about two acres of the homestead, had raised a garden on it every year since 1898; that the rest of the land was too steep, rough, and rocky for cultivation; that he pastured about 25 head of his horses on the place. The improvements on the land were a lumber house 12 by 16, lumber roof, lumber floor, one room, ceiled, and papered, good spring water, all fenced with three wires, total value of improvements about $250, one door and one window. It is alleged in the indictment that, in truth and in fact, at the time when the defendant so subscribed and swore to the truth of said testimony, that he then and there well knew that the said Charles A. Watson "had never settled or resided upon or improved or cultivated the said land, so described, as required by the said homestead laws of the United States, or in any manner whatever, and had not settled upon and established actual residence thereon in the year 1898, or at any other time, and had not resided on said land so described, or any part thereof, since first establishing residence thereon, except when he made a trip to the Willamette Valley in July, 1902, for the benefit of his health, or otherwise or at all, and had not returned to said land and re-established his actual residence thereon in October, 1902, or at any other time in said year

or in any other year, and had not raised a crop on said land every year from 1898 to 1904, or during any of said years, and had not cultivated two acres of said land." It is charged that the defendant "in manner and form aforesaid, in and by his said testimony, and upon his oath aforesaid, in a case in which the law of the said United States authorized an oath to be administered, unlawfully did willfully, and contrary to his said oath, state and subscribe material matters, which he did not then believe to be true, and thereby did commit wilful and corrupt perjury." The defendant demurred to this indictment on the ground that the matters stated therein were not sufficient in law to constitute a crime. The court overruled the demurrer, and thereafter the cause was tried before a jury, which returned a verdict of "guilty, as charged in the indictment."

In the course of the trial the United States called as a witness one E. A. Putnam, who testified that he knew Charles A. Watson, had seen him in Portland in 1903 at the Merchant's Hotel, about the 28th of April in that year; that he had a conversation with him. The witness, in the course of his examination, was then asked the following question: "State whether or not there was anything in that conversation that showed, or tended to show, where Watson had been about that time or immediately preceding it." To the question the defendant objected, on the ground that it was incompetent, and not in any way binding upon the defendant in the case, and hearsay, and not the best evidence. The court overruled the objection, and admitted the testimony as bearing upon the question as to whether or not Watson did state the truth in regard to the answers that he made in making his proof. The witness answered that Watson said "he had his foot cut at the time. He had been down working on the Columbia river, down about St. Helens somewhere, and said he had come up, and he was going out home, out to his place, out to where his folks lived * * * out towards Forest Grove, out in Washington county."

William Shepard was also called as a witness for the United States, and testified that he had a conversation with Watson at Greenville in 1901, and, over an objection of the defendant, said that Watson spoke of his claim, said that he wanted to go back and prove up, but gave as a reason why he did not "that there was some horses run off that spring, and he says he was hired to do it, and he didn't suppose the settlers wanted him to come back." Watson was not called, and did not testify as a witness in the case.

John Morgan was called as a witness for the United States. He testified that he lived in Wheeler county and took up a claim in that county. Being shown his testimony on final proof in support of the entry, the court inquired as to the purpose, and the United States Attorney said that he proposed to prove a similar act on the part of the defendant, that the witness on the stand took a homestead and made proof, and that the defendant was one of his witnesses and swore to his proof, which he would follow by showing that at the time the witness did not reside and never had resided on the claim. The proof was made in September, 1904. The testimony was admitted over defendant's objection, and the witness testified that he did not reside on the claim and did not cultivate it. The witness was also permitted, over the objection of the defendant, to testify that he took up the claim for the Butte Land, Livestock & Lumber Company.

The transcript of record does not contain all the evidence in the case, but it does contain this statement: "That it should further be certified that there was other testimony on the part of the government tending to show that Watson was in Washington county, Or., in December, 1900, in February, 1901, in May, 1902, and in May, 1903; that Watson had had a conversation with the witness Bledsoe, and had told the witness that he had been in Missouri in the year 1900; that this conversation occurred in July, 1901; that Charles A. Watson had worked for the witness Bradley in March and April of the year 1902; that in August, October, and November, 1898, Watson had transactions with the witness Moore, who conducted a store at Greenville and also in October, November, and December of 1900, and in January, February and May, 1901, and had like transactions with the firm of Moore & Son in March, April, May, June, July, August, and October, 1902; that these were personal transactions with the man Watson over the counter of the store, and the wit-

ness Ireland corroborated the witness Moore. There was evidence from the witness Butler, clerk of Wheeler county, that Watson's name did not appear upon the registration or poll books of that county, and by witness Godman, clerk of Washington county, that Watson had registered in that county under date of the 19th of March, 1902, by the witness Clymer, a postmaster at Fossil, that he had not delivered any mail for Watson, but had been requested by Coe Barnard to put Charlie Watson's mail in Coe Barnard's box; that he did not remember prior to 1903 of Watson ever getting his mail at the post-office in Fossil. There was other testimony to show that Watson had not been seen by the witnesses in Wheeler county at the times or within the periods named in the indictment, except occasionally. It was the testimony of Henry Neal, a witness, that in 1901 he heard Coe Barnard and Cant Zachary talking together about Watson going away from Wheeler county with horses and not having come back, and that Watson had not shown up at that time."

James S. Stewart, United States commissioner, was also called by the United States as a witness. He identified the proof of homestead entry made by Morgan and the fact that the defendant was one of the witnesses. He was thereupon called upon as a witness by the defendant as to the defendant's general reputation in the community where he lived for truth and veracity, which he testified was good. On cross-examination by the United States the witness was asked to identify the final proof in a homestead entry made by the defendant on the 23d of June, 1904, upon the statement of the United States Attorney that he proposed to show that the defendant before the witness as a United States commissioner swore to the fact that he had continuously resided on a homestead other than the place where he did reside. The homestead entry was identified, over the objection of the defendant. On redirect examination the witness testified that he did not know how much the defendant lived on his claim, nothing except what the defendant swore to in his proof; that he did not know how many improvements he had on the place; did not know whether defendant's family resided on the place or not; did not know any more than what he swore to in his proof; and did not know whether the statements made in his proof were true or false.

Bennett & Sinnott, for plaintiff in error.

Francis J. Heney and Tracy C. Becker, Special Assistants to the Attorney General of the United States, and William C. Bristol, U. S. Atty., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It is objected that there is no allegation in the indictment that the United States commissioner before whom the defendant appeared and took the false oath mentioned in the indictment had authority to administer the particular oath upon which the charge of perjury is based. The indictment is founded upon section 5392 of the Revised Statutes (U. S. Comp. St. 1901, p. 3653), which provides as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person in any case in which the law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury."

The authority of a United States commissioner to administer the oath and take the testimony of the defendant is found in section 2294 of

the Revised Statutes, as amended by Act March 4, 1904, c. 394, 33 Stat. 59 (U. S. Comp. St. Supp. 1907, p. 467), as follows:

"That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber culture, desert land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner * * * in the county, parish, or land district in which the lands are situated."

The charge in the indictment is that the defendant "came in person before James S. Stewart, who was then and there the duly appointed, qualified, and acting United States commissioner for the district of Oregon, and who was then and there an officer, who was authorized by the laws of the United States to administer *an* oath and to take the testimony of witnesses in the matter of the application of a claimant to make final proof upon a homestead entry of public lands of the United States." The objection to this allegation is that it is the mere statement of the commissioner's general authority to administer oaths in the matter of homestead proofs; that under Act March 3, 1879, c. 192, 20 Stat. 472 (U. S. Comp. St. 1901, p. 1392), there are certain preliminary proceedings required to be taken by the homestead claimant before the commissioner has authority to take proof or administer an oath in the final homestead entry; that the indictment does not set forth these preliminary proceedings; and that, therefore, it does not appear that the commissioner had authority to administer the oath in this particular case. The only other alternative, it is contended, was that the indictment should have been in the form prescribed by section 5396 of the Revised Statutes, which would have been sufficient had it alleged that the commissioner had authority to administer *said oath*; that is to say, the oath that was required to be taken in that case at that time.

In our opinion the indictment is not open to the objection urged against it. It is not only alleged that the commissioner was an officer who was authorized by the laws of the United States to administer an oath and take testimony of witnesses in the matter of the application of a claimant to make final proof upon a homestead entry, but it is alleged that the commissioner "was then and there engaged in taking and hearing testimony in the matter of the application of Charles A. Watson, late of said district of Oregon, to make final proof in support of his homestead entry," and the particulars relating to the land, its location, and Watson's homestead filing upon the land and the making of final proof in this particular case are set out in the indictment, from which it appears that the proceeding had reached that stage when the claimant was entitled to make final proof, and it is alleged "that it then and there became, and was, material that the said James S. Stewart, as such United States commissioner for the district of Oregon and the register and receiver of the United States Land Office at The Dalles in said district of Oregon, should know and be informed from and by the said testimony whether the said Charles A. Watson had settled and resided upon and improved or cultivated the said lands so described, as required by the homestead laws of the United States," etc., and that the defendant made oath before the commissioner "of and concerning the truth of the matter contained

in said testimony so subscribed by him," and so, being sworn, "then and there, to prevent the said James S. Stewart, United States commissioner for the district of Oregon, and the said register and receiver of the United States Land Office at The Dalles, in said district of Oregon, from knowing the true facts and circumstances pertaining to the settlement and residence of the said Charles A. Watson upon, and his cultivation and improvement of the said lands * * * willfully, corruptly, and falsely, and contrary to his said oath did depose and swear as in said testimony set forth, of and concerning the material facts aforesaid, and did state and subscribe material matters which he did not then believe to be true." And it is further alleged that the defendant, in and by his said testimony and upon his oath aforesaid, in a case in which the law of the United States authorized an oath to be administered, did unlawfully and willfully, and contrary to said oath, state material matters which he did not believe to be true. From these allegations setting forth the general authority of the commissioner to administer an oath and take testimony in this class of cases and the statement of the proceedings before the commissioner in which he was engaged in taking and hearing testimony the court will take judicial notice that the commissioner had competent authority to administer the oath to the defendant in this particular proceeding and in this particular case.

The objection that it is not sufficiently alleged in the indictment that defendant's testimony was material is also without merit. The reference already made to the allegations of the indictment shows that it distinctly appears therefrom that defendant's testimony was material to the inquiry before the commissioner and the register and receiver of the land office as to whether Watson had complied with the law with respect to his homestead claim.

It is assigned as error that the court permitted the prosecution to prove certain oral statements made by Watson tending to show that Watson did not reside on the homestead claimed by him during the time stated in his homestead proof. It is contended that the admission of these statements is contrary to the rule excluding hearsay evidence, except in certain circumstances not material to this case. The objection relates to the testimony of the witnesses Putnam and Shepard. These two witnesses were permitted to testify, over the objections of the defendant, as to conversations with Watson, the first at Portland, Or., in April, 1903, and the second at Greenville, Or., a place west of Portland, in 1901. When these conversations took place, Watson was not residing on the land claimed by him as a homestead. The indictment charged that the defendant had testified in 1904 that Watson had established his residence on the land claimed as a homestead in 1898, and had since resided there continuously, except between July and October, 1904. The question of fact for the jury to ascertain was whether this sworn statement of the defendant was true or not, and evidence as to the residence of Watson during 1898 to 1904 was relevant to that inquiry. It follows that evidence of the fact that from 1901 to 1903 he was absent from the land claimed by him as a homestead was also material and relevant. The United States requires absolute good faith on the part of the settler in the

occupation of public land for the purpose of acquiring title thereto under the homestead law. No mere pretense of establishing a residence upon the land or occasional visits to it will answer the requirement. The acts of occupation must be with the intention of actually residing upon the land, and hence it follows that under the law residence upon a homestead claimed is a combination of act and intent. With respect to the acts of Watson relating to his residence or lack of residence upon the claim evidence was admitted upon the trial and this evidence is not now a matter of controversy. The only question now is whether his declarations connected with such acts and relating to his lack of residence upon the land were also admissible in evidence. We think they were, as part of the res gestæ. In Lund v. Tyngsborough, 63 Mass. 36, the court, in discussing this question, said:

"The main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction. Thus, where a debtor leaves his house to avoid his creditors, which is an act of bankruptcy, and goes abroad, and continues abroad, the act of bankruptcy continues during the continuance abroad for this purpose. * * * Perhaps the most common and largest class of cases in which declarations are admissible is that in which the state of mind or motive with which any particular act is done is the subject of inquiry. Thus, where the question is as to the motive of a debtor in leaving his house and going and remaining abroad, so as to determine whether or not an act of bankruptcy is committed, his declarations when leaving his house and while remaining abroad, as to his motives for leaving his house and for remaining abroad, are admissible in evidence. Such declarations, accompanying the act, clearly belong to the res gestæ. They are calculated to elucidate and explain the act and derive a degree of credit from the act."

In Viles v. Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311, the question was as to declarations concerning the domicile of the plaintiff in the action. The court said:

"The change in his place of abode might be temporary or permanent. It might indicate a change of domicile or not, according to the circumstances attending it. Declarations of a person accompanying a change of his abiding place have always been held competent to explain the change as a part of the res gestæ; but declarations in such cases are often admissible on a broader ground than as a part of the act of removing from one place to another. The intention of the person removing is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be introduced if it is free from objection in other particulars. * * * Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show intention."

In Insurance Co. v. Mosley, 8 Wall. 397, 404–405, 19 L. Ed. 437, the Supreme Court of the United States had this to say in respect to declarations of this character:

"Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and give them their proper effect. As independent, explanatory, or corroborative evidence, it is often indispensable to the true administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury."

To the same effect is Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 296, 12 Sup. Ct. 909, 36 L. Ed. 706.

We think that under this rule the declarations of Watson relating to his residence and in connection with facts relating to the same subject were competent as evidence tending to show that it was not his intention to reside on the land.

It is assigned as error that the court admitted the evidence of the witness Morgan, over the objection of defendant. The evidence of this witness tended to show that in September, 1904, he made proof of his residence upon a homestead upon public lands in the same section of the state where Watson made his claim, and that the defendant was a witness on behalf of Morgan, and that Morgan never resided upon the land. This evidence was offered and admitted as tending to show knowledge, design, and system on the part of defendant in furnishing evidence in support of a fraudulent scheme to obtain title to public lands, and the evidence was so limited by the court in its instructions to the jury. In Van Gesner v. U. S., 153 Fed. 46, 55, 82 C. C. A. 180, evidence of this character was admitted to illustrate or establish the intent or motive of the defendant with respect to the particular act in controversy, and in the instructions to the jury the evidence was so limited. The admission of the testimony and the instructions of the court to the jury with respect thereto were affirmed by this court. The same case was taken to the Supreme Court of the United States (Williamson v. U. S., 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278), by the defendant Williamson, where the admission of this testimony was affirmed by that court. The rule in that case is applicable to the facts in this case.

The defendant called James S. Stewart, the United States commissioner, before whom the homestead proof was taken in this case. He was asked if he knew the general reputation of the defendant for truth and veracity in the community where he lived. He answered that he did, and, upon further inquiry, testified that it had been good. On cross-examination the witness was shown the final proof of the defendant taken before the witness in support of his own homestead claim. The proof was identified by the witness. The United States Attorney stated that he offered the evidence for the purpose of showing matter affecting the truth and veracity of the defendant; that, as a witness in his own behalf in a homestead proceeding, he swore to the fact that he had continuously resided on land other than the place where he actually resided. The evidence was admitted, over the objection of the defendant, and the witness was asked if he knew whether the defendant resided on the premises described in the homestead proof, but the witness testified that all he knew about it was what was stated in the homestead proof. If the admission of this evidence was error, it was clearly without prejudice, as it was not contradicted in any particular. So far as the evidence submitted to the jury was concerned, it stood as a truthful statement, and therefore without any prejudicial effect upon the jury as against the defendant.

Finding no prejudicial error in the record, the judgment of the court below is affirmed.

## BACKER v. PENN LUBRICATING CO.

(Circuit Court of Appeals, Sixth Circuit. June 18, 1908.)

No. 1,776.

1. MINES AND MINERALS—CONSTRUCTION OF OIL LEASE—TITLE TO OIL IN PLACE.
   An oil lease in ordinary form, giving the lessee the exclusive right to explore for produce and sell oil from the land on payment of a royalty, does not vest him with title to the oil in place.
2. SAME—RIGHTS OF LESSEE.
   Such a lessee, however, has a right of action for damages against one who invades his exclusive right by going upon the land during the term of his lease without his consent and drilling wells and removing and selling oil therefrom.
3. PLEADING—SUFFICIENCY OF PETITION—GENERAL DEMURRER UNDER KENTUCKY CODE.
   Under Civ. Code Prac. Ky. §§ 2, 4, which abolish forms of action, and section 93, which defines a general "demurrer" as "an objection to a pleading because it does not state facts sufficient to constitute a cause of action or a defense," a petition which shows a right of recovery in plaintiff in some form of action and contains a prayer for general relief is not subject to a general demurrer, because it is based upon an erroneous theory as to his rights and measure of damages and does not entitle him to the specific relief prayed for.
4. TRESPASS—ACTIONS—DEFENSES.
   In an action by an oil lessee for damages against one who entered upon and took oil from the leased premises, an answer, alleging that defendant's entry was peaceable and made in good faith under a lease which defendant believed to be valid, is not subject to a general demurrer, since such good faith may at least affect the extent of defendant's liability for damages.

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

E. Heim, for plaintiff in error.

O. H. Waddle, for defendant in error.

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

KNAPPEN, District Judge. By this proceeding a review is sought of the action of the court below in dismissing the petition of plaintiff (appellant here), filed under the Kentucky Code of Civil Procedure as statement of plaintiff's cause of action, and in not sustaining demurrer to defendant's answer and counterclaim.

Plaintiff's petition alleged that one Duncan and wife, on November 11, 1902, gave to plaintiff an "oil lease" upon certain described lands in Wayne county, Ky., by the express provisions of which plaintiff was granted the exclusive right to operate or drill thereon for petroleum, gas, and other minerals for a term of 20 years, and so much longer as such products could be produced in paying quantities, upon payment to Duncan of 10 per cent. of the petroleum extracted and $25 for each gas well (in case oil should be found in paying quantities); plaintiff agreeing to drill a well within six months from the making of the lease, or in lieu thereof to pay Duncan $50 a year un-

til work should be commenced. The petition alleged that plaintiff thereby acquired a leasehold estate in the land, by virtue of which he had the sole and exclusive right: (a) To enter upon, explore, and develop the land for oil, gas, and other minerals; (b) to drill wells for oil and gas; (c) "to the oil in and under said tract of land"; (d) to extract and market the oil and gas therefrom; (e) to run the oil that might be found or that should be under the land; and (f) to sell and dispose of all the oil in and under the tract, excepting the one-tenth to be paid to Duncan by way of royalty. The petition further alleged that plaintiff lawfully entered under the lease for the purpose of exploring and developing for oil, gas, and other minerals, and that after such entry defendant, with full knowledge of plaintiff's lease and of the latter's rights thereunder, forcibly and wrongfully, and against the will and over the protest both of plaintiff and of Duncan, entered upon the land, erected derricks, and drilled for oil thereon, and extracted therefrom and converted to its own use upwards of 10,000 barrels of petroleum. The petition alleges that the oil so taken by defendant (over and above the one-tenth royalty belonging to Duncan) "belonged to and was the property and oil of this plaintiff," and prayed judgment for the value of the oil so converted, and for "general, special, necessary, and proper relief."

The answer alleged: That in 1895 Duncan and wife gave to one Williams an oil lease for 20 years, or as long as oil, gas, or minerals could be obtained in paying quantities, upon the entire of the lands in question (and other lands) upon payment of royalty; that in the year 1896, and within the time limited therefor by the lease, Williams drilled a well, which proved unproductive; that in the year 1902 defendant, who had meanwhile become the owner of Williams' rights, reentered and continued the drilling of wells with the knowledge and consent of Duncan, but, failing to find oil in paying quantities, temporarily left, with the intention, known to Duncan, of returning and continuing the development; that during defendant's temporary absence plaintiff obtained his lease, with knowledge of defendant's prior lease and the developments under it, and of defendant's intention to continue such development, and for the purpose of circumventing defendant; that the latter, in pursuance of its original intention, re-entered peaceably in 1903, and from that date until 1905 drilled the wells and produced the oil referred to in plaintiff's petition, in the good-faith belief that it had an exclusive prior and superior right as against plaintiff; that plaintiff made no entry at least until after defendant's entry in 1903; that to prevent plaintiff from forcibly excluding defendant from the premises and from himself forcibly drilling wells and producing the oil therefrom, defendant, by suit in the state circuit court against plaintiff herein, obtained judgment that defendant had a right superior to plaintiff's in the development and exploitation of the premises under its lease, and perpetually restraining plaintiff herein from entering upon the premises for the purpose of drilling or mining for oil, gas, or other minerals; that the Kentucky Court of Appeals reversed the judgment of the Circuit Court, holding that defendant herein had abandoned its right to operate under its lease; that the circuit court refused to delay restitution of the premises until an ac-

counting could be had of profits and improvements made under defendant's occupancy; that an appeal from said refusal was then pending in the Kentucky Court of Appeals and undetermined, such pendency being urged in abatement of plaintiff's suit; that, when defendant surrendered possession under the judgment of the Kentucky state court, it left thereon six producing oil wells, which had cost defendant, and which enhanced the value of the premises, more than the value of the oil produced by defendant therefrom; that the plaintiff took possession and had the benefit of all these improvements, thereby escaping the risk and expense of development, and thereby obtaining a profit greater than the value of the oil obtained by defendant, which production cost the latter more than its value; and that all defendant's acts complained of were done in the good-faith belief of its rightful conduct. The answer denied that the plaintiff was the owner of the oil in question, and denied the latter's right to recovery therefor. Defendant asked judgment on its counterclaim for the value of the improvements made by it, in excess of the value of the oil taken.

The plaintiff interposed a demurrer "that said answer and counterclaim does not state facts sufficient to constitute or to support a good defense or counterclaim to plaintiff's cause of action." The court carried the demurrer back to the plaintiff's petition, held that the latter did not state a cause of action, and, on plaintiff's declining to amend, entered judgment dismissing the petition with costs. The sufficiency of the answer and counterclaim was not considered.

The decision of the court below was based upon the proposition that under the lease in question title to the oil in place was not in the plaintiff; and although the court stated its opinion that to the extent plaintiff was damaged by being deprived of the right to explore for, find, and take the oil, he was entitled to recover of defendant, yet that, plaintiff's cause of action being predicated upon an erroneous theory as to the ownership of the oil in place, recovery could not be had upon that or any other theory or basis. The law seems to be settled that, under a lease of the nature here in question, title to the oil in place is not in the lessee. Steelsmith v. Gartlan, 45 W. Va. 27, 34, 29 S. E. 978, 44 L. R. A. 107; Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732; Plummer v. Iron Co., 160 Pa. 483, 28 Atl. 853; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Tennessee Oil, Gas & Mineral Co. v. Brown, 131 Fed. 696, 65 C. C. A. 524. We content ourselves with citing these few authorities, and refrain from further discussing the proposition, for the reason that plaintiff's counsel concedes in this court that the title to the oil in place was not in the plaintiff.

But does it follow from this that the petition should be dismissed? It is not seriously denied that under the facts stated in the petition the plaintiff's rights under his lease are shown to have been violated. Plaintiff had, at the least, the sole right during the leasehold term, subject to the limitations relating thereto, to explore for oil and to take it when he should find it, yielding to the lessor one-tenth thereof as royalty. The petition clearly alleges an invasion of this right, and it is clear that such invasion gives a right of action of some kind for damages suffered by the lessee, whether such invasion is the act of

the lessor or of another lessee. Haven & Chase Oil Co. v. Jordan, 13 Ky. Law Rep. 878; Breyfogle v. Woods, 15 Ky. Law Rep. 782; Logan Natural Gas & Fuel Co. v. Gt. Southern Gas & Oil Co., 126 Fed. 623, 61 C. C. A. 359; Gt. Southern Gas & Oil Co. v. Logan Natural Gas & Fuel Co. (C. C. A.) 155 Fed. 114. Here again we refrain from an extended citation of authorities because the proposition seems so obvious, and is practically conceded.

Unless therefore the court below was right in holding that the plaintiff could not recover upon any theory of his legal rights except that stated in his petition, viz., his ownership of the oil in place, the case was improperly dismissed. Were this pleading to be tested by the rules of common-law pleading, it may be conceded that it would have been subject to demurrer; but the rules of common-law pleading do not obtain in Kentucky, and the sufficiency of this pleading must be tested by the provisions of the Kentucky Code of Civil Practice. In so testing, it should be premised that, for the purposes of this review, the sufficiency of the petition must be judged by its liability to general demurrer, as the petition was not directly demurred to, and the demurrer by which it has been tested is a general demurrer to the answer and counterclaim.

Section 92 of the Kentucky Civil Code of Practice provides that:

"A special demurrer is an objection to a pleading which shows—(1) that the court has no jurisdiction of the defendant, or of the subject of the action; or (2) that the plaintiff has no legal capacity to sue; or (3) that another action is pending, in this state, between the same parties, for the same cause; or, (4) that there is a defect of parties, plaintiff or defendant."

Section 93 provides that:

"A general demurrer is an objection to a pleading, because it does not state facts sufficient to constitute a cause of action or a defense; or, because it does not state facts sufficient to support a cause of action or a defense."

The demurrer under consideration is clearly a general demurrer, and, as the petition states a cause of action of some kind, it is not subject to general demurrer unless plaintiff has misconceived his form of action, or unless he is limited to the alleged erroneous measure of damages stated in the petition.

By sections 2 and 4 of the Kentucky Code forms of actions at law are abolished; it being provided that:

"There shall be but one form of action."

It is therefore unnecessary to define the particular form of the action, whether trespass, trover, assumpsit, or otherwise, for it is well settled that the Code, by reducing the forms of action to one, changes the specific question whether the facts stated show a cause of action in trespass or assumpsit, or any other particular form, into the general question whether the petition shows a right of action in any form, by showing a right in the plaintiff and an injury to that right by the defendant. Hill v. Barrett, 14 B. Mon. (Ky.) 67; Murphy v. Estes, 6 Bush (Ky.) 532; Richmond, etc., Turnpike Co. v. Rogers, 7 Bush (Ky.) 532. It is true that the authorities cited lay down the rule that the Code does not change the law which determined what facts constitute a cause of action, nor does it authorize a recovery upon a

statement of facts which before its adoption had not authorized a recovery in some form of action, and that therefore former precedents, rules, and adjudications may be resorted to as authoritative, except so far as they relate to distinctions between the different forms of actions or to formal and merely technical allegations. But we find nothing in this proposition to sustain the contention that plaintiff is to be denied recovery for the sole reason that he has misconceived the legal basis of defendant's liability. It is clear, to our minds, that the petition cannot be dismissed because the pleader took an erroneous view of the legal effect of the lease.

Section 90 of the Code of Practice provides that the petition must demand the specific relief to which the plaintiff considers himself entitled, and that it "may contain a general prayer for any other relief to which the plaintiff may appear to be entitled." The petition in question demands not only the value of the oil, but "general, special, necessary, and proper relief." We content ourselves with holding that the petition states a cause of action at common law, and so is not subject to general demurrer.

As to the answer and counterclaim:

By this pleading defendant denies an entry by plaintiff prior to defendant's entry, and denies the alleged forcible nature of the latter's entry. This allegation is not, to our minds, overthrown by the reference to the decision of the Kentucky Court of Appeals to the effect that the defendant could not maintain its suit because of the prior abandonment of its leasehold rights. The answer also alleges that the oil in question was taken in good faith, and contends that for this reason defendant is not liable to pay the value of the oil at the surface, but that it should be credited with the reasonable expense of producing the oil, or that the plaintiff should be charged as against mesne profits with the value to which the improvements made by defendant have enhanced the value of plaintiff's leasehold.

We pass by, as not necessary for decision at this time, the question of defendant's right to specifically offset the value of improvements against the value of the oil taken. This question, it seems to us, must depend upon the applicability, to a suit for the invasion of leasehold rights of the nature here involved, of the Kentucky statute relating to mesne profits and improvements, in actions for the recovery of real property, and this question is not discussed in the briefs of counsel. In so saying, we must not be understood as intimating that recovery can be had for improvements made with knowledge of the adverse claim.

But the question of defendant's good faith is certainly material in any aspect. The rule is well established that the ultimate measure of recovery against a trespasser, whether the subject of the taking be timber or minerals, must be determined largely upon the question of the good or bad faith of the taking Durant Mining Co. v. Percy Con. Mining Co., 93 Fed. 166, 35 C. C. A. 252; Woodenware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; Pine River Logging Co. v. United States, 186 U. S. 279, 293, 22 Sup. Ct. 920, 46 L. Ed. 1164; Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180; Benson Mining Co. v. Alta

Mining Co., 145 U. S. 428, 434, 12 Sup. Ct. 877, 36 L. Ed. 762; Winchester v. Craig, 33 Mich. 205. Good faith, under this rule, is not necessarily dependent upon ignorance of an adverse claim, and the answer alleges good faith in the taking. It would seem from the answer to be not improbable that defendant's good faith may become an important factor in determining at least the extent of its liability, and a general demurrer to an answer is properly overruled if any portion of it presents a defense to the plaintiff's claim in whole or in part. United Society of Shakers v. Underwood, 11 Bush (Ky.) 265, 269, 21 Am. Rep. 214.

The judgment dismissing the petition is reversed, with directions to overrule the demurrer, both as affecting the petition and as relating to the answer and counterclaim.

NOTE.—The following is the opinion of Cochran, District Judge, on the demurrer:

COCHRAN, District Judge. This cause is submitted on demurrer to the answer and counterclaim. The defendant, on the consideration of the demurrer, raises the question as to the sufficiency of the petition, and, as I am of the opinion that the petition is not good, it is not necessary to consider the sufficiency of the answer and counterclaim. The theory of the petition is that the plaintiff was the owner of the oil which the defendant found and took from the premises covered by his lease, and it is on this basis that he seeks relief. He cannot recover upon any other theory or basis. It is well settled that the sole right conferred upon a lessee under a lease similar to plaintiff's is to explore for oil and to take it when he finds it, yielding to the lessor his one-eighth part thereof. This being so, the lessee acquired no title to the oil in the ground covered by his lease until he finds and takes it. This was so decided in the cases of Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, and Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320, cited by defendant's counsel. It has even been held that, if the lessee has sunk his well and found the oil, he has no title therein until he takes it. In the case of Carter v. County Court of Tyler County, 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725, it was held that in such a case the lessee could not be assessed for taxation with the prospective production of the well as personal property. Judge English said: "One of the main features of the contract embodied in these leases is that the lessee shall put down the wells and bring the oil to the surface, and when thus produced the landlord is to have one-eighth as rent or royalty and the lessee seven-eighths. While the oil remains in the cavities of the rocks in situ, this court has held in Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292, and Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222, that it is a part of the realty. The lessee may drill the well to the sand or rock in which the oil is contained, but the oil does not change its character from realty to personalty, or any portion of its ownership, until it is brought to the surface and then seven-eighths of it becomes the property of the lessee." The cases of Steelsmith v. Gartland and Huggins v. Daley were cited with approval in the case of Tennessee Oil, Gas & Min. Co. v. Brown, 131 Fed. 696, 65 C. C. A. 524, a decision of the Sixth Circuit Court of Appeals, and it was there held that the lessee in such a lease as this, covering both oil and coal, had no title, not only to the oil, but also to the coal, and that though the lease had words of present conveyance. As, then, the defendant found and took no oil which belonged to the plaintiff, he cannot recover of him on the theory and basis that he did. What defendant did that was a wrong to plaintiff was during the time of plaintiff's disseisin to deprive him of the right to explore for, to find, and to take this oil; and to the extent that he was damaged by this deprivation he is entitled to recover of defendant. But we have no such case here.

The demurrer, therefore, will be carried back to the petition, and it adjudged not to state a good cause of action against defendant.

## DEVOU v. CITY OF CINCINNATI.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1908.)

No. 1,778.

EMINENT DOMAIN—PROCEEDINGS TO ASSESS COMPENSATION FOR PROPERTY—EVIDENCE.

On the trial to a jury of a proceeding to condemn improved real estate in a city, testimony as to the cost of the building, or its value aside from the value of the land, by witnesses not qualified to testify as to the value of the land, or the property as a whole, is inadmissible, since the value of the building as a part of the entire property, the market value of which is the question in issue, is necessarily affected by the value of the land and its location, surroundings, and the uses to which it can be put.

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

Fred W. Keam, for plaintiff in error.

Albert H. Morrill, for defendant in error.

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

RICHARDS, Circuit Judge. This was a suit brought by the city of Cincinnati to condemn certain pieces of property for park purposes. Among the defendants was Sarah O. Devou, the owner of parcel No. 22, consisting of a lot 50 feet by 100 feet, at the southeast corner of Mound and Barr streets, on which there is a four-story stone and brick building, containing about 50 rooms, and parcel No. 35, consisting of a lot 25 feet front on the north side of Kenyon avenue (No. 628) by 80 feet in depth, upon which there is a two-story brick and frame dwelling house of eight rooms. The case was submitted to jury, which assessed the compensation to be paid by the city to Mrs. Devou as follows:

Parcel 22. Value of land taken, including buildings and other structures situate thereon, $20,000. Damages to residue, nothing.

Parcel 35. Value of land taken, including buildings and other structures situate thereon, $3,000. Damages to residue, nothing.

The usual formal errors are assigned, namely, that the verdict is contrary to the weight of the evidence and against the law, that it does not give a fair equivalent for the property taken, that the court erred in its charges and in overruling the motion for a new trial, and that the judgment is contrary to law; but none of these are seriously relied upon in argument. The error relied upon is the refusal of the court to admit the testimony of architects, builders, and insurance adjusters, who were unable to qualify as experts upon the value of the real estate involved, and were interrogated upon the value of the buildings exclusive of the land. The court's action, and the nature and effect of the ruling, appear in the testimony of James McLaughlin, Charles Rosenstein, and George B. McMillan. McLaughlin is an architect, who has constructed a number of prominent buildings in Cincinnati. After stating that fact, and that he had examined the property of Mrs. Devou at the corner of Barr and Mound streets, he

was asked to give his opinion of the present value of that property. Before answering this question, he stated touching his qualifications as a witness:

"I do not profess to be an expert on the value of property on Mound street."

And in consequence the court sustained the objection that he was not qualified as an expert on the value of real estate in that locality. He was then asked what the value of the improvements on the lot at the corner of Barr and Mound streets added to the value of the ground. The court ruled that it was not competent to show the value of the building separately from the value of the land:

"The value of the land may be shown, and then, in addition, you may show there is a building on it, and the character of the building and the use to which it can be devoted, as enhancing the value of the land."

After this ruling the witness was allowed to state what, in his opinion, it would cost to put a building on the lot. The next day the court reconsidered its ruling and said:

"Yesterday the court ruled upon the introduction of testimony as to the cost of construction of the building or buildings upon this land. In thinking of it since, I think the court was wrong. The question here is as to the market value of this property, and it is entirely legitimate and proper to show what these buildings are, the condition in which they are, whether they are substantial, of stone, brick, or frame, how situated, to show that they are suitable for many uses that would give them value and make them salable—all those things. But what they cost back in 1867, and what they would cost to-day, does not throw any light upon the market value. Sometimes money is very foolishly expended in the erection of a building, so that it is entering the field of speculation, and it cannot aid, but would confuse, the jury in determining what the fair market value of the property is. Therefore the court will exclude all the answers that were given. All the testimony given on that subject yesterday, will be stricken out, and the jury instructed not to consider it."

The witness was then asked:

"Suppose that the ground at the corner of Mound and Barr streets is of the value of $15,000 without any buildings upon it, what in your opinion would be the value of the ground with buildings upon it in their present condition?"

This question was objected to. It was limited by certain questions of the court to an attempt to secure from the witness an opinion of the value of the buildings alone, although it appeared that the witness was not an expert upon real estate values in that locality, and was then excluded.

Charles Rosenstein was a contractor and builder. He also acted as an adjuster for fire insurance companies. He described the improvements upon the property on the corner of Barr and Mound streets. He had acted as an appraiser for a building association, but had never appraised property nearer than three or four blocks from the property in question. The court having held that he was not qualified to testify as an expert, the same question that was put to McLaughlin, intended to draw out an opinion as to the value of the ground, exclusive of the buildings, was put to this witness, and excluded.

George B. McMillan was a contractor and builder. He examined the property at the corner of Barr and Mound streets, and gave a

detailed description of the improvements. The witness acted as an appraiser for building associations, but it appeared he had never appraised land in that locality. After an examination as to the witness' qualifications as an expert, the court held that he had not qualified, and sustained an objection, both to the question propounded to McLaughlin as to the value of the house and ground together, supposing the ground were worth $15,000, and to a question as to the present value of the improvements.

It will be perceived that the action of the court below can be sustained, both on the ground that it was not proper under the circumstances to ask the witness as to the value of the buildings irrespective of the land, and also on the ground that the witness had not qualified as an expert upon the value of the ground in that locality, and therefore on the value of the buildings excluding the land. This was not a case where there was anything unusual or complex about the method to be used in valuing the property sought to be condemned. The principal piece of property, parcel 22, constituted a lot 50 feet by 100 feet at the corner of Mound and Barr streets, having on it a four-story stone and brick building. The jury was impaneled for the purpose of assessing the value of that property. The four-story stone and brick building had been built about 1867. The locality was then a fashionable one, and no expense was spared in constructing the building. In the course of years the situation changed, the locality deteriorated, and the structure became a tenement house, occupied by negroes. Now, it obviously would not assist the jury, in determining the present market value of that property, to be informed that it had cost a large sum for its construction originally, or that a building such as it, with thick walls and stone facing, containing all the material that went into the original structure, would cost (as a mere structure, and irrespective of the ground on which it was built and the locality in which it stood) a large sum. Such a building might originally have cost $60,000. It might as a structure, still retaining its original strength as a substantial building, be valued, irrespective of the ground, at that figure. But this would not enable the jury to arrive at the actual value of the ground and building to-day. It would require for this purpose the testimony of experts acquainted with the value, both of land and buildings, in that locality to-day.

It seems clear to us that the effort of the defendant below was not to enlighten, but rather to confuse and mislead, the jury from a consideration of the actual value of the land and buildings as they are now into a consideration of their cost, of what they might be valued at as buildings alone, irrespective of the ground. In the cases cited by the plaintiff in error, Foote v. Railroad Co., 11 Ohio Cir. Dec. 685, and Railroad Co. v. Gorsuch, 8 Ohio Cir. Ct. R. (N. S.) 297, it will be observed that the rulings in each case were based upon its own peculiar circumstances.

In the Foote Case there was a well used in connection with the farm of which the strip appropriated by the railroad company formed a part, and on this strip were also certain forest and fruit trees. The plaintiff was allowed to show what the well cost. While the court did not intimate that it would be proper to estimate the value of the

well entirely separate and apart from the value of the land, yet it held that, in getting at the value of the land, it was proper to show the cost of the well as an element of value; and in that connection it was proper to show the nature of the well, its depth, the manner in which it was walled, the supply of water it afforded, and its utility and necessity. The same position was taken with regard to the action of the trial court in excluding testimony as to the value of trees that stood upon the land at the time the railroad company took possession of it. The reviewing court held that it was proper to ascertain what the trees would add to the value of the land for the purposes for which it was used before it was occupied by the railroad company.

In the Gorsuch Case there was a building on the land sought to be appropriated. A witness qualified as to the value of the land, but not as to the buildings, and when asked as to the fair market value of the land exclusive of the buildings he was excluded. The Circuit Court held that this was error. He had the right to speak as to the value of the land, although he had not qualified as an expert on the value of the buildings. In the case at bar the witness excluded did not qualify as to the value of the land. The court said (page 302):

"In the case at bar we are of the opinion that the plaintiff had the right to show the value of the land separate from the building, and the value of the building separate from the land, and in the absence of all other evidence the aggregate of these two valuations should be taken as the value of the parcel." Railroad v. Gorsuch, 8 Ohio Cir. Ct. R. (N. S.).

But, on consideration, it is evident that the value of the land enters into the value of the parcel in a way the value of the building does not. If you are an expert, you may testify as to the value of the land exclusive of the building, but you cannot properly separate the building from the land, and testify as to its value wholly irrespective of the land. The local conditions which fix the value of the land reflect upon the building, so its value, unless it is removable, cannot be ascertained irrespective of the land. There may be cases where it is proper enough to permit testimony as to the value of the building separate from the land, and all the land separate from the building, where from such evidence the jury can reach the fact which it is to ascertain, namely, the market value of the land including the building. But in the present case there was an abundance of testimony as to the market value of each parcel as it stands now, by duly qualified experts. We think, under these circumstances, the court did right in rejecting the testimony of those not qualified to act as experts upon a fact which was not directly before the jury, and could not, under the circumstances, be of any substantial service to it in its deliberations.

Judgment affirmed.

## GORDON v. ROSS-HIGGINS CO. et al.

(Circuit Court of Appeals, Ninth Circuit. June 1, 1908.)

No. 1,440.

PUBLIC LANDS—TOWN SITE LAW—OCCUPATION OF LOT—ABANDONMENT.

Plaintiff staked out a lot in the mining camp of Fairbanks, Alaska, and built a log cabin thereon in which he resided for some three months and then left and did not return for three years. He left some tools, a stove, etc., in the cabin, and asked two different parsons to look after the property for him, but neither took possession of nor occupied the same. No steps had been taken to locate a town site at Fairbanks, and there was no law under which titles were recorded, but books were kept for the benefit of settlers in which locations were recorded, and plaintiff's was recorded therein. About a year after he left, other persons located the lot and went into possession, which was continuous thereafter; their rights having been subsequently acquired in good faith by defendants, who with their grantors had made valuable improvements on the property. *Held*, that plaintiff's acts amounted to an abandonment of the lot, and that he was not an occupant or in possession and had no right therein which could ripen into a title under the town site law at the time of its location by defendant's predecessor in interest, or which would support an action to recover the property from them.

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 by the plaintiff in error against the defendants in error to recover possession of lot No. 2, in block 3, in the town of Fairbanks in the territory of Alaska, and for the value of the rents and profits of the lands and premises while the plaintiff was excluded therefrom.

The plaintiff alleges in his complaint: That on the 1st day of June, 1906, he was the owner and seised and possessed and entitled to the possession of the lot in controversy; that he had been such owner ever since the 24th day of February, 1903; that on or about the 15th day of June, 1906, the defendant the Ross-Higgins Company entered upon the northerly portion of said lot, 50x100 feet in size, and ever since has forcibly retained possession of the same; that on or about September 24, 1904, the defendant Lillie J. Ray entered upon the southerly portion of said lot, 50x65 feet in size, and ever since has occupied and retained the use and possession thereof.

The defendants in their answer deny the allegations of plaintiff's complaint, and for a further answer aver that the defendant Ross-Higgins Company is the owner (subject to the paramount title of the United States) and in possession of and entitled to the possession of the lot of land described in the complaint. For a further defense the defendant Ross-Higgins Company alleges: That on the 13th day of June, 1906, it found one Daniel McLean and John McLeod, by their lessee, a tenant, in the quiet and peaceable and exclusive possession of the lot of land in controversy, claiming to own and possess the same as a town lot located on the public lands of the United States; that the said McLean and McLeod and their grantees and predecessors in interest had held and possessed and occupied the said lot of land for more than three years; that on the 13th day of June, 1906, the defendant, in good faith, purchased from said Daniel McLean and John McLeod a portion of said lot and the improvements thereon and received from them a deed therefor and the quiet and peaceable possession of the premises; that defendant, at the time of said purchase, was ignorant of any claim of plaintiff to said lot; that it caused due and diligent inquiry to be made to ascertain if any person other than the said McLean and McLeod had or made any claim to said premises; that before the commencement of this action the defendant, in good faith, and at an expense of more than $2,500, built and constructed upon said premises a large frame store building and other buildings to be used in con-

nection therewith; that plaintiff never did at any time, until long subsequent to the erection and completion of said building, notify defendant of his claim to said property. For a further defense, defendant alleges that, more than three years prior to the time when the defendant so purchased the said lot from Daniel McLean and John McLeod, plaintiff had abandoned any claim theretofore had or made to said lot or any part thereof. For a further answer it is alleged that Lillie J. Ray is, and ever since the 24th day of September, 1904, has been, the owner (subject only to the paramount title of the United States) and in the possession and entitled to the possession of the said 65 feet more or less of the lot in controversy. Plaintiff in his reply denies the affirmative matter contained in defendant's answer, and, replying more specifically, that he ever abandoned the lot in controversy. The case was tried before the court and a jury.

The plaintiff testified in his own behalf substantially to the effect that he staked the lot in controversy on the 24th day of February, 1903, by placing stakes on it in the usual way, and that he filed a notice to be recorded with a person who was acting as recorder for the settlement of Fairbanks. After he staked the lot he built a cabin on the lot, on the Second avenue end of the lot. The cabin was 12x14 or 12x16 feet. The cabin was built out of logs. The logs were cut down on the premises, rolled together, notched and erected, and moss put between the logs and on the roof of the cabin, after putting the roof on. Then lined the cabin with canvas; the canvas coming down to between two and three feet from the floor. There was a door in the cabin, but he could not get any windows at the time, and the cabin had no windows. The openings were closed with a piece of canvas. The cabin was partially floored. There was a bunk in it and a stove, and he placed his tools in the cabin, carpenter's, machinist's, and steam-fitting tools. He had two pairs of blankets and his clothes there. He lived in the cabin after that time until about the 25th of June. He left there about the 25th day of June. He was looking for work at the time. Left the cabin fastened up and in charge of two different parties. The first one was Antone Mainville. The witness was looking around for something to do in Fairbanks. Mainville said he might have to go away soon himself. The witness was going out to the Creeks at that time looking for work. Then he spoke to Marston about it. Plaintiff went out to the Creeks, to Cleary and Gold Stream. He was there two or three weeks; stopped with a party who was doing some prospecting. Followed Gold Stream down that way. Went to a place called Nulato. From there he went to St. Michaels and remained eight or ten days. His health was poor. Had a bad cough. Thought he had the consumption. From there he went to Seattle, where he remained six or eight weeks; from there to the Hawaiian Islands. Went there because he was sick. Remained a year and a half. Received a letter from Marston, who stated that all his tools had been stolen out of his cabin, and a party had come along and staked the ground. Was not in a position to do anything about it. Was in poor health. He returned to Seattle in 1905, and from Seattle proceeded to Valdez, where he remained four or five months, working part of the time, then returned to Seattle, where he remained until the next spring, and then returned to Fairbanks in 1906 and undertook to take possession of his cabin. He found the cabin open and no window in it. The canvas he had put in the cabin was not there. No property of any kind in the cabin. He found Ross-Higgins Company on the First street end of the property and Mrs. Ray on the Second street end. On the 6th day of July, 1906, he commenced the present action against the defendant.

He was asked by his counsel whether or not at the time he left Fairbanks to go to the Creeks, or when he left to go to the outside, or at any time, he ever intended to abandon his property, to leave it and make no further claim to it. To this question he answered "No," and further stated, in answer to a question, that he never authorized anybody to part with the property on his behalf. After some further testimony concerning the cabin, the plaintiff rested, whereupon defendant moved the court for a nonsuit, on the ground that the plaintiff had failed to show such a prior possession of the property in controversy at the time of the commencement of the action as entitled him to maintain an action of ejectment; that the testimony on behalf of the

plaintiff showed only that he was in possession of the property for a period of about three months in the year 1903; that he left the property at that time and was continuously absent from the 25th day of June, 1903, until the 1st day of July, 1906; that he had offered no proof whatsoever that he had any one else in possession of the property for him and on his behalf during that time, or that he had left anything upon the property to indicate to the defendants in this action that he claimed any interest; and, furthermore, from the length of the absence of the plaintiff from the property, the law conclusively presumed an abandonment. The court declined to rule upon the motion at that time, and the defendants proceeded with their testimony. In plaintiff's testimony a book was introduced in evidence purporting to be a record book of lot locations kept by the persons acting for the settlers of Fairbanks. There appeared to have been no authority of law at that time for a town recorder of Fairbanks whose duty it was to keep any record of town lots. This record was therefore not admitted as binding upon any one as a notice of title, but was admitted as simply showing possession. In this book was recorded: "Block 3 East, between First and Second streets, lot 2, February 24, 1903, William Gordon, March 3, 1903, Recorded." Underneath this record was the notice of the subsequent location of the same lot, namely, the joint location of the lot by Limbocker and Smith. The defendant's testimony showed a chain of title by recorded deeds and possession, commencing with Limbocker and Smith, in July, 1904, and by various conveyances the title to 50 feet on First avenue by 100 feet in depth became vested in the defendant Ross-Higgins Company, and the title to 50 feet on Second avenue and extending north toward First avenue, a distance of 65 feet more or less, became vested in the defendant Lillie J. Ray. It appears from the testimony that the representative or agent of the defendant Ross-Higgins Company, on June 13, 1906, purchased the northern portion of the lot in good faith from Daniel McLean and John McLeod, who appeared to have the record title to the ground, and paid them therefor the sum of $1,200; that on September 24, 1904, Henry T. Ray purchased the southerly end of the lot in good faith from Charles Irwin and Helen B. Irwin, who appeared to have the record title to the ground, and paid them therefor the sum of $625, taking the deed in the name of Lillie J. Ray.

The plaintiff was then permitted to call as a witness A. L. Mainville, who testified that when the plaintiff left Fairbanks in the summer of 1903 he told the witness to look after the lot in question when he was gone. The witness himself left Fairbanks on the 13th of July, 1903. The plaintiff also called Edward Marston, who testified that he was living in Fairbanks in 1903; that he was keeping the Fairbanks saloon and hotel. The plaintiff came to witness and asked him if he would look after his property, as he was going away to look for work, and perhaps going to the outside, and the witness told plaintiff he would do the best he could. The witness further testified that in July, 1904, Limbocker came to the witness and said he wanted to use the tools in the cabin. The witness said he had no right to loan them. Subsequently Limbocker acknowledged he had borrowed them. The witness said he did not do anything further about the matter. He had no power of attorney to act.

At the conclusion of the evidence, the attorney for the defendants renewed his motion that the court instruct the jury to return a verdict in the case in favor of the defendants, for the reason assigned in the motion for nonsuit, and for the further reason that it was undisputed that the defendants in the case had no notice or knowledge of any claim of the plaintiff in the case to the property, and that the premises were abandoned by the plaintiff in this case. The court instructed the jury accordingly, and the plaintiff excepted. The jury returned a verdict for the defendants. From the judgment entered upon the verdict the case is brought here upon a writ of error.

Claypool, Kellum & Cowles (W. C. Sharpstein, of counsel), for plaintiff.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The errors assigned relate to the rulings of the court in the exclusion and admission of evidence and the action of the court instructing the jury to find a verdict for the defendant. In our view of the case it will be sufficient to determine the question whether upon the evidence the court was justified in instructing the jury to find a verdict for the defendant.

Section 2387 of the Revised Statutes (U. S. Comp. St. 1901, p. 1457), provides that:

"Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site," it shall be lawful to enter "the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests."

The act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891 (26 Stat. 1095, c. 561 [U. S. Comp. St. 1901, p. 1536]), provides, in section 11:

"That until otherwise ordered by Congress, lands in Alaska may be entered for town-site purposes for the several use and benefit of the occupants of such town-sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose."

It does not appear that at any time during the period involved in the question of the possession of the lot in controversy any proceedings were taken under the statute by the town of Fairbanks to execute the trust therein provided; but the possession here contended for by the parties to this action is one that may ultimately ripen into a title under such statutes (Malony v. Adsit, 175 U. S. 281, 289, 20 Sup. Ct. 115, 44 L. Ed. 163), and the court must determine the character of occupancy or possession with that purpose in view. In Bender v. Shimer, 19 L. D. 363, 367, the Secretary of the Interior, in a contest relating to a lot in the town of El Reno in Oklahoma, had occasion to consider the question:

"What is the meaning of the word 'occupancy' as a term of real estate law, and who is an 'occupant' within the meaning of the town site law?"

The Secretary, in discussing this question, says:

"The meaning of the term may differ very materially, it seems, in its application to different kinds of property, according to the use which, from the nature of it, it is commonly designed. 'Occupied' always implies a substantial and practical use of a building for the purpose for which it is designed. In insurance law, the terms of a policy contemplate that a dwelling house is occupied when human beings habitually reside in it, and unoccupied when no one lives or dwells in it; that there be in the house the presence of human beings, as at their customary place of abode, not absolutely and uninterruptedly continuous, but the house must be the 'place of usual return and habitual stoppage.' Within the meaning of a tax law, the owner of land may be in occupation of it by his tenant. See Anderson's Law Dictionary, p. 725, title 'Occupy,' and cases therein cited. An occupant, within the meaning of the town site law, is one who is a settler or resident of the town and in bona fide actual possession of the lot at the time the entry was made. One who has never been in actual possession of a lot cannot therefore be said to be an occupant of it. The occupancy must be actual and cannot be begun by an agent. It must be for residence or for business, or use, and the residence, business, or use must be by the claimants. There must be a subjection of the land to his will and control. See American & English Encyclopedia of Law, title "Town-

sites,' note 'Occupant,' vol. 19, p. 364, and cases therein cited. The authorities, however, are uniform that actual settlement is not required to constitute actual possession. 'Actual possession as much consists of a present power and right of dominion as an actual corporeal presence.' Minturn v. Burr, 16 Cal. 107–109. By 'actual possession' is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. Coryell v. Cain, 16 Cal. 567–573. 'Actual possession' of land is the purpose to enjoy, united with, or manifested by, such visible acts, improvements, or inclosures as will give to the locator the absolute and exclusive enjoyment of it. Stainінger v. Andrews, 4 Nev. 59–631. It is 'actual' also where one having the title is in possession of lands by his tenant, agent, or steward. Fleming v. Maddox, 30 Iowa, 240. It follows from these authorities that there can be no such thing as constructive occupancy under the town site laws, but there must be an actual bodily presence of the claimant, or some one for him, on the lot or lots for which he seeks to acquire title, or a purpose to enjoy, united with, or manifested by, such visible acts, improvements, or inclosures as will give to the claimant the absolute and exclusive enjoyment of it."

In Courtney v. Turner, 12 Nev. 345, 352, the Supreme Court of Nevada, in considering what acts were sufficient to constitute such a possession of public lands as would support an action of ejectment, said:

"'Actual possession' of land consists in subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use. Justice to the community also requires in the circumstances of this country that the extent of the claim should be clearly defined, and that the possession should be open, notorious, and continuous."

Applying these definitions of "occupancy" and "possession" to the facts of the present case, we find that the plaintiff was not an occupant or in possession of the lot in question when the defendants' predecessors in interest entered upon and took possession of the premises. The plaintiff testified that he occupied the cabin from the time he completed it until about the 25th day of June, 1903. He was asked by his attorney: "When did you leave that property?" His reply was: "I left there about the 25th day of June, somewhere around there." What did he mean when he said he left the property in June, 1903? He meant that he did not continue in actual possession of it after that date. He was not in the actual possession of the lot himself after June 25, 1903, and he did not have a tenant or agent in actual possession for him after that date. Mainville testified that the plaintiff told him to look after the lot when he was gone, but Mainville did not live in the cabin, and was not left in actual occupation or possession of the lot, and, besides, he remained only a few days in Fairbanks. Marston was next asked to look after the property. He was keeping a saloon and hotel, did not occupy the cabin, and was not left in the actual possession of the lot.

Leaving tools in the cabin, together with a stove and a few articles of personal property, was not of itself sufficient to retain possession of the premises; nor was the claim made by the plaintiff that he was in poor health a sufficient excuse for his failure to maintain possession of the premises for the period of three years. His poor health did not prevent him from having a representative on the premises.

He knew in 1904, while he was in the Hawaiian Islands, that his tools had been taken from the cabin, and that another party had taken possession of the ground; but he took no steps to assert his claim of possession. He was at Valdez, in Alaska, four or five months during the summer of 1905, and still he made no effort to protect whatever right of possession he may have had at that time. He waited until other parties had placed expensive improvements upon the ground before he took action. This does not look like good faith in dealing with the claim of a right of possession on public lands, particularly in a mining camp. Such conduct amounted to an abandonment of the ground in controversy. It is true that he testified in October, 1906, that he never intended to abandon the property; but this declaration cannot, under the circumstances, prevail as against the evidence afforded by his acts.

In this view of the case the remaining assignments became immaterial and need not be considered.

The judgment of the District Court is affirmed.

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## THE WHITE SEAL.

## THE LIZZIE CRAWFORD.

(Circuit Court of Appeals, Third Circuit. June 8, 1908.)

No. 27.

SALVAGE—RESCUE OF STRANDED LAUNCH—RIGHT TO COMPENSATION.

A tug, which found a naphtha launch stranded on a jetty in the Delaware river, having holes pierced in her bottom by the rocks and in danger of further injury, and, as she was apparently abandoned, all of her apparel and property having been removed, rescued and took her to port, was entitled to a salvage award, although warned by the owner and master, who came out in a boat, not to touch the launch: there being evidence to sustain a finding by the trial court that they did not advise the tug that they had any interest in her, and that the master of the tug was justified in supposing that they merely desired themselves to be the salvors.

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

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

For opinion below, see 156 Fed. 201.

J. H. Brinton, for appellant.

Edward F. Pugh, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the District Court of the United States for the Eastern District of Pennsylvania, in admiralty. The cases, as stated, were founded upon the same facts and were heard together. These facts, so far as they were undisputed, are as follows:

About 3 o'clock in the afternoon of Sunday, June 26, 1904, the naphtha launch, or yacht, "White Seal," whereof McMasters was part

owner and master, was run upon a stone jetty at the lower end of Reedy Island, in the Delaware Bay. At the time, the yacht was in control of McMasters and one Lear, the engineer. Including these two, there were about sixteen persons on board, the others being passengers. The tide was low at the time, and as it was discovered that there were two holes toward the stern and under the engine, made by the rocks on which the yacht had run, all on board disembarked. Two anchors were put out to hold her from floating off when the tide arose. The whole party then went over in small boats to the Delaware shore, at or near Port Penn, carrying with them nearly all the movables and furniture on board. During the night a storm of wind and rain arose, and the boat pounded considerably on the rocks and filled with water. About 3 or 4 o'clock in the morning, the captain and engineer returned to the boat, and finding it in this condition, took everything movable out of her, including the binnacle, wheel, whistle, and all detachable parts of the machinery, and carried them ashore to the mainland. It is in testimony that, while on shore, either on the evening of the accident or the next morning, the captain and engineer had made arrangements with one Duncan, a lighthouse keeper near Port Penn, on the Delaware shore, to collect and take out casks and barrels, with which they expected to be able to float the boat off the rocks. During the forenoon of the next day, after the accident, while the captain and engineer were still on the Delaware shore, a mile or three-quarters of a mile away from the Reedy Island Jetty, the boat lay upon the rocks, with no one on board or near her.

George F. Murray, master of the tug "Lizzie Crawford" and libelant in the cross-libel, testifies that at about half past 11 in the forenoon, having heard from the Reedy Island Reporting Station that a yacht had run aground on the jetty and that no one was on board of her, went down to where the "White Seal" lay upon the rocks; that he went as near as possible, and he or his mate boarded her and found that she was stripped and full of water, and apparently abandoned; that with some difficulty he tried, as well as he could, to stop up the holes he found in her hull, by the use of bedquilts and other means, and fastening a short hawser to her bitts, so as to keep her from sinking, proceeded to pull her off. He testifies that at about the time he was pulling her off, or after he had gotten her off the rocks, a boat with two men in it appeared, and stopping some 75 or 100 feet away, hailed him; that he could not understand clearly what was said, but thought they asked what he was doing, and when questioned what they had to do with it, they, or one of them, replied, "Never mind, you'll see what we have to do with it, if you don't let that boat alone"; that they did not claim to be owners or make any protest as such against what he was doing, and that he thought they were perhaps fishermen, who were seeking a salvage for themselves. This testimony is, in the main, corroborated by that of his mate and of his wife. He then testifies that he towed the yacht across to a mud pen not far away, towards the Jersey shore, used by the government as a place of deposit for mud dredged out of the channel of the river and bay; that he did this in order to get a soft bottom on which the yacht might lie

until he secured the assistance of another tug to take her to Philadelphia. This assistance was obtained the next day from the tug "William J. Sewell," by whose steam pumps the yacht was pumped out sufficiently to get her into a sling, and she was thus carried between the two tugs to Camden, where she was delivered to her owners at a shipyard.

There is no serious dispute as to the facts thus summarized, except as to what occurred when McMasters and Lear, the engineer and master of the yacht, pulled out in a boat from the shore and approached the tug. They testified that, when the tug "Lizzie Crawford" came up, they were on the shore, waiting for the barrels or casks to be collected, which it was proposed to use in floating the yacht, by attaching them thereto when the tide was low in the afternoon; that they then rowed across to the jetty, about a mile away, thinking, perhaps, that the tug was employed by the insurance people; that they came alongside, or quite near to, the tug and held a conversation with the captain, stating that they were the owners, and protesting against the removal of the yacht by the tug, and that against their protest the yacht was taken to the mud pen, as described by the master and those on board the tug. This, of course, is the crucial point in the case, and if the testimony of the libelants for the yacht is to be believed, the conduct of the tug was an officious and unwarranted intermeddling with the property of the libelants, for which the tug should have been responsible. Libels were accordingly filed, respectively, by the owners of the yacht against the master of the tug, charging unwarrantable interference with and trespass upon their property, and by the master of the tug against the yacht, claiming compensation for a salvage service. By stipulation between the proctors for the several parties, it was agreed that the appeal filed on behalf of the yacht should be deemed to relate to both of said causes, and that they should be argued together, with like effect as if said causes had been consolidated.

The court below has dealt very fully with the testimony, which is somewhat voluminous, and the learned judge has made certain findings of fact, which, if accepted, are decisive of the issues involved. Among other things, he finds that on June 27th, the day after the accident, the master of the tug "Lizzie Crawford" heard of the condition of the yacht and went to her assistance; that when he arrived, he found the yacht with no one on board and stripped of all her apparel and movable property, and apparently abandoned; that she was resting upon the jagged rocks of the jetty while under water, and was in danger of receiving further injury; that at about the time he began the work of saving her, a party in a rowboat told him not to touch the yacht, but did not inform him as to their interest therein; that from what they said to the master of the tug, and the way in which they acted towards him, he could well conclude that they were parties who had no connection with the boat, and were simply interfering without authority. After stating the claims of the libel filed by the "White Seal," the learned judge proceeds:

"We, however, find that the master of the tug 'Lizzie Crawford' was not informed as to the character of the men in the rowboat at the time the

tug pulled the 'White Seal' off the jetty, nor had he any information as to their authority over the launch. He did no more than his duty in proceeding to save her from destruction, and we are not convinced that he could have done any thing better than to tow her to a place, with soft bottom, upon which she could rest until he could stop the leaks which she received upon the rocks. The master of the tug, however, discovered that the holes in the bottom of the vessel were under the engine and he was unable to get at them. He found it necessary to secure the services of another tug to tow the launch to Camden, where she was docked by her owners and repaired. The work of saving her was not at all dangerous, although it required continuous labor for about eight days. Because of the location of the injury to the launch it was necessary to employ the tug 'Sewell' to do some pumping, and to aid the libelant in towing the launch to Camden. It was necessary to tow the launch between the tugs 'Sewell' and 'Crawford' in order that she might be kept afloat."

Accordingly, the libel filed by the owners of the "White Seal" was dismissed, and to the libelant on behalf of the tug there was awarded $850.00 for salvage service, including the amount to be paid by said libelant to the tug "Sewell" for her assistance.

The case is not without difficulty, but we think, after a careful examination of the testimony, that while the master of the tug may have been somewhat officious in his conduct on the occasion in question, we should not do otherwise than give full weight to the findings of fact made by the learned judge of the court below. Those findings being accepted, we think the conclusion arrived at was correct, and the decrees below are therefore affirmed.

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## THOMAS v. F. B. VANDEGRIFT & CO.

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

No. 2 (1,553).

1. CUSTOMS DUTIES—CLASSIFICATION—"FURNACES"—BOILER TUBES—FLUES.
   The provision for "furnaces," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641), does not include so-called arched Purves furnaces, consisting simply of corrugated steel cylinders or tubes, which are not furnaces in fact, but are intended to be used in the manufacture of furnaces. Such articles are dutiable under the provision in the same paragraph for boiler tubes or flues.

   [Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3009.]

2. SAME—COMMERCIAL DESIGNATION—ARTICLES NOT GENERAL MERCHANDISE.
   Where commodities are not kept in stock nor dealt in as articles of general merchandise, but are made only to the order of those requiring them, conditions are not such as to allow the establishment of a trade designation.

3. STATUTES—EVIDENCE OF CONGRESSIONAL INTENT—LETTERS TO COMMITTEE.
   In ascertaining legislative intent a court is authorized to look only at the language employed by Congress, and a communication by a manufacturer seeking the enactment of a certain tariff provision, written to the Ways and Means Committee, may not be considered.

   Buffington, Circuit Judge, dissenting.

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

For decision below, see 153 Fed. 591.

Jasper Yeates Brinton, Asst. U. S. Atty. (J. Whitaker Thompson, U. S. Atty., on the brief), for the United States.

W. Wickham Smith (Francis Fisher Kane, on the brief), for importers.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is a petition by C. Wesley Thomas, collector of customs for the port of Philadelphia, to review a decision of the Circuit Court for the Eastern District of Pennsylvania, affirming a decision of the Board of United States General Appraisers with respect to the classification of certain merchandise imported into the port of Philadelphia by F. B. Vandegrift & Co. in November and December, 1902.

The merchandise was invoiced as "arched Purves furnaces," and was classified by the collector under the second clause of paragraph 152 of the Tariff Act of July 24, 1897 (chapter 11, Schedule C, 30 Stat. 163 [U. S. Comp. St. 1901, p. 1641]), as "welded cylindrical furnaces," and the appropriate duty assessed thereon at 2½ cents per pound. The importers duly protested on the ground that the merchandise was properly dutiable at 2 cents per pound under the first clause of the same paragraph as "lap welded, butt welded, seamed, or jointed iron or steel boiler tubes, pipes, flues, or stays."

Upon hearing by the Board the protest was sustained in an opinion filed April 29, 1903; and from the decision of the Board so rendered the collector duly filed his petition for a review; and subsequently, upon formal reference for that purpose, additional testimony was taken both for the importer and for the government.

Paragraph 152 of the tariff act of 1897, under which the present controversy arises, is as follows:

> Lap welded, butt welded, seamed, or jointed iron or steel boiler tubes, pipes, flues, or stays, not thinner than number sixteen wire gauge, two cents per pound; welded cylindrical furnaces, made from plate metal, two and one-half cents per pound.

The opinion of the Board of Appraisers is as follows:

> The merchandise in question consists of so-called steel tubes or boiler flues. Duty was assessed thereon at the rate of 2½ cents per pound under the clause of paragraph 152 of the act of July 24, 1897, which provides for "welded cylindrical furnaces, made from plate metal." The importers claim that the merchandise is properly dutiable at the rate of 2 cents per pound under the first clause of said paragraph, which provides for "lap welded, butt welded, seamed, or jointed iron or steel boiler tubes, pipes, flues, or stays."
>
> The question raised here was passed upon by this Board in Re Saunders & Masters (protest 93,418f, unpublished opinion filed November 3, 1902), adversely to the government. These articles are not furnaces, but are tubes used for making furnaces.
>
> Following that ruling, we sustain the protests and reverse the decision of the collector.

The articles in question are manufactured of plate metal, cylindrical in form, lap welded, 7 or 8 feet in length, 46 inches in diameter,

nine-sixteenths of an inch in thickness, and corrugated. As thus appearing, without any reference to any intended use to which they might be put, they are simply tubes or cylinders, in formation like any other tubes or cylinders of larger or smaller dimensions, perfectly plain on the inside, where nothing is presented but the inner surface of the corrugated iron constituting the tube or cylinder. It would seem impossible to classify such articles otherwise than under the first subparagraph of paragraph 152, above quoted—that is, as "lap welded, iron or steel tubes or flues not thinner than number sixteen wire gauge." The classification of merchandise of substantially the same description was a matter of judicial determination in the case of In re Whitney, decided in 1892 in the Circuit Court for the District of Delaware. 53 Fed. 235. In that case the Board of General Appraisers had found articles like these dutiable under the language of the first subparagraph of paragraph 152, which then constituted paragraph 157, Schedule C, of the revenue act of October 1, 1890 (chapter 1244, 26 Stat. 578), which did not contain the second subparagraph of paragraph 152 above referred to. The government contended that the imported articles were dutiable under the provisions of paragraph 215, Schedule C, of the same act, as "manufactures, articles, or wares not specially enumerated in this act composed wholly or in part of iron, steel," etc., and brought the question before the Circuit Court by an application for review of the decision of the Board of General Appraisers.

In discussing the character of the articles in question, with reference to their proper classification, the learned judge said:

> The imported articles consisted of certain ribbed steel cylinders, each one being 9½ feet in length, 45 inches in diameter, flanged at one end, and weighing 3,104½ pounds. They were manufactured at Sheffield, England, and the respondent is the sole importer of them in the United States. They are not kept in stock, but are made to order and delivered to the purchaser in the condition in which they leave the factory. The importations in question were designed and adapted for the boilers of steamboats which were being built for the Stonington Line by the Harlan & Hollingsworth Company. The manner of their use may be described in the language of the government's witness (Kafer) in answer to the question:
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> What is it necessary to do to them [the cylinders] before they are in a condition to be practically used in the boiler by having a fire built in them? A. Holes will have to be drilled in the flanges at either ends, holes being drilled in other parts of the boiler to correspond; rivets inserted in these holes, riveted up; the same made tight by calking. The bridge walls and grate bars are inserted in their proper places. A front is put in with a furnace door. Coal is put in the furnace. I am presuming now that other parts of the boiler are properly constructed. The coal may then be ignited.
>
> When thus ready for use in a boiler, all of the cylinder, except about 6 inches at the front, would be surrounded by water. The cylinder has now become, in part, practically a furnace, and, as contended by the appellant, is no longer, if it ever was, a boiler flue, such as is provided for in paragraph 157, above quoted. On the other hand, it is claimed that the cylinders are none the less flues from being partly converted into furnaces after they have been put in place in the boiler.
>
> A flue may be defined to be a pipe, tube, or passage for the conveyance of the products of combustion—flame, smoke, hot gases, heated air, etc. The practical operation of the Purves flue is this: After the fire has been started, the smoke, flame, and hot air pass over the bridge wall into the bridge-wall connection, thence through the direct flues to the back connection, and thence

through the return flues to the uptake. The grate bars and bridge wall fill up from one-half to two-thirds of the cylinder, according to the length of the latter, which varies from 9 to 18 feet, so that some portion of it is used as a flue independently of the furnace appliances. This cylinder differs from the old-fashioned boiler flue in the use to which it is applied, but does it differ so widely as to lose the descriptive name and meaning of "flue"? It is a comparatively modern production, and has been largely substituted for the rectangular furnace in marine boilers. * * *

The most conclusive evidence on the question of nomenclature is perhaps that furnished by the advertisements of the Continental Iron Works, of Brooklyn, N. Y. This concern is a large manufacturer of corrugated furnace flues, which are similar in all essential features to the Purves ribbed flues and are applied to the same uses; the only difference being that the former are corrugated and the latter are ribbed. In the Scientific American, the Iron Age, Power, and similar publications, running through the years 1887, 1888, 1889, 1890, and 1891, may be found the following advertisement:

"The Continental Iron Works, Brooklyn, N. Y. Sole manufacturers of corrugated boiler flues, under their own patents and those of Samson Fox, of Leeds, England. Made in all sizes, with flanged or plain ends."

The classification thus judicially determined has been followed ever since by the departmental administration of the customs.

It is argued, however, on behalf of the government, that in the tariff act of 1897 there was added to the paragraph just considered the second subparagraph of paragraph 152, as follows: "Welded cylindrical furnaces made from plate metal, two and one-half cents per pound."

Reading, however, these two paragraphs as they stand in the act of 1897, it is difficult to see, apart from any evidence as to the use of these tubes or cylinders, why the classification under the first subparagraph, which has been adhered to by the customs administration ever since the decision in the Whitney Case in 1892, should be changed so as to include these plain tubes or cylinders under the description of welded cylindrical furnaces.

It has been shown by the testimony that these tubes or cylinders, after they were imported from abroad or manufactured in this country, were fitted up with elaborate structures on the inside of the same, consisting of fire brick, grate bars, horizontal and vertical plates, heads riveted on the flanges at either end, and a fire door at one end, with an elaborate system of pipes to carry off the products of combustion. When thus completed they undoubtedly were, and were properly called, furnaces. A number of witnesses were also introduced, whose testimony was to the effect that these tubes or cylinders, in the condition in which they were imported, were spoken of by those using or importing them as furnaces, and in fact they were so invoiced in the present case; but this convenient mode of designating them by the use to which they were to be put cannot change the essential character of the article itself. No such trade designation has been shown as comes within the rule applicable in such cases. In fact, the conditions were not such as to allow of a trade designation, as these articles were not kept in stock or dealt in as articles of general merchandise, but were only made to the order of those requiring them. To classify these articles as furnaces would, we think, be doing violence to the ordinary meaning of language, which should always, in the first instance, be resorted to in the interpretation of legislative acts,

as well as be in violation of that canon of construction of taxing laws which forbids any tax burden to be imposed except by clear and unequivocal language. We think the Board of General Appraisers tersely and correctly covered the case by saying: "These articles are not furnaces, but are tubes used for making furnaces."

We cannot agree with the counsel for the government as to the weight to be attached to the communication addressed to the Committee on Ways and Means of the House of Representatives, by the Continental Iron Works, dated January 4, 1897, upon the suggestion made in which communication they ask us to infer that the second subparagraph of paragraph 152 of the act of 1897 was inserted. It is true that the communication was from a manufacturer interested in the protection to be derived from a higher duty upon the articles he was manufacturing. But we are only authorized to look at the language employed by Congress, who seem either to have disregarded the suggestion or misunderstood what was required by the manufacturer to accomplish his object. If furnaces are imported in the construction of which tubes or cylinders like the articles here in question are used, they will be subject to the duty imposed by the second subparagraph of section 152; and it will not be difficult to distinguish them from the simple tubes or cylinders which are the subject of the importation with which we are here concerned.

It is interesting to note that the writer of the above-mentioned communication is the same whose advertisement is referred to by Judge Wales in the Whitney Case as describing themselves as manufacturers of corrugated furnace flues, simply, similar in all particulars to the importation here in question.

We think the judgment below should be affirmed, and it is so ordered.

BUFFINGTON, Circuit Judge, dissents.

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## MODOX CO. et al. v. MOXIE NERVE FOOD CO.

(Circuit Court of Appeals, First Circuit. October 9, 1907. On the Merits, November 20, 1907.)

No. 734.

1. INJUNCTION—PROCEEDINGS FOR PRELIMINARY INJUNCTION—OBJECTIONS TO AFFIDAVITS.
   Objections to affidavits filed with a motion for a preliminary injunction in a federal court, which go to a matter of form only, must be made in advance of the hearing on the motion, where there is ample time therefor.
2. SAME.
   Under the practice of the federal courts, it is not an objection to affidavits filed with a bill and motion for a preliminary injunction in support of such motion that they were previously made and signed and are not entitled in the cause, where it reasonably appears that they were made for the purpose of being used in a suit between the parties.
3. TRADE-MARKS AND TRADE-NAMES—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
   An interlocutory order granting a preliminary injunction against the unlawful imitation of a trade-name and unfair competition affirmed, but,

especially as the parties do not agree as to the completeness of the record. full reservation is made for final hearing. Rogers v. International Silver Co. 118 Fed. 133, 134, 55 C. C. A. 83, applied.

[Ed. Note.—Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Evans v. Suess Ornamental Glass Co., 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the District of Rhode Island.

For opinion below, see 153 Fed. 487. See, also, 152 Fed. 493; 155 Fed. 304.

George H. Huddy, Jr. (Benjamin B. Dewing and Charles A. Wilson, on the brief), for appellants.

Oliver Mitchell and Robert Cushman (Charles D. Woodberry and Roberts & Mitchell, on the brief), for appellee.

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

PUTNAM, Circuit Judge. This is an appeal from a decretal order for a preliminary injunction issued by the Circuit Court. The point now submitted to us is based on the following alleged error as assigned:

"In admitting as evidence for the complainant in support of its motion for a preliminary injunction extrajudicial affidavits."

This submission was on briefs with the agreement that it be disposed of before the appeal is heard on the merits.

The bill was filed on March 22, 1907. The motion for the interlocutory injunction and the complainant's affidavits in support thereof were filed with the bill. The docket entries are not made a part of the record. We have therefore nothing to show whether these affidavits were filed by special permission, or order, of the court, or whether any time for hearing the motion was formally fixed, or any order entered in reference thereto. The respondents' affidavits were filed on April 15, 1907, and affidavits in behalf of the complainant in rebuttal were filed on April 23, 1907. The hearing on the motion in the Circuit Court was had on May 4, 1907, and the interlocutory order entered on May 20, 1907. Until the hearing on May 4th, no objection was made to any of the complainant's affidavits, nor was there any motion to strike them out. At the hearing, for the first time, the respondents objected to the reading of the affidavits in support, on the ground, as stated in the record, that they were extrajudicial. This objection was overruled, and the respondents noted an exception thereto. Apparently no objection was taken to the affidavits in rebuttal, and, so far as the record shows, nothing more specific was given as a reason on which the respondents based their objection than the foregoing general statement.

We are now pressed with the facts that the complainant filed a great many affidavits in support of its motion, the first of which was sworn to before a notary public at Boston on the 12th day of March, 1907, and the last before a notary public at Providence on the 21st day of March, 1907, and that none of them was preceded by a separate

caption, although all of them when filed were attached to the motion, which motion had a caption to which no objection is taken.

We do not care to dwell on the form in which the affidavits in rebuttal were made, because no objection was taken to them; and, if the objection to the affidavits in support is sustained, there must be a reversal, while, if it is overruled, no objection can apparently be made to the affidavits in rebuttal which are not made to those filed with the bill.

It is said that all the affidavits in question contain the following statement:

"I make this affidavit for use in a suit which I understand is to be brought by the Moxie Nerve Food Company of New England against the Modox Company, of Providence, R. I."

The respondents, however, call attention to the fact that this paragraph names neither the jurisdiction nor the court in which the suit was to be brought, and we may add that it does not appear that the caption with which these affidavits were bound when they were filed was complete in the statement of the tribunal or of the jurisdiction at the time they were sworn to.

The propositions made by the respondents are not stated in their brief in the way called for by our rules, and therefore they run through the text in such manner that we are not sure we understand them. We read them as follows: First, that the affidavits were sworn to before the bill was filed; second, that, as they name no particular court, they cannot be made use of in any judicial tribunal; third, that, under the circumstances, perjury could not be assigned on any of them.

Inasmuch as none of these matters go to the substance of the testimony, it cannot be questioned that, in view of the fact that the affidavits had been filed so long before the hearing, the objections come too late in accordance with the settled practice in the federal courts. This would be so even in common-law suits. Doane v. Glenn, 21 Wall. 33, 35, 22 L. Ed. 476, and various cases to which the rule has been applied. Much more so in equity, where it becomes very necessary that, before the record is opened on its merits to the Chancellor, all preliminary matters possible be worked out of it. However, as the question raised is an important one, as well as a novel one in this circuit, we will meet it, subject to a certain qualification with reference to one aspect in which the fact that no motion was made to strike out the affidavits in advance of the hearing becomes very material.

The authorities cited by the parties are quite inconsistent, and very few of them, if any, are such as require our attention. There is no question that, under the English practice, affidavits sworn to before a bill is filed cannot be read, and this is rested principally, if not entirely, on the ground that perjury could not be assigned in regard to them. Daniell's Chancery Practice, *891; Francome v. Francome, 11 Jur. N. R. 123. The same reason has sometimes been assigned in the United States in support of the same rule; but, by the nature of things, it could not have much effect in the federal courts, be-

cause there all proceedings for perjury depend on the statutes. If there were no statute providing punishment for perjury, it could not be assumed that the federal courts would stop. Legal proceedings would go on nevertheless. But in the federal jurisdiction there are numbers of extrajudicial jurats which are within section 5392 of the Revised Statutes (U. S. Comp. St. 1901, p. 3653), which governs the general topic of perjury. Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; Markham v. United States, 160 U. S. 319, 324, 16 Sup. Ct. 288, 40 L. Ed. 441. An observation in the opinion in Markham v. United States comes directly in point with reference to the breadth of the construction to be given to that statute. There it was observed that a false answer with regard to an inquiry pending before the Commissioner of Pensions laid the basis of criminal proceedings, because "the inquiry presumably related to the claim by him"—that is, by the person who made the answer—"for a pension." It is added:

"The general charge that the statement was made with reference to the pending inquiry," etc., "in connection with the distinct, although general, averments that such statement was material to that inquiry, was quite sufficient under the statute."

This renders inapplicable any suggestion that an affidavit could not lay the basis of a criminal proceeding merely because it preceded the filing of a bill, or the beginning of a suit at common law.

With regard to the entitling, there is authority to the point that, if an affidavit had been entitled, it could not be read under circumstances like those at bar, with the statement that, if not entitled, it could be. We refer particularly to the observations of Judge Blatchford, afterwards Mr. Justice Blatchford, in Baldwin v. Bernard, 9 Blatch. 509, Fed. Cas. No. 797, note, decided in 1861. He also observed that the reading of such affidavits, taken before proceedings in court were formally commenced, is the constant practice on applications for habeas corpus and mandamus, and that "to swear falsely in such affidavits is indictable as perjury." Judge Drummond, who knew the federal practice as well as any judge, in 1875, in Shook v. Rankin, 6 Biss. 477, 480, 481, Fed. Cas. No. 12,804, stated that practice with reference to affidavits, accompanying motions for interlocutory injunctions, made before bills are filed, and not formally entitled, as follows:

"It affirmatively appears, I think, that these affidavits were made for the purpose of being used in this case; and, conceding that they did not at the time contain the proper title of the cause, still they were made and forwarded to counsel, who may be presumed to be authorized by the parties to give the proper character to them by stating the name of the cause in which they were to be used. It seems to me that it would be adopting a very rigid rule, and one hardly in accordance with the liberal practice of the present day, to declare that the affidavits should be rejected because, at the time when the affidavits were made and signed by the parties, the name of the cause was not stated, provided they knew that they were to be used in the cause, although they did not know the technical description of the title of the same."

This states the rule now practiced. We have observed that it did not entirely appear that there was sufficient in the record to show clearly that the motion for the injunction was entitled before it was filed, and therefore to show that the affiants knew, or are presumed

to have known, sufficient facts to bring them within the observations of Judge Drummond, or of the Supreme Court in Markham v. United States, 160 U. S., at page 324, 16 Sup. Ct. 288, 40 L. Ed. 441, already cited. This, however, if important, should have been sifted out on a motion made in advance of the hearing on the merits, and the impossibility of our now sifting it out illustrates the propriety of the rule to which we have referred that all objections which do not go to the testimony of a witness must be settled in a preliminary manner.

The objections of the respondents, now the appellants, to the reading of the affidavits of the complainant, are overruled.

On the Merits.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PER CURIAM. After full consideration and a perusal of the opinion of the learned judge of the Circuit Court, we conclude that the order appealed from was properly made. We desire, however, it should be understood that we reserve the right to give the entire case a re-examination without prejudice if it should come before us on final decree. We especially make this reservation because the parties are not agreed as to the completeness or correctness of the record now before us.

The appellants complain that the terms of the order appealed against are too sweeping. Their propositions on this score are, of course, not discussed in the opinion of the learned judge of the Circuit Court, which was passed down before the order was drafted. We think the position is solved by our opinion in Wm. G. Rogers Co. v. International Silver Co., 118 Fed. 133, 134, 55 C. C. A. 83, and, at any rate, it must be inferred from what we have already said that we are not barred hereby from giving due consideration to the terms of the final decree if the complainant should ultimately obtain one and the respondents are not satisfied with the details thereof.

The order appealed from is affirmed, and the appellee recovers its costs of appeal.

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## SHALLUS v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 12, 1908.)

No 771 (1,686).

1. CUSTOMS DUTIES — CLASSIFICATION — "TIN PLATES" — "SHEETS * * * COMMERCIALLY KNOWN AS TIN PLATES."

   The term "sheets * * * commercially known as tin plates," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 134, 30 Stat. 160 (U. S. Comp St. 1901, p. 1638), means rectangular sheets, and does not include small disks.

2. SAME—TIN DISKS—MANUFACTURES OF METAL—"WASTE"—"WHOLLY OR PARTLY MANUFACTURED FROM TIN PLATE"—"ARTICLES OF METAL, WHETHER PARTLY OR WHOLLY MANUFACTURED."

   Small disks produced in the manufacture of tin cans, being a by-product in the process of cutting an aperture for filling, and being of much less value than the tin from which they were cut, are not articles "wholly or partly manufactured from tin plate," under Tariff Act July 24, 1897, c.

11, § 1, Schedule C, par. 140, 30 Stat. 162 (U. S. Comp. St. 1901, p. 1639), nor "waste" under Schedule N, par. 463, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1679), but are dutiable as articles of metal, "whether partly or wholly manufactured," under Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645).

3. SAME—"MANUFACTURED" TIN PLATE—DECREASE IN VALUE—"MANUFACTURED FROM TIN PLATE."

Disks cut as a by-product from tin plate, which are reduced by the process to only about one-fifth of the value of the plate from which they were made, are not "manufactured from tin plate," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645). "Manufacture" implies addition to, and not subtraction from, and an article cannot be said to have been manufactured which results from a process that reduces its value.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4344–4346; vol. 8, p. 7716.]

4. SAME—STATUTES—LEGISLATIVE INTENT—PROHIBITIVE DUTIES.

A construction of the tariff law which produces unjust and unconscionable duties should be avoided, if possible. It is to be assumed that Congress did not intend to make duties prohibitive. Its purpose in enacting the tariff act of 1897 was to protect and not to prohibit, to raise, and not cut off revenue, to promote and not to destroy, legitimate competition, and such construction should be adopted as will give effect to that purpose.

5. STATUTES—CONGRESSIONAL RECORDS AND DEBATES.

Congressional records and debates may be consulted in ascertaining legislative intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 291–294.]

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

For decision below, see 155 Fed. 213.

Walter Evans Hampton, for importer.

John C. Rose, for the United States.

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

DAYTON, District Judge. This is an appeal of an importer from a decree of the United States Circuit Court for the District of Maryland, affirming a decision of the Board of General Appraisers upholding the decision of the collector of the Port of Baltimore to the effect that certain tin disks or tin circles, imported by appellant, were liable to a specific duty of 1½ cents per pound.

The paragraphs of the Dingley Tariff Act (Act July 24, 1897, c. 11, § 1, Schedules C and N, 30 Stat. 160, 162, 167, and 194 [U. S. Comp. St. 1901, pp. 1638, 1639, 1645, and 1679]) controlling the case, that may be in any way involved, are:

"Par. 134. Sheets or plates of iron or steel, or taggers iron or steel, coated with tin or lead, or with a mixture of which these metals, or either of them, is a component part, by the dipping or any other process, and commercially known as tin plates, terne plates, and taggers tin, one and one-half cents per pound."

"Par. 140. No article not specially provided for in this act, which is wholly or partly manufactured from tin plate * * * or of which such tin plate * * * shall be the material or chief value, shall pay a lower rate of duty than that imposed on the tin plate, * * * from which it is made or of which it shall be the component thereof, of chief value."

"Par. 193. Articles or wares not specially provided for in this act, com-

posed 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 cent. ad valorem."

"Par. 463. Waste, not specially provided for in this act, ten per centum ad valorem."

The disks or circles in question were imported from Canada and arose there as a by-product in the manufacture of tin cans. They constitute simply the round piece cut out of the top of the can to provide the aperture by means of which the can could be filled.

It is clear from the statement of this fact that these small disks, varying from 1½ to 3 inches in diameter, cannot be held to be sheets of tin, "commercially known as tin plates." The word "commercially," used in the act, is not to be construed as meaningless, and tin plates are commercially known as rectangular sheets of various sizes, such as 10x20, 14x28 inches (T. D. 15,786). Therefore paragraph 134 may be dismissed from consideration as having no bearing in itself upon the controversy except so far as it fixes the rate to be imposed upon articles embraced in paragraph 140. It seems clear from the evidence that the value of these disks or circles in Canada at the time of importation was from three-fourths of one cent to one cent per pound, while the value in England of commercial tin plates at the time was about two and three-fourths cents per pound. If therefore these disks are charged with the 1½ cents per pound duty required to be assessed against commercial plates, they must pay near 200 per cent. ad valorem, while the commercial plates would pay about 50 per cent. ad valorem. The proposition that a part of the whole, containing the exact substance and only changed in form and size by which its value is so greatly depreciated, should be so discriminated against is so manifestly unjust and unconscionable as to be avoided if possible. Such discrimination makes, as shown by the evidence, the importation of these disks prohibitive. Did Congress design this? We think not, and this part of the question might well be determined by the universally conceded principle that in the construction of statutes the legislative intent and will are to be ascertained and carried out. As said by Mr. Justice Harlan, in Oates v. First National Bank of Montgomery, 100 U. S. 239, 25 L. Ed. 580:

"The duty of the court, being satisfied of the intention of the Legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction (Wilkinson v. Leland, 2 Pet. 627, 7 L. Ed. 542; Sedgwick, Const. & Stat. Const. 196), and we should discard any construction that would lead to absurd consequences (U. S. v. Kirby, 7 Wall. 482, 19 L. Ed. 278). We ought, rather, adopting the language of Lord Hale, to be 'curious and subtle to invent reasons and means' to carry out the clear intent of the lawmaking power when thus expressed. * * * 'A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it be within the meaning of the makers.' Suckley v. Furse, 15 Johns. (N. Y.) 338; People v. Ins. Co., 15 Johns. (N. Y.) 358, 380, 8 Am. Dec. 243."

And as said by Mr. Justice Brewer, in Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397:

"In order to fully understand the force and scope of any statute, we must have regard to the conditions and circumstances for which the legislation

was intended and under which it is to become operative. We are not narrowly to read the letter and ignore the state of affairs to which that legislation was intended and is applicable."

But, again, it is well settled that, these duties being in derogation of common-law right, the statutes imposing them must be construed most favorable to the importer having them to pay. American Net & Twine Co. v. Worthington, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821.

These duties are "never imposed upon the citizen upon vague or doubtful interpretations," and, if the question is one of doubt, it will be resolved in favor of the importer. Hartranft v. Wiegmann, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012.

In accordance with these principles, the Circuit Court of Appeals for the First Circuit, in U. S. v. Proctor, 76 C. C. A. 96, 145 Fed. 126, has held extract of nutgalls from which tannic acid may be produced not entitled to be assessed with the duty imposed upon tannic acid because, among other reasons, such duty would impose a 400 per cent. ad valorem duty, prohibitive in character, and not within the intention of Congress.

In the case before us we can see no reason for reaching a different conclusion. The purpose of Congress (and to ascertain it we are entitled to consider its records and debates upon the subject), it is manifest, was to protect, and not prohibit; to raise revenue, and not cut off revenue; to promote legitimate business, and not destroy it.

We cannot regard these disks as being "wholly or partly manufactured from tin plate" under fair construction of these terms. Only the narrowest and most technical construction can hold them to be so. It is against common sense and common experience to say that an article is "manufactured" wholly or in part by a process that reduces fivefold its value in its original state. The act of manufacturing implies addition and not subtraction from its value. These disks are simply and solely the resulting incident of the manufacture of the tin sheet into the tin can. It is true they can be saved and utilized for minor purposes, and their value exceeds that of the ordinary clippings and cuttings well defined as waste; but for most of the uses for which they can be applied it is, we think, immaterial whether they have the coating of tin or be dipped in tin or not. For instance, if the original sheet plate before being dipped in tin were to be made into the cans, and these cans alone should then be subject to the coat of tin, these disks would remain simply "articles of wares * * * composed wholly or in part of iron, steel, lead or other metal," as set forth in the "basket" clause or paragraph 193. For practical purposes, in most instances, such untinned disks would be as effective for the purposes now used as they would be if coated with tin. Such would be the case at least with the roofing cap, which the evidence shows is the principal use to which they are devoted. Under the circumstances, the coating of tin upon them may well be regarded as immaterial. On the other hand, while it might not be proper to class them as waste, for in their shape they command a higher price than the waste cuttings for the reason that they are partly prepared for roofing caps and other like articles, they can very rightly be assessed under paragraph 193,

the "basket" one especially provided to reach just such articles and under which they will be taxed fairly and equitably with the tin and other metal importations, and we therefore hold that they should be so assessed.

The decree of the court below must be reversed, and the cause remanded, with instructions to enter decree in accordance with the views herein set forth.

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## HALL v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908. Rehearing Denied May 20, 1908.)

No. 1,354.

APPEAL AND ERROR—REVIEW—CAUSE TRIED TO COURT—GENERAL FINDING.

A general finding by a Circuit Court, where a jury has been waived, is conclusive in the courts of review on all issues of fact, if there was any evidence on which it could have been made, and the rule is applicable notwithstanding a motion by the defeated party for judgment raising an assumed question of law as to the sufficiency of the evidence.

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

This writ of error is from a judgment in favor of the defendant below, in an action of trespass on the case, brought by the plaintiff in error (as plaintiff) to recover damages for alleged negligence of the defendant. The issues, under the declaration and plea of not guilty, were submitted for trial by the court, upon waiver of a jury, and the finding of the court was general—of "the issues generally for the defendant." At the close of the testimony, motion was made on behalf of the plaintiff for a finding in his favor "on the ground that the evidence was sufficient in law to warrant such finding," and exception was taken for denial thereof. The ruling of the court thereupon is assigned as error, and the testimony heard upon the trial is preserved in a bill of exceptions. Alleged error in this ruling is relied upon for reversal, although a ruling in the course of the trial, striking out an item of testimony, is also complained of.

The issues raised under several counts of the declaration were of negligence in the treatment of a message, accepted at the defendant's office in Houghton, Mich., to be transmitted by wire to 325 persons, including the plaintiff, at various locations throughout the country, whereby delivery to the plaintiff was delayed, causing him to suffer loss in a purchase of mining stocks. The transaction was the same involved in Swan v. Western Union Telegraph Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; but the testimony in the present case discloses other material facts and circumstances, which render both the stipulation of facts, as there submitted, and the deductions therefrom in the opinion referred to, inapplicable for an understanding of the issues and testimony upon which the present finding rests, beyond the general nature of the transactions, and the form and character of the message and of the lists of addressees, in numerous localities, to whom the message was to be transmitted from the defendant's Houghton office. In so far as the testimony in the case at bar is deemed material for the purpose of review, mention will appear in the opinion.

Henry Love Clarke, for plaintiff in error.

Percy B. Eckhart, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The defendant telegraph company received from Stevens, "a copper-min-

ing expert," at its office in Houghton, Mich., a message to be sent by wire to 325 different persons, in numerous localities and various sections of the United States, with their addresses accompanying the message, on six typewritten (single space) sheets. Its import, of rich developments in "Mohawk" copper mine and "quick rise" in the stock, with advice to make "quick purchase," and the purpose of the message, to induce purchases on the Boston Stock Exchange (where the stocks were listed), and expectation that "the entire lot was to be transmitted as rapidly as possible," were well understood at the Houghton office, when the message was accepted to be forwarded. The plaintiff, Hall, was one of the addressees named in the list, located at Chicago. While the message and lists were accepted in the morning, his copy reached his Chicago address at 3:25 p. m. As the Boston Stock Exchange closed at 2 p. m. (Chicago time), and no hour of sending (or delay) was indicated in the message, the plaintiff testifies that he assumed it to be applicable for the following day, purchased stock accordingly, when the price had advanced, and the delay deprived him of the benefit of purchase at the lower prices of the instant day.

The declaration alleges, in several counts, negligence on the part of the defendant company: (a) In failing to transmit the plaintiff's message with dispatch, as its undertaking required; and (b) in failure to notify either Stevens or Hall of the fact of delay. Under the defendant's plea of not guilty, the issues thus presented were submitted for trial by the court, without a jury, and considerable testimony appears upon the primary issue of negligence in the treatment of the messages at Houghton and en route, with various versions by the witnesses of the transactions at Houghton. The finding of the trial court thereupon was general on all issues in favor of the defendant—in effect a verdict of not guilty—so that the finding is conclusive of reasonable diligence and dispatch on the part of the telegraph company, if supported by evidence. The rule thus stated is well settled and invariable (Lehnen v. Dickson, 148 U. S. 71, 72, 13 Sup. Ct. 481, 37 L. Ed. 373, and cases reviewed; Dooley v. Pease, 180 U. S. 126, 132, 21 Sup. Ct. 329, 45 L. Ed. 457), and it is equally applicable to such issue of fact, notwithstanding a motion by the defeated party raising an assumed question of law upon the sufficiency of the evidence—as clearly recognized in the several authorities, infra, cited in the brief for the plaintiff in error, by way of support for departure from the rule in such case.

The plaintiff in error interposed a "peremptory motion for judgment for the plaintiff on the ground that the evidence was thereto sufficient in law," which was overruled by the court. Thereupon the contention for review of this finding is thus stated in the argument on behalf of the plaintiff in error: "A reviewable proposition of law" is raised by such motion "as to the sufficiency of the entire evidence to sustain the case of the moving party." And the authorities relied upon for its support are: City of St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 96, 13 Sup. Ct. 485, 37 L. Ed. 380; United States Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 76 C. C. A. 114; World's Columbian Ex. Co. v. Republic of France, 96 Fed. 687, 38 C. C. A. 483. Neither these cases, nor any citations in the argument,

uphold this contention, in our understanding of their doctrine, which is well recognized alike in respect of the verdict of a jury or finding of the court, on issues of fact in trials at law. That doctrine is that when no issue of ultimate fact remains under the testimony, at the close of the case, determination of the controversy arises as a question of law, upon proper motion, and the authorities referred to concur in the rule that the only reviewable question of law raised by the plaintiff's above-mentioned motion was whether there was substantial evidence in support of the finding for the defendant. When such evidence appears in the record, the motion is left without force for the purposes of review, and the finding settles the issues of fact. The testimony is not further reviewable to ascertain seeming credibility or preponderance of the evidence.

On reference to the evidence introduced on behalf of the defendant in this record, support for the finding clearly appears in the testimony of the manager and both operators, at the Houghton office of the company. These witnesses concur in detailing the utmost dispatch and diligence in sending the messages to the addresses, 325 in number, as rearranged for best wiring service, with both operators and all the wires employed constantly in such work, from the time Stevens directed transmission until all were completed. Although Stevens (the sender) brought the message and lists to the office early in the morning, all were to be held to await his order for wiring, and such order was not given until 10:10 a. m., notwithstanding the imminence of the closing hour (for that day) of the Boston Stock Exchange. The methods employed by the telegraph office to expedite the wiring are described in detail by the witnesses—including simultaneous use of local and duplex (through) wires, provisions for relays and for "manifolding at relay offices," together with needful rearrangement of the lists for such purposes—but we deem it sufficient to mention, as fair deductions of fact therefrom: That efficient operators and every available means were in the service, from start to finish, and the performance was extraordinary and speedy; that Stevens was acquainted with the difficulty of such work and the equipment of the office, and no representations were made to him which were not carried out; that Stevens made several calls at the office during the morning, and on his last visit, at the noon hour, was informed of a short delay which had occurred from "wire trouble," but then corrected, and the messages were in course of forwarding, but not completed; and that he neither inquired as to the number sent or further time required, nor gave any instructions or warning as to the remaining messages.

This version of the transaction was, in effect, accepted by the trial court as established by the preponderance of the proof. In so far as it was at variance with evidence introduced by the plaintiff, the finding in its favor is conclusive; and, so treated, no standing appears for the charge of negligence and breach of duty on the part of the defendant. Moreover, the facts stated by the above-mentioned witnesses, of exercising the utmost vigilance and dispatch in transmitting the messages, are uncontroverted, while reversal is sought upon these propositions, in substance: (a) That "quick dispatch" was understood to be needful and was promised by the manager; (b) that other testimony

establishes that all could have been sent, with the facilities of the office, before noon; (c) that the order of the addresses on the lists was disregarded, so that the plaintiff's address, at the head of a sheet numbered 1, was not reached for sending until afternoon; (d) that it became the duty of the defendant, in such event to notify either Stevens or the plaintiff of such postponement, to save from the misunderstanding, from which the alleged loss arose. We are of opinion that neither of these contentions is tenable under the finding referred to. Each rests alike on a question of fact, whether the issue stated is one alone of fact, or of mixed law and fact, and each is equally settled by the general finding of fact, whenever the question of law involved is not distinguished and reserved for review apart from the fact. U. S. Fidelity & Guaranty Co. v. Board of Com'rs, 145 Fed. 144, 151, 76 C. C. A. 114.

The testimony discloses no undisputed fact of instructions disregarded, of materiality pointed out or suggested in the order of the addresses—concededly arranged both by Stevens and by the telegraph operators for convenience in wiring, with no intimation by Stevens that individual preference was intended—or of promise or duty unperformed on the part of the defendant; and we are of opinion that no reviewable error is assigned, either upon the motion of plaintiff for a finding in his favor, or upon the adverse finding and judgment.

The remaining assignment of error relates to the rejection of testimony, offered by way of fixing damages for recovery by the plaintiff, and thus becomes immaterial in the foregoing view.

The judgment of the Circuit Court is affirmed.

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## SOLT v. CANNEY.

(Circuit Court of Appeals, First Circuit. June 18, 1908.)

No. 758.

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff had been employed by defendant for a number of years in working at a granite quarry. At the time of his injury he was in charge of a car and engaged with others in loading rough stones thereon by means of a derrick. The stones were gripped by means of tongs; holes being drilled or cut therein to keep the points of the tongs from slipping, and plaintiff assisting in such work. He and another had made three attempts to make a hitch on a stone; the tongs slipping each time. Finally, a hitch was made which held, and the stone was raised into the air and swung over the car. Plaintiff got upon the car to guide it into place, and, desiring to pass to the other side of it on the car, he pushed it back, when the tongs again slipped, and the stone fell and injured him. It was a matter of common knowledge among those engaged in such work that while a stone of such kind might ride safely when undisturbed, when moved so as to change the bearings of the points they would be likely to slip, and plaintiff could have passed under or around the one in question without touching it. *Held*, that both on the ground of assumption of risk and of contributory negligence plaintiff was barred from recovery for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574–600, 749.

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

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

William A. Pew, Jr., for plaintiff in error.
Francis Peabody, Jr., for defendant in error.

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

ALDRICH, District Judge. Solt, the plaintiff, was a workman in the employ of the defendant, and, with others, under one Larson as foreman or superintendent, was engaged at the time of the injury in loading a car with quarried stones which were being hoisted from the defendant's quarry and swung over and lowered to a car by means of a derrick. Solt had had six years' experience in the quarry, and, at the time of the accident, was in charge of the car which was being loaded. The operation of transferring the pieces or blocks of granite from the quarry to the car involved hitching to stones by such tongs and dogs as are used in ordinary derrick stone hoisting; the grip or hitch of the tongs being usually across the narrow way of the stone. As the stones were hoisted, they were brought into position over the car by means of a tag rope so connected as to pull the derrick boom around that the stones might be lowered upon the car. At the time of the injury, Solt was upon the car, only a short distance from the quarry, which was in plain sight of all the parties concerned in the work of loading. When a given piece of granite was to be hoisted, holes were drilled or cut in the rock into which the points or dogs of the hoisting tongs were inserted. This was sometimes done by Larson, sometimes by the plaintiff, sometimes by the two together, and sometimes by others.

Under conditions of rough quarrying, when the tongs and dogs are put to the hoisting test, the hitch or hold not infrequently gives away. On the occasion in question, Larson and Solt secured the hitch and placed one stone on the car. The hitch to the second stone was also made by Larson and Solt, Larson securing the dog on one side and Solt on the other, and, when an attempt was made to hoist, the dog slipped, and the stone fell. Then Solt went to the car, and a second hitch was made, which slipped, as was also the case when a third attempt was made to hoist. This was all so far under the eye and observance of Solt as to enable him to describe it on the witness stand. Finally, a hitch was made which raised the stone into the air, and a workman by the name of Santti, by means of the tag rope, pulled the derrick boom and the stone into position over the car. It was a part of Solt's duty, as they were loading, to see that the stones were lowered into the proper place upon the car. He usually did this by pushing the stone as it was being lowered so that it would be deposited at the intended place. When the stone which hurt Solt came round over the car, Solt found that he was on the wrong side of the car to push the stone into place as it was lowered, and, according to his own account of it, in order to pass to the other side of the car he took hold of the end of the stone with both hands and pushed it towards the

bank. Pushing it out of its suspended position and out of balance caused the dogs to slip, and the stone to fall, and thus the injury happened.

It is a matter of common understanding that, when such a hitch is secured upon irregular-shaped objects of weight as to once hoist and hold them, they will ride safely through the air, unless they encounter something which interrupts their balance. It is also well understood, in the business of stone hoisting, and in the business of hoisting irregular-shaped weights of any description, that slight interruption may materially change and endanger the bearing of the weight and the hold of the points of the dogs. It is likewise well understood by those acquainted with stone quarrying that granite bearings upon hardened points are liable to shift under changing pressure, and that the mere weight of a hand upon the end of a rock hanging in tongs upon dog points might so disturb its balance as to change it from a safe horizontal position to a perpendicular one creating conditions of danger and hazard through putting the rock upon different bearings upon the points of the dogs, whereby the hold might be released.

Under the circumstances, Solt's act in pushing the stone upon its end in order to pass it was hazardous and careless. It was quite unnecessary for him to push the stone out of its suspended position in order to pass from one part of the car to another. He could have stepped off the car, or quite likely, letting the stone alone, could have passed safely under it. Pushing the stone from its suspended position in order to pass from one part of the car to another was no necessary part of the performance of his duty. Standing back, and guardedly, in the line of duty, pushing a suspended stone away as it is being lowered into a particular place, is one thing. Unnecessarily, heedlessly, and for one's personal convenience pushing a suspended stone aside through pressure upon one end and passing it at the same time, is quite another and different thing. It was for Solt's own convenience that he pushed the stone aside, and he thus brought the injury upon himself.

Both the doctrine of assumption of risk and that of contributory negligence interpose against the plaintiff's recovery.

Holding this view, we have no occasion to consider whether Larson was exercising superintendence within the meaning of section 71, c. 106, Rev. Laws Mass. 1902.

The judgment of the Circuit Court is affirmed, and the defendant recovers his costs in this court.

## YOUNG & HOLLAND CO. v. BRANDE BROS. et al.

(Circuit Court of Appeals, First Circuit. April 28, 1908.)

No. 752.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PROCEDURE.
A court of bankruptcy has power to make orders respecting the pleadings in a proceeding in involuntary bankruptcy, and where the alleged bankrupt has failed to comply with such orders, while the court cannot on that ground deprive him of his right to appear and contest the adjudication, it has jurisdiction to proceed with the hearing in his absence, on his failure to appear in response to an order to show cause served upon him. Hovey v. Elliott, 167 U. S. 409, 446, 447, 17 Sup. Ct. 841, 42 L. Ed. 215, distinguished.

2. APPEAL AND ERROR—OBJECTIONS NOT RAISED BELOW.
The rule applied that as the appellant although having notice, did not defend in the District Court, he cannot defend on appeal.

Appeal from the District Court of the United States for the District of Rhode Island.

Edward D. Bassett (Bassett & Raymond, on the brief), for appellant.

J. Jerome Hahn and Richard E. Lyman (Edward E. Lyman and Lyman & McDonnell, on the brief), for appellees.

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

PUTNAM, Circuit Judge. This was an appeal by the Young & Holland Company from an adjudication of bankruptcy entered against it by the District Court. On the return day of the order to show cause on the petition filed against it, the respondent, now the appellant, filed an answer in which, among other things, it denied insolvency. Thereupon it was ordered by the District Court to file a bill of particulars of its assets and creditors. It filed one, but the same was not satisfactory to the court, and two supplemental orders were entered directing it to amend. Finally the court, on the 27th day of November, 1907, entered an order of which the following is a copy:

"On the application of the petitioning creditors showing that on the 28th day of October, A. D. 1907, an order of this court was made and entered for the examination of Carroll H. Chapman, and for the production of the books of the Young & Holland Company, that on the 21st day of November, A. D. 1907, an order was entered for the amendment of the bill of particulars by setting forth the street and number in the list of addresses of the debtors of said Young & Holland Company, and said petitioning creditors alleging that said orders have not been complied with, it is ordered that said Young & Holland Company show cause on Saturday, November 30, A. D. 1907, at 10 o'clock a. m., why it should not be adjudged bankrupt for failure to comply with said orders."

This was duly served on the same day on the appellant's solicitor of record. On the return day—that is, the 30th day of November—the appellant made no appearance in response to the order, whereupon an oral motion was made by the petitioning creditors for an adjudication of bankruptcy, and an order of adjudication was made, from which this appeal was taken. The order set out proceedings looking to an

examination of Chapman, the treasurer of the corporation, for the purpose of obtaining a list of assets and liabilities. It mainly, however, related to all the attempts to obtain a satisfactory bill of particulars from the appellant, which it is not necessary to rehearse here, except so far as the recital relates to the 27th day of November and thereafterwards. That was as follows:

"And it further appearing that on the 27th day of November, 1907, an order was entered in this court commanding the said Young & Holland Company to show cause on the 30th day of November why, for failure to comply with the orders of said court, it should not be adjudicated bankrupt, service of which last order, as appears, was duly made upon Edward D. Bassett, attorney for said Young & Holland Company; and it appearing that on the 30th day of November, no appearance being made for said Young & Holland Company, that it failed to comply with the orders of said court, and that the sworn petition supported by an affidavit of the petitioner's counsel show that said Young & Holland is bankrupt within the meaning of the bankruptcy act, it is hereby declared and adjudicated bankrupt."

The reference in the foregoing to the affidavit of the petitioners' counsel was evidently only to satisfy the conscience of the court, in order to make sure that it was doing no injustice; and, so far as the legal rights of the parties on appeal are concerned, it may be stricken out as mere surplusage. The appellant refers to the fact that among the orders named by the District Court was one for the examination of Chapman; but apparently the appellant does not place any particular reliance thereon, and it could not so long as other grounds for the proceeding appear which were sufficient therefor. Taking the whole together, it is evident that the court entered the adjudication substantially because the then respondent had failed to complete its pleadings in accordance with the interlocutory orders; but we will reiterate, because it is a very important fact, that, notwithstanding the appellant had an opportunity to appear in the District Court to try out there the issue now presented to us, it failed to do so, and it now seeks to try it before us for the first time.

Examining what there is in the record before us, and considering all the positions of the parties, the whole case on appeal comes down to the validity of the proceedings of the District Court on the 30th day of November, as we have explained them. Plain it is that, in view of Hovey v. Elliott, 167 U. S. 409, 446, 447, 17 Sup. Ct. 841, 42 L. Ed. 215, the District Court could not have deprived the respondent of its right to appear and contest the proposed adjudication merely because it had failed to comply with the orders of the court with reference to bills of particulars or anything else. In other words, the District Court could not, on account of any actual or presumed contempt of its orders, have prohibited the respondent from being heard on any matters pending on the day in question; but it is a part of the right and duty of all courts to perfect the pleadings in litigation pending before them before going to a hearing, and the ordinary remedy which the courts use for that purpose in proceedings at common law, or in proceedings akin thereto, such as a proceeding on a petition for an adjudication of bankruptcy, is by directing defaults and nonsuits. Consequently it does not at all follow that Hovey v. Elliott, which related to an incidental order for payment of money into court, and not at all to a

preparation of the pleadings for a proper understanding of the suit, and in which the court, the validity of whose judgment was denied, not only adjudged against the party in contempt, but absolutely refused to hear him, applies to this case as it presented itself to the District Court. There is essential difference in view of the fact that this proceeding concerned a claim as to perfecting pleadings, and as to the power of the District Court to compel the perfection of them. There is also an essential difference in that, instead of the District Court refusing to hear the respondent, it issued notice to it to come in and be heard. Therefore, notwithstanding Hovey v. Elliott, we are of the opinion that the District Court had jurisdiction to take into consideration whatever questions might be raised under the order of November 27th, and to dispose of those questions, subject to an appeal in the event they were incorrectly disposed of. Such being the fact, it was the duty of the respondent to have tried out the issue in the District Court before bringing the matter to our attention on appeal. This is the settled rule, with exceptions so rare that we need not consider them. Neither need we consider whether the District Court, on the parties being heard, could properly have entered the adjudication which it did. It is sufficient for present purposes to determine that the District Court had jurisdiction over the question now involved, and that, therefore, the appellant cannot compel this court to try out this issue for the first time.

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

NOTE BY THE COURT.—Since this opinion was prepared, Bennett v. Bennett, 208 U. S. 505, 28 Sup. Ct. 356, 52 L. Ed. 590, has been announced. The conclusions there seem to confirm the result we have reached.

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## CHICAGO GREAT WESTERN RY. CO. v. MOHAUPT.*

(Circuit Court of Appeals, Eighth Circuit. June 2, 1908.)

No. 2,709.

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

An adult person traveling on a railroad train, who, several blocks before the train reached a station, and while it was moving at a speed of 10 miles an hour, voluntarily and without necessity left the car in which he was seated and stood upon the open platform, and while so riding was killed in a collision with another train standing at the station, no passenger in the cars being seriously injured, was chargeable with contributory negligence which precluded a recovery from the company for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1376–1378.

Injuries to passengers occupying positions other than seats, see note to St. Louis, I. M. & S. Ry. Co. v. Leftwich, 54 C. C. A. 4.]

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

A. G. Briggs and John L. Erdall, for plaintiff in error.

C. D. O'Brien, R. D. O'Brien, and E. W. Williams, for defendant in error.

*Rehearing denied July 24, 1908.

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

ADAMS, Circuit Judge. This was an action for damages instituted under the statutes of Minnesota by the personal representative of Edward Mohaupt, deceased, for alleged negligence of defendant's servants and agents in the operation of one of its trains of cars. The defenses were twofold: (1) That decedent was a trespasser on the train, and that defendant was not guilty of any wanton or willful disregard of his rights; and (2) that he so exposed himself to danger as to contribute to the injury sustained by him. The decedent took one of the passenger trains of the defendant company somewhere between St. Paul and Minneapolis, to be carried to the latter place. The proof discloses that there was a tacit understanding between him and the conductor of the train that he should be carried free, and pursuant to such understanding he paid no fare for his transportation. As the train approached Minneapolis station, it collided with the rear end of another train standing at the station, and decedent was crushed and killed. For some six blocks before reaching the station, and while the train was moving at a rate of about 10 miles an hour, decedent had been riding on the rear, open or unvestibuled, platform of the smoking car, having before that time left the smoking car in which he had been riding, and which afforded ample room and safe accommodation for him, and was standing on the platform when the fatal collision occurred. No person inside the cars was seriously hurt by the collision.

At the conclusion of the testimony, the court was asked to direct a verdict for the defendant on two grounds, one because decedent was not a passenger, but a mere trespasser, and, again, because of his own contributory negligence, but refused to do so, and this action affords the basis of one of the assignments of error. The argument is made that the conductor had no authority to permit decedent to ride free on the train; that he was a trespasser in so doing, and as such could exact only a low grade of care from the defendant company, and attention is called to the cases of Condran v. Chicago, M. & St. P. Ry., 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749, and Purple v. Union Pacific R. Co., 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700, as authority for the proposition that the only duty legally imposed upon defendant in such circumstances was not to willfully or recklessly inflict injury upon him, and it is urged that the proof shows neither willfulness nor recklessness on the part of defendant company.

The court below ruled that the decedent was neither a trespasser nor a passenger, but a licensee, and that as such he was entitled to the observance of ordinary care by the defendant railway company. This conclusion is strenuously resisted by defendant's learned counsel. They claim that the proof brings the case well within the rule announced in the foregoing cases, and that the trial court erred in not applying that rule to this case. We, however, in view of the conclusion reached on the other ground urged for the peremptory instruction, do not deem it necessary to pass upon the merits of this one.

There is no substantial proof that defendant had any reasonable ground or excuse for riding on the platform of the car. The smoking car in which he had been riding before he took his position on the platform afforded him ample room and accommodation. There were but few passengers in it. So, likewise, the car next to the smoking car and immediately behind the platform on which he was standing contained many vacant seats, in any one of which he could comfortably and conveniently have ridden into the station. If he had remained in the smoking car where he was, he would have been uninjured, as no one there was hurt by the collision. He was an experienced brakeman and selected the dangerous place upon the platform when other safe and convenient places were available to him. Instead of relying on the well-established rule of law and practice which require railway companies to bring their passenger trains to a full stop at stations and remain so until all persons have had a reasonable opportunity to alight and remain inside the car until it arrived at the station, for some unexplained reason he voluntarily, and without any compulsion or inducement by defendant's agents or servants, left the car at least six blocks away from the station and took the platform at a time when the train was not slowing up for the station, but was moving rapidly, and remained there until his fatal injury was received. The theory that he went so long before the train reached the station to make ready to alight when it should arrive has no support in the proof, and, even if such were the fact, it would not, unless in exceptional circumstances, have justified him in exposing himself to the unnecessary peril.

The rule is well settled that:

"Where the railway company has provided a safe and secure place for passengers to ride within its cars, a passenger who voluntarily and unnecessarily takes a position upon the platform of a car while the train is in motion will, in so doing, be chargeable with such contributory negligence as will preclude him from the right to recover for an injury which would not have befallen him had he been in his proper place." 3 Hutch. on Carriers, § 1197; 3 Thomp. Com. on Law of Negligence, § 2947; Beach on Contributory Negligence, § 149.

This court, in St. Louis, I. M. & S. Ry. Co. v. Leftwich, 117 Fed. 127, 54 C. C. A. 1, observed that:

"Platforms and steps of railway cars propelled by steam are dangerous places for passengers to ride. They are not provided for that purpose, and passenger coaches generally carry on their doors, or in other conspicuous places, notices that the rules of railway companies forbid the passengers to occupy these places for the purpose of riding upon the trains. Moreover, it is a general rule of law that a passenger who, without any reasonable cause or excuse, rides on a platform or on the steps of a railway car * * * is guilty of negligence which, if it contributes to an injury that he sustains, will bar his recovery of damages therefor on account of the concurring negligence of the railway company."

In Hickey v. Boston & Lowell R. R. Co., 14 Allen (Mass.) 429, the Supreme Judicial Court of Massachusetts considered what would be "reasonable cause" for a passenger to ride upon a platform, and there said:

"If, then, the position upon the platform was taken voluntarily, and without reasonable cause of necessity or propriety, the plaintiff fails to show

that her intestate was in the exercise of due care and caution. An eager desire to be first in, to arrive at the front rather than at the rear of the train is certainly not such reasonable cause. Ordinarily no accident occurs to those who rush out of the train or rush into the cars at stations, before the trains fairly come to a stop or after it is in motion again; but it cannot now be questioned that those who do so take upon themeslves all the risks which attend such a practice."

In Fletcher v. Boston & M. R. R., 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414, a case was under consideration where the plaintiff was injured while standing upon the upper step leading from the platform of a car. The court said:

"Plainly, if he had remained in the car until the train stopped, this danger would have been avoided. But he voluntarily left a place provided for him as a passenger, and where he would have been safe, and exposed himself to the chance of injury, which common experience has shown is incident to standing upon the platform of a moving railroad car. The fact that the station had been announced, and the train was being reduced in speed preparatory to stopping, or that the combination of conditions causing the accident was peculiar, and not ordinarily to be anticipated, does not furnish a sufficient excuse for his conduct"—citing Manning v. West End Ry., 166 Mass. 230, 44 N. E. 135.

We are aware of the frequent practice of travelers to needlessly rush to the door of the car and sometimes out upon the platform before the train comes to a full stop, merely to expedite their departure from the train; but the open platform when the train is in motion is a dangerous place, and the practice of resorting to it, except for some urgent and good reason, is against the dictates of common prudence and ought not to receive judicial sanction. Ordinarily, it is only a fancied necessity which prompts it, and it is a reasonable thing to require the passenger to forego the practice except at his own peril in case of accident. We think the decedent contributed to the terrible misfortune which befell him, and that no recovery can be had by his personal representatives on account of it. The court below should have so instructed the jury.

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

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## CHICAGO, M. & ST. P. RY. CO. v. HAUBER.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,421.

1. RAILROADS—INJURIES TO PERSON AT STATION—DEFECTIVE PLATFORM—EVIDENCE.

   In an action against a railroad company for injuries to plaintiff by the collapse of a defective freight platform, evidence *held* to warrant a finding that the beams of the platform were rotten, and that a proper inspection would have disclosed such condition.

2. SAME—INVITATION TO USE.

   Plaintiff's grandfather ordered a car from defendant railroad, in which to ship certain furniture, and the railroad company placed the car beside a defective platform, the use of which had been abandoned. Plaintiff's grandfather attempted to load the car from the side opposite the platform and directed plaintiff to remain at the car and watch the goods while being loaded. Plaintiff seated himself on the edge of the

platform near lumber piled thereon by defendant, and while so seated the platform collapsed, because of its defective condition, and plaintiff was injured. *Held*, that defendant, by placing the car at the platform, without giving any notice of its condition, invited the use of the platform, and plaintiff, as a helper of his grandfather, being entitled to the same right on the premises that the grandfather had, was neither a trespasser nor a mere licensee, but was a person to whom defendant owed the duty of exercising due care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 869.]

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

Defendant in error recovered judgment against the railway company on account of personal injuries. He was 11 years old when the accident occurred. A platform on the company's ground collapsed.

The assignments are that the court erred in refusing to take the case from the jury and in giving and declining to give certain instructions.

The part of the charge that was excepted to reads as follows:

"In other words, if the boy was rightfully upon the premises of defendant, and by the exercise of ordinary care such as boys of his age would exercise, in doing the work that he was doing there, wandered onto this platform and was sitting down, and if you further believe from the evidence that the defendant was negligent in respect to that platform, as I am about to define that term, and the platform fell, and he was injured, then, if the defendant was negligent as I shall define, the boy would have a right to recover for whatever injury he sustained as shown or proved by the evidence.

"The defendant's duty in this respect would be substantially this: There is no evidence here tending to show that it had actual knowledge of the defective condition of this platform. It should use the same supervision that an ordinary, prudent business man would use in his affairs of life to ascertain the condition of this platform. If it failed to use ordinary supervision and care to ascertain its condition, and if you believe from all the evidence in the case that the platform had been constructed for a number of years and had been standing so idle for a long time, and if you further believe from the evidence in the case that the defendant piled a lot of lumber upon it, and they failed to use ordinary care to ascertain its condition previous to making that kind of use of the platform, and if you further believe from the evidence that, if they had exercised the ordinary and usual care that men of ordinary prudence use about their own business, they would have ascertained that the platform was defective and rotten and liable to fall if they put a weight upon it, then, as I said, if they failed to use that sort of care, and the platform was in fact rotten and decayed, and if it would have been ascertained by the use of this care, then in such case the law holds that they were bound to know its condition, and if that state of the evidence is shown here, and the platform fell in consequence of being defective, and injured this boy, then he is entitled to recover for whatever injuries he sustained in consequence of the fall."

The court declined to give the following, which was tendered by defendant:

"I charge you that the evidence in this case conclusively establishes the following facts:

"First. That the spur track and the milk platform mentioned in evidence were wholly upon the private property of the defendant, Chicago, Milwaukee & St. Paul Railway Company.

"Second. That said milk platform had not been used for upwards of two (2) years prior to the time of the accident, for receiving or shipping freight therefrom, and that Joseph Hauber, grandfather of the plaintiff herein, lived immediately across the street from said spur track and milk platform and was thoroughly familiar therewith, and knew that said platform was not and had not been in use for the purpose of receiving or shipping freight therefrom for upwards of two (2) years prior to the time of the accident to the plaintiff.

"Third. That at the time said Joseph Hauber, grandfather of the plaintiff, procured a car to be set upon the spur track for the purpose of loading the same with furniture, he intended to and did load said car from the Austin avenue side thereof, and that he made no use of said platform in connection with loading said car.

"Fourth. That it appears that the accident to said plaintiff herein happened on the southerly side of refrigerator car standing upon the easterly part of said spur track, and not at the car which said Joseph Hauber was loading with furniture.

"I therefore charge you as a matter of law that neither Joseph Hauber, grandfather of said plaintiff, nor the plaintiff herein, had any right or license upon said platform at the time of the accident in question, and that the plaintiff herein was at most a mere licensee in the yard of the defendant company, and that as to said platform the defendant, Chicago, Milwaukee & St. Paul Railway Company, owed the plaintiff herein only the duty of refraining from wantonly or willfully injuring him.

"And I further charge you that there is no evidence whatever of any wanton or willful injury being inflicted by the defendant upon the plaintiff herein."

John A. Russell, for plaintiff in error.

J. P. Mahoney, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Though defendant's foreman, who directed the lumber to be piled on the platform, testified that he first examined the platform carefully and "found the timbers all sound and solid on the outside," and though the carpenter who removed the wreck declared that the timbers, while "rotten at the heart, like a shell," "appeared to be all right on the outside," the jury had the right to accept the testimony of plaintiff's witnesses that "the beams were rotten," "I passed the platform many times, it was pretty well gone up, the posts were pretty well gone up, the stringers were all rotten," and therefrom to conclude that the platform was liable to collapse at any moment and that a proper inspection could not have failed to discover the dangerous condition.

By its motion for a directed verdict, and also by its requested instruction, defendant insisted that plaintiff was a trespasser, or at most a bare licensee, and therefore that defendant owed him no duty except to refrain from injuring him wantonly. The platform, 10 feet wide and 40 feet long, was wholly on the private property of defendant. Its use for receiving or shipping freight had been discontinued for more than two years prior to the accident. This fact was known to plaintiff and his grandfather. Along the side away from the main tracks was a spur track, adjoining which was a public street, Austin avenue. Plaintiff's grandfather had engaged from defendant a car in which to ship his household goods. Defendant placed a box car on the spur track beside the platform and notified the grandfather that it was ready for his use. There is no evidence that defendant notified him, or that he otherwise knew, of the dangerous condition of the platform. He employed several men to help in moving his goods and loading them into the car. The doors on each side of the car were open. "The furniture was being loaded from the Austin avenue side of the car. Some they put out on the other side there to get a chance to get in the car." Plaintiff was directed by his grandfather

to keep watch over the goods while the men went back and forth. As the boy was seated on the edge of the platform near some lumber that had been piled thereon by defendant, the platform gave way. Under the foregoing circumstances (covered by the testimony which is most favorable to plaintiff, and which we must assume the jury accepted), plaintiff was not a trespasser nor a bare licensee. As a helper of his grandfather, he had the same right on defendant's premises that the grandfather had. And the latter, as a shipper, had the right to be on the defendant's premises and to do thereon whatever was necessary or proper in loading the car. And defendant, by placing the car beside the platform for the purpose of being loaded, without giving any notice of its condition, may justly be held to have invited the use of the platform. We find that the trial judge correctly apprehended the scope of the evidence and committed no error in overruling the motion for a directed verdict or in giving or refusing to give instructions.

The judgment is affirmed.

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## EAGLE OIL CO. OF NEW YORK et al. v. VACUUM OIL CO.

(Circuit Court of Appeals, Third Circuit. June 18, 1908.)

No. 14.

1. EQUITY—PLEADING—EFFECT OF OVERRULING PLEA AFTER HEARING.
   Where a plea in equity, setting up the facts relied on as a defense to one part of the bill, and supplemented by an answer as to the remainder, is overruled on the proofs after hearing on issue joined thereon, the defendant is not entitled to answer over.

2. APPEAL AND ERROR—REVIEW—FINDINGS OF FACTS.
   The finding of a trial court on the proofs against the truth of a plea affirmed.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970–3978.]
   Buffington, Circuit Judge, dissenting.

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

For opinion below, see 154 Fed. 867.

Eugene Mackey, for appellants.

C. Schuyler Davis and Edmund Wetmore, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The appellee was plaintiff and the appellants were defendants in a suit in equity for alleged infringement of trade-marks and unfair competition. The bills, original and supplemental, alleged the adoption, use and registration by the complainant of certain words, which it charged the defendants with having applied to goods of the Eagle Oil Company, fraudulently and in violation of complainant's rights, by branding goods of that company with the complainant's trade-marks in this country, and selling the same in this country, by placing said brands upon its goods in this

country and selling the goods so branded in foreign markets, and by exporting its goods from this country with the intention of selling them under said brands in foreign countries and actually selling them in the foreign market under said brands. The Eagle Oil Company and F. W. Hastings, Jr., "as secretary and treasurer and a director of said corporation, and individually," filed a joint plea and answer, and the defendant George F. Von Krogh, as a director and individually, filed a separate but substantially identical plea and answer. The first-mentioned plea is copied in the margin.[1] It was interposed, as will be observed, "to all the relief and discovery sought by the said bills, both original and supplemental, except only so much thereof as prays for relief against and discovery of all acts and deeds of these defendants done in these United States"; it was pleaded "in bar of all relief and discovery sought in said bills of complaint against or for

[1] "These defendants, Eagle Oil Company of New York and F. W. Hastings, Jr., as secretary and treasurer and a director of said corporation and individually, to all the relief and discovery sought by the said bills, both original and supplemental, except only so much thereof as prays for relief against and discovery of all acts and deeds of this defendant done in these United States, plead in bar of all relief and discovery sought in said bills of complaint against or for all acts and deeds of these defendants or their agents or officers, alleged to have been done in some foreign country or nation: That such acts or deeds, if performed or done at all, and not admitting hereby that such acts and deeds were done or performed by it, were wholly done or performed without the borders and boundaries of these United States and wholly within the borders and boundaries of some foreign country or nation. That of such acts and deeds only the courts of such foreign country or nation, and not this court or any court within these United States, has jurisdiction. Further, that this plaintiff has heretofore instituted legal proceedings in a court of competent jurisdiction in the German Empire, to restrain the respondent Eagle Oil Company of New York from the commission of the very acts and deeds done and performed in the German Empire, with regard to the use of the word 'Vacuum,' which the plaintiff now asks relief against and discovery of in this suit. True translations of the plaintiff's bill, defendant's answer, and the decree of the court in such proceedings are hereto attached, marked respectively 'Exhibit A,' 'Exhibit B,' and 'Exhibit C,' and made part hereof, and, notwithstanding such decree, the complainant has appealed therefrom to a higher court, where the same is now pending. And, further, that this plaintiff has also instituted legal proceedings in a court of competent jurisdiction in the Kingdom of Denmark to restrain in that country the use of the word 'Vacuum' on petroleum oils and products, sold for a purpose similar to that for which plaintiff sells its oils and products, and in advertisements, statements, publications, and writings, relating and referring to such oils and products. All of which matters and things the respondents do aver to be true and plead the same to the twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, and twenty-sixth paragraphs of plaintiff's bill of complaint, and to interrogatories of said bill, numbered 8, 9, 10, 83, and 85, and to so much of the twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, and thirty-ninth paragraphs of the said bill, and to so much of the interrogatories therein numbered 7, 11, 13 to 35, inclusive, 46 to 70, inclusive, 72 to 78, inclusive, 82, 104, 106, 110, 111, 131, 132, 133, 134, 135 to 145, inclusive, 148 to 156, inclusive, 175 to 190, inclusive, and 193, and to so much of the supplemental bill and interrogatories as are not answered, and pray the judgment of this court whether they shall be required to further answer so much of the said bills and interrogatories as are not met or covered by this plea."

all acts and deeds of these defendants or their agents or officers, alleged to have been done in some foreign country or nation"; and it alleged and averred "that such acts or deeds, if performed or done at all, * * * were wholly done or performed without the borders or boundaries of these United States, and wholly within the borders and boundaries of some foreign country or nation, and that of such acts and deeds only the courts of such foreign country or nation, and not this court, or any court within these United States, has jurisdiction." This plea was connectedly followed by an answer to so much of the original bill as the plea did not cover, in which the charges of wrongful acts committed by the defendants in this country were denied. In June, 1903, the plea was set down to be argued, and, after hearing, was "allowed, with liberty to the complainant to take issue thereon." In November, 1904, the sufficiency of the answer was in the main sustained, and on December 23, 1904, general replications to the plea and to the answer, respectively, were filed.

It appears from the foregoing synopsis that the plea and answer, conjointly, purported to set up, affirmatively or by way of denial, all matters of fact upon which the defendants relied, whether to defeat the jurisdiction of the court or to bar the relief sought by the bill, and that issue was taken upon the plea as long ago as in December, 1904. Yet we are now asked to say that when, upon the proofs, that issue was determined against the defendants, the court below erred in refusing their "demand for an opportunity to answer over." But, in our opinion, that demand was neither reasonable nor warranted. If the fact stated in the plea had been determined for the defendants, it would have availed them as far as in law and equity it ought to avail them, and surely its determination for the complainant should not be wholly without avail to it. The contention that equity rule 34 entitled the defendants to answer over after the issue upon their plea had been decided against them is founded upon a mistaken understanding of the effect to be attributed to its use of the word "overruled." Wherever, in the series of rules relating to demurrers and pleas (31–38), that word occurs in connection with a plea, it manifestly signifies a precursory adjudication of its invalidity, and not an eventual determination of the issue proposed by it. In this case, then, as an issue was taken upon the defendants' plea, and it was found to be false, what was next to be done? Was it to be merely overruled, and an order made that the defendants should answer further, as if, when set down for argument, it had been overruled for insufficiency? "This is not the usual course. Having put the plaintiff to the trouble and delay of an issue, the defendants cannot, after it is found against them, claim the right to file an answer." This was said by Mr. Justice Bradley in speaking for the Supreme Court of the United States in the case of Kennedy v. Creswell, 101 U. S. 641–644, 25 L. Ed. 1075, and we think the learned judge below was clearly right in regarding it as an authoritative and still final exposition of the law.

It results from what has been said that the specifications which aver that the court below should have allowed the defendants to answer over cannot prevail, and the other points made in the brief of the appellants may be disposed of together, and very briefly. As to the

contention that the proofs did not support the findings of the learned judge, it would be profitless to again discuss the evidence. It must suffice to say that having fully considered it we have independently arrived at the conclusion which was reached by him, that "the truth of the facts set forth in the pleas has not been shown, but the contrary"; and, it being thus determined that "the acts complained of were not wholly performed outside of the United States," it is not requisite to decide whether "the courts of the United States have jurisdiction of an infringement of a trade-mark, or an act of unfair competition committed entirely in a foreign country." Vacuum Oil Co. v. Eagle Oil Co.(C. C.) 154 Fed. 867.

None of the specifications of error having been sustained, the decree of the Circuit Court should be affirmed, and it is so ordered.

BUFFINGTON, Circuit Judge, dissents.

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In re KEHLER.

(Circuit Court of Appeals, Second Circuit. June 6, 1908.)

BANKRUPTCY—FRIVOLOUS APPEAL—DISMISSAL.

Where, on a former appeal, it was determined that if the alleged bankrupt committed the acts of bankruptcy in question while insane the adjudication was wrong, but if the acts were committed while sane it was proper to continue the case, though the bankrupt subsequently became insane, and the case was remanded to give the petitioning creditors an opportunity to rebut the presumption of insanity arising from the inquisition, and on such hearing a number of witnesses testified that he was sane when the acts of bankruptcy were committed, and no evidence to the contrary was offered by the bankrupt's committee, a further appeal by such committee, raising the same question previously determined, would be dismissed as frivolous.

[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 Western District of New York.

Guy E. Farquhar, for appellant.

John A. Van Arsdale, for appellees.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. This is a motion by the petitioning creditors and by the receiver to dismiss the appeal of the committee for the bankrupt on the ground that the same is frivolous and was taken for the purposes of delay. The question which the appellant proposes to argue on this appeal was presented by the former appeal, was discussed in the briefs and at the oral argument and was decided by this court. In re Kehler, 159 Fed. 55. In our opinion we said:

"Should the petitioning creditors desire an opportunity to rebut the presumption of insanity arising from the inquisition, an opportunity should be given them."

It now appears that this question was referred to a special master who, after hearing a number of witnesses, reported that Kehler was

sane when the acts of bankruptcy were committed. This report was confirmed by the District Court and Kehler was again adjudicated a bankrupt. No evidence to establish insanity was offered by the committee although his counsel appeared and cross-examined the witnesses. The only additional fact, therefore, not appearing on the former record, is that the bankrupt was sane when the acts of bankruptcy were committed. The creditors' petition was filed February 22, 1907, and Kehler was not adjudged insane by the Pennsylvania court until March 2, 1907.

The question now presented was decided by us on the former appeal as follows:

"If he (Kehler) 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 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 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.' "

A comparison of the brief filed in opposition to this motion and the brief presented by counsel for the committee on the former appeal discloses the fact that the two are identical, the same authorities are cited, the same contentions are urged. In fact, the seven pages of the present brief which deal with the question of law are copied verbatim from the former brief. In effect we are asked to listen to a reargument of a question which, after full consideration, we decided less than five months ago. As we see no reason for changing our opinion, the parties should not be subjected to the expense and delay of a second appeal.

The motion to dismiss is granted.

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KNAPP et al. v. MILWAUKEE TRUST CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908. Rehearing denied June 4, 1908.)

Nos. 1,422, 1,425.

1. BANKRUPTCY—ORDERS—MODE OF REVIEW.

Where a bankrupt's creditor answered his trustee's petition to sell certain chattels and claimed chattel mortgage liens thereon, an order holding the chattel mortgages void was reviewable by appeal.

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

2. CHATTEL MORTGAGES—VALIDITY—POWER OF SALE—RETENTION BY MORTGAGOR.

Under the Wisconsin law, a chattel mortgage allowing the mortgagor to dispose of the avails of the mortgaged property and appropriate the same to his own use, provided only that the interest on the bond secured was paid and a sinking fund amounting to $500 per quarter, or $2,000 per annum, is provided for, and declaring that, when the mortgagee shall consent to waive the requirements as to the sinking fund, then the mortgagor shall keep up the interest on the bond secured and may apply all the balance of the proceeds to his own uses and purposes, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 393–401, 410.]

3. BANKRUPTCY—REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Where the capacity of a bankrupt's trustee to sue on account of alleged defects in the petition and proofs on which the adjudication of bankruptcy was made was not challenged at the trial, such question could not be raised on appeal.

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

4. SAME—WANT OF JURISDICTION.

On appeal from a District Court's decree in a controversy arising in bankruptcy proceedings, the only want of jurisdiction available to appellant, when raised for the first time in the Court of Appeals, is the District Court's want of jurisdiction to render the decree appealed from.

On Rehearing.

5. SAME—APPEAL TO SUPREME COURT—FINDINGS BY CIRCUIT COURT OF APPEALS.

General Bankruptcy Order 36, § 3 (89 Fed. xxxvi, 32 C. C. A. xxxvi), declaring that, in every case in which either party is entitled by the act to appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its decree, make and file a finding of the facts and its conclusions of law thereon, stated separately, and that the record to the Supreme Court on such appeal shall consist only of the pleadings, judgment, findings of fact, and conclusions of law, does not require a Circuit Court of Appeals of its own motion to ascertain and determine in advance of its decision whether a question is raised on which a party is entitled to the allowance of an appeal to the Supreme Court, but such right, if claimed, should be called to the court's attention in advance of decision, by a request for findings in the event of an adverse ruling on the question claimed to be appealable.

Appeal from, and Petition to Review and Revise Order of, the District Court of the United States for the Eastern District of Wisconsin.

Mark Breeden, Jr., for appellants.

A. W. Fairchild, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. On petition of creditors the Standard Telephone & Electric Company was adjudged a bankrupt. Knapp, on coming into court to answer the trustee's petition to sell, claimed chattel mortgage liens on part of the estate in the hands of the trustee. The trustee contended that the chattel mortgages were void, and the court so found. Knapp has appealed, and has also filed a petition to review and revise. The petition is dismissed, as the matter is properly reviewable on appeal.

The mortgages were clearly void for the reasons set forth at large in the opinion of the district judge. In re Standard Telephone & Electric Co. (D. C.) 157 Fed. 106.

Appellant insists that the decree in this litigation between him and the trustee must be held void on account of alleged defects in the petition and proofs on which the adjudication of bankruptcy was made. No challenge of the trustee's capacity was made before or during the trial in the court below, and so no ruling was made which appellant can bring before us for review. He claims, however, that it is a question of want of jurisdiction in the District Court. The only want of jurisdiction which appellant would have the right to require us to look into would be the District Court's want of jurisdiction to render the decree appealed from. This decree is of the class the District Court has authority to enter. The parties to this decree are of the class the District Court has authority to hear. The District Court's jurisdiction to enter this decree was no more dependent than a state court's would have been, upon the rightful appointment of the trustee.

The decree is affirmed.

On Rehearing.

No matters are presented in the petition for a rehearing that were not fully considered on the original hearing, and the petition is therefore denied.

The appellant has petitioned that, in the event a rehearing is denied, this court will prepare a special finding of facts and thereupon state its conclusions of law in order that appellant may prosecute an appeal from this court to the Supreme Court of the United States.

Sections 2 and 3 of Order 36 of the General Orders in Bankruptcy (89 Fed. xxxvi, 32 C. C. A. xxxvi), promulgated by the Supreme Court, read as follows:

"Sec. 2. Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

"Sec. 3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

The decree of this court was rendered on April 14, 1908. Whether the subject-matter of this controversy makes a case that is appealable to the Supreme Court under subdivision "b" of section 25 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), and whether it is too late in any event to take the appeal under section 2 of the General Order above quoted, are questions that would have to be considered should an allowance of an appeal hereafter be asked. At this time it is enough to say that we do not understand that section 3 of General Order 36 intends that a Cir-

cuit Court of Appeals shall, of its own motion, ascertain and determine in advance of its decision upon an appeal in bankruptcy, whether a question is raised upon which a party is entitled to allowance of an appeal to the Supreme Court. If such right is claimed, it should be called to attention, as we believe, in advance of decision, with request for findings in the event of adverse ruling upon the question alleged to be appealable. Whether findings of fact and conclusions of law are to be made and filed in this case, nunc pro tunc as of the date of such decree, can be determined if and when application for appeal to the Supreme Court is made and allowed.

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## CITY OF CHICAGO v. TROY LAUNDRY MACHINERY CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,437.

1. APPEAL AND ERROR—REVIEW—BILL OF EXCEPTIONS—SUFFICIENCY.
An assignment that the court erred in overruling defendant's motion, made at the close of all the evidence, to take the case from the jury, cannot be reviewed, where the bill of exceptions neither recites nor otherwise shows that it contains all the evidence.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2911–2915.]

2. TRESPASS—UNDERMINING LAND—PROXIMATE CAUSE.
In 1887 defendant city constructed a tunnel, 55 feet below the surface, across the lands in controversy, and on the completion of the tunnel began to pump water through it and continued to do so. In 1903 the owner erected a building on the land which he leased to plaintiff. In the preparation of the foundation a number of piles penetrated the tunnel, and after plaintiff took possession the flowing water carried away the soil so that the building sank. Defendant never obtained any right to enter or be on the land for any purpose from the owner or plaintiff, and neither knew of the tunnel until the damage was done. *Held*, that the forcing of water across the land was a continuing trespass and constituted the proximate cause of the injury, for which plaintiff was entitled to recover.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 8.]

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

Frank L. Childs and George W. Miller, for plaintiff in error.

Horace Kent Tenney and Henry W. Wolseley, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Defendant in error, plaintiff below, recovered judgment for damages caused by the undermining of its premises by water escaping from one of defendant's water tunnels.

The assignment that the court erred in overruling defendant's motion, made when the evidence was all introduced, to take the case away from the jury, cannot be considered, for the bill of exceptions neither recites nor otherwise shows that it contains all the evidence. But defendant really has lost nothing, because under assignments respect-

ing the admission of evidence and the giving of instructions the propositions on which defendant relies for reversal are presented.

The exceptions were to rulings that plaintiff was entitled to recover on the following state of facts: In 1887 defendant built the tunnel, about 55 feet below the surface, across the lands of one Winterbotham, who continued to be the owner. On completion of the tunnel defendant began to pump water through it, and continued to do so until the damage in suit was done. In 1903 the owner erected a building and leased it to plaintiff. In the preparation of the foundation a number of piles penetrated the tunnel. After plaintiff was in possession, the flowing water carried away the soil so that the building sank. Defendant never obtained from the owner or from plaintiff or from any one any right to enter or be upon the lands for any purpose. Neither the owner nor plaintiff knew of the tunnel until after the damage was done.

Defendant's propositions are: (1) That the only trespass shown was committed before plaintiff's tenancy began, and therefore defendant was answerable to the owner alone; and (2) that the trespass was not the proximate cause of the injuries complained of. Both involve the same mistake of fact. The trespass with shovel and trowel in 1887 was not the only trespass. That trespass appears as a mere historic incident in the case. The unlawful building of the tunnel gave defendant no right in the land. The forcing of water across the land was unlawful, whether with a tunnel or without a tunnel, whether pumped in 1887 or in 1903. In 1887 the unlawful act occasioned no injury. In 1903 defendant, by its act of pumping water across plaintiff's leasehold, carried away plaintiff's soil and undermined its building. Every pulse of the water was a trespass just as much as if defendant was carrying the dirt away with shovels. And this trespass was the proximate cause, legally the sole cause, for the innocent act of the owner in driving piles cannot be used as a shield by defendant any more than could the innocent acts of the bystanders in the squib case. Scott v. Shepherd, 2 W. Bl. 192.

Argument, without any assignment of error on which to base it, is made that the declaration is fatally defective. The declaration was based with sufficient certainty upon the theory of liability herein sustained.

The judgment is affirmed.

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## ALLIS-CHALMERS CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. May 12, 1908.)

No. 1,455.

APPEAL AND ERROR—TIME FOR SUING OUT WRIT OF ERROR—FINAL JUDGMENT.

A judgment entered by a federal court in an action at law, which includes costs against the losing party, is none the less final because a blank is left for the insertion of the amount of such costs when taxed, such taxation and entry being made as of course under Rev. St. § 983 (U. S. Comp. St. 1901, p. 706), by the judge or clerk, and requiring no

further judicial action, and the time for suing out a writ of error to review such judgment runs from such entry, and not from the time when the blank is filled.

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

On motion to dismiss writ of error.

Kemper K. Knapp, for plaintiff in error.

Edwin W. Sims and James H. Wilkerson, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. Motion is made on behalf of the United States to dismiss this writ of error, as not sued out by the plaintiff in error within six months after the entry of the judgment in question, and the court is of opinion that the writ must be dismissed for that cause. The suit was at law to recover for liabilities alleged to have been incurred by the Allis-Chalmers Company, in violations of statute of the United States, resulting in a verdict and judgment entered thereupon January 28, 1907, against the plaintiff in error, from which this writ of error was sued out January 17, 1908. In the judgment so entered costs were imposed, in addition to the statutory forfeiture, in the following terms: "Besides its costs in this behalf expended, amounting to the sum of ———." For support of the writ, as timely, it is contended on behalf of the plaintiff in error that such entry of January 28th was not the final judgment, by reason of the provision for costs thus made, with a blank left for insertion of the amount when taxed; and that it became final only on January 17, 1908, when an order of court (appearing in the transcript of record) taxed the amount of costs and directed the clerk to insert such amount in the blank.

The judgment at common law is the final determination pronounced by the court upon the matters submitted to it (23 Cyc. 665), and all the issues in the suit below were thus determined with the entry made January 28, 1907. In reference to costs the only matter for judicial determination was whether the statutory costs were to be imposed; and when so adjudged taxation ensues, as of course, either by court or its clerk, for items fixed by statute and amounts ascertained ex parte or of record, and pursuant to statute (section 983, Rev. St. [U. S. Comp. St. 1901, p. 706]), are to "be included in and form a portion of the judgment." Such taxation involves no decision of issues in suit—no postponement of final judgment as above defined—and the subsequent order of the court referred to, which directs the amount taxed to be inserted in the judgment, was needless for that purpose, and without force, either to establish another adjudication or another entry of judgment. Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co., 84 Fed. 213, 28 C. C. A. 481. Vide Fowler v. Hamill, 139 U. S. 549, 550, 11 Sup. Ct. 663, 35 L. Ed. 266.

The authorities cited for the contention that costs must be taxed and inserted in the judgment before the entry becomes final are from states which have substituted code practice for that of the common law, and the rulings referred to are not deemed applicable for definition of final entry of this judgment—whether such entry is governed

by the general rule under the common-law practice or by the analogous practice in Illinois—and the rule which we adopt, as above stated, has not only the sanction of federal authorities, but appears as well to have been generally recognized and observed in the forum of the adjudication in question, and to be in accord with the approved practice (Smith v. Harris, 12 Ill. 462, 467) in the courts of Illinois.

The writ of error therefore was not obtained in time to vest jurisdiction in this court, and it is dismissed.

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## THE SOMERVILLE.

(Circuit Court of Appeals, Second Circuit. May 5, 1908.)

No. 205.

COLLISION—MOVING VESSEL AND VESSEL AT PIER—NAVIGATION IN FOG.

A ferryboat *held* solely in fault for a collision which occurred while she was on her way from her Communipaw Slip to Twenty-Third street, New York, in a dense fog, at a speed exceeding five miles an hour, by her getting out of her course and striking and sinking a car float lying at a Hoboken Pier, inside the pier lines.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 213–215.

Collision rules—speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

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

On appeal from a decree entered January 7, 1907, awarding damages to the libelant, the Pennsylvania Railroad Company, for damages resulting from a collision between the ferryboat Somerville, owned by the Central Railroad Company of New Jersey, and a car float owned by the libelant. The collision occurred at 6:30 a. m., May 6, 1906. The car float was moored at the end of Pier L, Hoboken, N. J., being the outside boat of five which were lying there. Soon after the collision the car float sank. The testimony was all taken in open court.

James J. Macklin and La Roy S. Gove, for appellant.

Robinson, Biddle & Benedict (Roderick Terry, Jr., and W. S. Montgomery, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. No negligence can be attributed to the car float. She was lying motionless inside the pierhead line where she had a right to be and where it was customary for floats to lie awaiting their turn at the bridges. At about 6:15 a. m. the Somerville started from her Communipaw Slip, on the New Jersey side, destined for Twenty-Third street on the New York side, a distance of over 3 statute miles. A heavy fog was prevailing at the time making it impossible to see vessels on the river at a greater distance than 300 feet. Some of the witnesses testify that they could not see 25 feet and all agree that the fog was unusually dense. The collision occurred about 15 minutes after the Somerville had left her slip making it nec-

essary for her to travel during that period considerably over a mile. Her master says her speed was about 3 miles an hour, and this must be taken as his judgment as to the speed which it was safe to maintain in the circumstances then existing. It is manifest, however, that her speed must have been over 5 miles an hour if, as he testifies, he reached Pier L at 6:30. This we think was not moderate speed considering the density of the fog. The Somerville was also at fault for not keeping her course. After leaving her slip she steered a course E. by N. which brought her about to the middle of the river. From that point to Twenty-Third street the compass course was N. N. E. Had she taken this course and maintained it the collision would have been impossible. The statement of the pilot, that after he had starboarded and slowed down to permit the Cortlandt Street ferryboat to pass he resumed his N. N. E. course and maintained it, is obviously a mistake, as that course, irrespective of the position in the river where it was taken or resumed, would inevitably have brought the Somerville to the New York side. In order to reach the New Jersey side at Pier L it was necessary for her to steer a course N. ½ W.

We see no escape from the conclusion that the Somerville in permitting herself to deviate so far from her compass course and in proceeding at a speed of over 5 miles an hour in a dense fog, was guilty of grave fault. The Lancaster, a tug belonging to the libelant, was in the vicinity of the float, intending to pick her up, when the Somerville loomed up from the fog. It is said that the Lancaster should have given warning whistles. Being well inside the pier line we do not think she was under any obligation to sound answering signals to those that came to her from vessels hidden by the fog in the river. She heard the Somerville's whistle but she had no means of knowing which way the Somerville was headed and had a right to assume that she was not going to run down a vessel moored at one of the piers. A signal from a vessel at or near the piers, instead of relieving, might have complicated the situation.

It is unnecessary to discuss the narrow channel rule as the court has decided at the present session, in the case of The C. W. Morse, 161 Fed. 847, that the rule does not apply to a crowded harbor where it is necessary that vessels should navigate in every possible direction.

Decree affirmed with interest and costs.

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## NORTH & EAST RIVER STEAMBOAT CO. v. NEW YORK, N. H. & H. R. CO.

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

No. 244.

COLLISION—STEAMER AND TOWS—NEGLIGENT NAVIGATION OF TOWS.

Evidence *held* sufficient to sustain a finding that libelant's vessel was injured in a collision due to the fault of respondent's tows, which were spread out so as to occupy the greater part of the channel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 200–202.]

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

James T. Kilbreth and William Greenough, for appellant.
Carpenter, Park & Symmers, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Practically the only question raised upon this appeal is whether there was a collision. The libelant's vessel was evidently injured in some way, and its witnesses testify affirmatively that the collision occurred substantially as stated in the libel. On the other hand, the testimony of respondent's witnesses, while mostly negative in character, tends to show that no such collision took place at all.

The burden of proof is upon the libelant. Still, considering all the testimony and all the circumstances, but without reviewing them here, we reach the conclusion that the libelant has sustained this burden, and has shown that a collision took place on the east side of the channel. Inasmuch as the various tows of the respondent, instead of following each other, were spread out into a flotilla which practically occupied three-quarters of the entire channel, we have no difficulty in reaching the conclusion that such navigation was negligent, and was the cause of the collision.

Decree affirmed, with interest and costs.

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## ECONOMY LOCOMOTIVE SANDER CO. v. AMERICAN LOCOMOTIVE SANDER CO.

(Circuit Court of Appeals, Third Circuit. December 18, 1907.)*

No. 25.

PATENTS—INFRINGEMENT—LOCOMOTIVE TRACK SANDER.

The Leach patent, No. 433,686, for a locomotive track sander, discloses patentable novelty and invention; also, *held* infringed.

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

For opinion below, see 154 Fed. 79.

Hector T. Fenton, for appellant.
Francis T. Chambers, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal from a decree of the Circuit Court for the District of Delaware. In that court patent No. 433,686, issued to H. L. Leach, for a locomotive track sander, was adjudged valid, and the first and second claims thereof held to be infringed by appellant, the Economy Locomotive Sander Company. From a decree awarding an injunction this appeal was taken.

We find no error in the action of the court below. The device in

*Rehearing denied.

question was one to regulate the flow of sand from the sand box of a locomotive engine to the track rail. It consisted in locking the flow of sand from the box by placing a trap in the down-take pipe, and unlocking and delivering such locked sand by a blast nozzle located in such trap. The device was as meritorious as it was simple. It proved effective in the starting and stopping of trains, and at once went into general use. It was novel, and, in our opinion, patentable. Leach was the first to locate the blast in the body of the sand lock, and therein lies the gist of his invention. By doing so he attacked and undermined the sand lock from within, and thereby secured better control of the sand and the feed thereof in smaller and more even quantities. The respondent's sanders, while differing in form, embody the peculiar functional features of Leach's device, in that the blast nozzle is located in the body of the sand lock, and the sand is carried from such lock or trap through the discharge pipe by the propulsive force of the blast.

The decree of the court below is therefore affirmed.

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## AMERICAN LOCOMOTIVE SANDER CO. v. ECONOMY LOCOMOTIVE SANDER CO.

(Circuit Court of Appeals, Third Circuit. December 18, 1907.)*

No. 26.

PATENTS—PATENTABLE NOVELTY—LOCOMOTIVE TRACK SANDER.

The Leach patent, No. 656,553, for improvements in pneumatic track sanders for locomotives, discloses no new principle of operation, functional capacity, or inventive feature over the device of patent No. 433,686 to the same patentee, and is void for lack of novelty.

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

For opinion below, see 154 Fed. 83.

Francis T. Chambers, for appellant.

Hector T. Fenton, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below a decree was entered adjudging patent No. 656,553, issued to H. L. Leach, for a track sander for locomotives, invalid as not involving patentable novelty. From such decree the American Locomotive Sander Company, the owner of the patent, appealed to this court. We are of opinion the decree in the court below was right. The sander of this patent to Leach was of the same general type shown in his earlier patent No. 433,686. That patent we considered in a case between these same parties at No. 25 October term, 1907. 162 Fed. 683. It covered the generic device, and gave Leach protection for his inventive contribution. In the present patent he has taken the generic invention, duplicated it, and for mechanical—not functional—reasons fed the dupli-

*Rehearing denied.

cated sander from a single down-take pipe. Such aggregation or multiplication of the old generic type disclosed no new principle of operation, functional capacity, or inventive feature. Nor is invention involved in giving a downward turn to the end of the horizontal discharge pipe, and thereby making a sand lock.

Finding no error in the decree, it is affirmed.

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## VITZTHUM v. LARGE et al.

(District Court, N. D. Iowa, W. D. June 30, 1908.)

1. COURTS—UNITED STATES COURTS—STIPULATION TO SUBSTITUTE STATE PRACTICE.

   The only way of testing the sufficiency of an answer in equity as a defense to the bill is to set the cause down for hearing and final decree on bill and answer, and a federal court of equity should not permit parties to abrogate such procedure by substituting by stipulation a state practice of interposing a demurrer to the answer with leave to amend or plead further after a ruling thereon.

2. BANKRUPTCY—VOIDABLE PREFERENCE—TRANSFER OF EXEMPT PROPERTY.

   Property transferred by a bankrupt to a creditor, which was exempt under the laws of the state, cannot be recovered by his trustee.

3. SAME—EFFECT OF AGREEMENT MADE BEFORE FOUR MONTHS' PERIOD.

   The fact that a transfer of property by a bankrupt to a creditor to be applied on an antecedent debt, made within four months prior to the bankruptcy, was pursuant to an agreement made before the four months' period, will not prevent its recovery by his trustee.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 262, 263.]

In Equity. On objections to answer.

Shull, Farnsworth & Sammis, for complainant.

Milchrist & Scott, for defendants.

REED, District Judge. This suit is by complainant, as trustee in bankruptcy of the estate of Ira E. Eldregde, bankrupt, to recover of the defendant bank and John J. Large, its cashier, the value of certain real and personal property alleged to have been transferred and conveyed to them by the bankrupt as a preference within the four months immediately preceding the bankruptcy. The answer admits that the property was transferred by the bankrupt to the bank within the four months prior to the bankruptcy to apply upon a debt then owing by him to the bank; but it alleges that a part of the property so transferred was property, or the proceeds of property, exempt to the bankrupt under the statutes of Iowa, and that the whole was so transferred pursuant to an agreement made with the bankrupt more than four months prior to the bankruptcy. The complainant filed a formal demurrer to the answer upon the ground alone that the facts alleged did not constitute a defense to the allegations of the bill. Counsel have filed a written stipulation that the demurrer may be considered as an application to set the case down for hearing upon bill and answer, and that the ruling upon the demurrer shall have the same effect as upon a demurrer to an answer in a law action, and

that either party shall have the right to further plead as he may be advised after the ruling upon the demurrer. This proceeding is quite irregular, and if stipulations like these are to be observed it will enable the parties to a suit in equity to abrogate entirely the equity rules, and require the court to proceed in equity causes as in actions at law. While the equity rules should not be so strictly enforced as to do injustice to either party, a reasonable adherence to them is necessary to orderly procedure, and to enable the court to bring the parties to final issues upon the merits. Under the practice as prescribed by the state statute, which counsel desire to have observed, a demurrer admits the allegations of the pleading demurred to for the purpose of the demurrer only, and if the demurrer is overruled, and the party demurring shall answer or reply, which he may do, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer, and no pleading shall be held sufficient because of a failure to demur thereto. Code Iowa 1897, §§ 3564, 3565. Such a practice is so at variance with the equity procedure in the national courts that parties should not be permitted to introduce it into those courts to the exclusion of the procedure prescribed by the equity rules.

A demurrer to an answer in equity is unknown to the equity practice, and the only way of testing the sufficiency of an answer in equity as a defense to the bill is to set the cause down for hearing upon bill and answer. Banks v. Manchester, 128 U. S. 224–250, 9 Sup. Ct. 36, 32 L. Ed. 425; In re Sanford Fork & Tool Co., 160 U. S. 247–257, 16 Sup. Ct. 291, 40 L. Ed. 414; 1 Bates, Fed. Eq. § 216. A formal demurrer filed to an answer may, however, be treated by the court, in the absence of objections to so doing, as an application to set the cause down for hearing upon bill and answer, or as an exception to the answer for impertinence, or for failure to answer fully according as its contents may present the one or the other of these questions. If exceptions are taken for impertinence, or for failure to answer fully, and are allowed, the answer may be amended; but, if the cause is set down for hearing upon bill and answer, the allegations of the bill not denied, and of the answer, are admitted, and the cause is submitted for final decree upon the merits. In re Sanford Fork & Tool Co., 160 U. S. 247–257, 16 Sup. Ct. 291, 40 L. Ed. 414. It is obvious from the stipulation of the parties in this case that neither intended to so submit this cause, and it might work an injustice to one or the other of them to so dispose of it upon this submission.

Upon the question of the sufficiency of this answer to constitute a defense to the bill, it may be observed, however, that, if a part of the property transferred by the bankrupt to the bank was exempt, or the proceeds of exempt property, under the Iowa statute, the creditors generally would have no right thereto, nor the trustee to recover the same for their benefit. In re Eash, 157 Fed. (D. C.) 996. As to the other property, if it was transferred to the bank within the four months immediately preceding the bankruptcy, to apply upon a prior debt of the bankrupt, though in pursuance of an agreement made with him prior to said four months that he would do so, it

would seem to fall within the rule held by the Court of Appeals, this circuit, in Long v. Farmers' State Bank, 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585, and In re Great Western Mfg. Co., 152 Fed. 123–127, 81 C. C. A. 341.

In view of the manner in which the so-called demurrer has been submitted, leave is granted to each of the parties to amend his pleadings; the complainant in 15 days, and the defendants by the August rules, so that each may stand thereon if he shall be so advised.

It is ordered accordingly.

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UNITED STATES v. CORBETT et al.

(District Court, W. D. Wisconsin. June 5, 1908.)

No. 118.

1. BANKS AND BANKING — NATIONAL BANKS — OFFENSES BY OFFICERS—FALSE REPORTS.

An indictment charging officers of a national bank with making a false entry in a report made by them, "with intent to deceive an agent appointed to examine the affairs of the association, to wit, the Comptroller of the Currency of the United States" does not charge an offense under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), the comptroller not being charged with any duty to examine national banks, although he is given power to appoint agents for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 971.]

2. SAME.

A general averment in an indictment against officers of a national bank that a false entry charged to have been made by them in a report to the Comptroller of the Currency was made "with intent to injure and defraud the association" is insufficient to state an offense under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), no facts being alleged to show in what manner the bank could have been injured or defrauded thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 971.]

On Motion to Quash Portions of Each Count of the Indictment and Demurrer to the Rest of Such Counts.

Wm. G. Wheeler and H. H. Morgan, U. S. Attys., and W. C. Owen, Special Asst. U. S. Atty. Gen.

John Barnes and T. J. Connor, for defendants.

SANBORN, District Judge. This is a prosecution under section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497), for making false entries in a certain report made by defendants. Each count charges that the entry in question was false, and was made with intent to deceive an agent appointed to examine the affairs of the association, to wit, the Comptroller of the Currency of the United States. The question is whether any offense under the laws of the United States is thus charged.

That part of section 5209 creating the offense of making false entries in reports of national bank officers is as follows:

"Every president, director * * * or agent of any association, who * * * makes any false entry in any book, report or statement of the as-

sociation, with intent to injure or defraud the association, * * * or to deceive any agent appointed to examine the affairs of any such association * * * shall be deemed guilty," etc.

The first question is whether the Comptroller of the Currency is an agent appointed to examine the affairs of the bank. The only duty charged by the statute upon the Comptroller is to receive and publish the report. The law does not make it his duty to examine the bank affairs. The receiving, reading, and publication of the report is not an examination of the affairs of the bank. The national banking act (Act June 3, 1864, c. 106, 13 Stat. 99), of which section 5209 is a part, provided that the Comptroller should appoint suitable persons to make an examination of the affairs of every banking association, who should have power to make a thorough examination into all the affairs of the association, and who might examine any of the officers or agents thereof under oath; and who should make a full and detailed report to the Comptroller of the condition of the association. Section 5240, Rev. St. (U. S. Comp. St. 1901, p. 3516). It was not until January 20, 1873, that the Comptroller was given any power to examine national banks, and such power was restricted to banks in the District of Columbia. Section 332, Rev. St. (U. S. Comp. St. 1901, p. 190). It seems entirely clear that the person appointed to examine the affairs of a bank is one of the examiners so to be appointed, and who have now become a permanent force of the department, and not the Comptroller of the Currency, who is only to receive and publish the report. The statute is highly penal, and cannot be extended by construction. The conclusion reached is sustained by United States v. Bartow, 10 Fed. 874, and Clement v. United States, 149 Fed. 305, 316, 79 C. C. A. 243. While the point may have been involved in Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704, yet it is not there discussed nor decided. It is also plain in this case that it would have availed nothing in drawing the indictment to have charged that the false entries were made with intent to deceive one of the examiners appointed under section 5240, because the government could not have shown any statute or practice under which the report sent to the Comptroller is shown or delivered to any such examiner, or that the defendants had any knowledge that such report would ever be seen or come to the hands of such an examiner. In other words, the indictment was drawn upon the only theory by which it could possibly have been sustained by proof.

The indictment also charges that the entries were made with intent to injure and defraud the bank itself; but how this could be does not appear. It is barely possible that some harm might indirectly have come to the bank by the publication of the false report in the vicinity of the place where the bank was located, but this possibility is not sufficient to show the definite intent shown by the statute. The report must have been made with the purpose on the part of those signing it to injure and defraud the bank. The report could not possibly change the actual condition of the bank, and a false report showing a better condition than in fact existed might as readily be a benefit to the bank as a detriment. At all events, the detriment would be merely specu-

lative, insufficient to afford proof of a positive intent to injure and defraud the bank.

By a recent statute the case may be reviewed by writ of error on the part of the United States at this stage, and for that reason the matter should be disposed of now, before the defendants have been put in jeopardy, rather than by arrest of judgment, after a possible conviction.

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## SKILLIN v. MAGNUS et al.

(District Court, N. D. New York. September, 1907.)

1. BANKRUPTCY—SUIT BY TRUSTEE—JURISDICTION.
   A District Court as a court of bankruptcy has jurisdiction of a suit by a trustee in bankruptcy of a corporation against a number of defendants to recover unpaid subscriptions to the stock of the corporation; such suit being one which could not have been maintained by the bankrupt.
2. CORPORATIONS—CONTRACT OF SUBSCRIPTION TO STOCK.
   A provision of a contract of subscription to the preferred stock of a corporation that the subscriber shall receive as a bonus a certain amount of the common stock does not render his obligation to pay conditional, but that must be performed before the obligation to comply with such condition arises; nor does such provision, by the use of the word "bonus," render the contract illegal on its face, as in violation of a law of the state prohibiting corporations from issuing stock except for money or property.

In Equity. Suit to recover unpaid subscriptions to stock. On demurrer to bill.

Wetherhorn & Link, for demurrer.
Marshall S. Hagar, opposed.

HOUGH, District Judge. Under the ordinary rule that the bill of complaint must be taken most strongly against the demurrant, this demurrer must be overruled. So far as the jurisdiction of the court is concerned, while the decisions are hopelessly at variance, I am bound to follow the ruling of our Circuit Court of Appeals (In re Baudouine, 3 Am. Bankr. Rep. 651, 655, 101 Fed. 574, 41 C. C. A. 318), and inasmuch as this action in equity could not have been brought by the bankrupt, even though separate actions at law might have been maintained against these several defendants, to sustain the jurisdiction. So far as the merits of the contention expressed in the bill are concerned, it is, I think, true that (as contended by the complainant) this is not a conditional subscription. Whatever condition attached to the contract was subsequent, or, to put it in another way, the obligations of the parties to the agreement were successive. It was the duty of the several defendants to pay their subscriptions to the preferred stock, and not until they had done this were they entitled to receive the bonus of common stock. It follows that (apart from the corporation laws of New York) the defendants were and still are bound to pay the amounts of their several subscriptions, and that they cannot receive that for which they subscribed is no fault of the complainant herein, but presumably (in part at least) the fault of the defendants for not having made good their promise.

The situation presented by the bonus agreement, in view of the laws of the state of New York, is not free from difficulty. But I do not think I am at liberty to infer from the use of the word "bonus" that the shares of common stock which were to constitute the bonus were to be issued without consideration and in flat violation of law. It is always presumed that the law is to be complied with, and it was a possible thing to validly issue the common stock, and yet with equal validity make it possible for the subscribers to preferred shares to get one share of each kind of stock for the par price of one kind. There is nothing on the face of the bill which shows that this would not have been done, and it is not, therefore, "presumptio juris et de jure" that the agreement was utterly unlawful and therefore unenforceable.

The demurrer is overruled, with costs, with leave to answer on payment of costs within 20 days from the entry of order hereon.

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ENGLEHARD-HITCHCOCK CO. v. SOUTHERN BANKING & TRUST CO. et al.

(Circuit Court, N. D. Georgia. June 12, 1908.)

EQUITY—BILL OF REVIEW—PARTIES—FORECLOSURE DECREE.

A decree of foreclosure regularly entered under which the property has been sold and the sale confirmed cannot be set aside and the case reopened on petition of one not a party, but who claims some right or interest in the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1099.]

Smith, Hammond & Smith, for complainant.
Ethridge & Ethridge and E. L. Douglas, for defendants.

NEWMAN, District Judge. The proceeding now before the court is a supplemental bill, in the nature of a bill of review, seeking to reopen a decree entered in a foreclosure proceeding.

The facts are that a bill was filed to foreclose a mortgage on certain real estate in the city of Atlanta, a decree pro confesso was taken, a commissioner appointed to sell the property, a sale made, and the same afterwards confirmed. The property was bought by the holders of the notes secured by the mortgage or trust deed foreclosed. The complainant company in the supplemental proceeding now instituted is engaged in the business of putting in heating apparatus. It placed in the building on the land sold certain heating apparatus during the pendency of the foreclosure proceedings. According to the bill, the arrangement and contract to put in the heating appliances was made with the lessee of the property and with the holder of a deed to the equity of redemption of the property sold. It is alleged in the bill that the holder of the notes secured by the mortgage which was foreclosed knew that arrangements were being made by the complainant company to do the work and that they were making estimates and figuring on the same, but there is no allegation that he made any contract or agreement about it. The amount due the complainant, according to the allegations of this supplemental bill, is $924. The

case is now heard on the question of jurisdiction and on the right of the court to entertain this supplemental proceeding and reopen and change the decree in the original case.

I am inclined to the opinion that this case is original in character, and that it is necessary that the amount required to give the Circuit Court jurisdiction should be involved (Smith v. Woolfolk, 115 U. S. 143, 5 Sup. Ct. 1177, 29 L. Ed. 359; Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986), but, if it be assumed that the case comes within the rule of Krippendorf v. Hyde, 110 U. S. 281, 4 Sup. Ct. 27, 28 L. Ed. 145, and kindred cases, even then I do not think such a case is made as will justify the court in entertaining the bill. The complainant might probably have intervened in the original suit and had its rights determined before the decree foreclosing the mortgage was entered, but the case proceeded regularly between the parties and a decree pro confesso was taken, the property sold, and the sale confirmed. In this situation I am satisfied that this bill cannot be maintained. The complainant in this supplemental bill being no party to the original suit cannot be affected thereby, so far as I can see. Any facts complainant might establish in this proceeding, which would justify relief therein, would be just as effectual to enable it to obtain relief in a proper proceeding at law, or under the statutes of the state. If the complainant's rights, applying the facts as they may be determined to the law applicable, are superior to those of the purchaser, the foreclosure proceedings to which it was no party and of which it had no knowledge ought not to stand in its way.

Be this as it may, I do not think, where a decree is regularly and properly entered between the parties, and no fraud is alleged, that the decree can be reopened and set aside for any such reason as is suggested here. If this practice should be permitted, there would be no end to litigation. It would be prolonged indefinitely.

Any rights that the complainant in the supplemental bill may have growing out of the claim that Harry A. Etheridge bid $500 in excess of the amount actually received for the property at the sale by the commissioner can be asserted in the proper way and its merits passed upon, but not in this proceeding.

The supplemental bill must be dismissed, but without prejudice to complainant's right to institute such other proceedings in a court of competent jurisdiction as it may be advised.

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## In re C. H. BENNETT SHOE CO.

(District Court, D. Connecticut. June 23, 1908.)

No. 1,402.

BANKRUPTCY—PROVABLE DEBTS—MONEY BORROWED TO EFFECT COMPOSITION.

A note given by a bankrupt corporation to a stockholder for money borrowed with which to effect a composition, and which was so used, is not without consideration and may be proved as a debt in a second bankruptcy proceeding.

In Bankruptcy. On certificate from referee.

See 140 Fed. 687.

The following is the referee's certificate upon petition for review:

To the honorable James P. Platt, District Judge: I, John W. Banks, the referee in charge of this proceeding, do hereby certify: That in the course of this proceeding an order was made and entered on February 22, 1908, allowing the claim of the estate of Mary L. Bennett against this estate in the sum of $6,450. That on the 4th day of March, 1908, certain creditors by Robert H. Gould, their attorney, filed a petition for review, which was granted. That the facts upon which order was based are as follows: Prior to the present bankruptcy proceeding, the C. H. Bennett Shoe Company had been adjudged a bankrupt July 6, 1903, being case No. 1,096 in bankruptcy in this court. In that proceeding it made its creditors a composition offer of 26 per cent., which was accepted. This composition proceeding made necessary the deposit in court by the bankrupt of upwards of $6,000. Mary L. Bennett was one of the stockholders and directors of the bankrupt corporation. She owned real estate in the state of Rhode Island and had $1,221.83 on deposit in the Bridgeport Savings Bank. She mortgaged this real estate for $3,500, drew $1,221.83 out of the savings bank, and, adding enough thereto to make the total sum $5,000, loaned said sum of $5,000 to the bankrupt corporation to enable it to effect the composition with its creditors. This loan was made some time in August, 1903; the composition offer being accepted by the creditors August 17, 1903. On November 10, 1903, pursuant to a vote of the board of directors, the C. H. Bennett Shoe Company gave Mrs. Bennett its note for $5,000 as evidence of this indebtedness. In September, 1904, the C. H. Bennett Shoe Company ordered shoes from Greene, Anthony & Co., but was unable to obtain them on credit. In order to enable the company to obtain these shoes, Mrs. Bennett gave her check for $400, payable to C. H. Bennett, her husband and the president of the corporation, and by him indorsed to Greene, Anthony & Co., who thereupon shipped merchandise to that amount to the C. H. Bennett Shoe Company. No objection to the allowance of this claim was made by the trustee, but certain creditors filed specifications of objections to its allowance on the ground that no consideration for said note of $5,000 or said sum of $400 moved to said bankrupt corporation. The referee overruled said objections and allowed the claim as filed. The question presented on this review is the correctness of said ruling. Said question is certified to the judge for his opinion thereon.

Robert H. Gould, for objecting creditors.

Beers & Foster, for trustee.

PLATT, District Judge. The creditors claim that no consideration moved to said corporation in the situation set forth by the finding of facts. The corporation could borrow money to enable it to settle an offer of composition made to and accepted by its creditors. Having borrowed the money, it could give to the person who loaned the money its note with interest as an evidence of the indebtedness, and the money borrowed would form a consideration for the making of the note. Whether the money was a gift or a loan was a question of fact to be decided by the referee. He heard the evidence and ruled adversely to the objecting creditors. The testimony, so far as I have been able to assimilate it, seems to sustain the referee's finding. It is too much to believe that Mrs. Bennett would have put herself to such inconvenience and risk with the purpose in her mind to donate so large a sum of money to the bankrupt corporation. Wifely devotion cannot be counted upon to rush to such extremes.

The decision is affirmed.

## In re ALLEMAN.

(District Court, M. D. Pennsylvania. July 2, 1908.)

No. 916.

BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY.

The omission by a bankrupt from his schedules, under advice of counsel, of property claimed by another and the ownership of which was at least doubtful, cannot be held to be such a fraudulent concealment as to bar his right to a discharge under Bankr. Act July 1, 1898, § 14b(4), c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 735.]

In Bankruptcy. On exceptions to report of J. E. Vandersloot, special master, on objections to discharge.

E. A. Weaver, for the exceptions.

W. C. Sheely, opposed.

ARCHBALD, District Judge. There is but one exception which comes within the statute, that which charges the fraudulent concealment of his property by the bankrupt, and that is the only one therefore which can be considered. Nor is it sustained by the evidence. The alleged ownership by the bankrupt of the mail boxes at the Littlestown Post Office, upon which the exception is founded, is denied, and, to say the least, is doubtful, these boxes being claimed by his wife as purchaser of the property at sheriff's sale, to say nothing of the special arrangement outside of that by which she was to be the owner. Notice was given at the sale that these boxes would belong to the purchaser as a part of the realty to which they were affixed, and, while this may not be conclusive of the question, it certainly gives colorable ground for that contention. It is the fraudulent concealment of property that bars a discharge, and it is useless to charge that there was anything of that kind under the conditions which we have here. The property in question was omitted from the schedules by the bankrupt after consultation with and under the advice of counsel, based upon what has been referred to, and that is the end of any claim of fraud.

The exceptions are dismissed, and the report of the master is confirmed.

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## ST. LOUIS, I. M. & S. RY. CO. v. HAMPTON et al.

(Circuit Court, E. D. Arkansas, W. D. June 26, 1908.)

No. 1,624.

1. COMMERCE—STATE STATUTE REGULATING RAILROADS—CONSTITUTIONALITY—INTERFERENCE WITH INTERSTATE COMMERCE.

Acts Ark. 1907, p. 453, to regulate freight transportation by railroad companies doing business in the state of Arkansas, is unconstitutional, in that its provisions were clearly intended to apply to interstate shipments as well as intrastate shipments, and it is therefore an interference with interstate commerce.

2. CARRIERS—REGULATION—UNREASONABLE REQUIREMENTS.
It is also unconstitutional because its requirement upon the companies to furnish cars is absolute and subject to no exception whatever, even where the furnishing of such cars is impossible for reasons beyond the company's control.

In Equity.

Lovick Miles and Mehaffy & Williams, for plaintiff.
Morris M. Cohn, for defendants.

TRIEBER, District Judge (orally). In the argument counsel agreed that the only question necessary for a final determination of this cause is the constitutionality of the act of the General Assembly of the state of Arkansas No. 193, approved April 19, 1907, entitled "An act to regulate freight transportation by railroad companies doing business in the state of Arkansas" (Acts 1907, p. 453), and, if unconstitutional, that the injunction may be made perpetual.

The court holds that the act is unconstitutional upon two grounds:

1. By the last sentence of section 17, it is clearly shown that the intention of the Legislature was to apply its provisions to interstate shipments as fully as to intrastate shipments, and there is nothing in the act to indicate that the act would have been passed unless it could thus be made applicable. This is clearly an interference with interstate commerce, and, as this provision cannot be disregarded without defeating one of the main objects of the act, it is unconstitutional.

2. The requirement to furnish the cars is absolute and makes no exceptions for cases of a sudden congestion of traffic, actual inability to furnish cars by reason of their temporary detention in other states or in other places within the same state, none for interference of traffic occasioned by wrecks, accidents, or strikes. Houston, etc., R. R. v. Mayes, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, is conclusive.

For these reasons the temporary injunction heretofore granted will be made perpetual as to proceedings by defendants under the act of April 19, 1907, but the injunction is not to apply to any acts by defendants under any other statutes of the state.

Let there be a decree accordingly.

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## Ex parte STEELE.
## Ex parte BIRCH.

(District Court, N. D. Alabama, S. D. August 5, 1908.)

1. BANKRUPTCY—JURISDICTION—ADJUDICATION.
Ex parte Steele (D. C.) 156 Fed. 854, and subsequent case under same title, *held* not to be the law of the district.

2. SAME—"JUDGE."
"The judge," who must make the adjudication, reference, and dismissal of petitions, under the bankruptcy statute, by express terms of Act July 1, 1898, c. 541, § 1, subd. 16, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419), is defined to be "a judge" of the bankruptcy court. Where there are two judges, either may hold a court of bankruptcy and perform all the duties

thereof in the same place or at a different place within the district, while the other judge is also holding a court of bankruptcy.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3823-3826; vol. 8, p. 7695.]

3. JUDGES—CREATION OF OFFICE—ADDITIONAL DISTRICT JUDGE.

Act Feb. 25, 1907, c. 1198, 34 Stat. 931 (U. S. Comp. St. Supp. 1907, p. 187), providing for "a United States district judge for the Northern district of Alabama," does not repeal Act Aug. 2, 1886, c. 842, 24 Stat. 213 (U. S. Comp. St. 1901, p. 449), and prior laws which expressly confirm the jurisdiction of the then "present district judge of the several districts," and his successors, in the Northern and Middle districts. Both the words of the statute, and the surrounding conditions, if we could look to them, show that the legislation was merely "auxiliary" and intended to add another judge in a district, the business of which was greater than one judge alone could dispatch.

4. SAME—POWERS OF JUDGE.

Where there are two district judges of the same district, they have, unless the statutes relating to them otherwise provide, equal rights and authority, and in some matters joint rights and authority, and each judge is legally and morally bound to respect the rights of the other. The absence of one of them from the district, or the fact that one alone holds the court, cannot justify that judge either in law or morals in overriding the rights or authority of a colleague, or give legality to his appointment or removal of court officials, without the consent of the absent judge.

5. SAME—POWERS OF FEDERAL JUDGES.

Under Act Aug. 2, 1886, c. 842, 24 Stat. 213 (U. S. Comp. St. 1901, p. 449), the judge of the Northern and Middle districts, being equally the judge of both districts, can when in either exercise some judicial functions, regarding matters in the other district, without being personally present therein. The validity and propriety of such orders depend upon the matters to which they relate.

6. BANKRUPTCY—COURTS OF BANKRUPTCY—ORDERS OF JUDGE—APPOINTMENT OF REFEREE.

The court of bankruptcy is in a strict sense a court of equity, and a judge who is a judge of two districts may make an order to be entered in the court of either, as to a mere administrative matter—such as the appointment of a referee—although not personally present in the court, if he be at the time of the making of the order in either district.

7. JUDGES—APPOINTMENT OF ADDITIONAL JUDGE—POWER.

The commission of "a judge of the Northern district" having expired by adjournment of the Senate, without action upon his nomination, on May 30, 1908, "the judge of the Northern and Middle districts" again became the sole judge of the Northern district, and so continued until another appointment and qualification occurred. An order made and entered upon the minutes by direction of the judge of the Northern and Middle districts, appointing a referee in that interval, is a legal and valid act of a sole judge of the district, and the reappointment of "a judge of the Northern district" and his qualification thereafter cannot destroy the validity of the appointment, or authorize him, without the consent of the other judge, to vacate or annul it.

8. APPEAL AND ERROR—MOOT CASE.

When there is a real controversy, whether there be two judges of a district, and if so, as to their respective power in removing or appointing court officials, a case actually made concerning it could not be treated as a "moot case" in an appellate court, because the judges agreed in advance as to the steps actually taken to present the issue.

9. COURTS—CONFLICTING AUTHORITY—DUTY OF JUDGES.

It is particularly incumbent upon judicial officers to set an example of order, and when differences arise between them as to their powers, in matters in which the public have an interest, it is their duty to take such friendly steps in the exercise of their respective claims as will present the

issue in such shape that a decision can be obtained in a higher court with the least possible delay and friction. Such amicable actions, so far from being an object of censure, are always encouraged and approved by the courts, and the refusal to join in such amicable steps is not excused on the plea that such an agreement would offend the policy of the law.

10. SAME—DUTIES OF JUDGES.

In November, 1907, there were two judges of the Northern district, and S. was appointed a referee in bankruptcy by one of them without the consent of the other, who removed him, whereupon the judge appointing him revoked the order of removal. Afterwards, in 1908, the other judge, at a time when he was the sole judge, without interfering with S., appointed B. a referee, and made an order requiring the bankruptcy business to be divided equally between them, except when one of the judges for special reasons in a case ordered otherwise. Two days afterwards he repeated the order, without the consent of the other judge if he had then qualified. Thereupon his colleague, having qualified under a new appointment, revoked both these orders. *Held*, that the judge whose authority was thus ignored by his colleague, with due regard to the judicial station, could not retort by further orders revoking those of his colleague as fast as made, but pursues the better course in recommending to his appointee to take steps to revise the last order concerning him in the Court of Appeals, which has authority to do so under Bankr. Act July 1, 1898, c. 541, § 24, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431).

(Syllabus by the Court.)

11. WORDS AND PHRASES—"MOOT CASE."

A "moot case" is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4577.]

See 161 Fed. 886.

Prior to August 2, 1886, there was one district judge appointed for the Northern, Middle, and Southern districts of Alabama, under section 552 of the Revised Statutes (U. S. Comp. St. 1901, p. 447). That judge was the Honorable John Bruce. He was appointed and confirmed as judge of "each of the districts" in the state on the 25th of February, 1875, and so continued until the Act of August 2, 1886 (24 Stat. 213, c. 842 [U. S. Comp. St. 1901, p. 449]), when a judge (Hon. H. T. Toulmin) was appointed for the Southern district under the Act of August 2, 1886, the second section of which provided "that the jurisdiction of the present district judge for the several districts of Alabama and his successors shall hereafter be confined to the Northern and Middle districts of said state." Judge Bruce departed this life in October, 1901. Thomas G. Jones, having been duly appointed and confirmed, was commissioned and qualified as "judge of the Northern and Middle districts" on December 17, 1901. On February 25, 1907, an act was approved providing "for a United States judge for the Northern judicial district of Alabama," which enacted "that the President of the United States by and with the advice and consent of the Senate shall appoint a district judge for the Northern judicial district of Alabama, who shall possess and exercise all the powers conferred by existing law upon judges of the District Courts of the United States, and who shall possess the same powers and perform the same duties, within the said Northern judicial district of Alabama, as are now possessed by and performed by district judges of the United States in any of the judicial districts established by law, and he shall receive the same compensation now or hereafter prescribed by law in respect to other district judges of the United States; and provided that after the appointment the judge appointed under this act shall reside at Birmingham in said district." Act Feb. 25, 1907, c. 1198, 34 Stat. 931 (U. S. Comp. St. Supp. 1907, p. 187).

On April 7, 1907, Oscar R. Hundley was nominated by the President as judge of the Northern district and commissioned as such in the recess of the

Senate. He qualified a few days thereafter, and entered upon the discharge of his duties as judge of the Northern district. Judge Hundley, as well as the Executive Department, the circuit judges, and the bar and litigants recognized Thomas G. Jones as a judge of the Northern district under his commission as "judge of the Northern and Middle districts," and he acted as such whenever necessary. Judge Hundley refused to enter into any arrangement with him as to the appointment of officers, or to definitely commit himself in any way as to his intentions, in a correspondence lasting some weeks, or even as to a friendly test case as to the respective powers of the judges. The substance of the correspondence between the two judges on this point is set out in the opinion. The terms of the two referees then at Birmingham expired, respectively, on the 10th and 13th days of November, 1907, and they went out of office then; Judge Jones disclaiming authority to appoint without the consent of Judge Hundley, and the latter having rejected a proposition either to retain the referees as they were, or to appoint a third referee whom Judge Hundley could name, or, if that were not agreeable, for each of the judges to name one of the referees. On November 1, 1907, while holding court at Huntsville, Judge Hundley appointed Nenian L. Steele a referee in bankruptcy in Birmingham without the knowledge or consent of Judge Jones, who, on the 5th of November, 1907, in open court at Birmingham, revoked the order appointing Steele without Judge Hundley's consent, but was compelled at that time to return to duty in the Middle district. Judge Hundley set aside the order revoking Steele's appointment, and in an opinion reported in Ex parte Steele (D. C.) 156 Fed. 654, justified the refusal to make up a test case on the ground that it would be a moot case. Thereafter Steele continued as sole referee in bankruptcy at Birmingham.

Judge Jones, pending a bill introduced in Congress to legislate him out of the Northern district, made no further order as to Steele. Congress adjourned on the 30th of May, 1908, without ever having acted on the bill, and the Senate took no action on Judge Hundley's nomination. Thereupon Judge Jones on that day, being then the sole judge of both districts, as soon as Congress adjourned, and while in the Middle district, made an order, and sent it to the clerk at Birmingham to be entered there, appointing Alex. C. Birch a referee in bankruptcy at Birmingham, without disturbing Steele, but requiring the clerk, unless otherwise directed by a judge of the court, to refer the even-numbered cases in bankruptcy to one of the referees and the odd-numbered cases to the other. On June 1, 1908, Judge Jones in open court at Birmingham, repeated the same appointment and order without Judge Hundley's consent, if he had then qualified, under a new recess appointment. Judge Hundley set aside that order as improvidently made, and absolutely void, holding, in an opinion afterwards reported (In re Steele [D. C.] 161 Fed. 886), among other things, that the act of Congress creating courts of bankruptcy provided for one court only in the territory prescribed, and that the judge of the Northern and Middle districts had no authority to hold a court to appoint a referee in bankruptcy, when Judge Hundley was holding court in the district. Thereupon Judge Jones advised Referee Birch to seek a review of the order under section 24 of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]), as he (Judge Jones) could not always remain in the Northern district, and Judge Hundley avowed a purpose to revoke any orders made by Judge Jones concerning a referee in bankruptcy. Pending decision by the Court of Appeals on Referee Birch's petition, Judge Jones refused to make any further orders in the matter, esteeming that mode of settling a legal difference was not admissible with due regard for the public interests and the proprieties of the judicial station.

JONES, District Judge (after stating the facts as above). The publication of my colleague's opinions in Ex parte Steele, in the official reports and in the newspapers, and the conflicting orders growing out of a mere administrative matter, as to which we have joint authority, in the appointment of a referee at Birmingham, justify the filing at this time of an extended opinion as to the law of the case. Some ex-

traneous matters emphasized more than once in an invidious way, in both those opinions, render it highly proper also to put on record a plain and full statement of the facts regarding a controversy, which, in the unseemly form it has now assumed, the writer has exhausted all honorable means to avoid.

1. Of course, if my colleague be the sole district judge of the Northern district there can be no room for disputation here. If, however, there be two judges, they have equal and in some matters joint rights and authority, and each judge is legally and morally bound to respect the rights of the other. My colleague declares "any expression of opinion here upon that question would be mere dictum." No known definition of "dictum" supports that view. Whether there be one or two judges of the Northern district lies at the very threshold of the case. No judgment can be rendered as to the legality of the appointments and removals here at issue, without first ascertaining what judges had a right to participate in the making of those orders, and any judgment as to their validity or invalidity inevitably involves a conclusion and judgment on that point. Both opinions in Ex parte Steele proceed on the hypothesis that there are two district judges of the Northern district. The first opinion asserts that the "judge of the Northern and Middle districts" cannot, without the consent "of a judge for the Northern district," remove Mr. Steele, who was appointed without the consent of the judge of the Northern and Middle districts. The last opinion asserts that "a judge of the Northern district" may rightfully remove Mr. Birch, without the consent of the "judge of the Northern and Middle districts," who made the appointment without the consent of "a judge for the Northern district." The one opinion is cited to sustain the other.

My colleague's claim of right to remove Mr. Birch is largely, if not wholly, rested, at last, on the strange theory, to quote from the last opinion, conceding that there are two judges of the Northern district, yet "while he (Hon. O. R. Hundley) is in the district, and the other without the district, my decrees and orders are supreme," until some higher court reverses them. The solemn declaration is made that a judge, whom the law makes a judge equally for the Northern and Middle districts, when he remains personally in the Northern district, may have some rights which, perhaps, ought to be respected; but the very moment that judge goes into the Middle district, where the law also requires him to go, and therefore is not physically present in the Northern district, all the rights and relations of that judge to that district are forfeited until he again physically returns within its boundaries, and that the other judge, in the mean time, ipso facto, is invested in the Northern district with "supreme" power to loose and bind and confiscate the power of the absent judge. This is strange doctrine to come from the bench. All laws, human and divine, forbid judges, as well as other men, to seize upon that which is another's because he is not present to protect it, though the captor is where he can conveniently take and has the physical power to make the seizure. Even if a judge had that power, it would not absolve him from the high duty of settling a legal dispute between judges in an orderly way, or excuse the rejection of an offer, by

means of a friendly test case, to avoid the unseemliness of the situation now presented.

The power of appointment in this case is a joint power, relating to an administrative matter, which can only be exercised lawfully with the consent of the majority of those in whom the power is reposed. The physical power of a single judge while holding court alone to enter orders at will does not carry with it the legal right to usurp the powers of the absent judge. On direct attack, at least, the court's orders as to the appointment or removal of an officer are illegal, when it is shown that only one of the two judges participated in the act, contrary to the will of the other judge, who was willing and able to act. No one ever claimed that a district judge, although he frequently holds the Circuit Court alone, and when presiding therein may exercise all the powers thereof, could lawfully appoint or remove the circuit clerk against the wishes of the circuit judges. So far as the writer can learn, there is no case in the judicial annals of the United States where a district judge has attempted such a thing. The rightfulness or legality of such an appointment or removal made by a district judge when sitting alone, against the wishes of the circuit judges, could not be excused or justified on any legal theory that the physical power of the district judge at such time to usurp the legal prerogative which the law vests in the other judges, carried with it the legal power to do so. "Right, not might," determines the validity of acts, at least in courts of justice. The same principle governs the like case here. The statutes prescribe neither mode nor stated time for the appointment of court officials. When a court is held to make an appointment, all the judges having a right to participate must have notice and opportunity to attend and vote. Otherwise, the appointment will be invalid, and, when made by a court presided over by one only of two judges who disregards the wishes of the other, the appointment is a nullity, since there was no quorum to act upon the matter. Smyth v. Darley, 2 House of Lords Cases, 789; Doernbecher v. Columbia City Lumber Co., 21 Or. 573, 28 Pac. 899, 28 Am. St. Rep. 766; Com. v. Cullen, 13 Pa. 133, 53 Am. Dec. 450.

2. No justification can be found, as my learned colleague supposes, for his mode of resisting Mr. Birch's appointment by my method in resisting Mr. Steele's appointment. My action throughout was defensive, not offensive, against the vaunting of "supreme" authority, exercised in such form that no other mode of resistance was open. It did not imply any claim of sole authority, but did assert equal authority with a colleague, and the right to remove an officer without his consent, if he could appoint him without mine. No opinion was filed in the case or report of it then made for the official reports, the writer contenting himself with a statement from the bench, since it was not thought a difference between judges over a court officer deserved or should have any permanent place in judicial literature. The remarks then made from the bench deprecated the presentation of the issue by a collateral attack by one of the judges on the authority of the other, and expressed regret that a friendly test case had not been agreed on, which would have obviat-

ed the necessity for one judge revoking or continuing to revoke the orders of the other. It was an anomalous situation with which the writer had to deal. If he allowed the orders regarding Steele's appointment to go unchallenged, there was no way in which the validity of that appointment could be raised. Steele, in that event, would appear to be properly appointed. No appeal from one of his decisions would raise the authority of one judge to appoint without the consent of the other. A quo warranto would not lie to test the right, not only because the minutes then would show a proper appointment, but also because the statutes provide an exclusive mode for appointing and removing referees. The judge whose authority was invaded was not the aggrieved party, in the legal sense, and could not become one in any appellate proceeding to revise an ex parte order made by a brother judge. Steele, so long as the order appointing him was not challenged by the writer, would take no steps to revise the order. There was no way the writer could obtain a decision upon the law, unless he appointed some one in Steele's place, who could revise an order by my colleague revoking his appointment. While the writer knew he had as much right to disregard his colleague in making an appointment as that colleague had to disregard the writer, he had disclaimed such authority on the part of either. It was under these circumstances only that the writer declared the revocation of Steele's appointment was the "proper way" to deal with the matter, when a friendly test case had been refused.

A friendly test case could have been easily arranged at that time, with any co-operation on the part of my colleague, which did not necessitate any revoking order by him. A fine could have been imposed upon Steele for meddling with the bankrupt business, or for disobedience to an order to refrain from acting as referee, or the clerk might have been fined for refusing to obey the order of one or the other of the judges as to the reference of cases in bankruptcy, and on writ of error from the Court of Appeals the matter would have gone there and been settled. Other ways were open if a friendly test case had not been rejected by my colleague; but these steps, in the absence of such understanding, the writer did not feel were open to him, since it would have been scandalous, save as a last alternative in resistance to usurpation, for one judge to impose a fine upon an officer or person for doing that which another judge of the court asserted he had a perfect right to do. The situation when Mr. Steele was removed was not at all parallel to that when Mr. Birch was appointed by me. In the one case, my colleague was asserting "supreme" power; in the other, the writer was only insisting upon equal authority. In the one instance, a friendly test case was refused; in the other, it was offered.

Moreover, if the precedent set by me in removing Steele was wrong and justified a revocation of my order, my colleague's own action in that case was a precedent which forbade his removal of Birch, and would, on his own reasoning, be illegal, and justify an order revoking his order concerning him. Ex parte Steele cannot be the "law of the district" for my colleague's appointee, without being

the "law of the district" for mine, when both were appointed and removed under the same identical circumstances, save as to the appointment under the order of May 30th, made at a time when my colleague was not a judge of the district.

3. The learned judge's excuse for his refusal to join in the "making up of a test case" is that it would prevent the very adjudication which was desired. He says:

"Any such case made up by agreement between the judges would, indeed, be but a moot question, which any court before whom the matter was pending would promptly dismiss as such. This proposition is so well understood by the bench and bar that citation of authority to sustain it is unnecessary."

—and the writer adds impossible. Ex parte Steele stands alone on that point. No case in the books supports it. It is universally understood by the bench and bar, on the contrary, that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. The only way a disputed right can ever be made the subject of judicial investigation is, first, to exercise it, and then, having acted, to present a justiciable controversy in such shape that the disputed right can be passed upon in a judicial tribunal, which can pronounce the right and has the power to enforce it. When there is an actual, bona fide contest as to a legal right, an agreement to put the case, when made, by actual exercise of the right and resistance to it, in such shape that the right can be readily determined by the court, especially when the dispute concerns a matter of public moment, which should be speedily settled, has never been condemned by the courts. It is a common, everyday practice in every state of the Union. The noted Legal Tender Cases were made up in that way. A prominent instance of that kind in Alabama is Ex parte Dement, 53 Ala. 397, 25 Am. Rep. 611. Only the other day the state authorities agreed with certain taxpayers in advance as to the mode of presenting a test case to raise the constitutionality of the franchise tax. Certainly there is a real controversy here whether there be one or two judges of the Northern district, and, if there be two, as to the mode in which their power can be exercised, after each of the judges claiming the power has exercised it, and the other judge has disputed the right and resisted the exercise of the power. Can it be possible that this case would cease to be a real controversy which the court would not consider, if it were shown that the persons in whom the power is vested, and disputing about it, knowing there was an irrepressible contest ahead, had agreed in advance what acts they would do in the exercise of the disputed right in order to make a case, and thereby obtain a speedy judgment of the court upon it? When judges differ among themselves, as to the measure of their respective duties and rights, the law does not compel them to raise the black flag as to the mode in which the issue shall be settled, by forbidding all friendly concert to determine what steps each shall take, which, when taken, will present an actual case for review, in such form

as will involve the least friction and injury to the court and the public interests. On the contrary, such agreements promote good morals and sound public policy and are always favored.

The Supreme Court of the United States, in Lord v. Veazie, 8 How. 255, 12 L. Ed. 1067, discusses the question. There, it dismissed a case, "not that the proceedings were amicable, but there was no real conflict of interest between them, and the plaintiff and defendant had the same interest." Chief Justice Taney, speaking for the court, said:

"But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right, and in a case of that kind it sometimes happens that, for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner; that is to say, that they will not embarrass each other with unnecessary form or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. But there must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court, and such amicable actions, so far from being objects of censure, are always approved and encouraged."

The courts all hold, in varying language, the doctrine of the Supreme Court of Rhode Island, that:

"A 'moot case' is one which seeks to determine an abstract question which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination, simply because his motive in the assertion of such rights is to secure such determination. It is a matter of common practice. Most of the cases of trespass to try titles are of this sort." Adams v. Union Railroad, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 275–277.

4. The paramount question is, however, whether there are two district judges or only one for the Northern district. To properly answer this question requires an examination of prior laws constituting courts and judges of the Northern district; the terms of the later law providing for the appointment of "a judge for the Northern district," and, if the language of the statute leaves the intent in doubt, to consider the evil which called forth the later statute, and what construction best remedies the evil it was designed to cure.

Statutes Relating to the Judges in the Northern District.

Prior to the act of August 2, 1886, there was "one district judge" in Alabama who was "district judge in each of the districts included in the state," and required to reside in "some one of said districts." Rev. St. § 552 (U. S. Comp. St. 1901, p. 447). Then, as now, there were three judicial districts, the Northern, Middle and Southern. Act Aug. 2, 1886, c. 842, 24 Stat. 213 (U. S. Comp. St. 1901, p. 449), provided for the "appointment of a district judge for the Southern judicial district of Alabama," and that "the jurisdiction of the present district judge for the several districts of Alabama and his successors shall hereafter be confined to the Northern and Middle districts of said state." The district judge of the several districts of Alabama at that time was the Honorable John Bruce. Upon his death in 1901, the writer was appointed, confirmed, commissioned, and qualified, as

"judge of the Northern and Middle districts of Alabama," and thus became the "successor" of Judge Bruce "in each of the districts included in the state," from which the act of August 2, 1886, did not exclude him. That act excepted the Southern district only from the jurisdiction of the "successor" of Judge Bruce, and expressly continued former laws which made him judge in each of the remaining districts, "the Northern and Middle." Clearly, therefore, the writer is still judge of the Northern district, unless his jurisdiction has been withdrawn by subsequent legislation.

The situation which gave rise to the act providing for "a district judge for the Northern district of Alabama" is well known. At that time there was only one judge for both districts. He was required to hold court twice a year in five places in the two districts, or ten terms a year. A special act required six months open court at one of these places (Birmingham) in the Northern district. The volume of business had constantly increased, keeping pace with the industrial development of the country. Foreign corporations owned and operated trunk lines of railway in every part of the district, and other foreign corporations conducted therein industrial and manufacturing establishments on a very large scale. When sued in the state courts they transferred the cases to the federal court. Such suits constituted the great bulk of the litigated civil business. The bankruptcy law also created much business, and the trial of criminal cases consumed a large part of all the time possible to devote to the several terms. For some years the condition of the dockets in the Northern district had necessitated the calling in of outside judges. The business of the two districts could not be equitably divided between two judges, by giving each a separate district, since there was more business in one district than in the other, and more work than one judge alone could do in the Northern district. The judge of the Northern and Middle districts had some spare time from his duties in the Middle district. The State Bar Association and a great majority of the local bars finally recommended, as the best solution, the appointment of a district judge who should be a judge for both the Northern and Middle districts. A small minority of the local bars preferred the addition of a district judge in the Northern district, to work there in conjunction with the judge already there, while two or three local bars favored a sole judge for the Northern district. The writer favored the plan recommended by the State Bar Association and the bulk of the local bars. He deemed it unjust to advocate any arrangement which would give the new judge an undue share of the burden, though such an arrangement would have been preferable from a mere personal standpoint, since it would save considerable personal expense, and not necessitate frequent absences from home. The passage of a bill was long delayed for reasons not now material.

The Act of February 25, 1907.

Finally, a bill was approved on the 25th of February, 1907, providing for "a United States judge for the Northern district of Alabama." That act, following the title, provides simply for "a United States judge for the Northern district of Alabama," who shall "possess and

exercise all the powers conferred by existing laws upon judges of the District Courts of the United States, and shall possess the same powers and perform the same duties, within said Northern district of Alabama, as are now possessed and performed by district judges of the United States in any of the judicial districts established by law," and requires the new judge, after his appointment, to reside at Birmingham. Act Feb. 25, 1907, c. 1198, 34 Stat. 931 [U. S. Comp. St. Supp. 1907, p. 187]).

Upon examination of the statute, seeing that it did not add another judge for both districts, the writer earnestly endeavored before the bill passed the Senate, which was the earliest opportunity, to have it amended so as to relieve the judge of the Northern and Middle districts from any further duty in the Northern district. Senator Pettus, the Alabama member of the Senate Judiciary Committee, declined so to amend the bill, and the efforts of some of our delegation in the House to induce him to change his mind, were without avail.

If the act of 1907 took away the writer's jurisdiction in the Northern district, it was his duty to stay out of the district, unless specially designated to go there. If not, it was his duty to give such time as he could in connection with his duties in the Middle district, to the Northern district. The first practical phase of the question was presented as to some submitted cases undecided at the time of the passage of the act. The attorneys in one of them submitted that doubt might possibly arise as to the validity of a decision by me after the appointment of the new judge. The judge of the Northern and Middle districts, accordingly, wrote the Attorney General under the date of February 24, 1907, suggesting that the appointment be delayed for 10 days, in which time the cases could be disposed of. In reply the Attorney General wrote:

"This view has not been previously suggested to the Department, and at first sight the language of the bill read in connection with the act of August 2, 1886 (24 Stat. 213), would hardly seem consistent with such an interpretation. The question has not been submitted to the Attorney General officially, so there is nothing authoritative in the foregoing intimation as to the Department's views, but the suggestion mentioned does not seem, upon such consideration as it has been possible to give it, sufficiently well founded to justify any action by the Department based upon the assumption of its proving accurate."

At the same time the writer sought advice from a number of eminent lawyers in different parts of the state and from brother judges. With the exception of one of the lawyers, who hesitatingly reached the opposite conclusion, they all unhesitatingly advised that the act simply put another judge in the Northern district, without in any way otherwise interfering with the power and duty of the judge of the Northern and Middle districts, in the Northern district. It was understood, of course, that this advice was persuasive and not in any sense authoritative, and it is mentioned only as corroborative of the correctness of the results to which my own independent investigation led, which was that there was no doubt of the soundness of that advice.

Repeals by implication are not favored. If by any reasonable construction prior and subsequent statutes can each have some fair field of operation, that construction must prevail over any which denies all

effect to former laws on the same subject. Justice Story, in Wood v. United States, 16 Pet. 362, 10 L. Ed. 987, states the universally accepted rule. In that case he uses the following language regarding the prior legislation there, which is strictly applicable here to the act of August 2, 1886, and prior laws:

"That it has not been, expressly or by direct terms, repealed, is admitted; and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative, or cumulative or auxiliary; but there must be a positive repugnancy between the provisions of the new law, and those of the old, and even then the old law is repealed by implication, only pro tanto, to the extent of the repugnancy."

This doctrine is quite as broadly stated by the Supreme Court in the subsequent cases of Frost v. Wenie, 157 U. S. 58, 15 Sup. Ct. 532, 39 L. Ed. 614, and Ex parte Crow Dog, 109 U. S. 557, 3 Sup. Ct. 396, 27 L. Ed. 1030. The only possible way in which effect pro tanto can be given to the act of August 2, 1886, and prior laws on the subject, and the act to provide for the appointment of "a judge for the Northern district," is to hold that the later act is "merely cumulative, or auxiliary," and does not repeal the former laws, but is intended merely to add another judge to work in the Northern district with the judge already there. The statute contains no express words of repeal of former laws. There is nothing on which to work out a total repeal by implication. The statute makes not the slightest reference to the district judge already in the district, or as to any change in the nature of his powers and duties as specially prescribed in that district, by the act of August 2, 1886, and prior laws. Passing strange then, if Congress, which, of course, was aware of the former laws, in legislation upon that very subject, had intended to displace the existing judge, that the statute did not in so many words repeal the act of August 2, 1886, or use some expression inconsistent with any operation of prior statutes, in the same territory, regarding the same subject-matter. The act referring to the new judge whom it creates does not even use the article "the," but speaks of "a district judge." There are often two district judges in the same district. There is no hint in any term or word in the later act of any purpose to create a separate, exclusive, or sole judge. As if to exclude the idea that Congress intended that "a judge," for whom the later statute provided, should succeed to the powers and jurisdiction of the old judge in the Northern district, the act is careful not to give the new judge the power of the old judge, but only like powers, the "same powers" as possessed by district judges in any of the judicial districts.

This careful language is used in reference to a district in which Congress knew there was at the time the "judge of the Northern and Middle districts," a judge who himself comes clearly within the designation "district judges in any of the districts" who was vested with the same general powers and duties as district judges in "any judicial district." The new judge was to go into that district, where the other judge had these general powers, because Congress felt there should be two district judges. The powers of the court in the Northern dis-

trict were neither enlarged nor diminished. No new court was created. The court and its jurisdiction remain as they were, and the relations of the judges to the court and to each other are not changed in any way, as fixed by the general law applicable to all districts. The plain meaning of the words used generally, as descriptive of the power, "in any of the judicial districts, established by law," is that the new judge shall have in the Northern district, which is one of these districts, the "same power" therein, as judge, which any judge would have in any district where there are two judges. The context clearly and inevitably fixes that meaning. Manifestly, it is an unsound contention that a judge in a district where there are two judges must have sole power therein, because if he were in another district, where he was sole judge, he necessarily would have sole power therein. To sustain such a position, leaving out of view for the present the act of August 2, 1886, we must find some, "any," district, where the law is that, although there be two judges, yet one of them is vested with superior authority over the other, or may exclude the other judge. That is not the case in "any" of the judicial districts established by law. A contrary holding would also deny all effect whatever to the act of August 2, 1886, which expressly confirms the continued exercise of the powers of the judge already in that district, as conferred by general laws which are the same in all the districts. The plain purpose is not to take away any of the "jurisdiction" of the district judge then in the Northern district or to strip him, in any way, of equal participation in the powers of the court, but only to confer like powers upon the new judge. There is no provision, as in the act of 1886 under which Judge Toulmin was appointed, that the "present district judge" of the district shall thereafter be confined to another district, or be excluded from jurisdiction in either of the districts in which the prior law expressly confirmed him as judge. There is no word which, even by the most forced implication, raises the thought that the new judge shall be the "successor" of the old judge, or that cases in the hands of the old judge shall be transferred to the new judge, or that the old judge shall be excluded from his former jurisdiction, or any like provision. That the statute uses the words "a judge," and omits specifically to call him "additional judge," cannot be of the slightest significance, when the inevitable effect of the terms of the statute, which neither expressly affirm nor deny that he is an "additional judge," merely adds "a judge" to the judge already in the district, to hold the court therein. The nature of the duties and powers conferred upon "a judge," who is to exercise them in the district where there is another judge, determines whether he is an "additional judge," irrespective of the nomenclature adopted for the new judge, as plainly and as inevitably as if he had been called an "additional judge" in so many words.

After a somewhat diligent search of the various acts providing for a judge in a district in which there was already a judge, the writer has not been able to find a single statute where it has ever been held or thought to imply an intention to displace the old judge, unless it was so expressly stated or the intent was conveyed by the use of affirmative terms of some kind which necessarily implied the intent, as

in the act under which Judge Toulmin was appointed, that the old judge should thereafter be confined to other parts of the territorial jurisdiction, or that business pending before the old judge should be transferred to the new judge, or that the new judge should become the "successor" of the old judge in the district for which the new judge was appointed, and the like. If, however, the meaning of the language employed were doubtful, and we could look to surrounding circumstances, the result would be the same. The evil to be remedied was the inability of a single judge to promptly dispatch all the business in the Northern district, and the purpose was to cure the evil, not by taking any force then in the Northern judicial district out of it, but by adding to the judicial force already there. The purpose of the later legislation, to quote the language of Justice Story, was "merely auxiliary."

The writer at the time of the passage of the act of February 25, 1907, was as much the judge of the Northern as of the Middle district. He was no less the judge of the Northern district because he resided in the Middle district. He would have become no more the judge of the Northern district than he is, if he had changed his residence to the Northern district, as the law permits him to do. It would hardly be contended, if the plan suggested for the creation of a judge for both the Northern and Middle districts had been carried into effect by an act "to provide for a judge for the Northern and Middle districts" with provisions like those in the present act, that it would repeal the existing laws on the subject, abolish the judge already provided by law for those districts, and make the new judge the sole judge in both districts.

Some Prior Occurrences.

5. There were occurrences, as to court officials before my colleague qualified, necessary to record here to give a proper understanding of the situation at that time. The writer having been appointed by a president who disregarded all partisan considerations in the appointment, and also because it was a high and proper standard of judicial conduct, ignored all partisan considerations in appointing court officials, retaining and reappointing those he found in office, two-thirds of whom were of opposite political faith, without regard to their respective attitudes in their internal party dissentions, and had carefully refrained from attempting to influence their conduct in such matters. Some of the chief political leaders here, assuming they had the moral right to have court officers appointed and removed to effect their political ends where a judge had been appointed by a president of the same political faith as their own, had shortly after my accession to the bench, suggested the removal of the clerks of both the districts for partisan reasons, and afterwards went so far in dictating appointments and removals to the marshals that the President issued a circular reprobating and forbidding the practice. It was known that immediately upon my colleague's accession to the bench some of these gentlemen, his trusted advisers, urged the removal of the clerk at Birmingham and the supplanting of the referees there, and the filling of their places with some of the gentlemen giving that advice. The Birmingham press more than once reported conferences to that end, and

more than once confidently named officials appointed by me, Mr. Birch among them, who were stated to be objects of my colleague's disfavor, and with equal confidence gave the names of the persons, Mr. Steele among them, who would succeed them. Subsequent events proved the correctness of these prophecies. It was plain that the influential gentlemen who disapproved of my course in that regard and the attitude of individual court officers in their internal party strife, though they had been appointed on non-partisan grounds, and about two-thirds of them were of their political faith, were endeavoring to have that policy reversed, and to induce my colleague to take the matter in hand by entirely ignoring me in the appointment and removal of court officers. The writer could not consent to this plan, which, if carried out, would have made the court, so far as appointment and removal of its officials are concerned, a mere annex of a political organization.

Desirous of showing every official courtesy to my colleague, my purpose to aid him in every way in holding the courts was announced, and my view of the law, which gave us joint concern in the district, was also presented to him as soon after his appointment in April, 1907, as I had reason to think he was inclined to take a different view, together with the advice the writer had received and the several sources thereof. The writer, at the request of his colleague, gave him the authorities and the reasons which led to the conclusion that there were two district judges in the Northern district. He was most courteously informed of the policy the writer had pursued with reference to the appointment and removal of officers. and that, while the writer would not consent to the removal of any officer for other than legal cause, as to new appointments he most certainly would not ask anything which would not be cheerfully conceded to him, and that my view of our respective duties and functions was that neither could properly make an appointment or removal without the consent of the other, though either could hold court alone, and that the writer would not originate any order of the kind without his concurrence. His views and intentions were most courteously asked on these points, and it was most earnestly suggested, if difference arose, whether there were still two judges in the district, and as to their rights therein, that it be settled in a seemly way by a friendly test case.

In the correspondence which ensued, my colleague, while stating that his reported intentions, as given in the papers named, were the "idle gossip of newspaper scribblers" in papers which he had not read, and explicitly stating, "I have never said anything to anybody that I would make removals and appointments, or who I would appoint and when," yet, nevertheless, carefully refrained throughout the entire correspondence from committing himself in any way whatever as to his final intentions, either way, on these points, or even as to the course he would take as to a test case in event we disagreed, saying after the correspondence had continued for six weeks:

"I have not carefully considered all the questions contained in your numerous letters to me, for the pressure of public duties has been so arduous as to prevent my doing so. I respectfully decline to take up and decide these matters until such time as the public business will permit me to give proper consideration to the same."

The writer replied he had never had the slightest disposition to embarass his colleague by insisting upon a decision of any of these matters when his duties prevented him from giving proper attention to them, and concluded with this paragraph:

"According you the same purpose not to mislead which I claim for myself in the use of language, I take it, when you say you cannot take up and decide these matters until such time as the public business will permit me (you) to give proper attention to the same, that you mean me to understand that you will advise me of your views after you have had the requisite opportunity to consider these matters."

During this time, however, my colleague had asked the writer to hold short terms in the Northern district, which, of course, he could not do without a designation if he were not a judge of the district, but ignored the suggestion when it was made to him to raise the question by an application to the circuit judges for my designation, and more than once referred lawyers to me for orders in cases in which the writer had made former orders, which, of course, would not have been proper if he thought the writer was not a judge of the Northern district. The writer was thus left in uncertainty as to his colleague's views or intentions, and the correspondence as it went along did not remove that uncertainty. Thus it was said in one of my letters to my colleague:

"The tone of your courteous letter of the 17th inst. in reply to mine of the 16th inst., which states my attitude as to matters in which we have joint responsibility and power, leaves me in doubt as to your position upon the points presented. I feel sure such was not your intention, and upon being informed that the general language of your reply leaves me in uncertainty as to your position, you will unhesitatingly favor me with your views upon that point."

Again, in another letter of April 28, 1907, the writer said:

"There certainly can be no reason for declining to state your position. I would not intentionally be discourteous, or do you any injustice in these matters, but I must be frank to tell you that I do not comprehend what you mean."

After my colleague's letter that he would not take up and decide these matters until public business would permit, and my reply stating it was taken to avow he would inform me when he formed a conclusion, the matter was allowed to rest for about five months, until the writer felt it necessary to call the attention to the fact that the terms of the referees at Birmingham expired, respectively, on the 10th and 13th days of November. A letter, dated October 31, 1907, so advising him, was addressed to Huntsville, concluding with the suggestion:

"That we either allow the referees to remain as they are, or create a third one if you desire, whom I would join in appointing, or that you can name one of the referees and I the other, whom I would join in appointing. This, in my opinion, is the only way the appointment can be made. Please advise me what you will do. I will probably be in Birmingham on the 6th of November."

My letter of October 31, 1907, reached Huntsville in due course of mail on November 1st, and on that day, either before or after its receipt, my colleague made an order there to be entered at Birmingham, appointing Mr. Steele referee, though the order was not mailed for filing until two or three days later. The appointment was doubtless timed to anticipate my coming, for undoubtedly my colleague was then

possessed of his present views that my absence from the district justified what might not otherwise be valid. No word preceding it had come to me from him, though the correspondence had been halted awaiting it. My colleague had committed himself to advising me of his intentions as soon as his labors would permit him to form his conclusion. My coming to Birmingham was fixed by the date of a social event which the court officers, Mr. Steele among them, knew the writer would attend. He well knew, and besides it was chronicled in the local press, that the writer was recalled from Birmingham by the sudden death of a brother on the morning of November 6, 1907. When the writer fixed and announced the date of his visit to Birmingham, he could not have foreseen that Steele would be appointed five days in advance of that date. The writer's motive in going to or returning from Birmingham had no bearing whatever upon the legality of the order removing him. Yet, in the face of the known facts, the petition of Steele affirms, under all the solemnity of an oath, that the writer came into the district for "the sole and only purpose of making the order" removing him, and seeks to convey the impression that the writer's return was due to the fact that he had made the order. Evidently this sacrifice of the facts was made to furnish the text, seized upon in the opinion, to comment upon the "only visit" of the writer to the district, etc.

Stranger still, my colleague, who had been advised of the date of my coming, at a time when he knew the writer could not know that Steele had been appointed, for he had not then been appointed, and at a time when he knew the writer, relying on the sincerity of the correspondence between them, did not anticipate any appointment prior to the date of that visit, nevertheless deliberately reiterates, in a judicial opinion, that the visit was "for the sole purpose of removing petitioner from his position as referee," and indulges, also, in the vague insinuation, which cannot be fitly met, much less discussed in a judicial opinion, that the writer "could with equal impunity" have remained at home.

Being in Birmingham on November 5th, the writer promptly opened court and revoked the order appointing Steele, having no doubt that one judge had as much right to revoke the appointment as the other had to make it without the consent of his colleague. The reply to my letter of October 31st, which was not received until my return home on November 6th, was written after my colleague had acted, but did not advise me of his action, and stated his position as to a friendly test case, only in the general and uncertain terms, which governed the correspondence before.

Shortly afterwards bills (it is not necessary to inquire where they were originally framed) were introduced in both houses of Congress to make my colleague "supreme," by legislating me out of the Northern district. The purpose was now apparent, by means of orders constantly revoking mine, to keep Mr. Steele in office without my consent, and by the same means to exclude any appointee I might name meanwhile, until the bill could be passed. If the bill should pass, nothing practical would be gained by further orders by me, and the writer was not desirous of laurels won in a race of conflicting orders with a brother judge over the appointment of officers. The writer therefore allow-

ed the matter to rest until the adjournment of Congress, and as soon as it was known that Congress had adjourned on May 30th, without any action of these bills, the writer made an order appointing as one of the referees at Birmingham Mr. Alex. C. Birch, a gentleman of high character, who had served acceptably before and was overwhelmingly indorsed by the bar for reappointment. While Mr. Steele was not the writer's choice he was willing for his colleague to have his way in the choice of one of the referees, though the person might be "hostile" or "offensive," if my colleague yielded the same consideration to me. The writer therefore withheld any further order as to Mr. Steele in abeyance, awaiting further developments.

The order appointing Mr. Birch was made in chambers in the Middle district on Saturday, May 30, 1908, after it was known Congress had adjourned, and immediately mailed to the district clerk at Birmingham to be entered on the minutes there. The appointment had been delayed until that time for the reason already stated. When it was made the writer was the sole judge of the Northern district, and thus relieved of the situation in which he could not originate an appointment without the consent of a colleague, a view of the matter by which he had announced he would be governed if his colleague respected it. The writer did not doubt that the order of May 30th constituted a valid appointment by a sole judge. He repeated the order on June 1, 1908, in open court at Birmingham, regardless of his colleague's claim of "supreme power," if he had then qualified under a new appointment, because the issue could not be permitted to remain unsettled, and the personal presence in court of the judge who repeated that order would eliminate any collateral issue in the appellate court, if my colleague were reappointed and revoked the order, neither of which the writer doubted. Had the writer desired to avail himself of "supreme" power, in the situation of his colleague on the 30th of May, he would have removed Steele, who was illegally appointed without his consent. Wishing, however, to enforce and make effective only equal authority in the future, the writer, though then sole judge, made no order as to Mr. Steele, but contented himself with the appointment of Mr. Birch as a referee.

Ex parte Steele.

7. It must be said, with all due respect to my learned colleague, that his two opinions in Ex parte Steele are hopelessly irreconcilable. If as he asserts, his first opinion is "the law of the district," it is a flat-footed authority against his right to order the removal of Mr. Birch, who was appointed by me under the identical circumstances under which Mr. Steele was appointed by my colleague. Irrespective of that, the grounds upon which each of those opinions are rested are clearly untenable. These will now be considered. The issue here is not in the slightest degree as to one "court of concurrent jurisdiction" setting aside the decree or orders of "another court of competent jurisdiction." The issue is what judges, who exercise a joint power in appointments, constitute the very court which makes the orders. The order here concerns a mere administrative matter, the appointment or removal of a court officer, whose tenure is dependent upon the "dis-

cretion" of the court. The difference between such an order and a judgment or decree rendered in suits or proceedings among adversary parties is strikingly great. Decrees or orders in adversary litigation must be based upon some proceeding initiated to settle some disputed matter of right between contending parties. There must be a plaintiff and a defendant. Each has a right to notice of the various steps in the proceedings, to offer evidence and be heard, and then to appeal from the order or decree, which is final in general, unless reversed on appeal or writ of error. An order appointing or removing a referee has none of the elements of a decree in equity or a judgment at law. The appointment may be made or revoked at any time, at the "discretion" of the authority which makes it. An appointee with such a tenure is not entitled to notice or to be heard before the order of removal is made, or to appeal from it, or to revise it in any way, unless the removal is attempted in an illegal way, or by a tribunal not authorized to make it. All else rests in the "discretion" of the appointing power. There is no plaintiff or defendant, and no legal right in dispute, for the appointee has no right to hold against the will of the appointing power. There is no need for any proceeding or notice. The appointing power acts ex mero motu in whatever mode it chooses, as in its opinion the circumstances of the particular case require. The power to appoint and remove a court officer is not in its nature judicial or governed by the rules ordinarily applicable to the exercise of judicial power. It is in its nature executive or administrative, and under the Constitution Congress could have confided the power to the Executive Department and denied it to the courts.

The removal of Mr. Steele, whose appointment lacked legality because made by one judge, without the consent of the other, could not be illegal, as held in Ex parte Steele, because no "proceeding" was pending to that end, or because he did not have notice or a hearing. Ex parte Hennen, 13 Pet. 230, 10 L. Ed. 138; Field v. Com. 32 Pa. 478; People v. Mayor, 82 N. Y. 491; State v. Register, 59 Md. 283.

The failure to draw the distinction between the nature of the act when the officer is appointed or removed, and when decrees in equity or judgments at law are rendered, results in the further fallacy that conceding joint power to the judges in administrative matters like the appointment of officers, "would block the wheels of justice" in the trial of adversary litigation, in which judges have no joint power, "whenever one of the judges of the court is absent or sick."

Another curious fallacy asserted in both the opinions is that as there is but one district court in the Northern district, and that court is made the court of bankruptcy within its territorial limits, it would be a "migratory court" if one of the judges held the court of bankruptcy and made orders therein at one place, while another judge is holding court and making orders at the same time in another place, in the same district. That was the case when my orders were made in open court removing Mr. Steele and appointing Mr. Birch. If judges holding court at the same time in different parts of the district makes the court migratory, it has always been such, and the law so intended. There are four specified places in the Northern district for

holding open court. For more than a score of years the law has provided for the designation of an outside judge to hold court in the district when there is an "accumulation of business," and that has been frequently done, and they undoubtedly can exercise all of the powers of the regular judges therein. The statutes also frequently provide for two judges for the same district. Is it possible that the writer, one of the regular judges, could not hold the court of bankruptcy at Birmingham while his colleague, another of the regular judges, was holding court at Huntsville? Is it possible that Judge Toulmin, who, for a long time was designated to hold court in the Northern district, when holding court at Anniston, while the writer, who is the regular judge, was holding court at Birmingham, could make no legal orders in bankruptcy, or legally hold the bankruptcy court? Certainly the statute designated the writer as one of the judges of the Northern district, and he did not require any commission or permission from his colleague to hold court at any place in the district whenever he saw fit. It is needless to say that, where the court consists of more than one judge, each judge may hold the court in any part of the territory, and can exercise all the powers of the court in matters before him, although another judge is sitting at the same place or at a different place in the same territorial jurisdiction. The city court of Birmingham is a familiar instance of different judges holding the same court in the same place, and each exercising all the powers of the courts in cases before them. This is also true of the Circuit Courts of the United States, each of whose judges may hold court at the same time, in the same place, or at different places in the same district, and as to matters before him exercises all the powers of the court. His conclusion is rested upon the argument that, in prescribing the judge's duties as to adjudication, reference and dismissal of petitions, etc., the bankruptcy statute says "the judge" shall do these things. Clearly, he says:

"If it were intended that there should be more than one judge of the court of bankruptcy, reference would have been made to any of the judges, or the judges, rather than the judge. Or if it were the intention of Congress to confer jurisdiction in certain cases upon more than one judge, the statute would have read the judge or judges."

If this be a correct interpretation, there would be no way to determine what judge should discharge these duties in a district, where, as is frequently the case, there is more than one regular judge in a district. The very letter of the bankruptcy statute shatters the argument of my learned colleague and removes all possible doubt, if otherwise there could be any. It expressly declares, in subdivisions 29 and 30, section 1 (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]), that:

"Words importing the plural number may be applied to, and mean only a single person, or thing, and words importing the singular number may be applied to and mean several persons or things."

The learned judge, strange to say, also ignored subdivision 16 of the same section, which declares that "judge" shall mean "a judge of the bankrupt court." Most plainly therefore, even under the

letter of the bankruptcy law, the words "the judge" mean "a judge of the court of bankruptcy." How can it be seriously contended, when the bankruptcy law confers jurisdiction in bankruptcy upon the District Court, that it intended to exclude any of its judges from the performance of any of the duties assigned to the court in that regard?

It is said of the order appointing the referees at Anniston and Talladega:

"Although it has been some weeks since these appointments were made, yet so far they remain unchallenged."

Did the learned judge have any reason to think such challenge might come? Mr. McCarty had been unanimously recommended by the bar at Anniston for reappointment. My colleague knew the writer earnestly desired his reappointment, and would have made the order, but did not think he should originate it without Judge Hundley's consent, and Mr. McCarty's friends had therefore been directed to apply to him. A member of the Montgomery bar visited my colleague about the appointment of the referee at Talladega, and was authorized to state, and did state, as he informs me, that while Mr. McMillan would be very satisfactory to me, yet, as it was one of the first appointments since my colleague's accession to the bench, the writer would defer to his wishes, and he might select the other candidate in whose interest this member of the bar visited him, if he so desired.

It is also said in that opinion, Mr. Steele's appointment was made "without reference or regard to any other referee in bankruptcy and was made because the business of the court demanded the appointment." The terms of both the other referees expired within two weeks after Mr. Steele's appointment. When it was made, my colleague had rejected an offer to reappoint them, and to put in a third referee of his selection, or for each of us to appoint one referee, and knew they would go out, and since the writer had stated that without his consent he would not originate an appointment. There had been no sudden shrinkage of the business, and the experience of the past four years showed that it required at least two referees to dispatch it. Mr. Steele was thereafter continued as the sole referee, and the effort to appoint another referee has been stoutly resisted. Under such circumstances, how can it possibly be sincerely affirmed that the appointment was made "without regard to any other referee?"

## What Helped to Keep Down the Dockets.

Both opinions in Ex parte Steele emphasize the fact that the writer has held no regular court in the Northern district, not even "tried a single case," since the appointment of his colleague. These reasons were well known, though deliberately ignored. These opinions emphasize the self-sacrificing labors of my colleague, and the improvement thereby effected in the condition of the dockets as compared with former conditions. In the last opinion it is said, although he "found the dockets of every division of my district greatly crowded, save in the Southern division," he had, "by persistent work

caught up with the business in all its branches." The opinions abound with such expressions as these:

"Almost continuously on the bench." "Found the dockets of every division in my district greatly crowded." "By persistent work succeeded in catching up with the business." "Found every docket of this district greatly congested with undetermined cases." "Day and night my time has been given unsparingly to litigants." "There are now so many pressing cases on my desk needing attention."

But what have these things to do with the law of the case? It is not possible that my colleague supposed the facts he thus emphasizes could affect in the slightest degree the legality of the act under discussion. The opinion dwells upon them for some other purpose. The constant iteration by my colleague regarding the improvement in the docket by his strenuous labors, as compared with former conditions, could have no other purpose than to suggest comparison as to the efficiency of the service or devotion to duty of judges who labored in that field before him. If it be proper, in any event, for a judge to invite such contrast, it is not improper for another judge, when such contrast has been repeatedly drawn, to remark that in the Southern division (Birmingham), where the business has not been "caught up with," the bulk of the litigated cases in the past arose from removed suits against foreign corporations. For more than a year past these foreign corporations, awaiting decisions in the appellate court as to the constitutionality of the statute which forfeits their right to do intrastate business, if they remove a case to the federal courts, have, save in one solitary case, carefully refrained from removing any case to the federal court at Birmingham or elsewhere in the Northern district. It is apparent this taking away of the chief source of the courts litigated business has kept down the number of cases on the docket at Birmingham, and elsewhere in the district, as compared with former conditions, as much as the devotion to it of one judge's entire time would have done under former conditions.

What Temporarily Kept One of Its Judges out of Northern District.

It is well known to every one in Alabama that when my colleague was appointed in April, 1907, the writer was then in the Middle district busy with many phases of the fiercely contested railroad rate litigation which occupied all his time until late in September, and that upon his return to the Middle district, after a very short vacation, his time was again constantly taken up by renewed phases of litigation in that matter growing out of legislation at the extra session of the Legislature, and that he could not possibly have gone to his colleague's assistance. Moreover, his colleague, upon his qualification, without consulting the writer in any way, set the docket at each term in the several places in the Northern district, because he desired to dispatch its business alone. It would have been improper, not to say unchivalrous, for the writer, under those circumstances, to have gone of his own motion into the district and held court in the intervals, if he had the spare time, and thereby deprived his colleague of the opportunity to gain all the reputation possible in handling the entire dockets in the Northern district, pending a contested confirmation.

It is known to every one at all familiar with the litigation in the Northern district that one judge cannot keep down its dockets. My colleague must have assistance. The law put the duty to give that assistance upon the writer, as far as he can with regard to duties in another district. It was as well known to my colleague, as to members of the bar, that, upon the ending of the abnormal pressure put upon the court in the Middle district by the railroad rate litigation, the judge of the Northern and Middle districts must, and again will, resume the holding of court in the Northern district, as he did for years prior to his colleague's appointment. The judge of the Northern and Middle districts has served in the Northern district for years. Its bar and people, with whom he had long been identified in many ways, welcomed his appointment, and when it became known that he suggested a change in his relations to the district protested, and continue to protest, against it.

A judge of the court, occupying such relations to its bar and people, responsible in part for the character and conduct of its officials, and having to come in contact with them, surely has both moral and legal rights there, and it is difficult to fathom the frame of mind which induces a judge recently appointed for the district, who, the writer with proper diffidence can fairly state, has no foundation upon which to claim any superiority, to ask, much less to demand, that he be allowed to do as he pleases in the district. My colleague, however, suffers himself to say:

"If the learned judge can leave his district and court, and come into my district, as may suit his purposes and desires, and change without my knowledge or consent orders and rules in bankruptcy made by me, then the public business will be seriously disturbed."

Is the Northern district "his district," or "my district," or the personal or peculiar property of either of the judges? Is not the disturbance of the public business, if there has been any, caused by the junior judge's setting aside, without the consent of the older judge, the former arrangement, and refusing to enter into any arrangement whatever?

## Not Seeking to Enforce His Own Will at All Hazards.

That there has been no "serious" disturbance of the bankruptcy business is due solely to the fact that the writer, out of regard for the judicial office, and mindful of the interests of the public, after he had been disappointed in making a test case, declined to attempt to enforce his own will, at all hazards, by continuing to revoke the orders appointing Steele, as my colleague has done, and avows a purpose to do, regarding any order of appointment made by me of another referee. The writer permitted his colleague's order overriding the order annulling Steele's appointment to stand until some further order was made in his case, though by such a course a colleague was allowed by sheer usurpation, in the most offensive form, to continue Steele in office against the writer's will, and by the same methods to keep out of office any one appointed by the writer.

The law was not, as my colleague mistakenly believes, the "beacon light" which guided his "footsteps." The will o' the wisp which guided

them was the fancy that the Northern district is "my district," and that "due respect to the office I hold" justified the refusal of a test case, and any regard whatever to the rights of a brother judge, "at least when he is without the district." The older judge made no claim to superior authority, offered his colleague all he asked for himself, and after months' delay, in which his colleague makes no "footsteps" whose imprint discloses his final intentions, finds that colleague denying the writer's authority, trampling upon his rights, and preventing, as far as he can, any determination of the issue in a court of review. When the older judge, as he must, unless there be abject submission, makes orders to test these strange pretensions, his presence is described, in effect, as a visit without the permission of a colleague, and his orders are treated in a judicial opinion as in the nature of an invasion of another judge's territory and a raid upon the orderly transaction of business conducted by the other judge. The facts make their own comment, and show whether there has been self-seeking disregard of the legal rights of a brother judge, or a want of the courtesy usually obtaining among judges, or trespassing in any way upon what one judge owes another, and by whom. None of these things, as before remarked, enter into the legal merits of the case. They are brought forward by my colleague to draw some moral, and the writer is content that it be drawn.

Authority of Judge of Northern and Middle Districts, While in One of Them, to Make Orders to be Entered in the Other District.

My order removing Steele and one order appointing Birch were made while in open court in the Northern district. The other order appointing Mr. Birch was made in the Middle district. Any discussion of the power of a judge when out of the district can bear only upon the latter order. No one claims that a judge can make any order out of court, unless the power be given expressly or by necessary implication by statute, immemorial usage, or by the rules of the court. Here, as we shall presently see, all these sources of the power are found.

The appointment of an officer is quite unlike any order which affects the rights or interests of adversary parties in court. Anything which shows that the persons who compose the court have made the appointment is sufficient. Though it is a far better practice, no formal entry of the appointment upon the minutes is necessary. As said in Ex parte Hennen, 13 Pet. 229, 10 L. Ed. 138:

"The law giving the District Courts the power of appointing their own clerks does not prescribe any mode in which it shall be done."

In that case, the sole judge of the court in which the power was vested "executed and delivered a commission" to a person, who entered upon his duties and was recognized as clerk by the court. On direct attack it was held that it was "amply sufficient" to show that the court had appointed such person. Even judges of a common-law court can lawfully make an order of appointment in vacation, to fill a court office, since it is an undoubted duty of a court to whom the

appointment and removal of officers is confided to see, in the interest of the public, that the office be filled at all times.

If an order be otherwise valid, there are numbers of matters regarding the preparation of cases, preservation of property, appointment of officers, adjustment of their relations and duties, and other matters of administrative detail, as to which orders may be entered in courts in equity (and the bankrupt court is certainly such) when the judge who makes them is miles away, if he is then at a place where he is authorized to perform judicial functions. Central Trust Company v. Sheffield, etc., R. R. Co. (C. C.) 60 Fed. 9; 2 Daniel, Chancery Pleading & Practice, p. 1264, § 1324.

These orders, as we all know, are commonly called "chambers orders." Chamber business, as said in Re Neagle (C. C.) 39 Fed. 855, 5 L. R. A. 78, may be done, and is often done, on the streets, in the judge's own house, at the hotel where he stops, or it may be in transitu, on the cars. When that case went to the Supreme Court (135 U. S. 55, 10 Sup. Ct. 658, 34 L. Ed. 55), it is said:

"This chamber work is as important and necessary, and as much a discharge of his official duties, as though performed in the courthouse. Important cases are often argued before the judge at any place convenient to the parties concerned, and the decision of the judge is arrived at by investigation made in his own room, wherever he may be, and it is idle to say that this is not as much a performance of judicial duty as the filing of a judgment with the clerk, and the announcement of the result in open court."

The court of bankruptcy, save in matters where a jury is required, is in the strictest sense a court of equity. It is always open. It has no terms. Under general order No. 37 (89 Fed. xiv, 32 C. C. A. xiv), the rules of equity practice prescribed by the Supreme Court "must be followed as near as may be." If a judge need not be in open court to enter an order appointing an officer, and the order can be made at one place and sent for entry in court at another place, as was the case in Steele's appointment, which was made at Huntsville, and entered at Birmingham, my order in chambers at Montgomery, appointing Mr. Birch and forwarded for entry in Birmingham, cannot be invalid because the writer was not personally present in the court at Birmingham. Can it be invalid because the writer was not then personally present in the Northern district?

The original statute (codified section 552 of the Revised Statutes [U. S. Comp. St. 1901, p. 447]) provides:

"There shall be appointed in each of the states of Alabama * * * one district judge, who shall be district judge, for each of districts included in the state."

The act of August 2, 1886, declares the "jurisdiction" of the successor of that judge shall thereafter conclude only the Northern and Middle districts. "Jurisdiction" as to what? As "judge of each of the districts." The construction contended for by my colleague would require the interpolation of a proviso that the judge is not to be "judge of each district" at the same time, as to any matter whatever.

The writer is made by statute equally the judge of the Northern and Middle districts. He is required to reside in one or the other of these districts, and may exercise his choice. For what purpose

is this residence in one or the other of the two districts required? It is exacted so that whenever in either the judge may discharge therein judicial functions concerning both districts, at any time and place in either, where the nature of the act does not require his personal presence in a court at a particular place in one of the districts. The law intended to give both districts the same service in this respect as if they constituted one district under one judge. Ex parte Parker, 131 U. S. 225, 9 Sup. Ct. 708, 33 L. Ed. 123; Horn v. Pere Marquette R. Co. (C. C.) 151 Fed. 641.

A judge of the Northern district while holding court at Huntsville may make orders to be entered in court at Birmingham, because he is then in the territorial limits in which he is authorized to perform judicial duties. The judge of the Northern district may not make orders to be entered in the courts there when outside the territorial limits of the Northern district, because when out of its limits he is not at a place where the law authorizes him to perform judicial functions. The judge of the Northern and Middle districts may make orders to be entered in the courts in the Northern district, though not then in the Northern district, provided he is then in the Middle District, since there, as well as in the Northern district, he is within the territorial limits where the law authorizes him to exercise judicial functions regarding matters in the Northern district.

To hold otherwise would be to hold that the judge of the Northern and Middle districts is, in no sense, a judge of the Northern district, so long as he is not in that district, although he is in the Middle district, and to hold the same thing as to the Middle district when he is absent from it, though in the Northern district; or, in other words, that when the same person is judge equally of two districts he can never act as judge of both at the same time. Is it possible that the judge of the Northern and Middle districts while at Birmingham can make no valid order directing the marshal of the Middle district to attend him at one of the places in the Middle district, where he intends to open court? Is it possible that the clerk of the Middle district could excuse disobedience of an order to attend upon the court, or to draw a jury, or to enter any other proper order, on the ground that it had no legal validity, because the judge was not in the Middle district when he made the order and did not afterwards personally come into the district to enter it? What is true as to one district in this respect must hold good as to the other. If it be held that a judge who is equally judge of both districts has no such power, we impute to Congress a design to suspend the execution of all the statutes of the United States, so far as that judge's services are requisite in the Middle district, whenever the judge goes into the Northern district to perform duties there, and vice versa.

A case on all fours in principle with this is Hayzlett v. McMillan, 11 W. Va. 464–479. There the judge had authority to dissolve an injunction in vacation. He was judge of a circuit consisting of several counties, each constituting a separate circuit court, of which he was judge. Admitting his power to dissolve the injunction in vacation if he had gone into the particular county in which the matter was pending, it was stoutly denied that he could make the order when

in another county; but the contention was promptly overruled. The Supreme Court of that state said:

"The judges of the respective judicial circuits, each composed of the several counties by the Constitution and the law, are absent or may be absent from each county of their circuit a large portion of each year, holding the term of the circuit court required to be held in each county of their circuit. While they are holding a term of the court in each county, there is a vacation of the circuit court of each of the other counties composing the circuit, and if the judge of the circuit court in which a case is pending, wherein an injunction is awarded, could only hear a motion to dissolve an injunction within the county, in which such case is pending, then during the greater part of each year a motion to dissolve an injunction could not be heard and the plain object of the law would be defeated."

It was further said:

"To construe the powers of the circuit judge so as to forbid him to act in another county in his circuit in a case pending in a county from which he was absent would be plainly a departure from the purpose and object of the law, and render the power almost useless."

It is only of late years that there has been more than one judge in most states. Most of the states have always been divided into more than one district. After a most diligent search of the federal reports, no case can be found where the same person was judge of more than one district, where it has ever been held that a chamber order, otherwise lawful, was invalid, because the judge, at the time he made it, was not in the district where it was to be entered, if he was at the time it was made in some one of his districts. Certainly, if the power had been disputed, some case would have been made and decided in all these years as to the power. The exercise of such power is so essential to the object for which judges and courts are created that it is almost inconceivable, in the absence of any case challenging their authority, that the judges in the past acted on any other view.

The invariable practice of my predecessors under the bankruptcy laws of both 1867 and 1898 was, while in one district, to make all necessary orders, if need be in invitum, in bankruptcy, to be entered in another district, save in matters where a jury was required. For the past seven years it has been the practice of the writer, while in one district, to hear and decide bankruptcy cases, pending in the other district, if they were pressing, except where a jury was requisite, and to cause the proper orders to be entered in the proper district, though not personally present therein. There was never a hint that the procedure was illegal. In the noted Southern Car & Foundry Company Case, in which very eminent lawyers from several states appeared, and the administration of the large estate of the bankrupt pending in the Northern district was removed to the District Court in Tennessee, the parties afterwards sought to review the order on other grounds of jurisdiction, but not that jurisdiction was wanting, because the order was actually made in the Middle district, without consent of the interested parties. This long usage, extending through a series of years, followed by all the judges of the court during that period, is the legal equivalent of a positive rule of court on the subject. "It is not essential that any court, in

establishing, or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding, for a series of years, and this forms the law of the court." Duncan v. United States, 7 Pet. 435, 8 L. Ed. 739.

The writer has not been able to ascertain from the records accessible what the practice was under the bankruptcy law of 1841; but it is hardly probable, with the costly and difficult means of communication between the districts in those days, that "the judge of the several districts" practically suspended the bankrupt law in any of the districts, on the theory that he could not lawfully make any order in a district unless personally present in that district. This long contemporaneous construction by the courts supplies the immemorial usage which is a frequent source of power in the courts and relieves the question of any difficulty, if the effect of the statute as to the power of a district judge of the several districts in this particular could be matter of doubt. A construction of the law, relating to the power of the judge of the Northern and Middle districts, and his early predecessors who were judges of all the districts, which forbids a judge while in one district to exercise judicial functions in matters concerning the other, would nullify every order in past years granting or denying a discharge in bankruptcy, or for the conservation or sale of a bankrupt's estate, or decision as to a claim or composition, or for an injunction or receiver, if actually made in another district, though entered in the district where the bankrupt's estate was being administered, unless the order or decree was entered by consent, or the judge, after signing the order, went personally into that district and ordered its entry there.

Duty of Judges to Set an Example of Order.

9. The situation, in short, is this: If there be two judges of the Northern district, as the writer does not doubt, the appointment of Referee Birch on the 30th day of May, 1908, is valid, because the order was made by the then sole judge of the Northern district, and the reappointment of my colleague, again making two judges in the district, would not authorize him alone to revoke it. Apart from this, the appointment of Referee Birch made in open court June 1st is valid without the consent of Judge Hundley, if his appointment of Referee Steele be valid without my consent. If neither of these propositions be true, then there is no legal referee at Birmingham. A judge of the Northern district insists that the judge of the Northern and Middle districts has no rights which he is bound to respect, "at least when absent from the district." That view, if one may properly use such a simile of a judicial situation, compels one of the judges to "sit upon the lid" all the time to preserve his rights. This he cannot do, having duties in another district. Unless there be submission, which is not to be thought of, to the claim of "supreme" power on the part of a colleague, the judge of the Northern and Middle districts, whose authority is thus usurped, must, from time to time, make and enforce orders to preserve his authority. Must the clerk and marshall and the referees be beset with contradictory orders from judges of the same court, and punished for contempt for

disobedience by one judge, or released on habeas corpus by the other judge? Against being driven to such a necessity by the refusal of a test case, the writer earnestly protested, particularly in a letter of May 21, 1907, in which it was said:

"The public uncertainty and inconvenience growing out of such a state of affairs would be deplorable. The subordinate officers of the court would be between two fires, and forced at their peril to settle a judicial question, which would thus be thrust upon them. They would be liable to imprisonment if they disobeyed an order. One judge might put them in prison, and another take them out. No man, I think, who is not an enemy of both of us, would desire such a state of things. * * * The only way to avert these evils is to raise the question of our authority in some actual case, in such mode as will get a speedy judicial decision, and thus avoid embarrassment to us and injury to the public, and upon that I hope there may be agreement between us."

Still impressed with these views, and that it is the duty of judges to set an example of order, in official acts, and determined for the sake of the court to first exhaust every available alternative, before taking extraordinary steps even in resistance to bald usurpation, the writer has advised Referee Birch to seek to review in the Circuit Court of Appeals Judge Hundley's order revoking his appointment and vacating my order as to the disposition of cases, under section 24 of the bankruptcy statute, and, having been advised that such petition has been filed, directs the clerk to file this opinion in the last case of Ex parte Steele, wherein the orders of May 30 and June 1, 1908, in reference to Referee Birch were revoked.

It would seem that there is both warrant and need for the exercise of power to "superintend and revise in matters of law" the "proceedings of the several courts of bankruptcy," when different judges of the same court of bankruptcy confuse litigants, attorneys, and court officers by constant orders revoking the appointment of referees, and give conflicting directions even as to the reference of cases in bankruptcy, without which the bankruptcy law cannot be executed in any case, casting doubts on the validity of the acts of referees, and impairing confidence in the court itself, when such steps in the administration of justice therein are taken by the judges. In re Seebold, 105 Fed. 913, 45 C. C. A. 117, which is cited approvingly by the Supreme Court in Plymouth Cordage Co. v. Smith, 194 U. S. 311–315, 24 Sup. Ct. 725, 48 L. Ed. 992; Loveland on Bankruptcy, § 313, p. 900 et seq.; In re Carley, 117 Fed. 130, 55 C. C. A. 146.

For the foregoing reasons, no further order will be made by me in this matter, pending the decision of the Court of Appeals.

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## SALMONS v. NORFOLK & W. RY. CO.

(Circuit Court, S. D. West Virginia. June 1, 1908.)

No. 85.

1. MASTER AND SERVANT—INJURIES TO SERVANT—DECLARATION—ALLEGATIONS OF NEGLIGENCE.

A declaration in a federal court sitting in West Virginia, under the practice prevailing in that state, alleging that plaintiff's intestate, while in defendant's employ, was engaged in work and without fault on his part

was injured by defendant's negligence in causing a freight train to be run into and against a work train on which intestate was employed, by reason of which he was killed, sufficiently stated a cause of action justifying a recovery for any negligence of the defendant proved to have proximately caused the act producing the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 809–876.]

2. TRIAL—DEMURRER TO EVIDENCE.

Where both parties joined in a demurrer to the evidence, such demurrer admits the truth of all material evidence introduced on plaintiff's behalf, together with all inferences which may be fairly drawn therefrom, but only admits such evidence of the defendant as is not contradictory of plaintiff's evidence, so that plaintiff is entitled to judgment if the jury in any view of the evidence would have been legally justified in rendering a verdict for plaintiff.

3. COURTS—FEDERAL COURTS—RULES OF DECISION.

The question of the responsibility of a railroad corporation for injuries caused to or by its servants is one of general law in regard to which the federal courts are not bound to follow the decisions of the state courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 977–980.]

4. MASTER AND SERVANT—INJURY TO TRAINMEN—TELEGRAPH OPERATOR—NEGLIGENCE—FELLOW SERVANTS.

Where the rules of a railroad company made a telegraph operator in charge of a block signal responsible for the operation of trains within his block, and gave such operator absolute authority to hold trains until the block was clear, such operator was a vice principal, and not a fellow servant, of a trainman killed in a collision by the operator's negligence in opening the block and permitting a train to proceed while the block was occupied by another train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 495–499.]

5. SAME—ACTS OF TRAINMASTERS—AUTHORITY.

A railroad rule directed block signal operators not to permit a train to enter a block following a train in the same direction until the preceding train had been reported as having cleared the block station ahead, except by order of the superintendent. Another rule regulating trainmasters required them to take charge of the movement of the traffic, exercise supervision over the men employed on the trains and in the yard and station service, see that they understood and obeyed all rules, and suspend them when necessary for neglect of duty, and, in the case of detention of a train by accident or obstruction, go to the place, if necessary, and take general charge of clearing the road, etc. *Held* that, where an assistant trainmaster directed a block signal operator to permit a train to proceed before a train within the block had been reported as having cleared, whether the operator was justified in believing that such assistant trainmaster had authority to give such direction, and whether he was negligent in so doing, were for the jury.

## On Demurrer to Evidence.

Trespass on the case. On the 6th day of June, 1905, George Salmons, plaintiff's intestate, was a member of the crew of a work train known as "Extra No. 544," and with the other members of his crew was at work loading ties on a section of defendant's line of railway between two stations known as "Dingess" and "Hale," between which stations there was a long tunnel known as "Dingess Tunnel"; all of the section of track between the two stations, about 2¼ miles, being single track, without any side tracks save at the stations of Dingess and Hale. This work train entered this section of track from the west, passing Dingess, and went to work about the eastern portal of the tunnel

referred to. The train was in charge of Conductor Duis, who, in accordance with rules of the company, either left or sent a flagman to Dingess at the west end of the tunnel with written instructions to be delivered to conductors and enginemen of east-bound trains, notifying them of the position of this work train, near the east end of the tunnel and that the train would clear at Hale, and also sending a flagman with similar written instructions to Hale to notify conductors and enginemen of west-bound trains of the position of his work train. He also sent an additional brakeman to Hale to bring back word in the event that the train was desired to take the side track at Hale to permit the passing of a train. Both Dingess and Hale were telegraph stations with an operator on duty at each.

When the work train passed Dingess going east, the operator at that point, De Wit Crabtree, displayed to following trains from the west the red arm of his semaphore, signifying "danger! stop!" and purposed to so allow it to remain until he received from the operator at Hale the information that the work train had passed out of the "block," as the section between two telegraph stations is called in telegraphic parlance. Some time after this work train (extra No. 544) had passed into the block between Dingess and Hale, a following freight train, designated as "Second No. 70," approached Dingess from the west, and the engineman of that train, Mr. Fink, seeing the danger signal, had stopped or was in the act of stopping his train, when the semaphore signal was changed from the horizontal arm to nearly perpendicular, which latter position signifies a clear block. Mr. Fink, prior to receiving this semaphore signal, had received and signed the written message from Conductor Duis notifying him of the position of this work train, and which the flagman had presented to him. Engineer Fink of train "Second No. 70," on receiving the semaphore signal that the block was clear, proceeded on toward Hale and into Dingess Tunnel, of nearly a mile in length, and when near the eastern portal of the tunnel collided with the work train which was there at work loading ties. The work train had been cut in two for convenience in handling the ties, and two or three of the rear cars were standing within the portal of the tunnel, with a space of about 15 feet left between them and the remainder of the train to serve as a passageway for the men carrying the ties. Plaintiff's intestate was engaged in carrying a railroad tie through this passageway when the cars that were within the portal of the tunnel were violently struck by the train known as "Second No. 70," and being propelled eastwardly caught him between them and the remainder of the train and so badly crushed and injured him that he died within two or three hours thereafter.

In order to explain how second No. 70 came to get the signal that the block was clear, it is necessary to recur to the situation at Dingess when second No. 70 was stopping in obedience to the signal of the semaphore. Mr. W. O. Franklin, assistant trainmaster of the defendant company over a jurisdiction at that time extending from Williamson, W. Va., to Portsmouth, Ohio, and embracing the territory between Digness and Hale, happened to be at the telegraph office at Dingess, and, observing that this train had stopped or was stopping, he asked the operator, Crabtree, why he was holding the train. The operator told him that the work train was in the block between there and Hale, and Mr. Franklin asked him if the work train had sent back a flagman, to which he replied "Yes," and Mr. Franklin then said, "Let them go, that they would look out for that," and, as Crabtree states in his testimony, "I pulled the block down, and the train proceeded." He further explained that he did this on Mr. Franklin's authority, and that he then thought that Mr. Franklin had authority to permit him (or direct him) to let the train go ahead.

A large number of the rules of the defendant company were introduced in evidence. Many of them have no very direct or immediate bearing on any question here to be discussed; but the following rules or portions of rules may have. Rules Nos. 41 and 50 were introduced by the plaintiff. Rule 41, under the heading "Trainmasters," reads as follows:

"No. 41. They report to, and receive their instructions from the superintendent. It is their duty to take charge of the movement of the traffic;

exercise supervision over the men employed on the trains, and in yard and station service, see that they understand and obey the rules and suspend them when necessary for neglect of duty; in case of detention of train by accident or obstruction, go to the place, if necessary, take general charge of clearing the road, and see that proper precautions are taken to insure the safety of the trains and property. They must also perform such other duties as may be assigned to them."

In connection with this rule, it was testified by Mr. Franklin that his duties as assistant trainmaster were those mentioned in the rule 41, and that on the section of road under his jurisdiction he was the only assistant trainmaster working under and in conjunction with R. P. Johnson, the trainmaster.

The plaintiff also offered in evidence rule No. 50, as follows:

"Train Dispatchers.

"No. 50. Chief dispatchers report to and receive their instructions from the superintendent. They will obey the instructions of trainmasters as to road service, and the superintendent of telegraph as to telegraph and telephone service."

The defendant introduced in evidence the special rules printed on the time-table in force on the day of the accident (except Nos. 513, 535, and 541) from 501 to 542, inclusive, comprising "Rules Governing the Operation of Block Signals," and which were shown to be in force and applicable at the time of this accident. I quote the following as being specially in point, and explanatory of the situation:

"Instructions to Train and Engineer.

"No. 501. Taking effect upon date to be fixed by special order, trains will be governed in their movements by a block system designed to protect trains running in an opposite as well as in the same direction. This system will be independent of the General Rules governing train movement and the movements directed by special telegraphic orders, and must not be confused therewith.

"No. 502. The section of main track between two telegraph stations is termed a 'block.' A 'block' station is a telegraph station where signals are displayed directing train movements.

"No. 503. The form of signal to be used is the double-arm semaphore, consisting of a mast with two arms near the top, one on each side, except as stated in rule 514. A horizontal position of the arm, or a red light displayed signifies danger—stop. A nearly vertical position of the arm, or a white light signifies clear—go ahead. The right hand arm to a train approaching governs a train moving in that direction. The normal position of these signals will be at danger where they will remain except when held at clear by the hand of the operator. A block signal at danger must never be passed until the proper authority, in the form of a 'Permissive Block Card' or a clearance has been obtained from the operator, except as stated in rule No. 514.

"No. 504. An 'absolute block' means that but one train will be permitted to use the track between any two block stations at the same time."

(It was in evidence that the block between Dingess and Hale was an "absolute block.")

"No. 505. A 'permissive block' is used when trains are permitted to enter a block under notice that the preceding train has not cleared the same block. This is to be used only by direction of the superintendent, except as provided in rule No. 514."

(It is conceded that rule 514 has no application, as it was provided for stations having a "permissive block arm painted green"; no such appliance being provided at Dingess.)

"No. 506. The block signals will be used for train orders, and all rules applying to train order signals will apply to the block signals when used for train orders."

"No. 510. When a train approaches a block signal and it is changed to 'clear,' it will indicate that the block is clear to the first outer switch of the next station ahead. If the signal is at danger, it will indicate that the block is occupied by other trains, or that there are train orders."

"No. 518. These block rules will supersede all rules for the operation of block signals heretofore issued."

"Instructions to Operators.

"The responsibility of operating the block system is placed upon the operators at the block stations, who will be governed by the following rules:

* * * * * * * * * *

"No. 527. Operators * * * will not permit a train to enter a block following a train in the same direction until the preceding train has been reported as having cleared the block station ahead, except by order of the superintendent."

After the defendant had introduced its evidence, and both sides had rested, the defendant in writing demurred to the evidence introduced by the plaintiff, and the plaintiff in writing joined in said demurrer, and thereupon the jury returned its verdict in the following words and figures:

"If the court should be of the opinion that the law of the case upon the defendant's demurrer to the plaintiff's evidence should be for the plaintiff, then we, the jury, find for the plaintiff, and assess his damages at $6,000.00; but, if the court should be of the opinion that the law upon said demurrer to the evidence is for the defendant, then we find for the defendant.

"J. S. Ashworth, Foreman."

J. H. Meek, J. S. and J. R. Marcum, and Lace Marcum, for plaintiff.
Holt & Duncan, for defendant.

KELLER, District Judge (after stating the facts as above). This case, as will hereinafter appear, is a very important one, in that it presents some questions which have seldom, if ever, been directly passed upon by the Supreme Court of the United States, and also because it is to be decided upon a demurrer to the evidence of the plaintiff.

The declaration in the case, after making the necessary jurisdictional averments, charges: That the defendant was the owner and occupier of a line of railroad from the city of Norfolk, Va., to Kenova, in the Southern district of West Virginia; that plaintiff's intestate, George Salmons, was in the employ of defendant, engaged on one of its work trains near Dingess Tunnel; and that while so engaged at work, and without fault on his own part, defendant negligently caused a freight train to be run into and against the work train upon and about which plaintiff's intestate was at work, by reason of which he was killed.

Under the practice prevailing in Virginia and West Virginia, the declaration contained a sufficient statement of the cause of action, and any negligence of the defendant made to appear by the evidence as proximately causing the act producing the injury is sufficiently pleaded by such a declaration. Norfolk & W. Ry. Co. v. Phillips' Adm'x, 100 Va. 362, 41 S. E. 726; Snyder v. Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922.

In the argument before me it was admitted that the plaintiff's intestate was at his post of duty and without fault on his part when he was killed, and that his death was the result of negligence; but the plaintiff contends that the negligence was, in law, attributable to the defendant, whereas the defendant contends that the negligence proximately causing the injury was that of a fellow servant of plaintiff's intestate, for which the defendant is not liable. As this case is standing upon a demurrer to the evidence of the plaintiff, and such demur-

rer admits the truth of all material evidence introduced on behalf of the plaintiff, together with all inferences which may fairly be drawn therefrom, and only admits such evidence of the defendant as is not contradictory of plaintiff's evidence, we must examine the evidence in this case with a view of determining whether or not there was any evidence, together with fair inferences to be drawn therefrom, upon which, if submitted to a jury, they would, in any view of it, have been legally justifiable in returning a verdict for the plaintiff. If such can be found in the record, I must enter judgment for the plaintiff; if not, for the defendant. Heard v. Railroad Co., 26 W. Va. 455; Levy v. Insurance Co., 10 W. Va. 560, 27 Am. Rep. 598.

Before passing to a discussion of the questions involved, I may point out that counsel for the defendant did not agree as to the causal act of negligence in this case; one of counsel (Mr. Duncan) insisting that it was the act of Engineer Fink in proceeding carelessly with his train after having received information from the flagman of the work train that said train was in the block near the east portal of the tunnel, and contending that, such being the case, the negligence was clearly that of a fellow servant, and hence there can be no recovery. In answer to this, it is sufficient to point out that the jury might not have found that Engineer Fink was negligent in proceeding as he did after receiving the written order from the flagman of "Extra 544," because he thereafter received the signal that the block was clear, and under rule 510, introduced in evidence, this was an indication that the block was clear, and might well be held by the jury to have superseded the information communicated to him by the message of the flagman. The other counsel for defendant insisted: That the negligence in this case which proximately caused the injury was that of the Telegraph Operator Crabtree in signaling to second No. 70, the train of which Mr. Fink was engineman, that the block between Dingess and Hale was clear; that, in so signaling, Crabtree was the fellow servant of Salmons, the plaintiff's intestate; and hence that there can be no recovery.

On behalf of the plaintiff, it is insisted: First, that the telegraph operator, Crabtree, in so far as his duties were laid down as to block signals, was not the fellow servant of plaintiff's intestate, but the direct representative of the railway company in regard to those matters, and invested with a duty of the master which is nonassignable; and second, that, under the rules of the company, W. O. Franklin, assistant trainmaster, was a representative of the master, and that his negligence in directing or advising the operator, Crabtree, as to his course of action in the premises, directly contributed to the injury, and that hence the master is responsible in damages.

The first of these contentions involves the consideration of the general relation of master and servant, and of the proper interpretation of the doctrine under which the master is exempt from liability for injury to his servant where the proximate cause of the injury is the negligent act or omission of a fellow servant.

### Who are Fellow Servants?

The importance of determining upon correct principles the question who are fellow servants within the definition of those for whose negli-

gence the master is exempt is paramount. That it does not necessarily embrace all of the employés of the common master has been long well settled; but the courts have ever been averse to an attempt to lay down any hard and fast rule applicable to all cases, because all the circumstances of the particular case decided must necessarily enter into and affect its decision. As stated by the court in Hough v. Texas & Pacific R. Co., 100 U. S. 213–226, 25 L. Ed. 614:

"As to the general doctrine (of assumption of risks including negligence of fellow servant) to which we have adverted, very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been in its practical application in the special circumstances of particular cases."

Coming now to some of these particular cases, let us see what the courts have held, and, if we can, why they have so held:

In the case just adverted to (Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612), the court says:

"A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business in all of its departments are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employés, an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation. To guard against misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employés. Its duty in that respect to its employés is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés."

These views, which surely embody the most profound logic, are sustained by such leading cases as Ford v. Railroad Co., 110 Mass. 241, 14 Am. Rep. 598; Coal Co. v. Reid, 3 Macq. H. L. Cases, 266; Coal Co. v. McGuire, 3 Macq. H. L. Cases, 307; and many others.

In the case of Clarke v. Holmes, 7 Hurls. & N. 937, decided in the Exchequer Chamber upon appeal from the Court of Exchequer, Byles, J., made this pertinent remark:

"Why may not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others, the less will he be liable."

In accordance with these views, the Supreme Court of the United States has held, in Northern Pacific Railroad Company v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, that:

"It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. *No duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from liability.*" (Italics mine.)

To the same effect as to furnishing suitable machinery and appliances, see Hough v. Texas & Pacific R. R. Co., supra.

"A railroad company is not excused from its duty to inspect its cars by the sufficiency of the number of its inspectors and their competency. It is the duty of a railroad company to see to it that the wheels of its cars which are about to be drawn out on its road are in safe and proper condition, and this duty cannot be delegated so as to exonerate the company from liability to its servants for injuries caused by an omission to perform that duty, or by its negligent performance." Union Pacific R. Co. v. Snyder, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

"A railroad company is under a legal duty not to expose its employés to danger arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted to its train." Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188.

If the case at bar could be considered as being settled by the decisions of the highest appellate court of the state, the matter would present no difficulty, as the Supreme Court of Appeals of West Virginia has twice decided that a telegraph operator in charge of the signals at a station is not a fellow servant of an employé on one of the railroad company's trains. This was first held in Haney v. P., C., C. & St. L. Ry. Co., 38 W. Va. 570, 18 S. W. 748, and subsequently in the case of Flannegan v. Chesapeake & O. Ry. Co., 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. Rep. 896. The circumstances of this latter case were, in some respects, singularly like those in the case at bar. In the Flannegan Case, a freight train on which the plaintiff was engaged at work as a brakeman became uncoupled in what was known as "Sretchers' Neck Tunnel," and it became his duty to couple it. The conductor sent the rear brakeman back to flag any approaching train. The trains were run through this tunnel by the so-called "block system"; there being a telegraph station at each end of the tunnel. The operator at the west end of this tunnel gave a following passenger train the wrong signal—being that for a clear track—and allowed it to proceed at full speed, when she should have stopped it. Held, that the telegraph operator in charge of a signal station who has control, by means of signal orders, of the running of trains over a block section of a railroad, is not the fellow servant of a brakeman injured on such block section by reason of such operator's negligent management of the running of such trains. In considering the question involved, the court, in its opinion, says:

"Two persons who are called upon to perform the same duty, in effect, may occupy a relatively different position to the same employé in its discharge. For instance, the flagman protects his co-employés by warning the approaching train, while the master, the dispatcher, and the operator render them the same protection by not allowing the train to use the track until it is clear. One stops the train; the other holds it back. The one is a part of the train, while the other belongs to an entirely different department, which has the supervision and management of all trains, and yet is no part of any train, but is entirely stationary. The one acts for self-protection; the other being in no personal danger, acts for the safety of others, and the dispatch of his master's business. In this case the defendant, seeking to discharge its personal duty and provide a safe track, and at the same time facilitate the rapid movement of trains, established the signal station, and placed the operator in charge, with full authority by means of a code of signal orders equally as effective as any other kind could possibly be, to control the running of all trains over this block; and all trainmen, of every train, were under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties, she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master. Yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow servant of the trainmen, who are entirely at her command, and who can neither influence or control her independent actions? She is as much the master of her section block as the master is of the whole road. In Lewis v. Seifert, 116 Pa. 647, 11 Atl. 519, 2 Am. St. Rep. 631, it is held: 'The master owes to every employé the duty of providing a reasonably safe place in which to work. This is a direct personal and absolute obligation, and, while the master may delegate these duties to an agent, such agent stands in the place of the principal, and the latter is responsible for the acts of the agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate.'"

Undoubtedly, were the decisions of the state courts of last resort binding upon the federal courts within their jurisdiction, this decision and that in the case of Haney v. P., C., C. & St. L. Ry. Co., supra, would conclude this case; but as held in B. & O. R. R. Co. v. Baugh, 149 U. S. 369, 13 Sup. Ct. 915, 37 L. Ed. 772:

"The question of the responsibility of a railroad corporation for injuries caused to or by its servants is one of general law, in regard to which this court is not bound to follow the decisions of the state court." Point 2 of syllabus.

"The thirty-fourth section of the Judiciary Act of 1789 is limited in its application to the positive statutes of the state, and the construction thereof adopted by the local tribunal, and to rights and titles to things having a permanent locality." Point 3 of syllabus.

The question as to whether a telegraph operator is a fellow servant of an injured trainman has, so far as I am aware, only been before the United States Supreme Court on two occasions. The first was the case of Price v. Detroit, G., H. & M. R. Co., 145 U. S. 651, 12 Sup. Ct. 986, 36 L. Ed. 843, which was originally decided in the Circuit Court of the United States for the Eastern District of Michigan by Judge Henry B. Brown, who at the time of the hearing of the case in the Supreme Court was a member of that body, and consequently did not participate in the decision of the case, which was affirmed by a divided court. The facts in that case were that a west-bound train, known as "No. 11," had arrived at a station named "Lowell," where one Taft

was employed as local telegraph operator, and, while said train was still at Lowell engaged in switching cars preparatory to continuing its journey west, Taft received a telegraphic order from the train dispatcher at Detroit directing him to detain this train at Lowell until a certain east-bound train, known as "No. 82," on which the plaintiff's intestate was the engineer, arrived at Lowell, at which point the two trains were to meet and pass each other. This order Taft did not deliver to the conductor of No. 11, as was his duty, nor did he in any manner inform the conductor or engineer of its reception.

The other case decided by the Supreme Court of the United States is that of Northern Pacific R. Co. v. Dixon, reported in 194 U. S. 339, 24 Sup. Ct. 683, 48 L. Ed. 1006, in which the material facts were that the operator at Bonita, whose duty it was, under a rule of the company, to "record in a book to be kept for the purpose, and report to the superintendent, the time of arrival and departure of all trains, and the direction in which extra trains are moving," was asleep when extra freight train No. 162, going east, on which plaintiff's intestate was a fireman, arrived at his station at 12:35 a. m. and when it left at 12:50 a. m. Another extra freight, No. 159, was at the time moving westward toward No. 162 on a single track, and at 1:05 a. m. reached a station named Garrison, about 48 miles east of Bonita, and its arrival was reported to the train dispatcher, who thereupon asked the operator at Bonita whether No. 162 had arrived there, and the operator promptly answered that it had not. The question was repeated, and the operator asked if he was sure that No. 162 had not passed Bonita, and, upon his repeated assurance that it had not, the train dispatcher issued orders for the movement of these two trains, which were sufficient to guard against collision if the information received had been correct; but, as it was not correct, the movement resulted in a collision and the death of plaintiff's intestate. Upon these facts, the Circuit Court of Appeals of the Eighth Circuit certified the following questions:

"First. When a local telegraph operator is called upon specially by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, does the local operator, in the matter of giving such information, act as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the dispatcher that was induced by false information given by the local operator?

"Second. Is the negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the injury or death of a fireman of the company, without any fault or negligence of the train dispatcher, the negligence of a vice principal, for which the railway company is liable in damages to the fireman or his personal representatives, or is it the negligence of a fellow servant of the fireman, the risk of which the latter assumes?"

The Supreme Court (against the dissent of four of the justices) answered these questions as follows:

"First. The telegraph operator was, under the circumstances described, a fellow servant of the fireman.

"Second. The negligence of the telegraph operator was the negligence of a fellow servant of the fireman, the risk of which the latter assumed."

With regard to the case of Price v. Detroit, G., H. & M. R. Co., it is sufficient to say that the decision, being by a divided court, was not authority beyond the case under consideration.

In the Dixon Case, it will be observed that the answers to the questions certified by the Circuit Court of Appeals were carefully limited to the circumstances of the particular case, and were answered with reference to those circumstances. Undoubtedly, this Dixon Case, notwithstanding the strong dissent thereto of four justices of the Supreme Court, is binding authority upon the inferior federal courts as to all cases in which the circumstances are the same, and unquestionably holds that, as regards the duty of furnishing to the master information in regard to events transpiring at his station, the local operator is a fellow servant of trainmen who may be affected by the inaccuracy of such information; but I do not understand the decision as authority for the proposition that in no conceivable case can the local telegraph operator so represent the master as that his negligence may be imputed to the master. As the facts and circumstances in the case at bar are different from those in the Dixon Case, I feel impelled to state at some length wherein I find matter of distinction between the two cases. In the Dixon Case, and many similar cases decided by the Circuit Courts and Circuit Courts of Appeal, including Ill. Cent. R. Co. v. Bentz, 99 Fed. 657, 40 C. C. A. 56, B. & O. R. Co. v. Camp, 65 Fed. 953, 13 C. C. A. 233, Oregon Short Line & U. N. Ry. Co. v. Frost, 74 Fed. 965, 21 C. C. A. 186, and others, the duties performed by the local telegraph operator were those usually appertaining to telegraphic train orders, including the duty of reporting the arrival and departure of trains, and the delivery to the proper trainmen of telegraphic train orders received by the operator for the movement of trains passing his station, and therefore may be well said to be those of a subordinate purveyor of information both to and from headquarters. This precludes the idea of the operator being clothed with any authority of direction to trains or trainmen except in obedience to special instructions in the particular case received from superior authority.

In the case at bar, we are dealing with a different sort of duty under a different system, viz.: The block signal system, in which the responsibility and the employment of the operator are, in my judgment, different from the ordinary duties of a local telegraph operator as stated in the Dixon and similar cases. By this block signal system the track of a railroad company is divided into blocks, a block comprising that portion of the track between two telegraph stations each of which is provided with a semaphore consisting of a perpendicular mast with two arms, one projecting from each side of the mast when in normal position. The approaching train is governed in its movement by that arm of the semaphore which extends toward the right as viewed by the men on the train, and its normal position (horizontal) signifies "danger! stop!" which position it must and will occupy except when held at nearly vertical or "clear" by the hand of the operator, which

latter position signifies to the trainmen that the block is unobstructed to the first outer switch of the next station ahead. See rules introduced in evidence by the defendant.

By rule No. 506 (quoted in the statement preceding this opinion) addressed to trainmen, it is provided that:

"The block signals will be used for train orders, and all rules applying to train orders signals will apply to the block signals when used for train orders."

Coming immediately after rule 518 as it appears in the record, and before rule 519, is the following language:

"Instructions to Operators.

"The responsibility of operating the block system is placed upon the operators at the block stations, who will be governed by the following rules: * * *"

The rules which then follow make it clear that the operator is invested with the authority of displaying the proper signals governing the operations of the trains within his block without any special instructions relative to the particular case. As a matter of course his duties require him to obey all appropriate rules, and, in a case like the one at bar, to procure from the superintendent an authority to issue a "permissive block card" before permitting a following train to enter an "absolute block" which contains another train; but nevertheless the promulgation of all train orders for his block originates with him, and he must be, in my judgment, the representative of the master as to train orders upon that block, else the master has no representative for that service.

To illustrate what I mean, let us take the case at bar: When second No. 70 approached, the operator made the signal "danger! stop!" This was the correct signal under the rules, and was being obeyed by the trainmen. The operator had not only the right, but it was his duty, to give this signal under the rules without any communication whatever with the superintendent or any other higher authority. He was invested with this duty and responsibility by the rules of the company adopted for the operation of block signals, and he was made responsible for his block by those rules, and that signal to stop was the signal of the master. The trainmen were bound to obey it at their peril, although they knew it had not been telegraphed to the local operator from headquarters, but originated with him. Prior to the installation of the block system, the local operator would have had no right to stop this train except by virtue of orders originating in the superintendent's or dispatcher's office. Now he has the right and the duty to do so. So he has the power under the rules to direct this train to proceed with the assurance to the trainmen that the block is clear to the first outer switch of the next station ahead. He does so. Whose is that order? Had the track been clear, it would have been the valid order of the master, promulgated by the only means prescribed by the rules.

The master cannot delegate power to issue orders (not to repeat them, but to issue them) without assuming the responsibility for their correctness where they relate to such a matter as the protection of the safety of his employés at their place of work.

In the exhaustive opinion in the case of Baltimore & O. R. Co. v. Baugh, 149 U. S. 387, 13 Sup. Ct. 914, 37 L. Ed 781, the court quotes with approval from the opinion of Mr. Justice Valentine in the case of Atchison, T. & S. F. R. Co. v. Moore, 29 Kan. 632, 644, a portion of which quotation is as follows:

"A master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him, and, when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employés. And at common law, whenever the master delegates to any officer, servant, agent, or employé, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employé stands in the place of the master, and becomes a substitute for the master, a vice principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence."

I am of opinion that, under the particular circumstances of this case, the telegraph operator, Crabtree, in the operation of the block signal system under the rules introduced in evidence, was performing a positive duty of the master in relation to the movement of trains within his "block," and that there was sufficient evidence of his negligence to be submitted to the jury for their determination as to its existence and as to whether or not it was the proximate cause of the injury.

Did the Negligence of Franklin, the Assistant Trainmaster, Concur with That of the Operator?

The plaintiff contends that, even if it should be held that the telegraph operator, Crabtree, was a fellow servant of the plaintiff's intestate, his negligent act was the result of the direction of a man who had wide authority over him, and who was, undoubtedly, as he claims, the representative of the master in and about the movement of trains over a large part of the master's road, including the block in which the accident occurred, and insists that, if the negligence of the assistant trainmaster, Mr. Franklin, concurred with that of the operator, the company is responsible in damages.

The plaintiff predicates the view of the case at present under consideration upon rules Nos. 41 and 50, introduced by him in evidence. Rule No. 41 does seem to give a wide authority to trainmasters in relation to the movement of traffic. Under that rule, it is made their duty to "take charge of the movement of the traffic; exercise supervision over the men employed on the trains, and in yard and station service, see that they understand and obey the rules, and suspend them when necessary for neglect of duty; in case of detention of train by accident or obstruction, go to the place if necessary, take general charge of clearing the road, and see that proper precautions are taken to insure the safety of the trains and property."

This is surely a large delegation of authority, and it is evident that both Mr. Crabtree, the operator, and Mr. Franklin, the assistant trainmaster, understood it as authorizing the direction or advice under which the former acted on the day of the accident. Mr. Franklin stated on the stand that his duties and powers as assistant trainmaster were the same as those prescribed in the rule for trainmasters. Unquestionably, if I can understand the English language, this rule gave Mr. Franklin large authority over Crabtree. Crabtree was in station service, and under this rule, if I read it aright, might have been suspended by Mr. Franklin for neglect of duty. It was Franklin's duty to see that he understood and obeyed the rules, so far at least as related to the movement of traffic. In the event of detention of train by accident or obstruction, it was his duty to go to the place, if necessary, "take general charge of clearing the road, and see that proper precautions are taken to insure the safety of the trains and property."

I am frank to say that I think the rule No. 527, directing block signal operators not to permit a train to enter a block following a train in the same direction until the preceding train has been reported as having cleared the block station ahead, except by order of the superintendent, is perfectly clear and easily understood, and that one charged with the duties of a block signal operator should understand that such a rule is inviolable save by the authority therein named.

At the same time, where the act of one so far representing the master as to be charged with the duty of seeing that train, yard, and station employés understand and obey the rules, and having power to suspend them for neglect of duty, induces the violation of a rule by one of a class employés he is given power to supervise and suspend, and the violation of that rule was the proximate cause of injury, I think the question as to whether his negligence directly contributed to the injury is a proper one to be submitted to the jury.

The question is not, to my mind, determinable by inquiring whether or not Franklin in fact had the authority to suspend or modify the rules of the company in such a case, but whether he was, as to the control of the movement of traffic over that part of the road, a vice principal of the master, whether he was negligent, and whether his negligence, co-operating with that of a fellow servant of plaintiff's intestate, contributed to cause the injury. This inquiry is entirely unimportant, if I am correct in my view that, as to block signal service, Crabtree was not a fellow servant of plaintiff's intestate, and only becomes important upon the assumption that he was such fellow servant, here indulged for the sake of presenting this point. The master remains liable where the injury complained of was caused partly by a coservant's disregard of rules, and partly by the negligence of the master himself or of some employé for whose omissions of duty he is responsible. Louisville, N., A. & C. R. Co., v. Heck, 151 Ind. 292, 50 N. E. 988. As I have already said, this phase of the case is unimportant, in view of the fact that I hold that, in the performance of his duties in relation to the operation of the block signal system, Crabtree was not the fellow servant of trainmen within his block, but the representative of the master, and I have merely adverted to it because it was presented

in argument as an alternative proposition in the event it was held that Crabtree was a co-servant of plaintiff's intestate.

Having held that, under the circumstances of this case, the block signal operator, Crabtree, was not the fellow servant of plaintiff's intestate, I must hold that there was sufficient evidence of defendant's negligence to have been properly submitted to the jury, and the defendant's demurrer to the plaintiff's evidence will therefore be overruled, and judgment will be entered for the plaintiff upon the verdict of the jury.

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## In re CHARGE TO GRAND JURY.

(District Court, S. D. Georgia, E. D. February 27, 1908.)

1. INTERNAL REVENUE—SPECIAL TAX ON LIQUOR DEALERS—ENFORCEMENT BY COURTS.

   While the cardinal purpose of the provisions of the internal revenue law imposing special taxes on dealers in liquors is the raising of revenue for the United States, the federal courts may properly, in the exercise of the powers vested in them, rigidly enforce the penalties provided for a violation of such law, for the secondary purpose of aiding in the enforcement of the laws of a state regulating or prohibiting the sale of liquors.

2. SAME—PERSONS SUBJECT TO TAX—MEMBERS OF ILLEGAL CLUBS.

   Under the statute law of Georgia which makes it unlawful for any person to sell or barter either directly or indirectly, or to keep or furnish at any public place, or to keep on hand at any place of business, intoxicating liquors, a municipal corporation cannot lawfully license or charter a so-called "locker club" which, in fact, sells or furnishes liquors to its members, and such illegal charter is no protection to its members, each one of whom, who by his money, name, or patronage contributes to its support and maintenance, is a retail liquor dealer within the internal revenue law of the United States, subject to special tax as such and to the penalty imposed for carrying on the business without payment of such tax where a single tax stamp only is taken out in the name of the club.

After an eloquent historical address in relation to the laws regulating the manufacture and sale of intoxicating liquors, both state and national, and an interesting and instructive disquisition on the effect of the use of liquor on the negro population of the South and of the causes leading to the rights and enforcement of prohibitory laws in the South, more particularly in the state of Georgia, the judge continued his charge to the jury as follows:

SPEER, District Judge. It is not surprising, gentlemen, that with such convictions the courts, if they appreciate their duty, must with the utmost apprehension regard every effort to nullify, set aside, or evade those laws, made for the salvation of the people. Determine, then, if you can, my emotions, with the knowledge of such facts as those I have just recited, when this further knowledge came to me through the report of the United States marshal on yesterday:

"On Saturday, February 22d, I visited the 'locker club' known as the 'Alpine Club,' on the corner of Jefferson and Bryan streets, in Savannah, Ga. I found that this club was operated in a small room about 16 feet square on the first floor in a building which was recently a barroom. They had moved the bar fixtures out of the former barroom into an adjoining room, and this

last-named club was the clubroom. There were two entrances to the club—one through a door from Jefferson street, and one through the old barroom. Both these doors were locked, but, when I knocked on the door, a man named Kolman opened the door. I introduced myself to him as United States marshal, and told him I wanted to see his revenue tax stamp and his charter. He agreed to show them to me, and we went inside. When we reached the inside or clubroom, I found about 15 or 20 negroes in the place; two of them sitting in one corner in a state of complete intoxication. The place was furnished with regular bar fixtures. A white woman, who I was informed was Kolman's wife, was tending bar, serving drinks to three or four colored men who were standing at the bar. As I reached the inside, these men were just setting the glasses upon the counter, apparently having just drunk, and the white woman cleared them away, together with a bottle of whisky which was sitting on the counter, from which the negroes had doubtless poured their drinks. There were five or six negroes sitting at a table inside the clubroom, each with a glass of whisky before him."

It seems from the marshal's report that the manager of the "Alpine Club" had been previously in business. The marshal continues:

"In January they elected a new president and vice president of the old Alpine Club, both colored, and Kolman, the white man, is secretary and treasurer. Kolman showed us a contract he had with the old club, which recited the fact that the Alpine Club had no capital, and Kolman agreed to furnish the clubrooms, lights, etc., and, in consideration of the same, he was to receive all profits made from the sale of liquors, etc. Since opening the new Alpine Club, the officers of the same have agreed to pay him $75 per month to manage and operate the same. Kolman stated that he did not know how many members he had, as his lawyer had his membership book. He said they took in members whenever they had as many as four or five applications. On his desk I saw as many as 75 or 100 applications for membership. These applications for membership read as follows: 'To the Officers and Members of the Alpine Club, Savannah, Ga. Gentlemen: I hereby tender this my application for membership in your club, promising, if elected, to abide by all rules and regulations. Respectfully, ———.' In most cases these applications were not dated, and were signed by cross-marks, which were not witnessed. I also saw an order blank on the manager's desk, which read as follows: 'Savannah, Ga., Feb. 21, 1908. To the Superintendent of the Alpine Club, City. Dear Sir: Kindly order for my account three ½ pints of rye, for which I enclose $1. In placing this order, you are acting as my agent, and the said articles are for my personal use. Please have the same delivered to me by interstate shipment and notify me. Respectfully, C. Golden.' I was in this locker club possibly a half hour, and in that time there must have been 35 or 40 colored men that came in, some of whom had keys and let themselves in, while others of them knocked on the door for admission. I saw no lockers anywhere. Mr. R. B. Thomas, special United States gauger, who accompanied me, went behind the counter, and said he saw three small lockers under the counter, each one about large enough to hold a quart bottle of whisky.

"Respectfully submitted. George F. White, United States Marshal."

From the officers of the Internal Revenue Bureau it has been reported to me that there are 1,184 negro members of the Alpine Club. There are others, many others, which will be brought to your attention. By their genteel membership, by their beautiful and brilliant fixtures, or by their gleaming cut glass, some of them may produce an illusion which is inconsistent with the possibility of vice or crime. I believe there are 15 of these "locker clubs," as they are termed, in this community. Eight of them have providently gone out of business since certain admonitory remarks made by this court during the last month. The others might perhaps with some judiciousness have imitated thei-

example. An illustration as to these locker clubs may be found in the letter following:

"Captain G. B. Pritchard, Acting City Treasurer, City.

"Dear Sir: Upon payment of the required tax, please issue to the Olympia Club, Chris Evans, president, secretary and treasurer, a locker club license, at 42–44 Barnard street.

"Very respectfully, [Signed by Mayor.]"

Notwithstanding the numerous qualities of Chris Evans, "President, Secretary, and Treasurer," the mayor, who is a charming gentleman, whose friendship I cherish and covet, had no right whatever to issue this locker license, and it possesses no validity in view of the general law of the state of Georgia. That law is as follows:

"Be it enacted by the General Assembly of the state of Georgia, and it is hereby enacted by authority of the same, that from and after the first day of January next after the passage of this act, it shall not be lawful for any person within the limits of this state, to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or keep or furnish at any other public places or manufacture or keep on hand at their place of business any alcoholic, spirituous, malt, or intoxicating liquors or intoxicating bitters or other drinks which, if drunk to excess, will produce intoxication, and any person so offending shall be guilty of a misdemeanor, and shall be punished as prescribed in section 1039 of the Pen. Code 1895 of Georgia. * * *"

It is, however, said that because in the tax act the state imposes a tax of $500 on what are termed "locker clubs," this justifies the authorization of such clubs and the issuance of such licenses. We turn to that clause of the tax act upon which such argumentative persons rely. We find that it reads as follows:

"* * * In addition to the ad valorem tax on real estate and personal property, as required by the Constitution and provided for in the preceding section, the following specific taxes shall be levied and collected for each of said fiscal years: * * * Upon every club, corporation or association of persons who shall keep or permit to be kept in any room or place, or in any place connected therewith directly or indirectly, in which the members of such club, corporation or association assemble or frequent, any intoxicating liquors, the sum of five hundred dollars; provided, that nothing in this section shall be construed to license or permit the keeping of any intoxicating liquors, in any place now prohibited by law or which may hereafter be prohibited by law."

This means merely that if a man sets up a blind tiger in violation of the general state law, which I have just quoted, in addition to the other penalties, the state of Georgia can collect from him a special penalty of $500. There is no act of authority whatever to any one to violate the general state law. No municipal mandate whatever can have any force or effect when it is plainly obnoxious to the general laws of the state. As to these locker clubs, the law does not distinguish between their high condition or their low estate.

If the charters are in violation of state law, or are null and void for any reason, and therefore do not authorize these locker clubs to carry on the business of retail liquor dealers, and if, under the cover of such charters, individuals become members of an association, and, by membership dues or otherwise, pay their means for the purchase and maintenance of its place of business, its paraphernalia, and its liquors,

which are dealt out to them as called for, they each become liquor dealers in contemplation of both state and national law. The presence of a pigeon hole either under or over the bar will not avoid the penalties of the law.

Now, the statute which defines and punishes any violation of the law is found in section 16 of the act of February 8, 1875 (18 Stat. 310, c. 36), amending section 3242 of the Revised Statutes (U. S. Comp. St. 1901, p. 2095), and is as follows:

"* * * Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, or manufacturer of stills, without having paid the special tax as required by law * * * shall, for every such offense, be fined not less than $100, nor more than $5,000, and imprisoned not less than thirty days nor more than two years."

The offense of carrying on the business of a retail liquor dealer without paying the special tax as required by law is a misdemeanor. In a misdemeanor there are no degrees or grades of offense. Each man who participates in its successful completion is himself a complete offender. This is inevitable, because there is neither lawful charter nor lawful partnership or association. The men who deliberately sign agreements, announce themselves as members, authorize agents to buy, to keep on their account, to dispense the liquors, who pay in their money to support the establishment, and who consume and enable others to accumulate and consume these liquors, or any part thereof, whether furnished by one or other members of the association, are retail liquor dealers in contemplation of law. The law will look through the form to the substance of the offense. It will look at the entire transaction. It will not stop and scrutinize narrowly one stingy gentleman, who in grim exclusiveness will consume the liquid delights of his favorite brand from his own alleged locker. It will consider every evidential feature as described by the internal revenue officers or otherwise is put in proof, and determine whether, in fact, a man has so acted as to make himself a retail liquor dealer, or to keep up the business of a retail liquor establishment, where liquors can be freely disposed and dispensed, and at the same time so narrowly handle his own skirts as to keep them free from the stain of legal condemnation. If his money, his membership, his liquor, his name, his influence, his participation, aided to carry it on, and if he is not lawfully authorized to do these things, he is in the business with the others, and the law treats him as a retail liquor dealer.

It is true that the cardinal object of the national law is to enforce the collection of taxes for the federal treasury. I have never yet, however, been able to appreciate the fact that it is improper so to use lawful powers within one's jurisdiction, as to accomplish the direct purpose for which they were enacted, and at the same time do all one can for the general welfare of the people, and, if possible, for the elevation of their moral status. The United States courts can do great good toward the solution of the great problems before our people, which engage the thoughtful hours of every reflecting and patriotic man. While a certain class of thinkers, to an extent hide-bound, deny such powers to the United States courts, I observe that sometimes they are

very glad to call on us for help. Some of them may not do so in regard to the locker clubs. You will doubtless recall the stanza of Tam O'Shanter:

> "Inspiring bold John Barleycorn,
> "What dangers thou canst make us scorn."

While this is possibly true, the high-minded men, who for momentary indulgence, and possibly with momentary indignation at the policy of the state, have entered into these locker clubs, will, I am convinced, soon see that the part of good citizenship will guide them to their abandonment. Already the most astounding benefits have been experienced by the people at large from the prohibition law. Why, even the dumb brutes, who have been subjected to the service of man, would, if they could, thank God for prohibition. The hard driving and neglect of the drunken negro, and the drunken white man as well, have been succeeded by kindliness and attention. The state of Georgia in 12 months will gain incalculable advantages in the improvement of stock alone, because drunkards no longer handle and drive them. A prominent mill man in Macon, one of our best citizens, assured me that, while heretofore he could not get his men to work before Tuesday or Wednesday after the Saturday night debauch, now that whisky is gone, bright and early Monday morning they are at the engine, the spindle, and the loom. Labor, which was almost impossible to obtain through the rural districts, is now plentiful, and the work has just begun. Little more than a year ago I heard experienced contractors complain that many of their laborers would work only a day or two in a week to obtain enough money for support and the small amount of food consumed, and then quit work until the money was gone. The police courts of such great cities as Macon, Augusta, and Atlanta, when contrasted with their former methods, have practically gone out of business. The offenses formerly engaging their attention are now not committed. This will be found true in the superior courts and the county courts throughout the state of Georgia. Where a week or two weeks of the people's time and money were expended upon the criminal docket, it will not bear out my experience if they do not finish in a day, or two days. I well remember when I was a young Solicitor General that in one county in my circuit the sale of liquor was forbidden. Early Monday morning the tall, stalwart, clear-eyed people, cleanly, manly, quiet, temperate, and discreet would gather in the county seat. By the second day we were through with the criminal docket. In an adjoining county, with the same lands, the same climate, and the same people, often of the same families, the sale of liquor was present. The faithful judge was prompt to call the criminal docket at the first moment, but it was usually true that, with all the energy and dispatch of its officers, at least two weeks were required for its disposition. The looks of the people were different. In one county there was the temperate life, where hope elevates and joy brightens. In the other the countenances of the people were sodden. There was the bleared and bilious eye, the lurid visage, the unshorn jaws, and not unfrequently the unbathed person, which dispelled in the court an

odor that in the language of John Wesley on one occasion "did not smell like balsam." In a short time after the abolition of the liquor traffic, in the noble city of Athens, I have seen the drunkard reformed and reconsecrated to the duties of manhood, his dingy house repainted, his fences rebuilded, his once pathetic, bare-foot, dirty little children clean, well-clothed, well-shod, and well-fed, with bright eyes hastening to school, and the wife, whose once worn and wasted features, in the happiness and pride of his resurrection, had regained the loveliness and charm of youth.

I have not discussed the moral phases of this great question, but merely those which seem to be legal and political. If the laws which the people of our state have enacted are enforced, the chief happiness to inure to those we love is the consciousness that henceforth, if we expel the demon of the still from our borders, confidence and peace will reassume their place in happy homes among those dear objects of our love, dearer to us "than are the ruddy drops that visit our hearts." Once there was within my own memory no such thing in all the borders of this Southland as that unspeakable crime, the bare mention of which will stir a fever in the blood of age, and make the infant's sinews strong as steel. It will disappear from our civilization when the brain of the docile African, even of the lowest order, is no longer infuriated and rendered careless or desperate of consequences by the drink he absorbs. In his furtive wanderings on the lonely roads, or in his solitary lair in the forest, the poisonous cardiac stimulant drives the blood of the savage in swift pulsations to his compressed or maddened brain, and then—no matter how desperate the chance or certain of detection—the crime is committed. This it is which has ranked the people of Georgia, save perhaps in one or two great cosmopolitan cities, in the serried ranks of those who have determined that the sale and furnishing of liquor shall stop within our borders. The politicians did not do it. They framed a platform for local option. The representatives of the people stamped the planks of this platform into nothingness. It is a revolution, and it will not stop with Georgia, nor do I believe it will stop with the South. Even now the senior senator of this state has invoked the powerful aid of Congress to fulfill the purpose of this people. Lives will become irradiant by its presence. Gentle woman reassumes her rightful station as regnant queen. The prayers of good men in great cities, amid the dim religious light of great churches, are heard that it may prosper. And in country churches, in the shades of gigantic oaks, or amid the sighing pines, the prayers and the song worship of the simple, earnest servants of the old-time religion, as they roll away amid the aisles of the forest, are a thank-offering of a long suffering and a sorely troubled people that strong drink has been forever banished from our state.

I have confidence, gentlemen, that you, who are selected from the thoughtful, the conscientious, the reflecting, the home-loving, the God-fearing, the patriotic people of Georgia, will give such consideration to this great topic as will advance the cause of temperance, justice, right, and home.

## GILLESPIE v. POCAHONTAS COAL & COKE CO.

(Circuit Court, S. D. West Virginia. October 15, 1907.)

1. REMOVAL OF CAUSES—FEDERAL COURT—JURISDICTION—NONRESIDENCE OF PARTIES.

Where a suit is brought in a state court, and neither plaintiff nor defendant is a resident of that state, it is not removable to the Circuit Court of the United States solely on the ground of diversity of citizenship.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 60.]

2. SAME—CLOUD ON TITLE.

Jurisdictional Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), confers jurisdiction on a federal Circuit Court of a suit to remove a cloud from the title to land lying within the district where the suit is brought, so, where neither of the parties to a suit for such relief were residents of the state in the courts of which the suit was brought, it was removable to the federal Circuit Court.

3. SAME—PETITION FOR REMOVAL—RECORD.

The record may be examined in aid of a petition for the removal of a cause to the federal courts, where such averments do not disclose sufficient ground for jurisdiction on removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 167.]

4. SAME.

A petition to remove a cause to the federal Circuit Court should contain the essential averments to show jurisdiction on removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 166, 167.]

5. ACKNOWLEDGMENT—MODE—MARRIED WOMEN.

A certificate of acknowledgment to a deed, reciting that W., wife of the grantor, being examined by the officer privily and apart from her husband, and having the writing fully explained to her, declared she had willingly executed the same and did not wish to retract it, in accordance with the decisions of the Supreme Court of Appeals of West Virginia, where the instrument was executed, was insufficient to show that such feme covert acknowledged the deed to be her act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 183, 203–207.]

6. PARTITION—NATURE OF PROCEEDING—TRIAL OF TITLE.

The common-law rule that a trial of title could not be had in a suit for partition was changed by Code W. Va. 1889, c. 79, § 1 (Code 1906, § 3180), declaring that the court in such cases shall have jurisdiction of the questions of law affecting the legal title that may arise in the proceedings under which the court may pass on all claims of title except a title asserted by a stranger.

7. JUDGMENT—CONCLUSIVENESS—ISSUES DETERMINED—PRESUMPTION.

Where a court had jurisdiction to determine all conflicting questions of title between the parties to a partition suit, it would be presumed that it did so, and that the decree unappealed from finally adjudicated the interests of the parties in the land in controversy.

8. INFANTS—ACTION—CONCLUSIVENESS OF DECREE.

Where certain infants were parties to a suit for partition, a decree adjudicating their interests became conclusive on them, their privies, and alienees on the expiration of six months after they became of age with-

out their having within that time directly attacked the decree either by appeal or bill of review for error apparent on the face of the record.

9. PARTITION—FORM OF DECREE.
Where, in partition, the same title was decreed to certain distributees as was decreed to all the other co-tenants, and was such as M., who owned the fee, was seised of in his lifetime, the decree passed a fee to them, though it did not so state in terms.

10. SAME—CONSTRUCTION.
A partition decree recited that there were eight heirs to inherit the estate, and then purported to lay off and assign to each of them their respective interests, and to defendant's grantors, who held under a deed which was invalid as to the heir but valid as to her husband, was awarded an equal one-eighth part. *Held*, that such decree could not to be construed as intending to vest in defendant's grantor only the curtesy interest of the husband, but a title to a one-eighth interest in fee.

In Equity.

Chapman & Gillespie, for plaintiff.

Rucker, Anderson, Strother & Hughes and A. W. Reynolds, for defendant.

KELLER, District Judge. This is a suit in equity brought in the circuit court of McDowell county, W. Va., by J. S. Gillespie, a citizen and resident of the state of Virginia, against the Pocahontas Coal & Coke Company, a corporation organized and doing business under the laws of the state of New Jersey, and a citizen and resident of said state of New Jersey, for the purpose of setting aside and vacating, as clouds upon the title of plaintiff, certain deeds purporting to convey title to the defendant to certain lands in McDowell county, W. Va. The defendant in due time presented in the clerk's office of the circuit court of McDowell county, W. Va., its petition praying for the removal of this cause into the Circuit Court of the United States for the Southern District of West Virginia, accompanied by a bond in proper form; but it does not appear that any order was ever made by the state court either granting or refusing the prayer of the petition. At the next term of the Circuit Court of the United States for the Southern District of West Virginia, a copy of the record of this suit in the state circuit court was duly filed, and thereupon the plaintiff moved the court to remand the cause to the circuit court of McDowell county, W. Va. The judge then sitting (the writer being absent from his district) overruled this motion on the ground that no reason was suggested therefor.

It is true that the petition, standing alone, does not show any ground for the jurisdiction of the court upon removal, as it assigns no other ground than mere diversity of citizenship, and as the plaintiff is a citizen and resident of Virginia, and the defendant of New Jersey, this court, upon that ground alone, would have no jurisdiction to hear the cause. Foulk v. Gray et al. (C. C.) 120 Fed. 156; In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. However, upon inspection of the record accompanying the petition, it is at once seen that diversity of citizenship is not the sole ground of jurisdiction, as the suit is to remove a cloud from the title to land lying within the Southern district of West Virginia, and is therefore cognizable under

section 8 of the Jurisdictional Act of March 3, 1875 (chapter 137, 18 Stat. 472) as amended by the acts of 1887 and 1888 (Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 513]), and hence the suit was a removable one, and the motion to remand was properly overruled. See Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201; Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69.

It has long been held that the record may be looked to in aid of the averments of the petition, where these do not fully disclose sufficient grounds for the jurisdiction upon removal. See Ruckman v. Ruckman (C. C.) 1 Fed. 587; Supreme Lodge Knights of Pythias of the World v. Wilson, 66 Fed. 785, 14 C. C. A. 264. However, while it is true that the whole record may be looked to to ascertain whether jurisdiction exists, good pleading requires that all essential averments be included in the petition, and since the decision in Re Wisner, supra, has definitely settled that merely personal causes of action between citizens of different states will not give jurisdiction save in the district of the residence of either the plaintiff or the defendant, it is extremely important that, where removal is sought in a neutral jurisdiction, the grounds for such jurisdiction should be plainly set forth in the petition itself, by showing the subject-matter of the suit.

Coming now to the merits of the case, I desire to say first that the case has been ably presented by the eminent counsel on both sides, and I regret that the limited time at my disposal has prevented me from fully discussing all the matters presented; but, as I have come to the conclusion that this case is governed by one controlling proposition, I trust to be excused from discussing other interesting features which are more incidentally presented.

Briefly, the facts are as follows: One J. T. Myers owned a large tract of land in McDowell county, W. Va., which, upon his death, intestate, passed by descent to his eight children, one of whom was Mary L. B. Myers, who had, prior to the death of her father, intermarried with Thomas C. White. By deed dated December 9, 1887, White and his wife conveyed, or attempted to convey, to Harman Newberry, J. G. Watts, and William E. Peery, "their entire interest in the lands of Mary L. B. White's father (J. T. Myers), lying on the Dry Fork of Sandy river, in McDowell county, W. Va., said interest is one-eighth of said lands owned by the said J. T. Myers, deceased, the said parties of the first part warrant generally the title to the land hereby conveyed." That portion of the certificate of acknowledgment to the deed relating to the privy examination of the wife, etc., is as follows:

"And the said Mary L. B. White, wife of said Thomas C. White, being examined by me privily and apart from her said husband, and having the said writing fully explained to her, declared she had willingly executed the same and does not wish to retract it."

Mary L. B. White died in 1888, leaving, surviving her, Thomas C. White, her husband, and four children, two of whom died in infancy, after the death of their father, which occurred in 1891, and the other two, Mary White and Sterling White, are both living; the for-

mer having attained her majority in February, 1903, and the latter in August, 1905. In November, 1894, Jessie Beavers, who was also a daughter of J. T. Myers, and Henry Beavers, her husband, instituted a suit in the circuit court of McDowell county, W. Va., for the partition of the lands of which J. T. Myers died seised, alleging, inter alia, the deed from Thomas White and Mary L. B. White to Newberry, Watts, and Peery, and exhibiting a copy thereof, and also alleging the death of Mary L. B. White, leaving her husband and two infant children, Mary and Sterling, surviving her. To this bill, Newberry, Watts, and Peery, Thomas White, and Mary and Sterling White, infants, were made parties; the first three being proceeded against by order of publication. A guardian ad litem was appointed for Mary and Sterling White, and filed an answer on their behalf. In the final decree it is recited that Thomas White was proceeded against by order of publication, but this is not borne out by the record, and there is independent proof in the record of this case that Thomas White was dead, and had been dead since 1891. It may be well to point out that if this partition record could, by any possibility, be taken as proving that Thomas White was alive in 1894, it would also prove that he became and was the heir of his other two infant children who had survived their mother and meantime died. But neither the making of Thomas White a party to this bill, nor the patently erroneous recital in the decree that he had been proceeded against by publication, could have any effect to declare or prove that he was alive at the bringing of this suit, and the plaintiff has proved in this record that he had been dead for three years when the suit was brought.

The land was partitioned in this suit, and 58.8 acres, being one-eighth of all the lands partitioned, were laid off and assigned to Newberry, Watts, and Peery, and the decree was ordered to be recorded in the county clerk's office in accordance with the statutes of West Virginia. Subsequently, Watts and Peery conveyed their interest in this 58.8 acres to Newberry, and Newberry conveyed to the defendant, who in 1904 took possession of the lands by a tenant, who remained thereon until about June 22, 1906, when he suddenly left, and on the same day the plaintiff had a tenant take possession on his behalf. The circumstances indicate collusion between these tenants, though there is no direct proof of it. The plaintiff, at the time of bringing this suit, was the owner of whatever interest Mary and Sterling White had in these lands, and seeks to set aside the conveyances under which defendant claims title, as clouds upon his title.

The contentions of the defendant against the granting of the relief prayed for in the bill are two, namely: First, that the deed from Thomas C. White and Mary L. B. White to Newberry, Watts, and Peery was a good and valid deed, and availed to pass the title of Mrs. White to her interest in her father's estate; and, second, that, in any event, the decree in partition of the circuit court of McDowell county, assigning this 58.8 acres to the grantors of defendant, created title, and, that decree not having been appealed from or otherwise

directly impeached within the time required by law, it cannot now be attacked collaterally.

If the first contention of the defendant were sustained, it would immediately end this case, as, if the proposition thus contended for were sound, Mary White and Sterling White never acquired any interest in this property, and consequently could never have conveyed any interest therein. Personally, I have no doubt but that the decisions of the Supreme Court of Appeals of West Virginia, construing the statute formerly prevailing governing the acknowledgments of married women to deeds purporting to convey their separate estate, were wrong in principle, and I much doubt whether the present court would sustain them. Similar decisions by the Supreme Court of Virginia have recently been overruled by the case of Geil v. Geil, 101 Va. 773, 45 S. E. 325, decided September 17, 1903, and, as stated by the court in that case:

"It is difficult to comprehend how a married woman can declare that she has willingly executed a deed and does not wish to retract it, without thereby, in substance and effect, acknowledging the deed to be her act."

Nevertheless, the present state of the law, as determined by the supreme appellate court of this state, is in favor of the proposition that the deed here in question does not avail to pass the title of the female grantor, and I feel constrained to abide by the law as so declared until that decision has been duly reversed.

However, the defendant also relies on the decree in partition entered by the circuit court of McDowell county, W. Va., to defeat this suit. Under the common law, as is well known, a suit in partition was merely a possessory proceeding, and was entirely inefficient to try title, and where the common law still remains in force, such is still the case. Many statutes have been passed in the different states modifying the common law, and in West Virginia the extent of the jurisdiction is now (and was at the time of the partition suit made part of the record herein) governed by the provisions of section 1, c. 79, of the Code of West Virginia of 1899 (Code 1906, § 3180), which section reads as follows:

"Tenants in common, joint tenants and coparceners, shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be, shall have jurisdiction, in cases of partition, and in the exercise of such jurisdiction, may take cognizance of all questions of law affecting the legal title, that may arise in the proceedings."

Construing this statute, the Supreme Court of Appeals of West Virginia, in the case of Moore v. Harper, 27 W. Va. 362, decided that the court had authority to even pass upon an adverse claim to the land, but later have held, in the case of Davis v. Settle et al., 43 W. Va. 18, 26 S. E. 557, Syl., point 5:

"Section 1, c. 79, Code 1891, authorizes a court of equity in partition cases to pass on all questions of law touching the legal title of any one claiming to share in the partition to the interest he claims, if his interest be such as, if valid, will make him a co-owner in the common subject with the plaintiff, as holding under the same right or title under which the partition is to be made; but it does not authorize the court to pass on the title of a stranger claiming under a different title, adverse to the title under which the partition

is to be made, nor can such stranger and his hostile title be brought into such suit, and the conflict between the two hostile rights settled as incident to partition."

To the same effect is Carberry et al. v. W. Va. & P. R. Co., 44 W. Va. 260, 28 S. E. 694. For full notes upon the changes introduced by statutes as to the jurisdiction to try title in suits for partition, see Nicely v. Boyles, 4 Humph. (Tenn.) 177, 40 Am. Dec. 640, and Carter v. White, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853, in the latter of which the doctrine in West Virginia is stated and referred to. In the case last referred to, the editor sums up the effect of these statutory changes as follows:

"The general policy of the American statutes, especially those of a comparatively recent date, is to permit the parties in proceedings for partition to present and have determined every material question relating to the title, so that, as the result of the proceeding, each person having an allotment made to him, and each purchaser acquiring title under a decree of sale, may rest assured that he has acquired the title and interest of every person who has been before the court. All issues may be presented and determined which are necessary to the accomplishment of this result, and the determination, when made, is final and conclusive, and none of the parties can maintain any subsequent action or proceeding inconsistent with the determination thus made."

This language is just as pertinent, when applied to the recognized limits of jurisdiction in partition in West Virginia, as when applied to the wider jurisdiction obtaining in some of the other American states which permit adverse titles to be tried where the parties are before the court, and which doctrine was applied in Moore v. Harper, supra. In this case no question of a stranger title arose. All the parties before the court derived such title as they had from the same fountain, and the court had the right—and must be conclusively presumed to have exercised it—of deciding all questions of conflicting title arising between these parties.

The determination of the questions involved was just as final as regards the interest of the infant parties, Mary and Sterling White, as though they had been adults, save in one aspect. Had they been adults, and had neglected for six months to directly attack the decree either by appeal or by bill of review for error apparent on the face of the record, their rights would have been forever concluded. Being infants, they had their right to the choice of one of these remedies, at any time within six months after the time when they severally became 21 years of age—and, of course, their privies and alienees had the same right and for the same period—but, in my judgment, the moment that Mary White passed the age of 21 years and 6 months, without taking action to review and reverse the decree in the original partition suit, all remedy as to her interest, if such she had, was gone. And the same thing was true of the interest of Sterling White after he had passed the age of 21 years and 6 months.

Counsel for the plaintiff, aware, I suppose, of the final character of decrees in partition, unappealed from and unreviewed, and of the effect of the record thereof under section 8, c. 117, Code 1899 (Code 1906, § 3740), to pass title, have ingeniously sought to take the position that the court never decreed title to Newberry, Watts, and Peery,

and base it upon the fact that the language of the decree does not contain the words "in fee simple." It is enough to answer that the same title was decreed to them as was decreed to all of the other cotenants, and was merely such title as J. T. Myers, in his lifetime, was seised of.

Counsel further suggest that, at the time of the partition decree, Thomas C. White was still in life, and that a decree to Newberry, Watts, and Peery was proper to convey to them his life interest. If that fact had been proved in the partition case, it could only have served to embarrass the plaintiff in his claim of ownership of this tract of land, as, had Thomas White been then in life, he would have been the heir of his other two deceased infant children, and, under his deed to Newberry et al., at least one-half of this tract would have been theirs, even had the court then and there pronounced said deed invalid to convey Mrs. White's title to the land. But the fact is that Thomas White died in 1891, three years before this suit was brought. It is true that Thomas White was named as a party to the suit, and that one of the decrees recites that process was served by order of publication on one "Thomas B. White"; but neither the affidavit of nonresidence nor the order of publication contains the name of Thomas White, though both are contained in the record, and, there being no suggestion of his nonresidence, he could not be legally served by order of publication, even if he were alive. But even had the affidavit of nonresidence and the order of publication as well as the decree contained his name, still the whole record would have been insufficient as proof that he was then alive, and hence the proof of his death in 1891 does not controvert that record. The record of the partition would have to contain affirmative proof that Thomas White was then in life to warrant any presumption that an estate by the curtesy was what the court decreed to Newberry, Watts, and Peery.

That it was the intent of the court to decree a one-eighth interest in this land to Newberry, Watts, and Peery is abundantly shown by the following extract from the decree of March 13, 1895, providing for the appointment of commissioners and the partition of the land:

"It is therefore adjudged, ordered, and decreed that: Jessie Beavers, an heir at law of Thos. J. Meyers, deceased, have her interest laid off and assigned to her of the said land mentioned in said bill, being eight heirs to inherit said estate, said Jessie Beavers is to have one-eighth part of said real estate mentioned in said bill. W. F. Harman one-eighth of said estate, to have laid off and assigned to him. Minnie Moore to have two-thirds of one-eighth part laid off and assigned to her. Wm. P. Payne to have one-third of one-eighth part laid off and assigned to him. Rosa Lambert to have one-eighth part laid off and assigned to her. Harman Newberry, John G. Watts, and Wm. E. Peery to have one-eighth laid off and assigned to them. Kewee Creek Flat Top Coal Company to have three-eighths of the real estate mentioned in said bill laid off and assigned to said company."

This language will not admit of any other construction than that the court is decreeing the partition of the Thos. J. Myers lands with such title as Thos. J. Myers had therein at the time of his decease.

Mary and Sterling White were made parties to the suit for the same reason that their mother, if alive, would have been made a party, that they might contest, if they desired, the instrument by which, it

was alleged, their mother's interest had been conveyed. For the same reasons Charles W. Myers, Clifton Myers, and Annie Myers, his wife, James L. Williams and Margaret, his wife, née Margaret Myers, and at the time of suit Margaret Hall, and Mary Myers, widow of J. T. Myers, who had united in a deed conveying a three-eighths undivided interest to the Kewee Creek Flat Top Coal Company, were made parties to the bill; but the land was assigned to their grantee without any reference whatever to them.

Again, a deed is exhibited with the bill in partition showing that Minnie J. Myers, before her marriage to J. W. Moore, had made a deed purporting to convey her interest to W. F. Harman. Again, after her marriage, she and her husband made a deed conveying one-third of her interest to W. P. Payne. All of the parties interested were before the court, and the decree assigns to Minnie J. Moore two-thirds of her interest and to W. P. Payne one-third of such interest, with no explanation whatever as to why the entire interest is not assigned to W. F. Harman in accordance with the provisions of her earlier deed.

There results a necessary implication that the court held the deed from Minnie J. Myers to W. F. Harman to be ineffectual to convey to said Harman her interest, and so in this case there results a necessary implication, from what the court did, that the deed from Thomas White and Mary L. B. White to Newberry, Watts, and Peery was held effectual to convey that interest, and that holding, if erroneous, could only have been corrected by an appeal or a bill of review sued out in season.

Counsel for plaintiff earnestly insist that the decree of the court, which they say they have no wish to attack collaterally, was entirely proper and consistent with the theory that Thomas C. White was still alive, and that the court was assigning his curtesy to Newberry, Watts, and Peery. I cannot agree that the decree would be correct with that as the object of the decree, as it would be the duty of the court (and so presumed to be done) to assign the remainder after the determination of the particular estate. As I have already pointed out, there are insuperable obstacles in the way of the theory that Thomas White was then alive, and that it was his curtesy that was assigned to Newberry, Watts, and Peery. If he was then alive, he was the owner of one-half of the remainder of the tract by the death of his other two children, and his interest so acquired would have passed to Newberry, Watts, and Peery under his general warranty deed.

In addition to this, if Thomas White did not die as and when he is proved to have died in his suit, he is not dead for the purposes of this suit, and the plaintiff now has no standing to bring this suit. There is no proof whatever that he died after the filing of the partition suit, and if, as contended, he is shown to have been then alive, he is still alive, and will be immortal.

In my judgment the decree in the partition suit can only be construed as vesting in Newberry, Watts, and Peery the title derived from J. T. Meyers, and, so construing it, there is no equity in the bill, and it will, accordingly, be dismissed.

## REED v. NORFOLK & W. RY. CO.

(Circuit Court, S. D. West Virginia. November 19, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE.
A train containing three flat cars loaded with steel rails arrived in defendant's yard at 3 o'clock a. m., and at 11 o'clock plaintiff, a member of a yard crew, was directed to detach the cars from the train, and remove them to another part of the yard. One of the cars was equipped with a drop brake, which, when plaintiff attempted to use it, was standing up not in its proper position, and, on plaintiff's taking hold of the handle to release the brakes on the car, the brake stem suddenly slipped down, throwing plaintiff from the end of the car and injuring him. After the accident, the brake was inspected and shown to be in proper working order. *Held*, that such facts, in the absence of evidence that the car was properly inspected between the time it arrived in the yard and the time plaintiff was injured, were sufficient to establish a prima facie case of defendant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 215.]

2. SAME—CONTRIBUTORY NEGLIGENCE.
Plaintiff, never having used a brake of that character before and having seen very few of them, was not negligent in attempting to use it without examination when he found it in an upright unnatural position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 694.]

3. SAME—INSPECTION—BURDEN OF PROOF.
Where plaintiff, a brakeman, was injured while using a drop brake on a flat car with which he was unfamiliar, which was standing in an unnatural position at the time he attempted to use it, and plaintiff's evidence indicated that the car had been standing as part of the train in defendant's yards from 3 o'clock a. m. until 11 o'clock a. m., when the accident occurred, the burden was on defendant to show a proper and reasonable inspection of the car within such period, or that the train had been moved or the brake used after inspection by plaintiff's fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 898, 902.]

4. SAME—CHARACTER OF INSPECTION.
The duty of inspection is an unassignable duty of the master, so that, no matter by whom it is performed, the inspection must be as reasonably thorough and careful as though performed by the master in person.

5. SAME—INSTRUCTIONS.
Where plaintiff, a brakeman, was injured by a drop brake in an improper position, an instruction that, while it was defendant's duty to provide reasonably safe cars and brakes, still, if the brake in question was out of repair, plaintiff could not recover unless defendant knew of the condition of the brake and failed to remedy the same or notify plaintiff thereof or had an opportunity to inspect and failed to do so, was misleading as authorizing a verdict for defendant, if an inspection without reference to its character was in fact made.

6. SAME—RES IPSA LOQUITUR—CIRCUMSTANTIAL EVIDENCE.
The maxim, "res ipsa loquitur" has no application to a case between master and servant, but this rule does not prevent the establishment of a master's negligence in an action for injuries to a servant by the circumstances surrounding the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 898.

Application of doctrine of res ipsa loquitur in actions for injuries to servants, see note to Carnegie Steele Co. v. Byers, 82 C. C. A. 121.]

Trespass on the Case. Upon motion for new trial.

Rummell & Higginbotham, J. H. Gaines, and Staige Davis, for plaintiff.

Jos. I. Doran, Theodore W. Reath, and Holt & Duncan, for defendant.

KELLER, District Judge. The accident on account of which this suit was brought occurred on the yards of the defendant company at Bluefield, W. Va., on October 6, 1905, about 11 o'clock a. m. The plaintiff, a brakeman of some seven years' experience, was a member of a yard crew, and on the morning of the accident this crew had received orders to detach from a freight train which had arrived at Bluefield from Roanoke, Va., at about 3 o'clock a. m. that morning, three flat cars loaded with steel rails, and remove them to the east end of the yard, there to be unloaded. The rails protruded so far beyond the east end of the easternmost car that it was impracticable to couple the yard engine to said car, and, in consequence, an attempt was made by the crew to roll the three cars by gravity down the track far enough to permit the engine to be brought in rear of them. The crew consisted of E. H. Johnson, the conductor, who boarded the easternmost car, the plaintiff, who boarded the middle car, and one Compton, another brakeman (deceased at the time of trial), who boarded the westernmost of the three cars. The middle car was a flat car belonging to the Georgia Southern and Florida Railroad Company, and was equipped with what is known as a "drop" brake; that is to say, the brake stem, when not held up by the brakeman for the purpose of putting on or taking off the brake, would normally drop down under the car until the handle (an ordinary cross-bar forming with the brake staff a figure something like the letter "T") would rest upon the floor of the car. The other two cars were ordinary flat cars of the Norfolk & Western Ry. Co. equipped with stationary brakes. The uncontroverted testimony of the plaintiff upon the trial showed that, though he had been a brakeman for the time mentioned, he had never used a brake of this character before, and had seen very few of what are known as "drop" brakes. A witness from the Georgia Southern & Florida Railroad testified that this type of brake is quite common on flat cars in the south, being largely used in connection with the lumber industry; and that latterly many of these brakes are made so that the brake stem can be kept elevated, when desired, by means of what is known as a "cotter key" inserted through the stem. The uncontroverted testimony of the plaintiff further showed that, when he boarded this car, the brake was set, and that the brake stem was standing up (thus being in an abnormal position for that type of brake when not being handled); that upon his taking hold of the brake handle, in order to release the brakes, the brake stem suddenly gave way—that is, slipped down—and he was precipitated from the rear end of the car upon the track and in front of the following loaded car (all of the three cars being slowly moving at the time), and was thus injured, resulting in the loss of one leg and other injuries. The declaration, in substance, charged that the defendant was negli-

gent, in that it failed to furnish plaintiff a safe brake with which to work; that the same was improperly constructed, out of repair and dangerous, and, being an unusual appliance, unlike the brakes on defendant's cars, acted as a trap and thus occasioned the plaintiff's injuries. The defendant demurred to the declaration, which demurrer was overruled, and, issue being joined upon defendant's plea of "not guilty," the evidence was introduced, and at the conclusion of all the evidence the defendant moved the court for a peremptory instruction to the jury to find for the defendant, which motion being overruled the jury found for the plaintiff a verdict in the sum of $10,000, and answered certain special interrogatories, propounded by the defendant, in accordance with its general finding. The matter is now before me on a motion to set aside this verdict, and to grant to the defendant a new trial.

This case has been ably argued, both orally and by written and printed briefs, and I desire to express to counsel on both sides my appreciation of the care and labor bestowed upon what I conceive to be a remarkably difficult question. It is undoubtedly true that the general rule governing the proof requisite in the case of servants injured by defects in machinery or appliances requires that the plaintiff prove, not only the defect, but that the master either knew of it, or that it had existed for a sufficient length of time to warrant the fair presumption that he should have known of it. In this case we have a curious situation. Under the proof at the trial, there was no defect in this brake. It was carefully inspected immediately after the accident by two competent inspectors, who separately manipulated the brake, and each time, upon releasing it, it responded to the law of gravity, and dropped to its proper position, thus showing that it was in proper working order. On the other hand, we have the equally positive proof that at the time the plaintiff attempted to use this brake, a few minutes before this inspection, it was standing upright, out of its normal position, and presenting a trap which undoubtedly caused the injury to the plaintiff, and there can be no question (to my mind) of contributory negligence on the part of the plaintiff. This fact of the abnormal position of the brake stem being established, let us see whether it is not a warrantable inference to be drawn therefrom that this abnormal position had continued since the last time the brake was manipulated. The position was exactly contrary to the law of gravity, and therefore could not have occurred of itself, or by the motion of the car in being transported from place to place, and therefore may, as I believe, be fairly inferred as having existed since the brake was last set. The train came in as a whole about 3 o'clock a. m., and, according to the testimony of defendant, was inspected between that hour and 6 o'clock a. m. The evidence as to that inspection was before the jury, and I may here say that, had that inspection been of the character of the subsequent inspection, I should have had no hesitation in directing a verdict for the defendant. Had the inspectors, or either of them, been able to assert that the brake on this car was then in normal position, clearly no liability could have attached to the company because of the accident some hours later.

But the evidence as to the character of that inspection was before the jury, and the jury found upon a special interrogatory that the inspection thus and then given was not a proper or sufficient one as a matter of fact. This inspection was made by Messrs. D. D. Tynes and J. B. Carter, who inspected cars arriving from the east at night, and who testified that between the hours of 6 p. m. on October 5, 1905, and 6 a. m. on October 6th, they inspected between 500 and 600 cars, and that the method of inspection was for one man to walk on each side of a train with a torch in his hand. The jury found, and I cannot say they were not justified in finding, that an inspection so made, at night and with such a number of cars to inspect, was not a proper and reasonable inspection. Had the jury answered this special interrogatory otherwise, it would have been as much my duty to direct a verdict for the defendant as it would had the inspectors been able to testify that, at the time of this inspection, the brake was in good condition and normal position.

Of course, the evidence and the special finding of the jury still leaves open one question, namely: Was the train moved, or the brake handled, after the inspection and before the accident? Was it the duty of the plaintiff to throw light upon this question, or is it the duty of the defendant? In the first place, is there any fair inference that the train was moved or touched? It arrived at 3 a. m. October 6, 1905. At 11 a. m. this crew was sent to detach three cars from it, and shift them to the east end of the yard to be unloaded. These cars were undoubtedly found with brakes set, attached to the train that came in at 3 a. m., and there is nothing by way of inference to show that they had been moved or handled, and, if they were so handled, the knowledge of the fact (which would be by way of defense to the defendant) was much more likely to be within the knowledge of the defendant than of the plaintiff. Besides, if any burden rested on the plaintiff as to this question, it would have been to prove a negative, namely, that the car had not been touched, and I do not think the law properly lays that upon him. The main question, as it seems to me, to be determined in this case, is whether the facts attending the injury, as proved in the case, make a prima facie case of negligence against the defendant, and I am frank to say that, under the peculiar circumstances shown here, I am strongly inclined to think they do.

We can, I think, as I have before stated, eliminate from the case any possible question as to contributory negligence; and I also think we can eliminate any question as to the ordinary risks assumed by a railroad brakeman. This situation, as it presented itself at the time of the accident, presented what may be well styled a "trap" to the brakeman; and, in the light of what occurred, and of what was disclosed by the subsequent inspection of the brake, it can fairly be said that the abnormal position of the brake was due to the negligence of some person other than the plaintiff, and that such negligence was the proximate cause of his injury. That such condition had existed since the last time of handling the brake was, I think, not only a fair, but an irresistible inference; and, having thus established that this

abnormal and dangerous condition existed appreciably prior to the time of the accident, and that it could only have been caused by some personal negligence, it seems to me that the burden shifted to the defendant to show that such condition was not attributable to any negligence with which it was properly chargeable. This it sought to meet by proving an inspection within a proper and reasonable time. I have already stated that had that inspection been as thorough as the one made immediately subsequent to the injury, or had the jury found that the inspection was a proper and sufficient—or, in other words, reasonable inspection—the burden thus shifted would have been successfully met, or had the defendant shown that the train had been moved, or the brake used, after the inspection, by the fellow servants of the plaintiff, no recovery could have been had. But it is surely and clearly the law that the duty of inspection is one of the unassignable duties of the master, and, no matter by whom it is performed, the inspection must be as reasonably thorough and careful as though performed by the master in person; and, to relieve from responsibility, it is not enough to show that an inspection was made within a reasonable time, but the character of the inspection must be such as to show that it was a reasonably thorough one under the circumstances of the case. It was upon this view of the law that I declined to give the "second" special instruction asked for by the defendant, which reads as follows:

"The court further instructs the jury that, while it was the duty of the defendant to provide cars and brakes reasonably safe for the plaintiff to work with and upon, still that if the brake complained of was upon a foreign car recently brought upon the line of the defendant, and was improperly constructed, or out of repair, and, as a result of such improper construction or lack of repair, the plaintiff received the injury complained of, the plaintiff cannot, notwithstanding these facts, recover, unless they further find that the defendant either knew of the condition of the brake and failed to remedy the same, or notify the plaintiff thereof, or had an opportunity to inspect the same, and failed to do so."

The vice of this instruction lies in the fact that it is misleading to the jury, so that they would necessarily have to find that, if an inspection was made, the defendant was relieved from liability regardless of the view of the jury as to the character of the inspection as disclosed by the evidence. I feel quite sure that so much of this instruction as was proper was fairly embodied in my general charge. In this case I have only held that I do not consider that the plaintiff, in view of the character of the night inspection of this car and the jury's finding in regard thereto, was bound, as a part of his case, to prove that no one had tampered with the brake between the time of such inspection and the time of the injury. The car was constructively in the custody of the master, and not of this servant. The car when used by this servant was found with brakes set and attached to and still a part of the train that had come into the yard at 3 o'clock a. m., and there was absolutely nothing in the case to indicate that it had been handled or moved since its inspection, and hence nothing to indicate that this brake staff could have got into its abnormal position by being handled after that inspection, and I must hold that it

was no part of plaintiff's duty to affirmatively show that this car, in the custody of defendant, had not been handled since said inspection, in order to make out his prima facie case.

Some courts have gone much further than this. In Crawford v. United Railways & Electric Company of Baltimore, 101 Md. 402, 61 Atl. 287, 70 L. R. A. 489, it was held that:

"A system for inspection of the implements furnished for the use of employés cannot be regarded as adequate which does not provide for safe custody of the thing inspected during any substantial interval between its inspection and its use."

In this case the injury was occasioned by the giving way of a handhold on a summer car on its first trip in the morning, by reason of which a conductor was injured. This car had finished its last trip at 1 a. m. the previous night, and for lack of room in the car barn was allowed to stand in the street outside of the barn until it went out again in the morning. At 2:30 a. m. it was inspected by an inspector, who testified that he took hold of each handhold on this car with both hands, and swung his full weight thereon, and was prepared to say that there was no crack in that handle that night. The accident occurred on the first trip of the car which left the barn at 6 o'clock a. m. There was no evidence as to how the defect to the handhold occurred. It is to be remembered, as pointed out in the opinion in this Maryland case, that it is decided with full knowledge and appreciation of the fact that it was and is the settled law of Maryland that where injury was the consequence of the incompetency or neglect of a fellow servant, even if he be an inspector, no recovery can be had, and in this respect the Maryland doctrine is more stringent than that obtaining generally. The court found, however, that no negligence could be attributed to the inspector, but that the company had been guilty of negligence in not providing for the safe custody of the car between the time of inspection and its use by plaintiff. In Southern Pacific Co. v. Lafferty, 57 Fed. 536, 6 C. C. A. 479, where the injury was occasioned by a collision between two "live" engines which had in some unexplained way run away from the railroad yard where they had been left after the day's run, and the train on which plaintiffs' intestate was a brakeman, it was said:

"It is the duty of a railroad company to see that its locomotive engines, after their run, are left in a place of safety. If left where they are liable to be put in motion by the careless, negligent, or wilful act of outside parties, it is as much the duty of the railroad company to see that they are properly guarded to prevent accidents from occurring as it is to see that a sufficient number of employés are put on board the trains set in motion by its own orders."

And, commenting upon this statement, the court, in the case of Crawford v. United R. & E. Co., supra, adds:

"And, as a corollary from this, it follows that wherever the safety of a servant depends upon the inspection of some agency of the master which is negligently exposed in an unsafe place after inspection, and before its use, the master will be liable for injury resulting from such negligence."

Again, in Smith v. New York, S. & W. R. Co., 46 N. J. Law, 7, where loaded cars set on a side track and chocked by a tie escaped

on the main track and caused a collision, the question of the company's negligence was held to be for the jury, though there was no proof as to how the cars escaped. These cases have been referred to because of the strenuous contention of counsel for the defendant that it was the duty of plaintiff to prove as part of his prima facie case when this brake staff got out of repair, or out of position, and refers to the charge of the court as sustaining that view, and I think the oral charge does, in a measure, sustain the view, and therein I believe the charge is, in a measure, wrong. I still think that, if the evidence disclosed a use of this car by the fellow servants of the defendants after the inspection of the train as it came into the yard, it would go to show that its condition was the result of such use, and so rebut the prima facie case made by plaintiff; but I further believe and hold that, if such movement and use occurred, it was the duty of defendant to show it affirmatively as part of its case, and that it is neither to be presumed to have occurred, nor is it the affirmative duty of plaintiff to show that it did not occur. Why should it be? The car was in the custody of the company, not of the plaintiff. If it was used and moved by the company's employés in the course of their duties, it was done by the company's direction, and it should and would know it. If, on the contrary, it was tampered with by an outsider, as suggested in defendant's supplemental brief, the cases just cited hold that a failure to use proper care to prevent or discover such act was negligence of the company.

What, then, in the absence of a showing by defendant that the car was handled after its inspection by the fellow employés of the plaintiff, should prevent a jury from reasonably inferring that the position of this brake staff, which was abnormal, and constituted a trap for the plaintiff, had existed since before the train inspection proved by defendant? The abnormal position, being opposed to the law of gravity, was clearly pre-existing in its nature. It could not occur of itself or in the mere moving of the car. It was the result of some prior use of a brake by a human being, and was utterly dissimilar to those defects which may occur at any time and from unknown causes. I do not think it is asking too much of a defendant when it goes into its case by way of defense to show, if it can, that a car shown to be out of order when plaintiff was injured had been prior to such time, and after its inspection, moved or handled by it, through its servants; and, when it fails so to do, the jury has a right to infer that such movement or handling did not occur.

Considerable time was given in the argument to the discussion of the maxim, "Res ipsa loquitur," and as to whether this maxim has any application to cases arising between master and servant. In the courts throughout the United States generally the applicability of this doctrine is involved in great doubt and uncertainty, a great part of which is no doubt due to the fact that many decisions are catalogued as coming under this maxim which, strictly speaking, have no occasion to be referred to it, but may be decided with sole reference to the general rule of circumstantial evidence. The United States courts have ruled with unanimity that the maxim, "Res ipsa loquitur,"

has no application to cases between master and servant. Patton v. Texas & P. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Shandrew v. Chicago, St. P., M. & O. R. Co., 142 Fed. 320, 73 C. C. A. 430. I have no wish to enunciate in this case a different rule, and I feel bound by that so frequently enunciated, but I feel also certain that in so holding the federal courts never gave expression, or intended so to do, to the view that the general doctrine of circumstantial evidence was to be ignored or limited because the case in which it was to be applied happened to be one between a master and a servant. For a valuable and masterly discussion of the subject of the applicability of the maxim, "Res ipsa loquitur," as between master and servant, and more particularly of the proper distinction between that rule and the rule as to circumstantial evidence, I refer to the editorial case note to Fitzgerald v. Southern Railway Co., as reported in 6 L. R. A. (N. S.) 337 et seq., and which note, but for its length, I would feel very much like quoting almost in toto, as it so fully and admirably discusses and illustrates this vexed question. Referring to the general confusion that exists as to the position of courts generally, upon the subject, the learned author of the note says:

"With respect to cases that have held that the accident, in connection with the circumstances attending the same, was sufficient to make a prima facie case of negligence, the difficulty arises mainly from the fact that the decisions turn largely upon the circumstances of the particular case; and some of the cases of this kind are hardly to be distinguished from cases which merely apply the general rule that a fact in issue may be established prima facie by circumstantial evidence without any direct evidence."

Further on (page 342) the author says:

"To restate in the light of this distinction the distinctive function of the rule res ipsa loquitur: It is by the assumption of the postulate that physical causes such as are shown to have produced the accident do not ordinarily exist in the absence of negligence to permit the jury to infer some antecedent fault of omission or commission on the part of the master from circumstances which merely point to the physical causes of the accident, and which, apart from that postulate, have no tendency, in and of themselves, to point to negligence as the responsible human cause of the accident, and which do not disclose conditions the existence of which may, without reference to any antecedent fault of omission or commission, be found by the jury to constitute negligence. The comparatively limited function of the distinctive rules res ipsa loquitur may be expressed in a different way by the statement that cases which deny that the rule ever applies as between master and servant do not prevent the jury from inferring negligence from circumstances, in addition to the mere physical causes of the injury, which indicate some antecedent fault of omission or commission on the part of the master as the responsible human cause of the very accident in question, nor interfere with the submission to the jury of the question whether the existence of certain conditions, in and of itself, constitutes negligence without reference to any antecedent omission or commission on the part of the master."

This language clearly shows that a resort to the maxim, "Res ipsa loquitur," is not necessary when the circumstances of the case, as shown before the jury by the evidence, do point to the responsible human cause of the accident, and tend to show an antecedent fault either of omission or commission, on the part of the master. As I have heretofore pointed out, in the case at bar the evidence, aside from showing the mere physical causes of the injury, showed that the

existing condition of the brake stem in its abnormal position was the result of human agency and human negligence on the part of the last user of the brake; that this condition indeed could not have occurred save by human intervention; and that it was, in its nature continuing, at least in relation to the past, inasmuch as it could not have arisen of itself or by the mere movement of the car. In addition to this, the evidence was that this car came into the yard as a part of a train from Roanoke at 3 o'clock a. m., was inspected as a part of that train, and the evidence as to the method of that inspection was before the jury; and that, when plaintiff came to it in the morning, it was still attached to that train. The jury found as a fact that the inspection made that night was not a reasonably careful inspection, and there was evidence from which a reasonable man might have so found. I am of opinion from these facts that the jury, as reasonable men, were justified in inferring, in the absence of evidence to the contrary by the party in whose charge this car was from the time of its arrival until the time when plaintiff was called upon to use it, that the condition of the brake staff thereon, as it was when he used it, had existed at the time the car was first inspected, and that the defendant was negligent in said inspection, and that such negligence was the proximate cause of the injury to the plaintiff.

Wherefore the motion to set aside the verdict and award to the defendant a new trial will be overruled, and judgment will be entered on the verdict of the jury herein.

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## FIRMENT v. BERWIND-WHITE COAL MINING CO.

(Circuit Court, S. D. New York. June 27, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ACTION—INSTRUCTIONS.

In an action by a servant against the master to recover for a personal injury resulting from an explosion of steam pipes in a boiler room where plaintiff was working an instruction was not erroneous which charged, in effect, that it was the "absolute duty" of defendant to exercise reasonable and due care to provide a reasonably safe place and reasonably safe and well-constructed appliances, and keep them in a safe and proper condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1150–1154.]

2. SAME—BURDEN OF PROOF.

While the burden of proving defendant's negligence in such case rested on the plaintiff, where he gave credible evidence that certain dangerous defects in the machinery and appliances existed on and prior to the day of the accident, and were known to defendant, the burden was thrown on defendant to show that they had been repaired or did not exist.

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

3. SAME—INSTRUCTIONS.

Instructions in an action by an employé against the master to recover for a personal injury resulting from the bursting of steam pipes in defendant's boiler house reviewed, and *held* not to contain any material or prejudicial errors which entitled defendant to a new trial.

On Motion to Set Aside Verdict and for a New Trial.

Ira B. Wheeler, for plaintiff.
Theall & Beam (Austen G. Fox, of counsel), for defendant.

RAY, District Judge. The plaintiff, Joseph Firment, had been in the employ of the defendant about 18 years, and had every appearance of being an honest and reliable man. He was evidently not an educated man and spoke broken English, and there was some difficulty, at times, in getting at his exact meaning. On the 3d day of December, 1905, Sunday, the plaintiff, as he claims, was working in and about the boiler house at shaft or slope 7 of defendant at Horatio, Pa., concededly in the employ of defendant at the time, although it was denied he was working on the day in question, or that it was his duty to work, when he was severely and permanently injured by being struck on the limb below the knee by a part of the steam pipes, etc., connected with the boilers in the boiler room, which was thrown against or upon him by reason of a sudden explosion of such pipes or some part of them, whereby one or more sections were thrown out with great violence, and the room filled with steam. The plaintiff claimed, and gave evidence tending to show, that he had regular duties in and about this boiler house, and that on the day of the accident and injury he was not only attending to them, but was called upon by one of his superiors, who was making repairs in this boiler room, to assist, and that he did and was on his way through the boiler room to perform other duties assigned him by defendant when the explosion occurred and the injury was received. The defendant, on the other hand, contended, and gave evidence tending to show, that this was not true; that plaintiff was not at work or called upon to work on the day in question, and was an idler, interloper, spectator at the time, having no business to do or duty to perform at the boiler house. No point is made on this motion that there was error in admitting or rejecting evidence. The motion is based on alleged errors in the charge to the jury. The court instructed the jury pointedly and explicitly that if the plaintiff had no duties to perform there that day, or that if he had been performing duties for defendant, and had reasonable time to get away, and had not left, but was hanging about as an idler or interloper when the accident occurred, he could not recover.

The plaintiff claimed that certain sections or a certain section of this pipe with tees and nipples was badly out of repair some little time prior to the accident, and in a dangerous condition, so that an explosion was liable to occur, although he did not appreciate the danger, and that it was temporarily fixed up and braced to prevent the part that did blow out from blowing out, and that he was told a new part would be put in, etc., and that he relied thereon. He also claimed it was not properly, efficiently repaired by competent persons if repaired at all prior to the accident, and that he did not know such fact, and remained and worked there and received his injury when in the line of his duty to defendant as its employé; also that the risk of these defective pipes was not one he assumed. A Mr. Cook was the superintendent of defendant in charge there, and Howard Deffenbaugh was a foreman under him, and it was conceded he had power to set the plaintiff at work in the boiler house, if he did, which alleged

fact defendant denied. On the 19th day of November, 1905, the plaintiff claims that the repairs were made and the bracing done, but that one of the flanges was left cracked. Thomas Williams was the fire boss and Thomas Mendes was machine boss inside, and one Ernest Johnson was also a machine boss. The plaintiff was injured December 3d, and did no work after that during that month. His time was made out, and returned or turned in at four days. The plaintiff claimed he did extra work, and that this month he did one day's extra work, and that the defendant itself counted Sunday as a full day's work and paid him therefore, and hence that his time and account for the month made out by defendant and given him was very material and quite conclusive that defendant recognized him at the time as in its employ on Sunday when injured.

In charging the jury as to the duty of the defendant to the plaintiff, assuming him to have been at work by authority of the defendant and for it on Sunday, the court said:

"Now, gentlemen, as matter of law, it was the absolute duty of the defendant company to provide a reasonably safe place for the plaintiff to work, having due regard to the kind of work to be done and the conditions under which it was to be performed, and, of course, this boiler house would not be a reasonably safe place in which to work if the machinery, pipes, etc., was in such a condition that it would be liable to explode, go to pieces, fly about. It was also the duty of the defendant, as to machinery and appliances, to furnish reasonably safe and well-constructed machinery and appliances, including these boilers and pipes, and by pipes that includes the pipes, flanges, and nipples. Understand, I will not name them each time as I go along. I am not going to mention each part, because when I speak of pipe, I mean the whole unless I so specify. It was also the duty of the defendant as to pipes and appliances to furnish reasonably safe and well-constructed machinery and appliances, including the boilers and pipes, and to keep them in a safe and proper condition, exercising reasonable and due care so to do. It was also the duty of the defendant to use reasonable care to properly inspect the same from time to time, and see that they were in a reasonably safe and proper condition and free from serious or dangerous defects. If any defects or defect in these pipes were discovered by or known to the defendant or to its inspector or superintendent, then it was its duty to properly repair, and, if unsafe, to discontinue the use thereof or properly warn or notify its employés working with and about such appliances and machinery of the danger of so doing.

"If this pipe and flange or either of them or any of them that particular one or any of them, if they were out of repair and defective in the respects named or described so as to be unsafe, then it was the duty of the defendant company to promptly repair and put them in a safe condition, provided it knew or ought to have known of such defects, and, as I have stated, if in the exercise of reasonable care by a proper inspection at proper times defects which existed, if any could have been discovered, why, then, they were charged with notice whether they knew it or not, because it would be negligence not to inspect and not to exercise reasonable care to discover such defect.

"If there were any latent, hidden, concealed, or unusual danger connected with the use of this defective pipe and flange, or any of them, of which the plaintiff was ignorant, after the repairs were made on the 19th, then it was the duty of the defendant company to inform the plaintiff as well as its other employés about there of such danger, provided, of course, that this plaintiff worked in or about there or had duties to perform there. Of course, it was not their duty to go out to the miners in the mine and inform them, or to go upon streets and inform passersby, but it would have been their duty to point out latent, hidden, concealed, unknown, or unusual dangers arising from conditions of which they knew or ought to have known to

such of their employés as had occasion to be in or about this boiler house or in that vicinity where they would be liable to receive injury if there was any explosion.

"If the defendant failed in its duty to plaintiff in either of the respects named, namely, to furnish a reasonably safe place on account of unsafe pipes or appliances, flanges, etc., or (2) to furnish safe appliances and machinery, (3) to keep such appliances and machinery in a reasonably safe condition and in proper repair, or (4) to inform him of such dangers from pipes, defective pipes, if any, they being out of repair, then in either case the defendant was negligent. If such negligence, if you find negligence, if such negligence on the part of the defendant caused injury to the plaintiff, then this plaintiff is entitled to recover damages for the injury which he received by the reason of such negligence, and of which it, the negligence, was the proximate cause, unless the plaintiff himself knew the danger and risks, or ought to have known them, and assumed the risks, or was himself guilty of contributory negligence, that is, of such negligence on his part contributing to the injury as will, within the rules which will be stated by me, defeat a recovery."

This is challenged for the reasons, first, the court said "it was the absolute duty of the defendant company to provide a reasonably safe place"; and, second, the court said, "If there were any latent, hidden, concealed, or unusual danger connected with the use of this pipe and flange, or any of them, of which the plaintiff was ignorant, after the repairs were made on the 19th, then it was the duty of the defendant company to inform the plaintiff," etc., and did not qualify or limit the duty to such dangers as were known to defendant or in the exercise of due and reasonable care ought to have been known by it in that very sentence. This duty as to latent defects was immediately and in the very next sentence qualified and explained by saying to the jury:

"Of course, it was not their duty to go out to the miners in the mine and inform them, or go upon the streets and inform passersby, but it would have been their duty to point out latent, hidden, concealed, unknown, or unusual dangers arising from conditions of which they knew or ought to have known to such of their employés as had occasion to be in or about this boiler house or in that vicinity where they would be liable to receive injury if there was any explosion."

Other parts of the charge confined this duty to such as were there at work. On this subject the Supreme Court of the United States has aptly said in Mather v. Rillston, 156 U. S. 398, 399, 15 Sup. Ct. 464, 467, 39 L. Ed. 464:

"All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life, body, or limb it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. * * * Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily obtainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be

taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced."

As charged by the court in this case, the duty of the defendant is discharged when it uses reasonable care, under the circumstances of a particular case, to inspect and discover defects and informs its servants of latent, hidden, concealed, or unusual dangers, whether arising from defects or from conditions inherent in the business or machinery and appliances necessarily employed. And the duty of giving warning and instruction is, of course, confined to the dangers and defects known to the employer, or which in the exercise of due care ought to be known to the employer, and which are unknown to the servant. The jury was plainly instructed on this point.

Returning to the use of the words "absolute duty," it is plain to my mind that the charge was correct under the leading and controlling cases. The charge was that it was the absolute duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish reasonably safe and well-constructed machinery and appliances, including boilers and pipes, and to keep them in safe and proper condition, exercising reasonable and due care so to do, and having due regard to the kind of work to be done, and the conditions under which it was to be performed; that is, it was the absolute duty of the defendant to exercise reasonable and due care to provide a reasonably safe place and reasonably safe and well-constructed appliances, including pipes, etc., and to keep them in a safe and proper condition, having due regard to the kind of work and conditions under which done. As I understand the law, and as the Supreme Court of the United States declares the law to be, the duty to exercise reasonable and due care in these respects is an absolute duty. The duty exists, and it cannot be delegated, and it is unqualified. An absolute duty to provide a reasonably safe place, exercising reasonable and due care so to do, is not different from the duty to exercise reasonable care to provide a reasonably safe place. The jury was plainly told what the duty was, viz., to use reasonable care to provide a reasonably safe place and also that this duty was absolute on its part, having due regard to the kind of work and the conditions under which it was to be done. No jugglery with words can change the plain import and meaning of the charge. Says Thompson in his Commentaries on the Law of Negligence (volume 4, § 3874):

"As in other cases, the obligation of the master to see that the place where his servant is required to work is reasonably safe, is primary, absolute, and nonassignable, in the sense that the master is responsible for the negligence of any servant or agent, of whatever grade, to whom he delegates the performance of it."

Said Morrow, C. J., in Bunker Hill, etc., v. Jones, 130 Fed. 818, 65 C. C. A. 368:

"There is no rule of law more firmly established than that it is the absolute duty of the master to provide a reasonably safe place in which the servant shall work, having regard to the kind of work and the conditions under which it must necessarily be performed. Union Pac. Ry. Co. v. Jarvi, 69 Fed. 65, 3 C. C. A. 433; Western Coal Min. Co. v. Ingraham, 70 Fed. 219, 17 C. C. A. 71; Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464."

Says the Supreme Court of the United States in B. & O. Railroad v. Baugh, 149 U. S. 386, 13 Sup. Ct. 914, 37 L. Ed. 772:

"Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and, when he employs one to enter into his service, he impliedly says to him that there is no other danger in the place, the tools, and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto."

If, when the master employs a servant and sets him to work, he "impliedly engages" that the place and tools to be used "shall be reasonably safe," it seems to me that the duty to exercise reasonable care that they shall be so is an absolute duty. In Kranz v. L. I. R. Co., 123 N. Y. 1, 4, 25 N. E. 206, 20 Am. St. Rep. 716, the Court of Appeals held:

"The defendant owed to its servant the duty of providing a place reasonably safe for the work which he was directed to do."

In Lilly v. N. Y. C. & H. R. R. Co., 107 N. Y. 574, 14 N. E. 503, the Court of Appeals, per Peckham, J., said:

"The duty of an employer to provide safe and proper machinery for his employés, and the extent of that duty, are too well settled in this court to need the citation of authorities."

In Santa Fé Pac. R. R. v. Holmes, 202 U. S. 442, 26 Sup. Ct. 677, 50 L. Ed. 1094, the court says:

"It is the duty of a master to furnish safe places to work in and safe instruments to work with, and of this there need be no discussion. The duty is a continuing one, and must be exercised whenever circumstances demand it."

In Choctaw, etc., R. R. v. McDade, 191 U. S. 67, 24 Sup. Ct. 24, 25, 48 L. Ed. 96, the court says:

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use ordinary care to provide properly constructed roadbed, structures, and track to be used in the operation of the road. Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766."

If the master is "obliged" to do this, it seems clear that the duty is an "absolute" one.

In Vogel v. American Bridge Co., 180 N. Y. 376, 73 N. E. 1, 2, 70 L. R. A. 725, the court said:

"The doctrine of the responsibility of the master for the neglect, or default of one who, in the eye of the law, is his alter ego, applies to the obligation to furnish to his employés a reasonably safe place to work in and safe appliances to work with."

The expression "reasonably safe place" is quite generally and almost universally used to express the duty of the master to exercise due or reasonable care to provide a safe place. It is contended that there was error in the charge as to the burden of proof. On that subject the court charged:

"Now, then, gentlemen, the burden of proof. Negligence is never presumed. The presumption, in the first instance is that the defendant did its duty. Negligence, as I said, is not presumed, but it must be proved by a fair preponderance of evidence, and the burden of proving negligence is on the plaintiff. A finding of negligence cannot be predicated or founded on a surmise or guess or speculation. It must be predicated on the proof in the case, but it may be predicated and founded upon all the proof in the case when it is all in. The defendant, as I said, is presumed in the first instance to have done its duty. Before the plaintiff can recover, he must have established negligence. If the steam pipes and flanges were in a reasonably safe and proper condition and condition of repair and the accident happened from some cause not shown by evidence in the case, then the plaintiff cannot recover. You have heard the evidence as to defects and the conditions. It is for you to say on this whole evidence what was the condition of that pipe line, what were these conditions of these pipes, and were they properly inspected, were they properly repaired, and after they had made their repairs, as the defendant says down at boiler No. 1, and as Joe says on the 19th up here at Y—there they differ—but in either event were there defects?"

Later in the charge to cover a certain issue raised by the evidence and requests to charge the court said:

"Gentlemen, what was the cause of the explosion? If it was some unknown thing, if the cause was either from the mode of turning on the steam or from defects in the pipes or their connections which ordinary and due inspection could not discover, why, then, of course, negligence, if they had made reasonable inspection and due inspection, negligence would not be made out. If, on the other hand, this explosion, accident, injury arose from defects which they saw or which, in the exercise of reasonable care they might have seen, or from existing defects which they knew of and had not properly repaired, or from defects which they ought to have known of in the exercise of due care, and neglected to repair, and Joe, the plaintiff, was rightfully there, had been to work there that day under Johnson, and he was not guilty of contributory negligence, then, of course, he would be entitled to recover.

"Now, gentlemen, on the day in question, if the steam pipes and flanges were in a reasonably safe and proper condition and condition of repair and the accident happened from some cause not shown by evidence in the case, then the plaintiff cannot recover. If on the day in question, when it is conceded repairs had been going on, these pipes and flanges were carefully and properly inspected and examined by men reasonably competent for the duty, and no defects were found or known to defendant or its inspectors in charge, then defendant had done its duty in this regard and plaintiff cannot recover, for in such a case of course negligence would not be shown. Now, if on the Friday preceding the accident the pipes, flanges, etc., were properly examined and inspected, and all defects were remedied which were discovered or known, or which in the exercise of reasonable care ought to have been discovered and known, and none were discovered thereafter, or there were none which in the exercise of reasonable care ought to

have been discovered, then no negligence has been shown. Unless plaintiff has given evidence, taking all the evidence of all the witnesses together, showing defects and negligence, no unfavorable inference can be drawn against the defendant, for the reason it has not shown or explained the cause of the accident, because the burden of showing negligence was on the plaintiff, and because defendant was not called upon to show, to explain the cause of this accident until the plaintiff had shown existing defects in these pipes. When those were shown to exist, and they were shown to be dangerous, as one of the plaintiff's witnesses, its expert, testified, when that appeared, then the burden was thrown on the defendant of showing that none of the defects existed, and of showing, of course, that proper inspection and reasonable care would not have discovered them, did not discover the defects which caused the injury. In short, it was not the duty of the defendant to explain the cause of the accident, or show it was an unknown cause, until the plaintiff had given evidence showing or tending to show it was caused by the defendant's negligence."

One of plaintiff's witnesses testified that if certain defects in the pipes, which there was evidence tending to show existed, did exist, then they were dangerous, and that an explosion was likely to occur. It was not denied that on the 19th certain dangerous defects existed; but by defendant it was claimed they were repaired, while the plaintiff contended they were not. I take it that, when credible evidence was given by the plaintiff that certain dangerous defects existed on the day of and prior to the accident and were known to the defendant, the burden was thrown on the defendant to show that they had been properly repaired, or that they did not exist. This had nothing to do with the burden of proving defendant's negligence. The jury later was told explicitly that on the whole evidence the burden of showing negligence on the part of the defendant was on the plaintiff, that defendant was not called upon to explain the accident or show its cause, or that it was not due to its negligence until the plaintiff had given evidence showing that dangerous defects existed and were known to the defendant. But, when such evidence was given, it was incumbent on the defendant to meet it and give evidence tending to show the contrary. This was the burden of giving evidence on a certain point in the case. Of course, the burden of showing defendant's negligence, and that it was the proximate cause of plaintiff's injury and consequent damage, was on the plaintiff from first to last, and this burden did not shift. But the burden was on the defendant of meeting certain evidence in the case, and of giving evidence tending to show that the explosion did not occur from dangerous defects in the pipes liable to cause just such an explosion as actually did occur when the plaintiff had given credible evidence that such defects existed and that they would cause such an explosion.

The court later more fully charged:

"The defendant, gentlemen, was not bound to adopt any extraordinary tests for discovering defects in its appliances or machinery. It was only bound to exercise ordinary care in employing competent men for that purpose and in seeing to it that they did perform their duties. If that was done, if competent and proper men were employed, and if they did their duty, why, then, of course, the duty of the defendant in that respect was performed. Of course, negligence, as I have already told you in substance, cannot be based, a finding of negligence cannot be based upon the mere fact that an accident occurred, that a break occurred. It must appear from evidence in the case that that break, that explosion, was caused by negligence, by

negligence either in having defective pipes, etc., here in the first instance, or in neglecting to discover defects or in neglecting to repair defects. Of course you must be satisfied in order to find for the plaintiff in this case, you must be satisfied on the evidence in the case, that the accident, the break, arose from some defect which existed because of the negligence of the defendant, and I say, gentlemen, that negligence is never presumed, negligence must be proved, and if, on the question of negligence, the evidence is evenly balanced, then it is your duty to find for the defendant, because inasmuch as the plaintiff has the burden, why, if he fails to establish negligence, sustain the burden, then he fails in his case. When you come to contributory negligence, the burden is on the defendant to show that the plaintiff was guilty of negligence on his part which contributed to the injury. There the burden shifts right around. So you could not find contributory negligence on the part of this plaintiff, unless that has been established by a preponderance of evidence. If there was a defect and it was unknown to the defendant, if there was any defect here which caused this accident and injury, and the evidence is evenly balanced as to whether or not that could have been discovered by proper inspection and examination, discovered by the defendant, assuming it was unknown, why, then, of course, negligence would not be proved because on the evidence, if evenly balanced, the burden would not be sustained. The defendant was not bound to exercise extraordinary or utmost care, but only reasonable care, and on a question of negligence the question of care applies to everything, of course, of that kind. I have told you, gentlemen, that the burden of proof was on the plaintiff on the question of negligence, not only to prove that there was either a defect which caused the accident and that it was known to the defendant, or a defect causing the accident which in the exercise of ordinary care it could have discovered. I think I have gone over it sufficiently to explain the necessity of knowledge of a defect or a failure to know because of the want of proper inspection or proper examination, and it must have been negligence and a failure to repair I have told you already if this was a mere accident, and there was no negligence, then, of course, the plaintiff could not recover. I think I have told you the defendant was not an insurer. I know I did. I have covered that."

With these instructions, qualifying, and explaining what had been said before, the jury could not have been misled. Explicitly they are instructed that defendant was not bound to exercise extraordinary or utmost care, only ordinary care as to a safe place, machinery, repairs, etc., and that burden of proof was on the plaintiff not only to prove that there was a defect which caused the accident, and that it was known to the defendant, or that in the exercise of ordinary care it could have been discovered; and then, again, the court repeated:

"I think I have gone over it sufficiently to explain the necessity of knowledge of a defect or a failure to know because of the want of proper inspection or proper examination, and it must have been negligence and a failure to repair."

And again the court later charged:

"Now, the defendant company did not warrant or insure the safety of the plaintiff or the perfection of these boilers and pipes. Its duty was discharged when and only when its agents whose business it was to supply such instrumentalities and keep them in repair and safe condition had exercised due or reasonable care to keep them in such condition as to be reasonably and adequately safe for the use of the employés."

Exception is taken to what the court said in regard to the time and account given to the plaintiff by the defendant after the accident. Mr. Fox said at near the close of the trial:

"We accept the paper as true and the paper was made up from the slips and the pay roll. Of course, it was true, no doubt about it."

That paper credited the plaintiff four full days' work in December. It was important as bearing on the question whether plaintiff worked on Sunday the 3d day of December at the request of the defendant. Certain of defendant's witnesses claimed plaintiff did not work on that day. The court said, referring to that paper:

"That 'may be' better evidence than the mere memory of a man, better evidence than the mere recollection of somebody, something that was made up at the time from the papers themselves. But, gentlemen, the court intimates no opinion. That question of fact is for you, and you solely, to determine, whether on this Sunday of this injury and accident plaintiff was an idler and an interloper, or whether he actually did work there."

I think that, with the concession that the paper, which credited the plaintiff four full days' work in December, this charge was absolutely correct, and the fact that there was no pretense he worked elsewhere than at the boiler house that day, it was correct to say that the paper "may be better evidence than the mere memory of a man," referring to the witnesses of defendant who had said on the stand that plaintiff was not then at work at all that day. It is a settled rule that the charge of the court must be taken as a whole, and read with the evidence in the case. I have gone over the charge made, and find no material errors prejudicial to the defendant. The requests were all covered by the charge as made. After the charge was completed, no further requests were made and exceptions were taken after the jury had retired. There was no substantial doubt that the plaintiff worked in the boiler house the day of the accident by authority of the defendant; that the pipes or flanges were in a bad condition; that the defendant's employés had been at work at them all that day; that they went to pieces and that plaintiff was injured by the explosion. It was for the jury to say whether or not the defendant had used reasonable care to inspect and discover defects and repair those known or which ought to have been known. The evidence disclosed that the men intrusted with the duty of inspecting and repairing those pipes were men of little knowledge and experience in the business. The verdict was moderate in amount and amply sustained by the evidence.

The motion for a new trial is denied.

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## CONVERSE v. MEARS.

(Circuit Court, W. D. Wisconsin. July 16, 1908.)

No. 2.

1. CORPORATIONS—INSOLVENCY—RECEIVERS—STOCKHOLDERS' STATUTORY LIABILITY—SUITS IN FOREIGN JURISDICTION.

A chancery receiver of a domestic corporation on whom, as a quasi assignee for the benefit of creditors, is conferred authority to maintain an action to enforce a statutory liability of stockholders by Gen. Laws Minn. 1899, p. 315, c. 272, is entitled to sue in a foreign jurisdiction in a court having jurisdiction of the parties and subject-matter.

2. COURTS—RULES OF DECISION—FEDERAL COURTS—COMITY.

The nature of the liability imposed on stockholders of a corporation by the Constitution of Minnesota, declaring that each stockholder shall be liable to the amount of stock held or owned by him, as to whether such liability is wholly statutory or partially contractual, and therefore transitory, is a matter of general law as to which the federal courts sitting in Wisconsin are not bound to follow the decisions of the Wisconsin Supreme Court either as a matter of comity, or under Rev. St. § 721 (U. S. Comp. St. 1901, p. 581), providing that the laws of the several states are to be regarded as rules of decision in trials at common law so far as applicable.

[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. SAME.

Under Rev. St. § 721 (U. S. Comp. St. 1901, p. 581), providing that the laws of the several states are to be regarded as rules of decision in trials at common law so far as applicable, the federal courts will be governed by the laws of the state with reference to the construction placed on the constitutional or statutory provisions of the state by the highest state court, by decisions of the highest court of the state which have become rules of property, and by rules of law of local character involving domestic customs or usage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 956, 957.]

## At Law.

This is an action brought by the plaintiff, as receiver of a defunct Minnesota corporation, to recover from the defendant, a resident of Wisconsin, the amount of a certain assessment made by a court of equity in Minnesota upon shares of stock owned by the defendant in said corporation.

There has been a long and spirited contest in the courts, both state and national, to settle the correct principles and procedure for the enforcement of the liability of stockholders of insolvent corporations, imposed by the Constitution and statutes of Minnesota and other states. In 1899 (Laws 1899, p. 315, c. 272), the Legislature of Minnesota passed a statute to overcome the difficulty met by a receiver in such cases in the courts of other states, and to confer upon him the authority of a quasi assignee. This statute was in force when the present cause of action accrued.

The complaint sets out in detail the proceedings which were taken in the state court pursuant to the Constitution and statutes of Minnesota to enforce the superadded liability thereby imposed upon stockholders. A complete statement of the facts and details so alleged in the complaint will be found set out in extenso in the case of Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, to which reference is hereby made, because, mutatis mutandis, the allegations and facts are identical with the instant case, and we may thus avoid the lengthy recitations.

The defendant interposed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, that the court has no jurisdiction of the subject-matter, and that the plaintiff has not legal capacity to sue.

Jones & Schubring (C. A. Severance, of counsel), for plaintiff.
Sanborn & Blake, for defendant.

QUARLES, District Judge. Every general proposition of law raised by this demurrer has been finally and conclusively settled by the Supreme Court in Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, in favor of the plaintiff's contention. But

it is insisted that this court, sitting within the territorial limits of Wisconsin, should follow the adverse ruling of the Supreme Court of Wisconsin, as laid down in Finney v. Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486, Eau Claire National Bank v. Benson, 106 Wis. 624, 82 N. W. 604, Hunt v. Whewell, 122 Wis. 33, 99 N. W. 599, on grounds of comity.

To prevent confusion it must, at the outset, be borne in mind that in Finney v. Guy, supra, Eau Claire Bank v. Benson, supra, Hale v. Hardon, 95 Fed. 747, 37 C. C. A. 240, Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, and Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839, receivers were appointed under chapter 76 of the General Statutes of Minnesota for 1894, whereby the plaintiff became merely a chancery receiver, without title to the cause of action. In the instant case the receiver was appointed pursuant to chapter 272, p. 315, of the General Laws of Minnesota for 1899, whereby the receiver is invested with title to the cause of action against delinquent stockholders, and stands in the position of quasi assignee, and is held to be the representative of all creditors and stockholders of said corporation.

The case of Hunt v. Whewell, supra, originated under the latter statute; but the Supreme Court of Wisconsin adheres substantially to its former ruling, insisting that the suit brought in Wisconsin to enforce the liability of the stockholder is not strictly ancillary to the original suit in Minnesota, and that the Supreme Court of the United States had no occasion to pass upon, and did not pass upon, the doctrine of comity as applied by the Wisconsin court. The order of assessment made by the district court of Washington county, Minn., in this case, was ratified and affirmed by the Supreme Court of Minnesota on appeal. The Minnesota statute has been considered and construed by the Supreme Court of Minnesota in Hanson v. Davison, 73 Minn. 454, 76 N. W. 254. It is true that the opinion goes beyond the requirements of the case, but is at least suggestive of the opinion of the judges of that court as to the scope and functions of the receiver and the true construction of the statute.

With these preliminary suggestions in mind, let us analyze these conflicting rulings of the state and federal courts, in order to ascertain the very point upon which the conflict arises.

The basic principle upon which the opinion in Hunt v. Whewell rests is, to use the language of the court:

"The liability is statutory, the remedy to enforce it is statutory, and the appellant's title is a creature of the statute."

The doctrine is more fully stated in Finney v. Guy, 106 Wis. 256, 265, 82 N. W. 595, 598, 49 L. R. A. 486:

"(1) The statutory right, coupled with the statutory remedy for its enforcement, clearly intended to be pursued at the home of the corporation, is not transitory. (2) The action in a Minnesota court is a bar to any other action to enforce the liability of stockholders."

In Hunt v. Whewell, 122 Wis. 38, 99 N. W. 599, the court, in distinguishing that case from Parker v. Stoughton M. Co., 91 Wis. 174,

64 N. W. 751, 51 Am. St. Rep. 881, points out that in the latter case the suit was brought upon an assessment note belonging to the receiver as the representative of the corporation. It was a corporate asset that the liability did not depend upon any statute and was strictly transitory. Moved by these considerations, the Supreme Court of Wisconsin has held that it was not bound by the just requirements of comity to recognize or enforce such statutory remedy.

We now turn to the federal decisions on this vital proposition:

In Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966, the court say:

"We think the liability imposed by section 10 is a liability arising upon contract. The stockholders of the company are by that section made severally and individually liable, within certain limits, to the creditors of the company for its debts and contracts. Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published, and recorded."

In Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864, the question was presented whether the individual liability of a stockholder in a national bank survived as against his administrator, and on page 55 of 121 U. S., on page 801 of 7 Sup. Ct. (30 L. Ed. 864), the court say:

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes part of every contract, debt, and engagement of the bank itself, as much as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder."

Concord Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007:

"In the present case it is sought to escape the force of these decisions by the contention that the liability of the stockholder of a national bank to respond to an assessment in case of insolvency is not contractual, but statutory. Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

The right of the plaintiff to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is therefore clear. Dennick v. Railroad, 103 U. S. 11, 26 L. Ed. 439.

In Whitman v. Oxford Nat. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587, these cases are elaborately reviewed, and on page 563 of 176 U. S., on page 478 of 20 Sup. Ct. (44 L. Ed. 587), Mr. Justice Brewer sums up the discussion as follows:

"The liability which by the Constitution and statutes is thus declared to rest upon the stockholders, though statutory in its origin, is contractual in its nature."

In Bernheimer v. Converse, supra, we find the latest expression of the Supreme Court on the subject:

"It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and as such capable of being enforced in the courts, not only of that state, but of another state, and of the United States, although the obligation is not entirely contractual, and springs primarily from the law creating the obligation."

Can there be any doubt that this unfortunate conflict centers about a single proposition involving the nature of the cause of action, whether as here presented it is contractual in nature and therefore transitory? The two tribunals are in harmony as to the legal results that flow from either position. If the cause of action be contractual, and therefore transitory, no court has more thoroughly recognized its obligation to entertain such a case than has the Supreme Court of Wisconsin in Parker v. Stoughton M. Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881. On the other hand, the legal conclusions of the Supreme Court of Wisconsin, that a statutory remedy afforded for the enforcement of a statutory right is exclusive, is concurred in by the Supreme Court. Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376; Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825. It therefore conclusively appears that the crux of this controversy involves the nature of the cause of action, and is therefore a question of general law.

The contention of the defendant is that, inasmuch as the Supreme Court of Wisconsin has been pleased to denominate this doctrine as a part of the public policy of the state, it is entitled to such respect and deference from this court as has been frequently accorded to the domestic policy or peculiar usage or local law recognized by a sovereign state as part of its public policy. It is a postulate resulting from our dual system of government that comity between the states becomes a duty of the highest consequence, and that within certain limits the federal court may deflect from the strict line of federal precedent to give effect to such domestic policy, to avoid unseemly conflict of law within the state. In recognition of this principle, Congress enacted section 721, Rev. St. (U. S. Comp. St. 1901, p. 581), providing that the laws of the several states are to be regarded as rules of decision in trials at common law so far as applicable, etc. The courts have construed this statute to cover the following subjects, among others: First. A construction put upon a constitutional or statutory provision of a state by the highest court of the state becomes a part of the statute. Leffingwell v. Warren, 2 Black. 599, 17 L. Ed. 261. Second. Decisions of the highest court of the state which have become rules of property. Third. Rules of law of local character involving domestic customs or usage. Bucher v. Cheshire R. R., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Gardner v. Railway, 150 U. S. 357, 14 Sup. Ct. 140, 37 L. Ed. 1107.

In Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 21, 27 L. Ed. 359, the court say:

"So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there

has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt."

In Gilbert v. Am. Surety Co., 121 Fed. 499, 502, 57 C. C. A. 619, 61 L. R. A. 253, Seventh Circuit, Jenkins, J., declined to follow the decision of the Supreme Court of Illinois, because the question upon which it passed was one of general law, and was not founded upon the construction of the statute of the state, following and citing from Delmas v. Insurance Co., 14 Wall. 661, 668, 20 L. Ed. 757.

The contention of the defendant seems to be fully met in Boyce v. Tabb, 18 Wall. 546, 21 L. Ed. 757. The suit was brought upon a note which had been given as the purchase price of certain slaves. After the thirteenth constitutional amendment had been adopted, the Supreme Court of Louisiana held that such a sale would not furnish a valid consideration for a contract, and it was claimed that the decision of the state court was binding upon the federal court. The Supreme Court say:

"It is urged, on the part of the plaintiff in error, as the highest court of Louisiana has, on the grounds of public policy, refused to enforce contracts like this since the abolition of slavery, that Judiciary Act Sept. 24, 1789, c. 20, § 34, 1 Stat. 92 (U. S. Comp. St. 1901, p. 581), obliges this court to follow that rule of decision. This is an erroneous view of the obligation imposed by that section on this court, as our decisions abundantly show. The provisions of that section do not apply, nor was it intended that they should apply, to questions of a general nature not based on a local statute or usage, nor on any rule of law affecting titles to land, nor upon any principle which has become a settled rule of property. The decisions of the state courts on all questions not thus affected are not conclusive authority, although they are entitled to and will receive from us attention and respect."

See, also, Stowe v. Belfast Saving Bank (C. C.) 92 Fed. 90, 100.

From Booth v. Clark, 17 How. 322, 15 L. Ed. 164, to Hale v. Allinson, supra, the principles of comity have been often discussed as applied to the right of a chancery receiver to recognition in the courts of states other than those where appointed. The conclusions of the court have not always been harmonious. It would be unprofitable to refer to them in detail, because, as we shall see, this case must be ruled by statutory provisions not before the court when Finney v. Guy was considered by the Supreme Court of the United States.

It requires only reference to sections 4 and 6 of chapter 272, p. 317, Gen. Laws Minn. 1899; and section 3197, Rev. Laws Minn. 1905, all of which are fully set out in the complaint, to understand what plenary powers this receiver has, and how completely the statute has authorized him to bring suit against stockholders in any court, state or federal, wherever they may be found, and how completely he represents the insolvent corporation for all purposes. So that, in the instant case, the receiver comes clothed with title to the cause of action. He comes in his own right like any other litigant, not as a suppliant invoking the doctrine of comity. This distinction is enforced in Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337. By the laws of Missouri:

"Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of the state," etc.

On page 226 of 103 U. S., 26 L. Ed. 337, the court held:

"By the charter of this corporation, if a dissolution was decreed, its property passed by operation of law to the superintendent of the insurance department of the state, and he was charged with the duty of winding up its affairs. Every policy holder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the corporation can insist shall be regarded. The appellees, when they contracted with the Missouri corporation, impliedly agreed that, if the corporation was dissolved under the Missouri laws, the superintendent of the insurance department of the state should represent the company in all suits instituted by them in winding up its affairs. Relfe therefore became by operation of law the successor of the corporation in the litigation," etc.

In Burget v. Robinson, 123 Fed. 262, 268, 59 C. C. A. 260, referring to the suggestion of the Supreme Court in Hale v. Allinson, that the former statute of Minnesota did not confer upon the receiver the right to proceed to enforce the liability of stockholders, it is suggested that the latter statute of 1899 is susceptible of a different construction and may well bring the case within the doctrine of Relfe v. Rundle, supra.

In Parsons v. Charter Oak Life Ins. Co. (C. C.) 31 Fed. 305, Judge Shiras, in a case of conflicting claims between two receivers as to property situated in Iowa, where a defunct insurance company of Connecticut was being wound up in that state under a statute providing for the appointment of a receiver to take possession of all assets and property of the corporation, with power to sell and convey the same, and direct the application of the avails of such assets and property equitably, etc., held that the case was brought within the rule of Relfe v. Rundle, supra, and that every policy holder and creditor resident in Iowa is charged with notice of such statute and of the powers of the receiver thereunder, and impliedly agree that, in case of insolvency and dissolution under the laws of Connecticut, they would be bound by such laws, and that the rules of comity had no application to the case.

Kirtley v. Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738, is a most instructive case, covering all substantial features of the present controversy. The case arose under constitutional provisions in Ohio quite similar to those in Minnesota. But the Ohio statute did not invest the receiver with the title to the cause of action, as is the case here. He was a mere chancery receiver. Judge Day, speaking for the Court of Appeals for the Sixth Circuit, says on page 7 of 107 Fed., on page 109 of 46 C. C. A. (52 L. R. A. 738):

"Can the contractual liability of a stockholder of an Ohio corporation, domiciled in a foreign jurisdiction, be enforced, when the proofs show an assessment in the state of the creation of the corporation upon domestic stockholders to the full amount of the stockholders' liability? * * * We think, in the light of principle and authority, this question must be answered in the affirmative. We find the obligation to be one arising upon contract, and its enforcement upon principles of comity, at least, in cases like the one under consideration, to work no injustice upon citizens of a foreign jurisdiction. Can the receiver bring the action? We think the order is broad enough, assuming

the court had power to make it, to justify the prosecution of suits in another jurisdiction. This seems to have been one of the purposes for which the receiver was appointed, and it would be a very narrow construction to hold that he was appointed only to collect the judgments rendered in the Ohio court. * * * Such being the nature of the liability, it is well settled that such obligation will be enforced wherever practicable in a federal court of competent jurisdiction." Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587.

In Rhodes v. U. S. Bank, 66 Fed. 512, 13 C. C. A. 612, 34 L. R. A. 742, the Circuit Court of Appeals for the Seventh Circuit entertained a suit brought by a creditor against a stockholder of an insolvent Kansas corporation to enforce a statutory liability, on the authority of Flash v. Conn., supra, giving effect to the ruling of the Kansas court as to the power of the receiver.

In Hale v. Hardon, 95 Fed. 747, 37 C. C. A. 240, the Circuit Court of Appeals for the First Circuit held, under the Minnesota law of 1894 (Gen. St. 1894, c. 76), that the doctrine of Relfe v. Rundle, supra, applied, and that it was a part of the implied contract with every stockholder that in case of insolvency the corporation might be wound up according to the Minnesota law, and that the statutory receiver might sue extraterritorially.

The public policy of Minnesota and Wisconsin, as declared by their statutes concerning the method of winding up the affairs of insolvent corporations and gathering in the necessary contributions of stockholders into a common fund to meet the liabilities of the corporation, seems to be harmonious. Under neither system is a creditor permitted to pursue stockholders in an individual suit, but, wherever there is superadded liability, all creditors must be arrayed in a single suit against all stockholders who are amenable to process. The object is to avoid confusion and injustice by working out the rights, liabilities, and equities of all in a single proceeding, so that the burden may be justly ascertained and equitably distributed.

It is matter of common knowledge that in securing stock subscription little attention is paid in this commercial age to state lines. The stockholders of a Wisconsin corporation may be largely resident in Illinois or other adjoining states. If in case of insolvency there be no way to reach nonresident stockholders, there would seem to be a serious impediment in effectuating this public policy. Unless the Wisconsin receiver can resort to some proceeding that is in nature ancillary to the main suit in Wisconsin, then complete immunity will be enjoyed by all nonresident stockholders who may in many instances hold a large fraction of the stock, and this circumstance would defeat the very policy that this statute contemplates.

As Field, C. J., in Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232, well says:

"It certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligation towards creditors of the corporation which they have assumed by becoming stockholders."

But it is not for us to dictate how the domestic policy of Wisconsin shall be framed, or to what extent the Supreme Court of Wisconsin

shall yield to the dictates of comity in dealing with cases arising under the statutes of a sister state. We are only concerned with the question whether a just regard for the principles of comity will constrain us to depart from the ruling of the federal Supreme Court. We do not fail to appreciate the desirability of harmonious ruling by both tribunals sitting within the state; but it appears that the conflict of opinion does not fall within the lines where the duty to follow the state court has been recognized. We have seen that the question upon which the courts have differed involves the nature of the obligation assumed by the corporate stockholders under the Constitution and laws of Minnesota. This question lies beyond the realm of comity, and must be settled by each court as it arises, by the application of general principles of law.

No case has been cited, and I believe none can be found, where a federal court has surrendered the right of independent judgment when the question involved was one of general law. Therefore we conceive it to be our plain duty to adhere to the rule laid down in Bernheimer v. Converse, supra.

From which it follows that the demurrer must be overruled, and it is so ordered.

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## UNITED STATES v. CHICAGO GREAT WESTERN RY. CO.

(District Court, N. D. Iowa, E. D. May 6, 1908.)

1. RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION.

Under Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), a railroad company receiving cars to be hauled in moving interstate traffic, or in connection with other cars that are so used, is required to know at its peril that each of said cars is equipped with the safety appliances required by such act, and it is liable for the penalty prescribed therein for each car so hauled or used in moving interstate traffic, or in connection with other cars that are so used, which is not so equipped.

2. SAME—ACTION FOR VIOLATION—MEASURE OF PROOF REQUIRED.

An action by the United States to recover the penalty provided for a violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), is a suit of a civil nature, and a preponderance of the evidence only is required to establish the cause of action.

3. SAME—CARS BECOMING DEFECTIVE WHILE IN USE—DUTY TO DISCOVER AND REPAIR DEFECTS.

If a railroad train used in moving interstate traffic when started is properly equipped with air brakes as required by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 886), or if cars so used are properly equipped with automatic couplers as therein required when started or when received by the company for transportation over its line, but from any cause either train or cars become defective so as not to comply with the law while being so moved, the company is required to immediately repair such defects as soon as discovered, or as soon as they could have been discovered by the exercise of reasonable care, if the means of repair are at hand; but, if not, the company may haul the same to the nearest repair point without being subject to the penalty for violation of the act.

4. SAME — TRAINS — INSUFFICIENT EQUIPMENT WITH TRAIN BRAKES—"SINGLE TRAIN."

A freight train scheduled to run regularly between points in different states is a single train throughout such run and at all times subject to the provisions of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), although some of the cars composing it may have been left and others taken on at different stations, and although after entering the second state the engine, caboose, and train crew may have been changed. In such case, if at any one or more points in the run a sufficient number of the cars composing the train are not equipped with air brakes to meet the requirement of the act, the railroad company is liable to the penalty imposed for its violation, but to one penalty only.

Action to Recover Penalties for Alleged Violations of the Safety Appliance Law of Congress.

Frederick F. Faville, U. S. Atty., James A. Rogers, Asst. U. S. Atty., and Luther M. Walter, Special Asst. U. S. Atty.

Hurd, Lenehan & Kiesel, for defendant.

REED, District Judge (charging jury). This suit is brought on behalf of the United States by the United States attorney for the Northern district of Iowa, against the Chicago Great Western Railway Company, to recover from that company certain penalties which it is alleged have been incurred by it because of its violation of a law of the United States commonly known as the "Safety Appliance Law." The acts of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]) and the orders of the Interstate Commerce Commission made pursuant thereto and in force at the time of the several acts alleged to have been committed by the defendant provide substantially as follows:

That from and after the 1st day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use upon its line of railroad any locomotive engine in moving interstate traffic not equipped with appliances for operating the train-brake system, or to run any train in such traffic that has not 75 per cent. of the cars in such train equipped with power or train brakes that can be operated by the engineer on the locomotive hauling such train, so that he can control its speed without requiring brakeman to use the common hand brake for that purpose. Also, that it shall be unlawful for any such common carrier to haul, or permit to be hauled or used, on its line of railroad, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, and which is not also provided with secure grab irons or hand holds on its ends or sides, for the greater security of the men in coupling and uncoupling cars. The provisions and requirements of this law apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith; and if any such common carrier shall run any train, or haul or permit to be hauled on its line

of railroad any car, in violation of any of such provisions, it shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought on behalf of the United States by the United States attorney for the proper district, in the District Court of the United States having jurisdiction where such violation shall have been committed; and it is the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it is also the duty of the Interstate Commerce Commission to lodge with the proper United States attorney information of any such violation as may come to its knowledge.

These provisions, gentlemen, and some others that it is not necessary to now call to your attention, are the laws of Congress, commonly known as the "Safety Appliance Law," which it is alleged have been violated by the defendant, and this suit is brought to recover of it the penalty of $100 for each of 10 alleged violations thereof.

The petition is in 14 counts, each of which alleges that the defendant railway company was in March, 1907, a common carrier engaged in interstate commerce by railroad among several of the states of the United States, and particularly between the states of Illinois, Iowa, Nebraska, and Minnesota. Counts 11 and 12, however, have been withdrawn, and they are not therefore to be considered by you. The remaining 12 counts charge the 10 violations relied upon by the plaintiffs for recovery, and it is important that you should carefully observe the nature of the several charges made in them. These charges may be classified as follows: First, those which charge the hauling or using of cars by the defendant when not equipped with safety couplers, or grab irons, as required by the law; and, second, those which charge the hauling of a train or trains of cars when 75 per cent. of the cars in such train or trains were not equipped with power or train brakes, as required by the law.

Counts 1, 2, 3, 4, 5, 6, and 13 and 14 are of the first class, and each charges that the defendant, in March, 1907, hauled upon its line of railroad, within the jurisdiction of this court, a certain car, particularly describing it, which car was then being used regularly in the movement of interstate traffic, and that it was hauled by the defendant on its line of railroad when it was not equipped with couplers that would couple automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars, or with grab irons, as required by this law. Counts 7 and 8 belong to the second class. They both relate to one transaction, and allege that the defendant, in March, 1907, hauled on its line of railroad from Dubuque, in the state of Iowa, with one of its locomotive engines, a certain train, to wit, No. 73, composed of cars consigned from points in Illinois to points in Minnesota and Iowa, when 75 per cent. of the cars in such train were not equipped with power or train brakes that could be operated by the engineer of the locomotive engine drawing said train, and that would enable him to control its speed without requiring brakeman to use the common hand brake for that purpose. Counts 9 and 10 are also of the second class, and both relate to one transaction, and allege that in March, 1907, the defend-

ant hauled upon its line of railroad into Dubuque, in the state of Iowa, with its own locomotive, a train, namely, No. 73, composed of cars consigned from a point in Illinois to points in the state of Minnesota, when 75 per cent. of the cars in that train were not equipped with power or train brakes that could be used and operated by the engineer of the locomotive engine hauling said train, as before stated.

Briefly, gentlemen, these are the acts charged by the United States to have been committed by the defendant, and which it is alleged constitute the several violations by it of this safety appliance law of Congress. The defendant admits that it is a railroad corporation engaged in interstate commerce by railroad among the several states, and that its line of railroad is a through highway over which interstate traffic was being continually hauled from one state to another in the United States, as alleged in the petition; but it denies each and every other allegation of the several counts of the petition. And thus are presented the questions of fact that you are called upon to determine by your verdict.

You will observe, gentlemen, that the only questions for you to consider and determine are:

First, did the defendant, at or about the time alleged, haul upon its line of railroad, within this district, one or more of the cars described in the petition, when used in interstate commerce or in connection with other cars that were so used, without being equipped with couplers or grab irons, as required by this law of Congress?

Second, did it haul a train or trains of cars upon its said line of railroad, some of which cars were being used in interstate traffic, without 75 per cent. of the cars in such train being equipped with power or train brakes, as required by said law?

If it did either of these acts, then it is liable to the penalty of $100 for each car so hauled, and for each train that it so run, and the plaintiffs are entitled to your verdict for the penalties incurred for each such violation; but, if it did not do either, then it is not liable and is entitled to your verdict.

This law, gentlemen, is a beneficent one, and is intended to protect the public generally, and persons and property that are being transported by railroad, and particularly is it intended to protect the life and limbs of employés engaged in the dangerous and hazardous business of operating railroad trains, and railroad companies engaged in such commerce are required to strictly comply with its provisions and obey this law. It was therefore the duty of this defendant, when it received the various cars described in the petition to be hauled and used upon its line of railroad in moving interstate traffic, or in connection with other cars that were so used, to know at its peril that each of said cars was equipped with the safety appliances required by this law, and if it hauled or used any of said cars when not so equipped to move interstate traffic, or in connection with other cars that were so used, then it is liable to the penalty of $100 for each and every car described in some count of the petition that it so hauled or used.

The burden of proof is upon the plaintiffs to prove clearly and satisfactorily to you, by the greater weight of the credible evidence, that the defendant has committed some one or more of the several

acts charged against it as being a violation of this law of Congress. They are not required to prove the same beyond a reasonable doubt as in a criminal case, for this is not a criminal action, but is a suit of a civil nature to recover the penalties prescribed for a violation of the law. You are the judges, and the sole judges, of the credibility of the several witnesses who have testified before you, and of the weight that shall be given to the testimony of each. This is to be determined by you largely from the manner in which the witnesses have testified before you, their appearance when testifying, their interest, if any, or lack of interest, in the result of this controversy, their knowledge or lack of knowledge or means of knowing the facts about which they have testified, and all other matters appearing in the evidence which may affect or bear upon the credibility of the witnesses or the weight that shall be given to his testimony. You should not discredit the testimony of any witness solely because he is in the employ of either the government as an inspector of railroad trains or cars, or in the employ of the defendant railroad company; but you will determine the credibility of such witness and the weight to be given to the testimony of each as I have already said to you, and, when you have determined that, then you will determine where the greater weight of the testimony is upon these different questions of fact about which they have testified before you.

The inspectors of the government were not required to inform the employés of the railroad company, when they made the inspection of these cars, of the defects in the appliances, if any they discovered, and you should not discredit their testimony solely because they did not so inform them.

If from the evidence you find that the cars, or either of them, described in the petition or in some count thereof, were equipped with the requisite couplers and grab irons, and that they were in the condition required by the law when they were received by the defendant to be hauled upon its line of railroad, as stated, but during the time they were being so hauled the couplers or grab irons from any cause became injured or out of repair upon any of the cars, so that they were not in an operative condition, then the defendant would be required to immediately repair said defects and put the appliances in operative condition, if it could do so with the means and appliances at hand at the time and place when and where it discovered their defective and inoperative condition, or when such condition could have been discovered by the exercise of reasonable care on the part of its agents or servants charged with that duty. But if it did not at such time and place have the requisite means or appliances at hand to remedy such defect and put the couplers and grab irons in operative condition, then it would have the right, without incurring the penalty of the law, to haul such car or cars to the nearest repair point on its line where such defects could be repaired and the appliances put in operative condition. But if such defective or inoperative condition of the couplers and grab irons existed at a repair point on defendant's line, or at a place where such defects could have been remedied, then, if it hauled said car or cars from such place in such condition, it

would do so at its peril and be liable for the statutory penalty for so hauling or using such car described in any count of the petition.

In like manner, gentlemen, it was the duty of the defendant, when it started the train described in the petition, to be hauled upon its line of railroad into or out of the city of Dubuque, Iowa, to know at its peril that at least 75 per cent. of the cars in said train were equipped with air brakes, as required by the law, and, if that percentage of that train was not so equipped, then it is also liable for the penalty of $100 for the train described in the petition that it so hauled. But if you find from the evidence that 75 per cent. of the cars composing said train were equipped with air brakes, in an operative condition and so they could be operated by the engineer of the train when it left Chicago, but from any cause any of said air brakes afterwards become inoperative during the run, so as to reduce the percentage below 75 per cent., then it was the duty of the defendant to immediately repair such defect or defects and put the air brakes in operative condition as soon as the defects were discovered, or could have been discovered, by the exercise of reasonable care on the part of the agents or servants of the defendant charged with that duty, if such defects could have been so repaired by the means and appliances at hand for that purpose when the defect or defects were discovered. But if such means and appliances were not at hand to so remedy the said defects, the defendant would have the right, without incurring the penalty of the law, to haul the cars upon which said air brakes so became defective or inoperative to the nearest repair point on its line of railroad where such defects could be repaired and the cars and air brakes put in an operative condition. But if such defects existed at a repair point or other place where they could be repaired, as before stated, then, if the defendant ran the train from such place when 75 per cent. of the cars therein were not so equipped with operative air brakes as required by law, it is liable for the penalty of $100 for so running such train.

If you find from the evidence that train No. 73, mentioned in counts 7 and 8 and in counts 9 and 10 of the petition, was scheduled to run regularly as one train between Chicago and Oelwein, and that it did so run between said points, then I am of the opinion, and so charge you, that within the meaning of this law it was but a single train, though certain of the cars composing it when it started on the run may have been set out and others placed therein at different stations along the line, and even though the train crew and the engine and caboose were changed and another engine and another crew hauled it from Dubuque to Oelwein. If therefore you find that 75 per cent. of the cars in that train were not equipped with air brakes in an operative condition, and so they could be operated by the engineer of the locomotive hauling the train, at any point on the defendant's line of railroad over which the train was run from Chicago to Oelwein, so that he could control the speed of the train at all points on said run while hauling said train, without requiring the brakemen to use the common hand brakes for that purpose, then the defendant incurred and is liable for the penalty of $100 for running the train when it was not so equipped.

It appears from the evidence that some of the cars alleged to have been hauled or used by the defendant in violation of the law were not its own cars, but were the cars of some other company. This fact is wholly immaterial. If such cars were in defective condition, as contended on behalf of the plaintiffs, no matter to whom they belonged, the defendant would incur the same penalty in hauling such cars when in such defective condition that it would if they were its own cars. Each car hauled by the defendant must have been equipped with the required couplers and hand holds so that it could be coupled to, and uncoupled from, other cars by its own couplers, irrespective of the couplers or hand holds of the other car to which it was coupled, or was to be coupled.

By "interstate traffic" is meant, as you all know, traffic that is moved from one state or territory into or through some other state or territory.

Now, gentlemen, with these general rules in mind, I call your attention particularly to the several counts of this petition.

The first count alleges that the defendant, on or about March 26, 1907, hauled on its line of railroad one car, to wit, A. V. R. No. 371589, said car being one regularly used in the movement of interstate traffic, but at the time of said violation being empty, and that defendant hauled said car over its line of railroad from Dubuque, Iowa, in an easterly direction, when the coupling and uncoupling apparatus on the B end of said car was out of repair and inoperative, the bottom clevis to the chain connecting the lock pin or lock block to the uncoupling lever being missing on said end of said car, thus necessitating a man or men going between the ends of the cars to uncouple or couple them, and when said car was not equipped with couplers coupling automatically by impact as required by the laws of Congress. Now, gentlemen, you have heard the testimony of the witnesses on behalf of the plaintiffs and the defendant in regard to that car and the defect that it is claimed was in its coupling device, and it has been explained to you what is meant by the "A" and the "B" ends of a car; and whether or not that coupler was in that condition is purely a question of fact that you must determine from the evidence before you. What do you say, upon a careful and conscientious consideration of all the testimony upon that point, is the truth in regard to that car? And as you find the truth to be, from the evidence before you, so let your verdict be in regard to that car.

The second count of the petition is in exactly the same form, and alleges in exactly the same language that the defendant, on or about the 27th day of March, 1907, hauled on its line of railroad one car, to wit, C. & O. No. 26109, over its line of railroad from Dubuque, in an easterly direction; the top clevis pin to the chain connecting the lock pin or lock block to the uncoupling lever being missing on one end of said car. In the same manner as I have before stated, you must determine from the testimony what is the truth in regard to that car.

The third count is in exactly the same language, and alleges that the defendant hauled upon its line of railroad a Michigan Central car

No. 5631 from Dubuque, in the state of Iowa, in an easterly direction, the lock pin being broken on the B end of said car.

The fourth count is exactly the same as the three preceding counts, and alleges that on or about the 27th day of March, 1907, the defendant hauled C. & P. car No. 1455 on its line of railroad from Dubuque Iowa, in an easterly direction, when the lower clevis to the chain connecting the lock pin or lock block in the coupler on the B end of said car was out of repair and inoperative.

The fifth count is the same as the others, and describes defendant's own car No. 10706, and alleges that the coupling at the A end of said car was out of repair and inoperative.

The sixth count alleges in like manner that defendant hauled its own car No. 42102 over its line of railroad from Dubuque, in the state of Iowa; but it does not allege in which direction that car was hauled. That is the car, as I remember the testimony, that was hauled from the brewery in Dubuque, loaded with beer, to some point beyond Oelwein. The fact that that car was hauled wholly within the state of Iowa is not material, if in the same train that it was hauled there were other cars loaded with traffic from a point without the state, or from a point within the state consigned to a point without the state.

Count 14, the last in the petition, is of the same nature, and it alleges that defendant hauled a car, described as "A. G. S. No. 2396," from Oelwein, in the state of Iowa, in a westerly direction; the chain connecting the lock pin or lock block to the uncoupling lever being broken on the B end of said car.

The thirteenth count is the one that alleges that the car hauled was not equipped with a proper hand hold.

These, gentlemen, are the various counts in regard to the hauling of the cars; and I have sufficiently referred to the hauling of train No. 73. The view I take of that matter is that there can be but one penalty of $100, at most, recovered for the hauling of the train. Of course, if the company did not haul that train with the defective air brakes as alleged, if you find that the government has failed to prove that fact, there can be no recovery for that. But the utmost that can be recovered is $900; that is, $100 for each of the eight cars that were hauled and $100 for the train. If you find the plaintiffs entitled to recover, of course, you must return your verdict accordingly. I have prepared forms of a verdict which I will send to you by the bailiff, one of which you will use to express the verdict you agree upon.

When you retire, select one of your number as foreman, and, when you have agreed upon your verdict, have your foreman sign the verdict you agree upon and return it into court.

NOTE.—The verdict was for the government upon nine counts.

## McFADDEN et al. v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Circuit Court, E. D. Pennsylvania. July 22, 1908.)

No. 14.

INSURANCE—ACTION—VALUE OF PROPERTY—EVIDENCE.

In an action on a policy insuring certain cotton, evidence *held* to justify a finding that the loss occurred after 8:55 a. m. on June 8, 1905, and that the actual cash value of the cotton lost or damaged was 8.55 cents per pound at the time the loss or damage occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1722.]

John G. Johnson, for plaintiff.
Frederick B. Campbell and Fraley & Paul, for defendant.

J. B. McPHERSON, District Judge. This is an action brought to recover upon a policy of fire insurance issued by the defendant upon certain cotton stored in the city of New York. It was first tried in November, 1907, before a jury, but the verdict was afterwards set aside. At that trial the parties entered into the following stipulation concerning nearly all the facts:

"And now this 12th day of November, 1907, it is agreed that no evidence need be offered by either of the parties to this cause in support of the facts hereinafter set forth, but that either of the parties hereto may read this stipulation or any part thereof as conclusive evidence of any of said facts at any trial of this cause. But nothing herein contained shall in any wise preclude either party from offering evidence as to and upon the several factors or elements that should be considered in determining the actual cash value of the property described in the hereinafter specified policy of insurance. The facts thus agreed upon are as follows:

"On the 13th day of January, 1902, the defendant issued to plaintiffs its policy No. 6208895, by which it undertook to insure plaintiffs 'for a term of ——— from the eighth day of January, 1902, at noon to the ——— day of ——— 19— at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding ——— dollars upon the following described property and contained as described herein and not elsewhere, to wit: On merchandise as specified the property of the assured named herein or held by said assured in trust or on commission, or sold and not delivered, in such place or places for such amounts and for such time and at such premium as shall be indorsed in writing on a memorandum book attached hereto and approved by this company.'

"By said policy it was provided that 'this company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.'

"By writing indorsed upon said policy it was further provided as follows:

"'This company shall not be liable for a greater proportion of any loss or damage to the property described herein than the sum hereby insured bears to eighty per centum (80%) of the actual cash value of said property at the time such loss shall happen. * * * If the insurance under this policy be divided into two or more items these clauses shall apply to each item separately.'

"A copy of said policy is hereto attached marked 'Exhibit A,' and made a part hereof.

"The memorandum book therein referred to was filled, and all the insurance thereby granted has expired before the happening of the fire hereinafter referred to. No copy of said memorandum book is therefore attached

hereto. After said memorandum book had been so filled, defendant granted further insurance to plaintiffs under said policy upon separate slip certificates, all of which were in the form of which a copy is hereto annexed, marked 'Exhibit B' and made a part hereof, differing therefrom in the property insured, in the term of the insurance, and in the premium therefor.

"All of the insurance thus granted by the defendant to the plaintiffs was upon cotton in bales owned or held by the plaintiffs under the terms of said policy. A large part of such insurance was, as hereinafter set forth, upon such cotton stored at Brooklyn, N. Y., in stores known as Red Hook Stores 339, 344, and 345.

"On the 8th day of June, 1905, plaintiffs had insurance in force on cotton stored in Red Hook Store No. 344, Brooklyn, N. Y., under said policy and certificates, aggregating the sum of $102,227, and insurance on said cotton there stored, issued by other insurance companies, aggregating $25,155, making a total of $127,382.

"On said date plaintiffs also had insurance in force on cotton stored in Red Hook Store No. 345, Brooklyn, N. Y., under said policy and certificates, aggregating the sum of $162,942, and insurance thereon issued by another company in the sum of $507, making a total of $163,449.

"On said date plaintiffs also had insurance in force on cotton stored at Red Hook Store No. 339, Brooklyn, N. Y., under said policy and certificates, aggregating the sum of $27,363.

"Whether the cash value of said cotton on said date was the amount claimed by the plaintiffs or that claimed by the defendant the insurance thereon was in either case in excess of eighty per centum (80%) of the value thereof; and defendant under said policy was liable pro rata with the other insurance companies on said cotton to reimburse the plaintiffs the full amount of their loss from any fire which might occur in said cotton not exceeding the amount covered by its policy and certificates.

"On the 8th day of June, 1905, at 8:55 a. m. a fire occurred in said cotton, whereby the same was damaged in a large amount. The amount of damage not being known, the defendant and the other insurance companies concerned in said loss, with plaintiffs' consent, took possession of all of said cotton and sold the same for the benefit of all the parties concerned, including the plaintiffs.

"The defendant has paid the plaintiffs on account of the loss and of the proceeds of the sale of said cotton the following amounts:

| | |
|---|---|
| As to cotton stored in Red Hook Store No. 344 sums aggregating.. | $102,581.47 |
| As to cotton stored in Red Hook Store No. 345 sums aggregating.... | 46,828.29 |
| As to cotton stored in Red Hook Store No. 339 sums aggregating.... | 5,611.16 |
| Making a total of..... | $155,020.92 |

Deducting the amount realized by defendant from the sale of said cotton, the amounts so paid by defendant are much less than the total amount of defendant's insurance upon said cotton. It was therefore the duty of defendant to reimburse plaintiffs for its proportion of the entire value of all the insured cotton damaged by fire as aforesaid.

"The cash value of cotton in New York is determined by the prices realized on sales between merchants, which is known as 'spot cotton.' Such sales are sometimes made on the floor of the Exchange, but usually are not so made; 'spot cotton' being sold usually between members. Sales of cotton for future delivery, commonly known as 'cotton futures,' are made on the exchange, and constitute the largest portion of the daily sales on the exchange. Said exchange is open daily at 10 a. m. and closes at 3 p. m., except on Saturday when it closes at 12 o'clock noon.

"The by-laws of the New York Cotton Exchange provide that:

" 'The board of managers shall appoint a committee on spot quotations composed of seven members of the exchange, more or less actively engaged in the spot cotton business, two of whom shall retire at the end of each month. It shall be the duty of this committee to meet at the exchange on each business day at 2 p. m., except Saturdays, when it shall meet at 11:30 a. m. to confer upon, and, by vote of the majority of the members present, establish the mar-

ket quotation for the time being of middling upland cotton. The relative differences in valuation between the grades shall be those determined by the committee on revision of quotations of spot cotton.'

"The actual sales of 'spot cotton' quoted by the New York Cotton Exchange for the period beginning June 1st and ending June 14th, 1905, and the market quotations therefore as established by the committee on spot quotations are as follows:

| Date. | Number of Bales. | Price Per Pound. |
|---|---|---|
| June 1st | 2642 | 8.75 |
| 2d | 1550 | 8.50 |
| 3d | —— | 8.50 |
| 5th | 500 | 8.40 |
| 6th | 133 | 8.40 |
| 7th | 4253 | 8.40 |
| 8th | —— | 8.55 |
| 9th | 100 | 8.70 |
| 10th | 25 | 8.70 |
| 12th | —— | 8.70 |
| 13th | 215 | 8.90 |
| 14th | —— | 8.95 |

"The value of 'spot cotton' as fixed by 'spot committee' of the New York Exchange at 2 p. m. on June 7, 1905, was 8.40 cents per pound. The value of such cotton as fixed by said committee at 2 p. m. on June 3, 1905, was 8.55 cents per pound.

"The price of 'cotton futures' is fixed on the New York Cotton Exchange by a series of three calls, made, respectively, at the opening of the market at 10 o'clock a. m., at 11:45 a. m., and at 2 p. m. The quotations of the active 'cotton futures' for the period beginning June 5th, when spot cotton reached 8.40, until June 8th, the day of the fire, are as follows:

| Dates. | Active Futures. | Closing Price. |
|---|---|---|
| June 5th | July | 7.92 |
| | August | 7.94 |
| | September | 7.99 |
| | October | 8.05 |
| June 6th | July | 7.90 |
| | August | 7.92 |
| | September | 7.99 |
| | October | 8.04 |
| June 7th | July | 7.92 |
| | August | 7.95 |
| | September | 8.02 |
| | October | 8.07 |

| | | First call, 10 a. m. | Second call, 11:45 a. m. | Third call, 2 p. m. | Closing. |
|---|---|---|---|---|---|
| June 8th | July | 7.92 | 8. | 8.09 | 8.07 |
| | August | 7.95 | 8.02 | 8.11 | 8.10 |
| | September | 8. | 8.08 | —— | 8.14 |
| | October | 8.07 | 8.14 | 8.23 | 8.21 |

"Due proofs of the occurrence of said fire and of the loss suffered by the plaintiffs thereunder were duly furnished to the defendant on or about June 10, 1905.

"It is further agreed that the question at issue to be determined by the jury under the instructions of the court upon the foregoing facts and upon such other evidence as may be offered on behalf of either of the parties hereto is whether the actual value of the cotton injured or destroyed by fire as aforesaid is to be taken as 8.40 cents per pound or 8.55 cents per pound or some other value per pound.

"If the jury shall find that the actual value of said cotton was 8.40 cents per pound, then a verdict shall be entered for the defendant in the sum of $1.11.

"If the jury shall find that the actual value of said cotton was 8.55 cents

per pound, then a verdict shall be entered for the plaintiffs in the sum of $2,851.81, with interest from September 8, 1905.

"If the jury shall find the actual value of said cotton was some value per pound other than 8.40 cents or 8.55 cents, then the amount of the verdict shall be subsequently calculated and adjusted by counsel accordingly with interest from September 8, 1905."

In addition to this stipulation, the testimony of several witnesses was then heard, bearing upon the duration of the fire and the actual cash value of the cotton at the time when its injury or destruction took place.

After the verdict was set aside a second trial was had in May, 1908, before the court without a jury, and for the purposes of this trial a second and additional stipulation was entered into as follows:

"And now, this 1st day of May, 1908, it is stipulated and agreed by and between the parties plaintiff and defendant in the above entitled cause that the same shall be heard and decided by the court without a jury in accordance with the statute in such case made and provided.

"And it is further stipulated and agreed that said cause shall be heard before the court upon the stipulation as to facts heretofore agreed upon in this cause and upon the evidence offered at the trial of this cause had on the 16th day of November, 1907; and that the defendant withdraws exceptions to the evidence then offered, saving its exception to the admissibility of such evidence on the ground that the value of the property covered by the policies of insurance in force in this cause is to be determined as of the moment when the fire first broke out, and not as of any later time."

From these stipulations it will be observed that the court is simply asked to find a particular fact, namely, what was the actual value of the property insured at the time when the loss happened. In accordance with this request, therefore, I find from all the evidence that the loss happened at a later time than 8:55 a. m. on June 8th—the fire began at that hour, but the damage to the insured property was done afterwards—and that the actual cash value of the cotton lost or damaged was 8.55 cents per pound at the time when the loss or damage occurred.

In accordance with the foregoing stipulations, the clerk is directed to enter a finding in favor of the plaintiffs for $2,851.81, with interest from September 8, 1905, upon which a judgment may be entered in due course.

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## In re CONSUMERS' COFFEE CO. (No. 2.)

(District Court, E. D. Pennsylvania. July 6, 1908.)

No. 2,252.

1. BANKRUPTCY — RECEIVERS — CONTINUING BUSINESS AT LOSS — RECEIVER'S LIABILITY.

Where a receiver in bankruptcy persisted in carrying on the bankrupt's business, under a former order of the court, when he knew the business to be unprofitable from the beginning and capable of being conducted only at a loss, he should be surcharged with a portion of the loss sustained.

2. SAME—SURCHARGING ACCOUNT.

Where a receiver in bankruptcy did not account for the proceeds of the sale of certain fixtures belonging to the bankrupt, his account should be surcharged for that amount, but not with the value of supplies which

the bankrupt had on hand at the time the receiver was appointed, and which were used up in continuing the business, in the absence of proof that the money derived from the use thereof did not appear in the receipts with which the receiver was charged; nor should he be charged with the difference between the appraised and sale value of fixtures, furniture, etc., of another place of business, operated by the bankrupt.

In Bankruptcy.

The following is a copy of the referee's report, referred to in the opinion:

A petition in bankruptcy was filed against the Consumers' Coffee Company on May 18, 1905, and on May 19, 1905, a petition was filed asking for the appointment of a receiver. At the time of the filing of the said petition, the bankrupt was conducting two restaurants, one at 519 Market street, and another at 236 Chestnut street, and the petition praying for the appointment of a receiver asked for an order for leave to continue the restaurants as going concerns. At the hearing, the court appointed Claude P. Chew receiver and authorized him to "continue the business of the said Consumers' Coffee Company as a going concern until further order of this court." Acting under said order, the receiver continued the business at both restaurants, and in July, 1905, he presented his petition to the judges of the District Court reciting the fact that the business at 519 Market street was being conducted at a loss, that there was no prospect of securing a purchaser for it as a going concern, and praying for leave to sell it at public sale. An order of sale was thereupon entered, and on July 24, 1905, the court confirmed the sale of the business at 519 Market street for $635. Although the receiver was unable to secure a purchaser for the business at 236 Chestnut street as a going concern, and the business at that place had lost money during the first six weeks that it was conducted by him at the rate of about $150 a week, and although experience seems to have taught the receiver that it was inexpedient to continue the business at 519 Market street any longer, he made no effort to dispose of the business at 236 Chestnut street by obtaining a similar order of sale. Nor did he in any way present the facts of the situation to the court or to the creditors for the purpose of obtaining instruction and relieving himself of the responsibility of continuing a business which had up to that time lost almost as much money as the entire appraised value of its assets. The receiver continued to conduct the business at 236 Chestnut street for nearly nine months longer, to wit, until March 30, 1906, losing money uninterruptedly during every week of that period; the losses averaging over $100 per week and amounting to not less than $60 in any one week.

On April 9, 1906, an adjudication in bankruptcy was entered against the Consumers' Coffee Company, and the matter referred to me as referee. On May 1st the first meeting of creditors was held, and John S. Hershey appointed trustee. On the same date the receiver presented a petition praying for an order to sell the business at 236 Chestnut street at private sale for the sum of $700. The receiver alleged in his said petition that, "owing to his being unable to carry on the business without entailing further loss, he was compelled to abandon the business of renting (running) a restaurant and was unable to obtain a purchaser for the same as a going concern." A special meeting of creditors was held on May 15, 1906, for the purpose of considering the said petition, and, there being no objection thereto, the petition was approved, and an order made accordingly. On July 26, 1906, one of the creditors presented a petition for an order on the receiver to file his account, upon which petition an order was entered on the same date that "Claude P. Chew do within ten days of the service of a copy of this order upon him file an account and report as receiver of the above estate." To this order no attention was paid. Thereafter, to wit, on October 3, 1906, a second petition was presented praying for an order on said receiver to show cause he should not file his account forthwith, and thereafter on October 12, 1906, the account was filed. It thus appears from the record that the receiver allowed more than six months to elapse from the time that the last moneys of the estate came into his hands before he filed his account.

At the time of his appointment as receiver, the said Claude P. Chew was employed in the credit department of N. Shellenburg & Co., and by reason of the duties of his said employment he was unable to give his full time and attention to the business of conducting restaurants. He visited the restaurant at 236 Chestnut street from day to day, sometimes giving it a mere perfunctory examination, and at other times staying there for several hours. The former manager of the bankrupt corporation was continued by the receiver as manager of the business and practically left in uncontrolled charge of the money of the business. The manager was the only one who compared the waiters' checks and the cash in the register from day to day. No written record was kept of the business, except a so-called cash book in which the receiver noted the daily receipts from the cash register. The waiters' checks have disappeared, and, as comparison of these checks with the cash in the register was left entirely to the manager of the business, the receiver appointed made no effort to assure himself of the correctness of this comparison, or the honesty of the manager. The moneys which the receiver took from the business from day to day were used in part to make cash payments on account of merchandise used in the business, and the balance was deposited by the receiver in his own private bank accounts, one of which was kept in his own name, and another in his name as attorney for his wife. There was no separate account kept by him as receiver either in one of the depositories designated by the court, or in any other bank. The cash book of the receiver was crudely kept, without any of the care which should, above all, be exercised by one who handles other people's money. The receiver knew that the business was losing money from the very first week during which he took charge, and that it was losing money continuously. He alleged that he kept up the business during the summer of 1905, notwithstanding the fact that he was losing money, in the hope of meeting with better success in the fall. When he found there was no improvement in the fall, he determined to make an application for a liquor license by using one of the employés of his business, one John Smith, as the applicant, after having a verbal understanding with him that, if the license were granted, it should be sold, and the proceeds used for the benefit of the bankrupt estate, and the applicant or lessee to be engaged as an employé of the business. How he expected to carry out his agreement does not appear. An application for a license was actually made, and in March, 1906, heard and refused. In the meantime the receiver permitted the expenses of the business to run on unchecked. He did not reduce the force of employés or their salaries, and his management, or lack of management, continued unchanged. He had known from the very beginning of his receivership that the business was an unprofitable one and an undesirable one. He had the opinion of experienced restaurateurs in Philadelphia, to some one of whom he had hoped to sell the business. None of them, however, would take it because, as the receiver testified: "They did not think that it was a good thing." There were other restaurants in bankruptcy in Philadelphia in 1905. Yet with all this information at hand, and with the knowledge that he was steadily losing the money of the creditors and with the persons who were dealing with him on the faith of his official position as receiver, he continued to carry on the business upon his own responsibility in the loosest manner, without books, and without proper supervision of his moneys, and he now seeks refuge behind the original order of the court which authorized him to "continue the business as a going concern until a further order of this court." Can it be possible that the judges of the District Court meant to authorize this man to continue a business from May, 1905, to March, 1906, at a known average weekly loss of $100, without proper account books or records, with an officer of the bankrupt corporation in control of the moneys, without a proper bank account or separation of his private funds from the moneys of the receivership? To ask the question is to state the answer. It was the duty of this receiver to present a report to the court promptly as soon as he saw the drift of affairs, especially as, in this case, there had been no adjudication, and no referee was in charge of the matter. The referee as a rule makes it his duty to watch the progress of the estate, and where there is a business being conducted he is, by virtue of his position, brought in personal contact with the receiver or trustee and is able to keep himself advised of the prog-

ress of the business and to judge of the desirability of continuing it. But the receiver appointed by the judges of the District Court stands in no such relation to the court. The judge, by virtue of his office, is not thus brought into personal contact with the receiver and can receive no information except that which comes to him from the records of his court. The receiver is free to act as he pleases, bound only by his sense of duty and honesty and the fear of punishment for misfeasance. It is then that he is called on to exercise certain qualities—good judgment, ordinary prudence, reasonable common sense. This receiver did not only use ordinary good judgment, prudence, and caution in the administration of his trust, but showed almost entire absence of these qualities. He carried on the business at the expense of people who were dealing with him and who relied upon his official position as receiver of the court as sufficient assurance that they would be paid the money due them. He incurred obligations amounting, according to his own statement, to upwards of $5,000. He failed to do things that an honest and efficient receiver should have done. He mingled the funds of the estate with his own, he kept no proper books and records, he allowed irresponsible people to handle his cash practically unchecked, and altogether managed the estate, not with the care expected of an officer of the court, but with the recklessness of a speculator. It is difficult to understand the conduct of the receiver in this case, except upon the theory that he was enjoying some secret benefit out of the estate, or that he hoped in some way to profit by it. It is true that he states that he did not receive one cent for his services, and that he accounted for every dollar of the moneys that came into his hands. There is no way of testing the accuracy of his statements, because he made no proper records of his transactions at the time. The cash book presented by him to-day is of no higher value as evidence than his own oral testimony. I am not prepared to say that this receiver has improperly taken any of the moneys of the estate, but I do not hesitate to say that he has put himself in a position in which such a presumption must inevitably arise. However, it is not because of misappropriation he is asked to be surcharged, but because of mismanagement, and of this there can be no doubt. The facts of this case are of such a nature that I find it unnecessary to consider the general legal propositions submitted to me concerning the duties of a receiver. It is easily possible to reach the conclusions in this case per saltum that the receiver has grievously failed in the performance of his plain duty.

It has been suggested by counsel for the creditors that the receiver be surcharged with the losses at 236 Chestnut street from July 7, 1905; that being the date on which he presented his petition for an order of sale of 519 Market street. At that time he had been conducting both restaurants for six weeks. He knew that the restaurant at 236 Chestnut street was losing money at the rate of upwards of $150 a week, he had made ample inquiry to satisfy himself that the place was an undesirable one, and it was his duty at that time to present the matter to the court and ask for an order of sale. That he recognized this to be his duty in the case of the restaurant 519 Market street is in itself a sufficient indication of his ability to judge the situation in a reasonable and prudent way. The fact that he failed to exercise this judgment makes him liable for the result. I am of the opinion therefore that the receiver should be surcharged as follows:

| | | |
|---|---|---|
| (1) | With the losses incurred in the business (according to the expert accountant's report) from July 7, 1905, to March 30, 1906 | $3,919 51 |
| (2) | With the value of the supplies on hand at the time of his appointment as receiver (as per appraisement) | 213 63 |
| (3) | With the amount realized by him from the sale of fixtures at 519 Market street | 635 00 |
| (4) | With the depreciation in the value of the fixtures, furniture, dishes, etc., at 236 Chestnut street, being the difference between the amount of their appraised value, to wit, $1,244.34, and the amount for which they were sold by the receiver, to wit, $700.00 | 544 34 |
| | Total | $5,312 48 |

See 151 Fed. 933.

Henry N. Wessel, for creditors.
James S. Alcorn, for receiver.

J. B. McPHERSON, District Judge. After an attentive examination of the evidence offered before the referee (D. W. Amram, Esq.), I can see no reason for disagreeing with his findings of fact, and these findings afford a satisfactory basis for the conclusion that the receiver failed in his duty, and should be surcharged with some of the loss sustained by his improper persistence in carrying on a business which he knew to be unprofitable from the beginning. The referee's report, which is made part of this opinion, states the facts in detail, and I need not repeat them. My principal doubt has been whether the receiver should be charged with the loss from July 7, 1905, the date fixed by the referee, or from a later date in the fall after he had had an opportunity to learn from experience that the change of season would make no important difference in the business of the restaurant. After a good deal of reflection, I have come to the conclusion that perhaps it would be too harsh to charge him with the loss from July 7th, and I shall therefore modify this item so as to include the loss only from October 7th. The surcharge of $635, the amount realized from the sale of the fixtures at 519 Market street, is obviously proper, but I am unable to agree with the surcharge of the remaining two items. The supplies on hand at the time of the receiver's appointment, $213.-63, were presumably used up in conducting the business, and there is nothing to show that the money thus derived does not appear in the receipts with which he is charged. And I find no sufficient evidence to sustain the surcharge of $544.34, the difference between the appraisement of the fixtures, furniture, etc., at 236 Chestnut street, and the amount for which they were sold.

Thus modified, the report of the referee is confirmed.

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## UNITED STATES v. SHRYOCK et al.

(Circuit Court, S. D. Ohio, E. D. June 25, 1908.)

No. 62.

WATERS AND WATER COURSES—LEASE OF WATER POWER—CONSTRUCTION.

Pursuant to Act Aug. 11, 1888, c. 860, 25 Stat. 417, authorizing the same, the Secretary of War executed a lease granting to defendant the right for 20 years to use the surplus water not required for navigation at dam No. 9 on the Muskingum river for the purpose of operating an electric power plant, not exceeding 6,000 feet per minute, to be taken from the overflow canal and returned thereto. The lease and specifications attached provided that the quantity used should be determined from the tables prepared by the manufacturer of the wheels used or in the absence of such tables by the engineer in charge, the lessee to pay rent for the quantity asked for until the wheels were in place; also, that the water in the pool should not be lowered below a certain stage, but, in case of shortage, the leases first granted should have the preference and a rebate allowed for water required and not furnished. *Held*, that the lease contemplated the use of the water for operating a power plant only, and the govern-

ment was not obliged to furnish it for any other purpose; that, until a plant was installed, it might properly refuse to furnish water demanded for any other purpose or to go to waste, to the possible detriment of subsequent lessees; and that such refusal did not relieve defendant from the obligation to pay rent for the 6,000 feet named in the lease, which, and not the quantity so demanded, was the quantity "asked for" within the meaning of the lease.

## At Law.

This action was brought on a bond given by Shryock as principal and his codefendants as sureties to secure the payment of rents accruing on a lease for the right to use water from the water power of the Muskingum river. A verdict having been returned against the defendants, a motion is made to set it aside and for a new trial. The point of insistence is that the court, in charging the jury and in its rulings on the admissibility of evidence, erred in its construction of the lease.

On August 11, 1888, Congress enacted a law (25 Stat. 417, c. 860) which provides: "The Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the water powers on the Muskingum river at such rate and on such conditions and for such periods of time as may seem to him just, equitable, and expedient: Provided, that the leases or licenses shall be limited to the use of the surplus water not required for navigation." In pursuance of the authority vested in him by such act, the Secretary of War on August 1, 1903, invited sealed proposals for leasing, for power purposes, the surplus water not required for navigation at dam 9 in the Muskingum river. To the printed forms of proposal supplied to each bidder were attached specifications for his guidance. The specifications, among other things, recite that their purpose is to provide for leasing for power purposes the water not required for navigation, and that, where there are available lands belonging to the United States, leases will include suitable sites for the purpose of power plants, but no lands leased shall be occupied for other purposes than power plants and appurtenances. The United States reserved to itself the right to grant leases at different localities separately to different bidders, or all to the same bidder, as might be most advantageous to it, and stipulated that every lease shall be granted subject to any existing leases theretofore granted at the same locality, and that no right would be granted under any lease, subsequent to existing leases, to the use of water when the depth on the established crest of the dam is less than .2 of a foot. The quantities of water given on the blanks furnished bidders are approximated only, and bidders were told that they were expected to examine the maps and drawings in the office of the government's engineer, to visit the locality of the dam, and make their own estimates of the facilities and difficulties attending the use of water power created by it and all other contingencies, and it was specified that, in case the lessee should be deprived of the use of water by reason of its falling below a stage of .2 of a foot above the established crest of the dam, he shall be entitled to a rebate from his annual rental in a certain prescribed ratio, and that, if the water supply be insufficient to furnish the authorized allowance to all consumers, preference shall be given in the order of date of the original lease. The surplus water available at dam 9 was estimated at 11.3 feet, but the variation from time to time in the heighth of water in the pool formed by the dam is considerable. The specifications further provide as follows:

"(27) The lessee will be required to construct, maintain, and operate, on plans approved by the department, all inlet and outlet canals and other structures needed for diversion of water leased, and no structures shall be built and no operations be conducted which shall in any manner injure navigation, interfere with the operations of the government, or impair the usefulness of any improvement made by the government for the benefit of navigation. * * *

"(29) The consumption of water granted under a lease shall be determined from the tables prepared by the manufacturers of the wheels in use by the lessee, the head being assumed to be that at low water. Until the wheels are in place and the exact amount of water consumed can be determined, payment shall be made on the quantity of water asked for. Should wheels whose stand-

ard consumption has not been determined by the manufacturers be used the consumption shall be determined by the engineer officer in charge."

The lease is for a term of 20 years, commencing on May 1, 1904. The rent is made payable semiannually on the 1st days of May and November, respectively, of each year during said term. The lessee was within 60 days from the expiration of his lease to remove all buildings and machinery erected and installed by him. The specifications recite that they are to be attached, and they were in fact attached to and made a part of the lease, a copy of which was submitted for the bidder's inspection. William H. Frazier, having bid, on a blank proposal furnished him, for water power for the purpose of running an electric power plant, a lease executed, as it recites, in pursuance of the provisions of the act of August 11, 1888, and making the specifications a part of itself, was awarded him for the right to use for such purpose 6,000 cubic feet of water per minute from the water power of such river. Frazier, with the consent of the United States, assigned his lease to Shryock, who gave bond with his codefendants as bondsmen.

When the lease was offered in evidence, only portions of it were read, and its true import was not fully comprehended. In consequence, no objection having been interposed thereto, the evidence was permitted to take a needlessly wide range. The surplus water from the pool formed by the dam escaped through gates into the canal, which runs substantially parallel to the river, and empties into it at a lower point. Shryock paid four semiannual installments of rent on his lease, and then refused further payment, because, so he claims, no water had been furnished him, although he had frequently demanded it. There is some conflict in the evidence on this point, but the making of such demand is fairly established. He offered evidence to show that the canal, through freshets, especially that of March, 1907, had become out of repair, and that in some places mud and débris had become so deposited and in others the banks had been so washed away that the canal would not and could not carry the quantity of water called for by his lease, or sufficient for such a plant as he contemplated erecting, and that the United States had not furnished him any water whatever, nor had it at any time been able or willing to perform its part of the contract. The government's witnesses testified that the mud and débris lodged did not affect that portion of the canal which conveyed water to the site of his proposed plant, and that, in any event, at any time, on from 12 to 14 hours' notice, the United States could have furnished all the water called for by his lease, and that it could and would always have been ready, willing, and able to perform its contract. It was conceded that Shryock did not construct or attempt to construct a power plant, or inlets to or outlets from it. He testified, however, that he acquired a franchise from a neighboring town, had a "tentative" contract with a railroad company to furnish its engines with water, leased from the government a site on the canal for a power plant, for which he paid the rent, engaged one engineer whom he paid $100, and a subsequent engineer who advised him not to build until the water was furnished. The reason assigned by Shryock for not building was that there was not sufficient water in the pool to supply his demand, but there is no evidence that he so notified the United States or sought a cancellation of his lease. The insufficiency of water supply was controverted by the government's engineer in charge, who made four measurements per day as to the stage of water in the pool.

Sherman T. McPherson and Edward Moulinier, for the United States.

Kennedy & Mackey, for defendants.

SATER, District Judge (after stating the facts as above). By the terms of Act Cong. Aug. 11, 1888, c. 860, 25 Stat. 417, under which the lease was executed, the surplus water not required for navigation could be leased for power purposes only. The purpose of the act is the creation of revenue for the government and the encouragement of enterprises calling for the use of water as a means of power. The

bidder was notified by the specifications, which he in his proposal states he understood, that the leasing was to be for power purposes only, and the lease expressly states that the water was to be used for running an electric power plant. It contemplates the construction, maintenance, and operation by the lessee of a power plant, with inlets to conduct to it water from the canal, and outlets for the flow of water to the river after it had performed its office in generating power. After the wheels were installed in his plant, the quantity of water used was to be determined from the tables prepared by the manufacturers of the wheels, or, in the absence of such wheels, by the engineer officer in charge, and, until the wheels were so installed so that the amount of water consumed could be determined, payment was to be made on the quantity of water asked for. The quantity of water asked for is the quantity named in the lease—6,000 cubic feet per minute. Were this not so, the lessee by making no request for water would be wholly relieved from the payment of rent, and not only would the purpose of the law be thus defeated, but the express provision of the lease that rent should be paid on the 1st day of May and the 1st day of November of each year of the 20-year term would be nullified. He could rightfully demand water for one purpose only, and that was the production of power. Inasmuch as he did not equip himself to so use it, whatever demand he may have made for water the United States could safely ignore. He did not put it in default in the performance of its contract, because he did not perform the condition precedent to his right to make a lawful demand.

Shryock claims that he had the right to demand water, if he chose, merely for the purpose of letting it flow continuously through the canal, producing no power and serving no useful purpose, and that, if his demand so made was not granted, he was wholly relieved from the payment of rent. If his contention be correct, one person, by procuring all the leases for the surplus water available at any given pool formed by a dam, merely by remaining inactive, constructing no power plant and demanding no water, would obtain a monopoly of all the water stored, and, notwithstanding the absolute requirement as to semiannual payments of rent during each year of the term, would escape payment of all rental called for by his leases, and not only would the government thus secure no revenue, but the lessee, without cost to himself and at the expense of the government, could easily throttle competition with any plant operated by him at some other point along the river, or in the vicinity; or, by paying for the water turned into the canal at his request, without utilizing any part of it for power purposes, he could, in an inexpensive way, debar competition, and thus defeat the purpose of the government to encourage manufacturing. If a lessee should procure one or more of the earlier leases of water from a given pool, and if the government is required on his demand to supply the water called for by his lease, regardless of its use for power purposes, he might, by paying therefor, permit the water to waste by flowing down the channel of the canal to the stoppage or impairment of the business of subsequent lessees, whenever the water so wasted reduces the depth on the established crest of dam to less than .2 of a foot, and thus partially at least defeat the purpose of the

act. Shryock acquired by his lease no right to the flow of water through the canal for any other than power purposes. If he failed to equip himself to use it for such purposes, he nevertheless was obligated to pay the rent named in the lease. By the acceptance of his lease he represented himself to be about to erect and equip a power plant. For the privilege of a water right for power purposes he agreed to pay a fixed sum semiannually until his plant was installed, and thereafter such a sum as represented the value of the water furnished to him under his lease for the operation of his plant.

The representation by the United States of the depth and quantity of water stored was but an approximation, and of this he had notice. It did not guarantee him a fixed supply. If he did not construct and equip a power plant, because he believed the United States could not supply the water called for by his lease, he rested on an opinion given by an unnamed engineer of unshown experience, which he did not verify by actual test or communicate to the lessor. He did not ask for a cancellation or modification of his lease, nor did he state when his belief in the insufficiency of the water supply arose, whether within the period for which the recovery of rent is sought, or some prior period for which he had paid, nor did he attempt to reconcile his repeated demands for water with his stated belief that the supply of water would not meet the requirements of his lease. He asked for water after the flood of 1907, near the close of the period for which a recovery of rental is sought, and at a time when the government was giving him a rebate—was making no charge—on account of the injury to the canal banks occasioned by the flood. He paid without dissent, so far as the record discloses, the rents that accrued for his factory site, and yet his leases for it would have been as valueless as that for water, if the water supply was insufficient to operate his plant. The construction put upon the lease in the charge to the jury is the same as that above expressed. A view more liberal to the defense characterized the rulings in the introduction of evidence.

Motion overruled, and judgment for plaintiff on the verdict.

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## ROBINSON v. MUTUAL RESERVE LIFE INS. CO.

## SCOVILL v. SAME.

(Circuit Court, S. D. New York. June 6, 1908.)

1. COURTS—PRIORITY OF JURISDICTION—POSSESSION OF PROPERTY.

It is the law of the federal courts that the court which first takes possession of property cannot be disturbed or interfered with in such possession by any other court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1386.

Jurisdiction as affected by possession of the subject-matter, see note to Adams v. Mercantile Trust Co., 15 C. C. A. 6.]

2. SAME.

A federal court of equity, which has acquired jurisdiction to administer the property of an insolvent corporation by taking possession of the same by its receivers in an appropriate suit, is not deprived of such jurisdic-

tion by a subsequent dissolution of the corporation by the judgment of a state court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1407.]

3. CORPORATIONS—INSOLVENCY—CREDITORS' SUIT.

A court of equity has jurisdiction to sequestrate the property of an insolvent corporation in a creditors' suit, where the bill charges fraud as well as insolvency.

4. COURTS—PRIORITY OF JURISDICTION—POSSESSION OF PROPERTY.

Code Civ. Proc. N. Y. §§ 1784, 1785, 1788, 1793, provide for two proceedings to sequestrate and distribute the property of insolvent corporations: One, applicable to all corporations, at suit of a judgment creditor whose execution has been returned unsatisfied, and the other, applicable to certain corporations including insurance companies, by a suit for dissolution brought by the Attorney General. In either case the assets are administered by a receiver appointed by the court. *Held*, that the creditors' suit so provided for may be maintained in a federal, as well as a state, court, and that, where a federal court in such a suit had taken possession of the assets of an insolvent insurance company by its receivers, the suit was not abated nor the court's jurisdiction ousted by the subsequent institution of a suit for dissolution by the Attorney General in which receivers were also appointed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1407.]

5. INSURANCE — LIFE INSURANCE COMPANY — INSOLVENCY — RIGHTS OF POLICY HOLDERS.

Upon the insolvency of a life insurance company, its policy holders become creditors, with the same right as other creditors, to maintain a suit for the liquidation of its affairs under a state statute giving such right to judgment creditors, and the objection that they had not reduced their claims to judgment and issued executions thereon may be waived by the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 51.]

In Equity. On motion to vacate appointment of receivers and surrender the property of defendant to state receivers.

Robert M. Luce, for petitioners.

Byrne & Cutcheon and Wm. Beverly Winslow (James Byrne, of counsel), for respondents.

WARD, Circuit Judge. To two bills in equity filed by policy holders citizens of states other than the state of New York, charging the Mutual Reserve Life Insurance Company, a domestic corporation, with fraud and insolvency, and asking that certain fraudulent assessments be set aside, and that receivers be appointed to collect and distribute the assets of the defendant, the defendant company filed answers admitting insolvency and joining in the prayers of the bills.

February 17, 1908, this court appointed receivers and directed that all the company's property be conveyed and assigned to them, which was done. February 19th, the Attorney General of the state of New York began a proceeding in the state court to dissolve the defendant, in which temporary receivers were appointed, who were subsequently made permanent. April 10, 1908, judgment dissolving the defendant was entered by default in the action pending in the state court. The state receivers now move that this court direct that the property in the hands of its receivers be turned over to the state receivers for distribution, and the appointment of the federal receivers be vacated.

It is the law of the federal courts, and, I believe, of all others, that the court which first takes possession of property cannot be disturbed or interfered with by any other court. Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257.

The state receivers, while admitting that the federal court has jurisdiction in equity to distribute the property of insolvent corporations, make several objections to the further exercise of the jurisdiction by this court in this cause. Before considering these objections, it may be pointed out that many objections which have been or might have been successfully made in the reported cases by a defendant corporation resisting the appointment of a receiver are waived when the corporation, as in this case, submits itself and joins in the prayer of the bill. Authorities cited are to be read with this consideration in mind.

It is said that by the decree of the state court dissolving the defendant causes pending in this court are abated, and that nothing further can be done in them. These actions, however, are in equity, and may be revived, and, indeed, without revivor, I think receivers are entitled to administer the trust fund in the hands of the court, because the court can operate upon the company's property even if it cannot operate upon the company itself. General Electric Co. v. West Asheville Improvement Co. (C. C.) 73 Fed. 386; Rio Grande Railroad Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. Ed. 400; Lake Superior Iron Co. v. Brown, Bonnell & Co. (C. C.) 44 Fed. 539; Leadville Coal Co. v. McCreery, 141 U. S. 475, 12 Sup. Ct. 28, 35 L. Ed. 824.

It is further said that there is no jurisdiction in equity to sequestrate the property of a corporation on the ground of insolvency merely; but the bills in this court allege not merely insolvency, but fraud, which is a recognized head of equitable jurisdiction.

It is further objected that a court of equity derives its power to sequestrate the property of a corporation entirely from the law of the state of incorporation. Jones v. Mutual Fidelity Co. (C. C.) 123 Fed. 506. Admitting for the purposes of argument that this is so, I proceed to inquire what the law of the state of New York upon the subject is:

Sections 1784, 1788, and 1793 of the Code of Civil Procedure authorize a judgment creditor whose execution has been returned wholly or partly unsatisfied to maintain an action to procure a judgment sequestrating the property of a corporation and providing for a distribution thereof among its fair and honest creditors, as in the case of a voluntary dissolution, and authorizes the court to appoint a receiver for that purpose.

Sections 1785, 1788, and 1793 of the same Code authorize the Attorney General to maintain an action to procure a judgment dissolving a corporation having power to make insurances and authorize the court to appoint a receiver to distribute its property among its fair and honest creditors, as in case of a voluntary dissolution.

Section 80 of the insurance law (Laws 1892, p. 1967, c. 690) subjects insurance companies which have taken advantage of the provi-

sions of article 2, c. 15, tit. 2, as the corporation in this case has done, to the provisions of that article in relation to the distribution of its assets. These provisions are that, if the Superintendent of Insurance shall be of the opinion that the company is insolvent, he shall so report to the Attorney General, who shall bring such action as may be authorized by law to be taken against an insolvent insurance company, viz., the above-mentioned provisions of sections 1785, etc., of the Code of Civil Procedure, and, if the court is satisfied of the insolvency, it shall appoint a receiver, who shall proceed in accordance with the provisions of sections 77 and 78 of the insurance law. There is nothing contained in these sections which a receiver appointed by this court cannot do as well as the receiver appointed by the state court.

It will, accordingly, be seen that the law of the state of New York authorizes two proceedings, one to sequestrate and distribute the property of an insolvent corporation at the suit of a judgment creditor, and the other to dissolve certain insolvent corporations, including insurance companies, and distribute their property, in an action by the Attorney General. If an action had been begun in the state court under section 1784, and a receiver had been appointed, it can hardly be supposed that the receiver could have been displaced if the Attorney General subsequently began an action to dissolve the corporation under section 1785. I think there would be no more reason for displacing the receivers appointed by this court because subsequent to their appointment the Attorney General began a proceeding in the state courts, under section 1785 of the Code of Civil Procedure, to dissolve the corporation.

These complainants, upon the insolvency of the company, became creditors. As Mr. Justice Bradley said, in the case of Carr v. Hamilton, 129 U. S. 252, at page 256, 9 Sup. Ct. 295, at page 296, 32 L. Ed. 669:

> "It is difficult to see why this principle of justice should not apply to persons holding policies of life insurance in a company which becomes bankrupt and goes into liquidation. By that act the company becomes civiliter mortuus, its business is brought to an absolute end, and the policy holders become creditors to an amount equal to the equitable value of their respective policies and entitled to participate pro rata in those assets."

The fact that the complainants have not recovered judgment or issued executions which were returned wholly or partly unsatisfied is a defense that may be, and has been, waived by the defendant. Hollins v. Briarfield Coal Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. Accordingly, if the jurisdiction of this court depends upon statutory authority, the law of the state of New York supplies it.

It is further objected that section 56 of the insurance law restricts the right to maintain an action for the appointment of a receiver of an insurance company to the Attorney General, except in an action by a judgment creditor. This section was repealed by section 15, c. 326, p. 773, Laws 1906. If, however, this law of the state of New York were to be regarded as part of the contract of insurance, and as such binding upon the court as well as upon the parties (Relfe v.

Rundle, 103 U. S. 222, 26 L. Ed. 337), the answer is that the action in this court is by complainants having the same standing as judgment creditors. Further, the decision in the Relfe Case, and in those following it (Taylor v. Life Association [C. C.] 13 Fed. 493, and Fry v. Life Association [C. C.] 31 Fed. 197), proceeded upon the ground that title to the defendant's property was by the law of the state of incorporation vested in an official of the state, as distinguished from a receiver appointed by the court. The law of New York makes no such provision, and, on the contrary, directs that the distribution of the property shall be made by receivers to be appointed by the courts.

The state court and its receivers have moved in this matter in the most courteous spirit, and this court, in a similar spirit, while feeling obliged to exercise its jurisdiction lawfully invoked (Hyde v. Stone, 20 How. 170, 175, 15 L. Ed. 874), will in the administration of the trust conform as far as possible to the requirements of the state statutes (Mercantile Trust Co. v. M., K. & T. Railway Co. [C. C.] 48 Fed. 351).

The motion is denied.

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## ROBINSON v. MUTUAL RESERVE LIFE INS. CO.

## SCOVILL v. SAME.

(Circuit Court, S. D. New York. June 6, 1908.)

INSURANCE—INSOLVENCY AND DISSOLUTION OF MUTUAL LIFE ASSOCIATION—DISTRIBUTION OF FUND IN HANDS OF TRUSTEE.

A life insurance association deposited a portion of its reserve fund with a trust company under an agreement requiring the company to hold and invest and pay over the income of the fund to the association, and further providing that "in case of a dissolution of the party of the first part (the association) the entire reserve fund shall be divided among the then members of the association or shall be distributed in such other equitable manner as the courts shall direct." *Held*, that such agreement imposed no duty of distribution on the trustee, but that, on a dissolution of the association, in an action by the state, a federal court having charge of the administration of its assets had power to order the trustee to turn over the securities and funds in its hands to the court's receivers for distribution with the other assets.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1847.]

Byrne & Cutcheon and Wm. Beverly Winslow (James Byrne, of counsel), for petitioners.

Joline, Larkin & Rathbone (Adrian H. Larkin, of counsel), for respondent.

WARD, Circuit Judge. This is a motion by receivers appointed by this court of the Mutual Reserve Life Insurance Company, a reincorporation, under chapter 690, p. 1930, Laws 1892, of the Mutual Reserve Fund Life Association, for an order requiring the Central Trust Company of New York to pay over to them certain mortgages and moneys held under an agreement dated October 18, 1882, which is as follows:

"This agreement, made the 18th day of October, 1882, between the Mutual Reserve Fund Life Association, a corporation duly organized under the

laws of the state of New York and located in the city of New York, party of the first part, and the Central Trust Company of New York, a corporation duly chartered by said state and located in said city of New York, as trustee, party of the second part, witnesseth: That, the said party of the first part, desiring to set aside a reserve fund for the exclusive benefit of its members, the said party of the second part hereby agrees to receive the same and any future additions thereto, as trustee, upon the following conditions:

"First. Such rate of interest shall be payable semiannually by said party of the second part on the current deposits, to the credit of said reserve fund, as shall be, from time to time, mutually agreed upon.

"Second. Said trust company shall, from time to time, upon the written order of the president of said association, invest said fund, or any portion of it, in such United States bonds, state, county or city securities, or on such bond and mortgage as shall be designated by the board of directors of said association and approved by the president of said trust company. Said securities shall be taken only in the name of said association, but shall be held by said trust company subject to the conditions of this contract, and with power of attorney from said association to collect the interest on the same. Any of such securities shall be sold by said trust company upon the written order of the president of said association accompanied by a certified copy of the vote of the board of directors of said association authorizing such sale, and the proceeds shall be deposited to the credit of the reserve fund account with the said party of the second part.

"Third. The semiannual interest on the current deposits and the interests on investments shall, as it matures, be transferred to the credit of the death fund account of the association in such bank or trust company in New York City as shall be designated by the board of directors of said association, provided that at the time of the maturing of any such interest the constitution of the association does not provide otherwise for its appropriation.

"Fourth. Upon receipt of a certified copy of a vote of the board of directors of said association, authorizing the transfer of any portion of said reserve fund to the death fund account above mentioned, such transfer shall be made by said trust company. But in every case the resolution of the board of directors authorizing such transfer shall state that such transfer is authorized by sections 3 and 4 of article 11 of the constitution of the association.

"Fifth. If the board of directors of said association shall for any reason deem it to be expedient to order a transfer of the whole or any portion of said reserve fund including the investments, to any state insurance department or to any other trust company organized under the laws of the state of New York, such transfer shall be made by said party of the second part, provided that no such transfer shall be made to any trust company until the delivery to said party of the second part of a certified copy of the order of the board of directors of said association, authorizing the transfer, and a certified copy of the contract under which the designated trust company shall accept the transfer; said contract to be indorsed as approved by one of the justices of the Supreme Court of the district in which the principal office of said association shall be located.

"Sixth. Said party of the second part shall be allowed a reasonable compensation for making investments of the reserve fund and collecting interest on the same, and for realizing on any of the securities of said fund and for any authorized expenses of any litigation arising out of this contract, without fault of the party of the second part.

"Seventh. In case of a dissolution of the party of the first part, the entire reserve fund shall be divided among the then members of the association, proportionally to the gross amount of assessments paid by said members respectively to said association, or shall be distributed in such other equitable manner as the courts shall direct.

"Eighth. The party of the second part is to be answerable only for its own default, malfeasance or negligence in carrying out this agreement.

"In witness whereof the party of the first part and the party of the second part, as trustee, have hereunto caused to be affixed their respective corporate seals, and their respective presidents and secretaries have hereunto set their hands this 18th day of October, 1882."

The insurance company is insolvent, and since the appointment of the receivers has been dissolved by a judgment of the Supreme Court of the state of New York in an action brought by the Attorney General of the state for that purpose under section 1785 of the Code of Civil Procedure.

If the agreement imposes on the trustee the duty of distribution, the fund cannot be disturbed in its hands, but must be left for distribution by it in accordance with the orders of the court. Matter of Home Provident Safety Fund Association of New York, 129 N. Y. 288, 29 N. E. 323.

Examination of the agreement satisfies me that the duty of the trustee is to hold and invest and pay over the income of the fund in its hands without any duty of distribution. Farmers' Loan & Trust Company v. Aberle, 19 App. Div. 79, 46 N. Y. Supp. 10.

The contingency upon which distribution is to take place provided for in the seventh article having arisen, the motion is granted; the amount payable to the trust company for its services and disbursements to be fixed in the order.

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## ROBINSON v. MUTUAL RESERVE LIFE INS. CO.

## SCOVILL v. SAME.

(Circuit Court, S. D. New York. June 6, 1908.)

INSURANCE — INSOLVENCY AND DISSOLUTION OF MUTUAL LIFE ASSOCIATION — DISTRIBUTION OF FUND DEPOSITED WITH STATE.

Laws N. Y. 1884, p. 429, c. 353, § 2, which authorizes any insurance company doing business on the co-operative or assessment plan, in its discretion to deposit securities with the Superintendent of the Insurance Department of the state, to be held for the sole benefit of the members of the company and subject to the provisions of such a deed of trust as shall be approved by the superintendent, does not impose upon him any duty to make distribution of the fund deposited on the insolvency of the company, and, in the absence of any such requirement in the deed of trust, he holds such securities or fund in such case subject to the orders of the court which is administering the estate of the insolvent corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1847.]

Byrne & Cutcheon and Wm. Beverly Winslow (James Byrne, of counsel), for petitioners.

William S. Jackson, Atty. Gen. of New York (William E. Kisselburgh, Sp. Deputy, of counsel), for respondent.

WARD, Circuit Judge. This is a motion by the receivers appointed by this court of the Mutual Reserve Life Insurance Company, formerly the Mutual Reserve Fund Life Association, for an order upon the Superintendent of Insurance of the State of New York to turn over to them two funds deposited with the Superintendent of the Insurance Department, as follows:

June 10, 1884, the Mutual Reserve Fund Life Association deposited with the Superintendent of the Insurance Department $100,000 of 3

per cent. United States bonds, under the provisions of section 2, c. 353, p. 429, Laws N. Y. 1884, reading as follows:

"Any corporation, association or society legally engaged in the business of insurance, upon the co-operative or assessment plan, and doing business in this state, may, in the discretion of such association through its officers or trustee, deposit with the Superintendent of the Insurance Department such securities and for such amounts as may be approved by him. The said deposits shall be received and held by the said superintendent for the sole benefit of the members of said corporation and subject to the provisions of such a deed of trust as shall be approved by the said superintendent and accepted by him from the officers or trustee of the said corporation. Provided, however, that the deposits with the insurance department and all other investments of reserve funds shall be made in the same class of securities that are now required under the general laws for deposit with the Superintendent of Insurance and for the investments of funds by life insurance companies."

The bonds were registered in the name of "Superintendent of the Insurance Department of the State of New York in trust for the members of the Mutual Reserve Fund Life Association pursuant to trust deed of Central Trust Company of New York dated October 18, 1882, and chapter 353 [p. 429], Laws of 1884 of the state of New York."

In an opinion handed down herewith, I have considered the effect of this deed therein set forth at length in connection with a motion of the receivers for an order requiring the trustee, the Central Trust Company of New York, to pay over to them the funds deposited with it. Following the case of Farmers' Loan & Trust Company v. Aberle, 19 App. Div. 79, 46 N. Y. Supp. 10, the motion was granted. The same considerations apply in my opinion to the Superintendent of Insurance as apply to the Central Trust Company, and I will therefore grant the motion in respect to this deposit.

January 29, 1886, the association deposited with the Superintendent of the Insurance Department, under the same law, a second fund of $100,000 in bonds of the United States under a trust deed of the following terms:

"This agreement made this 29th day of January, one thousand eight hundred and eighty-six, between the Mutual Reserve Fund Life Association, a corporation duly created, organized and existing under and by virtue of the laws of the state of New York, party of the first part, and Robert A. Maxwell, as Superintendent of the Insurance Department of the State of New York, and his successors in office, as trustee, party of the second part, witnesseth: That whereas the said party of the first part desires to deposit with the said party of the second part a fund for the exclusive benefit and security of the members of the said party of the first part, pursuant to the laws of the state of New York, now these presents witness that the party of the first part has this day deposited with the party of the second part the sum of one hundred thousand dollars ($100,000) in interest bearing bonds of the United States of America in trust as security for the policy holders or members of the party of the first part for the sole use, benefit and protection of said policy holders or members and as such security for and during the time the party of the first part shall continue in business, and until each and every liability to all its said policy holders or members shall be adjusted and fully paid. The party of the second part shall hold said bonds as security and for the use as above stated, but, so long as the party of the first part shall continue solvent, the party of the second part shall permit the party of the first part to collect the interest or dividends on said bonds so deposited, and from time to time to withdraw any of such bonds on depositing with the party of the second part such other securities of like value as those withdrawn and of the character allowed by the laws of the state of New York for de-

posits by life insurance companies with the Superintendent of the Insurance Department, and such substituted securities shall be received and held upon like terms and the like trust. In witness whereof the party of the first part has caused these presents to be sealed with its corporate seal, and the same to be signed by its president and secretary, and the party of the second part as trustee aforesaid has hereunto set his hand and the seal of the insurance department of the state of New York in duplicate this twenty-ninth day of January, one thousand eight hundred and eighty-six."

The Superintendent of the Insurance Department executed a certificate of deposit in the following form:

"I, Robert A. Maxwell, do hereby certify that I am Superintendent of the Insurance Department of the State of New York, and that the Mutual Reserve Fund Life Association, a corporation chartered by the said state, under chapter 175 of the Laws of 1883, and located at New York City, has heretofore deposited in this department stocks of the United States, of the several denominations and descriptions particularly set forth and described in the schedule signed by me and hereunto annexed amounting, at par value, to the sum of not less than one hundred thousand dollars; the said deposit having been made in compliance with the provisions of chapter 353 of the Laws of this State of the year 1884. And I do hereby further certify that said securities are now held by me, in this department, as such superintendent, as aforesaid, in my official capacity, on deposit and in trust as security for all the policy holders or members of the said corporation, for the sole use, benefit and protection of said policy holders or members and as such security for and during the time the said corporation shall continue in business, and until each and every liability to all its said policy holders or members shall be adjusted and fully paid. I further certify that I am satisfied that the stocks and securities are worth one hundred thousand dollars. Said deposit was made in this office on the 29th day of January, A. D. 1886, and has ever since that period been maintained intact, at all times, for the full amount of one hundred thousand dollars, in the stocks and securities above specified. In witness whereof, I have hereunto set my hand and caused my official seal to be affixed, at the city of Albany, the day and year first above written."

I discover no duty of distribution imposed upon the Superintendent of the Insurance Department in the deed of trust, and think the same considerations apply to it as apply to the first deed above mentioned.

Neither of these deposits was required by law. Chapter 353, p. 429, Laws 1884, permitted them to be made, and required the Superintendent of the Insurance Department to hold them subject to the provisions of the deed of trust accepted by him. If the deposits had been made, as the argument of the learned Attorney General assumes, under the positive requirements of section 71 of the insurance law (chapter 609, p. 1960, Laws 1892), quite a different situation would be presented. The Court of Appeals of the state of New York has decided that in such cases the superintendent is a statutory trustee under the duty of distribution, and that no court of equity can displace his possession. Ruggles v. Chapman, 59 N. Y. 163; Id., 64 N. Y. 557. The principle upon which these cases were decided does not apply to a voluntary deposit to be held subject to the provisions of a deed of trust. Even in the case of a deposit under a statutory trust, the Circuit Court of Appeals for the Eighth Circuit has held that federal courts proceeding in equity can compel a state officer to surrender the deposit to receivers appointed by them. Morrill v. American Reserve Bond Company (C. C.) 151 Fed. 305. The character of the deposits under consideration does not require me to go so far.

Motion granted.

## UNITED STATES v. FOUR HUNDRED AND TWENTY DOLLARS.

(District Court, S. D. Alabama. June 13, 1908.)

No. 1,188.

ALIENS — CONSTRUCTION OF IMMIGRATION ACT — PENALTY FOR VIOLATION BY MASTER OF VESSEL.

The provision of Immigration Act Feb. 20, 1907, § 15, c. 1134, 34 Stat. 903 (U. S. Comp. St. Supp. 1907, p. 398), that the master of any vessel bringing aliens into the United States who shall fail to deliver to the immigration officers at the port of arrival lists or manifests of all aliens on board as required by sections 12 and 13, and containing the information therein specified, "shall pay to the collector of customs at the port of arrival the sum of ten dollars for each alien concerning whom the above information is not contained in any list as aforesaid," is penal in its nature, and must be strictly construed, and so construed it does not impose such penalty for the giving of incorrect or false information in such list, where it includes all the aliens on board, and purports to give the required information as to each.

Wm. H. Armbrecht, U. S. Atty.
Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. This is a libel of information against $420 as penalties claimed for an alleged violation, by the master of the Spanish bark Carvajal, of Act Feb. 20, 1907, to regulate the immigration of aliens into the United States. 34 Stat. 898, c. 1134 (U. S. Comp. St. Supp. 1907, p. 389). The libel, in substance, alleges that upon the arrival of said bark Carvajal in the port of Mobile the master thereof delivered to the acting immigrant inspector at said port a paper purporting to be a list or manifest of the aliens brought in on said bark, which contained the names of said aliens and contained what purported to be the information required by the provisions of said act, and that said manifest was verified by the affidavit of the said master, as required by said act. The libel further alleges that the said manifest was not correct, in that the said master, in answer to the question asked in said manifest concerning each of said aliens, "By whom was passage paid?" said, "By himself" (the alien), which answer was not true; that in truth and in fact the passage of said aliens, and each of them, was paid by some other person; and that at the time said master furnished said manifest to the immigration officer he well knew, or had reason to believe, that said answer was untrue, and the information thereby given was incorrect. The libel charges that the furnishing of said incorrect manifest was not a bona fide compliance with said immigration act, "and was equivalent to furnishing no manifest whatever." There were 42 aliens reported on the manifest. A penalty of $10 being demanded for each of said 42 aliens, the aggregate sum of $420 has been deposited to stand in lieu of said vessel, to be disposed of and paid as, upon the hearing of the cause, the court may then adjudge. The prayer of the libel is that the said sum of $420 may, for the causes shown, be condemned to the use of and to be paid over to the United States. The master of the vessel intervenes, and claims said sum of $420, and excepts to the bill of information as insufficient in law, and

shows no right in the United States to said money or any part thereof because the libel affirmatively shows that said master did not neglect or omit to deliver the list or manifest required by the immigration act, but did deliver the same containing the information required by said act; and said master further excepts to said libel and says that the fact, as alleged in the libel, that the manifest furnished was not correct, gives no right to the United States to collect the penalty sought to be enforced in this action. Wherefore he says he is not bound to further answer said libel, and prays that the same be dismissed and that the said sum of money be returned to him.

The immigration act provides that it shall be the duty of the master of a vessel having aliens on board to deliver to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation of such aliens on board such vessel, which shall, in answer to questions at the top of said lists, state certain things required as information. Among other questions contained in the lists is this:

"Whether the alien has paid his own passage, or whether it has been paid by any other person, * * * and, if so, by whom."

The lists or manifests are required by the act to be signed and sworn to by the master that, "according to the best of his knowledge and belief, the information in said lists or manifests concerning each of said aliens named therein is correct and true in every respect." Immigration Act, c. 1134, §§ 12, 13, 34 Stat. 901, 902 (U. S. Comp. St. Supp. 1907, p. 397, 398). It is further provided in section 15 of said act that, in case of the failure of the master of any vessel to deliver to the said immigration officers lists or manifests of all aliens on board thereof as required in sections 12 and 13 of the act, he shall pay to the collector of customs at the port of arrival the sum of $10 for each alien concerning whom the above information is not contained in any list as aforesaid. It will be observed that the payment of the penalty of $10 is exacted for the neglect or omission to include in the lists or manifest delivered to the immigration officers each and every alien on board of the vessel, concerning whom the information is required. If the master, in the list delivered, omits any one of such aliens, or omits the information required as to any one of them, he incurs the penalty of $10 for such omission. No penalty is prescribed by the act for furnishing incorrect information. It is imposed for the failure to deliver lists or manifests with the information required, but not for delivering lists which might contain incorrect information. The act is, in its nature, penal, and, in order to render the master liable to the penalty imposed by the act, it must appear that he has neglected or omitted to do some act which the law made it his duty to perform. Steam Engine Co. v. Howard, 101 U. S. 188, 25 L. Ed. 786. "A statute penal in character must be construed with strictness against those sought to be subjected to its liabilities." Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. "A penal statute should be strictly construed, and with a view of carrying out the object aimed at by such a statute, or on grounds of public policy, a court has no right to interpolate words into it." In re McDonough (D. C.)

49 Fed. 360; In re Coy (C. C.) 31 Fed. 800; U. S. v. Morris, 14 Pet. 464, 10 L. Ed. 543. Penal statutes are not to be enlarged by implication or extended to cases not obviously within their words. A court cannot create a penalty by construction. It cannot add to or take from a statute. In Wiltberger's Case, 5 Wheat. 76, 5 L. Ed. 37, Chief Justice Marshall said:

"The intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

In Hamilton v. Rathbone, 175 U. S. 421, 20 Sup. Ct. 158 (44 L. Ed. 219), the court said: "The province of construction lies wholly within the domain of ambiguity." A penal law is one which prohibits an act and imposes a penalty for the commission of it; or one which requires an act to be done and imposes a penalty for the neglect or omission to do it. The term "penalty" denotes money recoverable by virtue of a statute imposing a payment by way of punishment. Black's Law Dictionary.

The law under consideration requires the master of a vessel bringing aliens into the United States to deliver to the immigration officers at the port of arrival lists or manifests of such aliens, said lists to contain certain information specified in the law, and it imposes a penalty for any neglect or omission to comply with the requirements of this law. If Congress had intended to impose a like penalty for any incorrect or false information furnished in said lists or manifests, it seems it would have said so in the law. But it may be said that it is material, and was the intention of Congress to have correct information concerning the aliens in question; and it may be asked what assurance is there that the information contained in said lists will be correct and true in the absence of a penalty for giving incorrect or false information. While it may be true that it is material, and was the intent of the law to obtain correct information on the subjects inquired about, and we do not know the motive of Congress in omitting to prescribe a penalty for furnishing incorrect information, we may well infer that it was because it was considered that the verification of the lists by the signature and oath of the master would be a sufficient assurance that said lists would speak the truth. The oath required to the lists is that, "according to the best of his knowledge and belief, the information in said lists or manifests concerning each of said aliens named therein is correct and true in every respect." The violation of this oath by the master in stating matters of information in the lists which he knew to be incorrect and untrue, or which he did not believe to be true, might subject him to severer punishment than the imposition of the penalty provided by the act under consideration, and it seems to me would be a greater assurance, if assurance were necessary, that the information furnished was correct and true in every respect, or believed to be so.

My opinion is that the exceptions to the libel of information are well taken, and the same are sustained.

The libel is therefore dismissed, with costs; and it is ordered that the said $420 be returned to Bernardo Jardon, the claimant in the cause.

## In re CONLEY.

(District Court, D. Nebraska. July 6, 1907.)

BANKRUPTCY—EXEMPTIONS—TOOLS AND INSTRUMENTS OF BUSINESS.

Under Code Civ. Proc. Neb. § 530, which exempts from sale on execution "the tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business," a bankrupt, who is a dealer in eggs and poultry, which he buys at farmers' houses, and takes to his places of business, and there prepares for shipment, is entitled to hold as exempt a horse, harness, and wagon suitable for use in bringing in such produce, and also his office furniture, scales, coops, egg-candling booths, etc., necessary to be used by him in conducting his business.

In Bankruptcy. On petition for revision of referee's order relating to bankrupt's claim of exemption.

John J. Ledwith and William M. Morning, for bankrupt.

T. C. MUNGER, District Judge. This cause comes before the court on a petition for a revision of the order of Fred W. Vaughan, referee in bankruptcy. The bankrupt herein filed a petition praying that certain articles named in his schedule should be set aside to him as exempt, and at the hearing the referee refused to allow the exemptions. The bankrupt's business has been that of a dealer in poultry, eggs, and farm produce, and in transacting this business it has been necessary to drive to the farms and villages in the territory adjacent to the town of the bankrupt's residence, and to bring to the bankrupt's place of business the produce so purchased, where the eggs were candled and cleaned, and the poultry and produce prepared for market, and then sold to commission merchants and other purchasers. In order to conduct such business it has been necessary for the bankrupt to have means of conveyance and carriage for the produce. The bankrupt asks to be allowed as exempt three horses, two dray wagons, three sets of harness, and certain other articles.

Section 530 of the Code of Civil Procedure of Nebraska, the clause which is involved in this controversy, allows exemptions as follows:

"Eighth. The tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business."

It is generally the rule that such exemption statutes are liberally construed, in order that the heads of families may not be stripped of all means of making a livelihood. The words in the statute, "or other person" should be given some force and effect. It is to be noted that the statute refers to tools and instruments "used and kept for the purpose of carrying on his trade or business." Statutes of other states are found where similar language is used, except that the word "profession" is substituted in place of the word "business." The evident provision of this section of the statute was to afford protection, not only to mechanics and miners, but also to other heads of families engaged in business, as distinguished from those who follow a trade as an occupation, by exempting the tools and instruments reasonably necessary to carry on such business. This view is in harmony with decisions un-

der similar statutes elsewhere. Cunningham v. Brictson, 101 Wis. 378, 77 N. W. 740; Watson v. Lederer, 11 Colo. 577, 19 Pac. 602, 1 L. R. A. 854, 7 Am. St. Rep. 263; Wilhite v. Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281.

It is next contended that a horse, wagon, and set of harness, an office desk, chair, scales, poultry coops, poultry troughs, candling booths, lamps, cooling barrels, and certain other articles cannot be regarded as tools and instruments within the meaning of the Nebraska statute above quoted. The claim is made on behalf of the objecting creditors that tools and instruments should be construed to mean mechanical tools, such as would be used by an artificer or handicraftsman. While such meaning is undoubtedly included in the language of this statute, it is by no means clear that the statute was intended to be so limited in its scope. The use of the words "or other person," and the description of the using and keeping of such tools and instruments for the purpose of carrying on such "trade or business," indicates that the Legislature did not intend to protect only those making use of tools. The statute in question makes provision in the same section for certain specific exemptions to those engaged in farming and also to professional men. But, unless this clause of the statute affords protection, there is no exemption extended to a large number of those who are equally deserving of the protection of the statute Laborers and small tradesmen and many others engaged in usefui occupations are evidently embraced within the meaning of this section of the statute. The Legislature could not, in the few words of a statute, properly define and state all classes of occupations, and the general language of the clause in question indicates that it was intended to cover, not only those engaged in other occupations, but also whatever tools and instruments are properly kept and used in the carrying on of such trade or business.

In Watson v. Lederer, 11 Colo. 577, 19 Pac. 602, 1 L. R. A. 854, 7 Am. St. Rep. 263, the court held that the horse and buggy and harness of an assayer, used in going from mine to mine and procuring ore for assaying purposes, was exempt as a tool or implement of the assayer's business. Under the Kansas statute it was held that the buggy and harness belonging to an insurance agent used by him in driving about, soliciting the business of writing insurance, was a tool or implement of his business. Wilhite v. Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281. So the omnibus used by a hotel keeper in driving passengers to and from the trains was likewise held exempt. White v. Gemeny, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320. The buggy used by a physician in his business has been held exempt under similar statutes in New Hampshire and New York. Richards v. Hubbard, 59 N. H. 158, 47 Am. Rep. 188; Van Buren v. Loper, 29 Barb. 388.

It would not seem unreasonable that the bankrupt should be allowed one horse and buggy and harness as exempt to him under this statute as part of the tools and instruments of his trade or business. As to the other articles mentioned above, it would seem that they were also necessary and proper tools and instruments of the bankrupt's business. The office desk and chair, scales, poultry coops, candling booths, etc.,

are a part of the necessary equipment of the bankrupt's business as a produce merchant dealing in poultry and eggs. They are the means by which the business is carried on and the instruments necessary to effect it. He is, therefore, entitled to them as exempt to him under the above section of the Code. In re McManus' Estate, 87 Cal. 292, 25 Pac. 413, 10 L. R. A. 567, 22 Am. St. Rep. 250; Cunningham v. Brictson, 101 Wis. 378, 77 N. W. 740; Woods v. Keyes, 96 Mass. 236, 92 Am. Dec. 765; Wilkinson v. Alley, 45 N. H. 551; Steiner v. Marshall, 15 Am. Bankr. Rep. 486, 140 Fed. 710, 72 C. C. A. 103; Davidson v. Sechrist, 28 Kan. 324; Amend v. Murphy, 69 Ill. 337. While the bankrupt is entitled to what tools and instruments are necessary to carry on his trade or business, he is not entitled to all that might add convenience. In re Collier, 7 Am. Bankr. Rep. 131, 111 Fed. 503.

The order of the referee will be reversed as to the following named articles: One horse, one dray wagon, one set of single dray harness, one horse blanket, one fly net, one desk, five chairs, two stoves, one letter file, one pair of scales, ten poultry coops, two candling booths, two lamps, one table, one bench, ten cooling barrels, ten galvanized feed troughs, one saw, one ax, and four cooling boards—with instructions to allow the bankrupt, Ellsworth Conley, to select from the articles claimed as exempt one of such articles, where two or more articles of the same kind were set aside as exempt by the trustee, and in all other respects the order of the referee is affirmed.

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## THE CAPTAIN JACK.

(District Court, D. Connecticut. July 1, 1908.)

No. 1,560.

1. SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—APPRAISAL OF VESSEL.

   In a proceeding for limitation of liability arising out of an accident which occurred more than two years before the proceeding, in appraising the value of the vessel at the time of the accident, deductions from her present value on account of additions made since the accident should also be made at their present value, and not at their cost.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 656.]

2. SAME—"FREIGHT PENDING"—EARNINGS IN WRECKING SERVICE.

   Where, at the time of an injury which gave rise to proceedings for limitation of liability, the vessel surrendered was employed in raising a sunken vessel under a contract by which the petitioner received a stated sum for the service, such sum may properly be considered as "freight pending" within the meaning of the statute, which must also be surrendered, and no deduction can be made therefrom on account of other vessels or appliances also used in the service, but which the petitioner did not surrender.

   [Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 2976–2977.]

In Admiralty. On exceptions to commissioner's report.

Carpenter, Park & Symmers, for petitioner.

C. A. Morse and E. H. Rogers, for damage claimant.

PLATT, District Judge. By its petition filed October 28, 1907, the T. A. Scott Company sought the protection of the limited liability law, and offered up its interest in the Capt. Jack in the condition in which she was after an accident which occurred upon her on February 7, 1905, including in such interest "freight pending at the time of the accident, if any." It was sent to a commissioner to make due appraisement thereof, and his report is before me. He finds that, at the time of the appraisement of the derrick scow or lighter Capt. Jack, she was shown to have been worth $2,000 at the time of the accident, but that in reaching this estimate the witnesses had included an engine, drums, and addition to the house, which have been put on the lighter since the accident and amount to $700 in value, which ought to be deducted so as to find her worth at the time of the accident. The damage claimant excepts to this deduction, because she says that the commissioner had nothing to base it upon, except testimony that the amount deducted was what the additions cost.

The method adopted by the commissioner was wrong in principle. Starting with a market value in 1907 of the Capt. Jack plus additions since the accident, he ought to have deducted the 1907 value of those additions in order to reach the estimated value in 1905. An examination of the testimony teaches me that the damage claimant has strong reason for urging that the commissioner's information was too meagre to support any conclusion on these points, but I am hopeful that the way in which I shall treat the matter will tend to promote absolute justice in the end. To send the matter back now because of the error would entail more expense than the situation warrants, and my notion is that by cutting the deduction in half a fair result will be reached. The position which I take is based upon the assumption that the experts who enlightened the commissioner would, if they had been put to it, have reckoned the market value of the little engine, drums, and addition to the house at $350, instead of $700. With the report thus modified, the result is an addition of $350 to the total value, making it $3,625.

The commissioner added, "Amount received for raising the Zouave, $800," and says that this amount should be included as "freight pending" within the reasonable meaning of the limited liability law. To this the petitioner excepts, and in doing so takes a somewhat peculiar position. An examination of the report of the commissioner and of the evidence which was offered before him develops the following situation: The petitioner made a "no cure, no pay," contract to raise the sunken Zouave in New Haven Harbor. To carry out the contract the petitioner needed: (1) The derrick lighter Capt. Jack, which is incapable of self-propulsion. (2) A complete diving equipment. (3) Some vessel (of which the Harriet is a type) which moving by power within itself could bring the Capt. Jack and the diving apparatus from New London to New Haven. The three distinctively separable parts of the general equipment were necessary in their totality to the success of the adventure. The petitioner admitted before the commissioner that part 2 should be added to its interest in the Capt. Jack. The claimant urged the addition of the Harriet, but to this the petitioner strenuously and successfully objected, because it was "not with-

in the issue." The commissioner, therefore, with no evidence before him about the Harriet, finds the value of parts 1 and 2 of the general necessary equipment, and adds the contract price for raising the Zouave.

The petitioner's exceptions are urged upon two theories. The first theory is that the contract was a salvage contract, and that salvage is an incident to the voyage of a ship, and the gains therefrom cannot be construed as coming within the meaning of Congress when it used the words "freight pending." My impression about that is this: The raising of the Zouave was the essential and only purpose for which the enterprise was undertaken. If the petitioner had contracted to carry paving stones from New London to New Haven for a certain price, it could have used the Capt. Jack minus the diving equipment. There is no other difference between the imaginary case and the one at issue. The second theory, and the one most strenuously urged, is that since the enterprise required the Capt. Jack and the Harriet, and the gain must come from their joint efforts, it cannot be attached in its entirety to the efforts of the Capt. Jack. I cannot understand how the petitioner can expect, as it has up to this time, to exclude the Harriet from the value surrendered, and in the next breath to include her as one of the necessary factors in carrying out the contract. It is an open question, reserved for the final hearing, whether the petitioner ought not, in order to limit its liability, to have given up the entire plant necessarily engaged in the adventure. If the law is so that it can surrender a part of that plant, it ought not to quarrel as to how the price for the service should be distributed. The derrick lighter and the diving equipment together furnished all that was needed, except that the ability to move about from place to place did not inhere within the lighter itself. The commissioner excluded the Harriet as not within the issue, and, as I am with him on the first theory advanced to sustain the exception, and as the second theory seems unfounded, because it is based upon facts which were excluded by the commissioner, I am bound to accept his report in respect to the addition of the $800.

Let the value of the petitioner's interest in the property surrendered be entered at $3,625.

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## MAJESTIC COAL & COKE CO. v. ILLINOIS CENT. R. CO.

(Circuit Court, N. D. Illinois, E. D. June 25, 1908.)

No. 28,784.

CARRIERS—INTERSTATE COMMERCE—DISTRIBUTION OF CARS AMONG COAL MINES.

A railroad company engaged in interstate commerce in making distribution of cars between coal mining companies engaged in such commerce where there is a shortage has no legal right under Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155), to leave out of consideration private or foreign cars used by such a company, although only in intrastate commerce, and make the allotment with reference to its own cars alone by which such company is given a preference or advantage over its competitors in interstate commerce.

In Equity. On demurrer to bill and motion to dissolve temporary injunction.

Goodrich, Vincent & Bradley (Ralph R. Bradley, of counsel), for complainant.

J. G. Drennan and W. S. Kenyon, for defendant.

H. B. Arnold, for Interstate Commerce Commission.

KOHLSAAT, Circuit Judge. This cause is now before the court on demurrer and motion to dissolve temporary injunction. Complainant filed its bill to restrain defendant from including certain private cars and certain so-called "foreign fuel cars" in estimating the distributive share or quota of complainant in and to defendant's "system cars," so called. From the bill it appears that heretofore complainant has been awarded its pro rata number of "system cars" without reference, and in addition to the private and foreign fuel cars employed in connection with its business. It is alleged in the bill that in this way it has been able to work its mine at its full capacity, whereby it could produce coal at reduced rates. This rate manifestly would be available for interstate shipments, although the bill alleges, and the demurrer admits, that the private and foreign fuel cars were engaged solely in intrastate trade. It further appears from the bill that complainant has entered into contracts on the basis of the old allotment of cars, which it cannot afford to carry out on the new basis of distribution of system cars.

It is claimed for complainant that, inasmuch as the private and foreign fuel cars deal only with intrastate transactions, the transactions in question do not come within the terms or spirit of the interstate commerce act. It is the plain intent of the act that railroad companies shall not extend any advantage to any shipper. It follows, therefore, that any act of a railroad company which directly or indirectly results in the extension of advantage to any one or more shippers over other shippers dealing with that road in interstate commerce is forbidden by the statute. It appears from the bill that the defendant is engaged in such commerce. There exists, therefore, this situation, viz.: The railroad is giving to the coal company facilities, in intrastate commerce, it may be, which enable the latter to place its coal upon the market for interstate shipment at a less price than that at which other coal mines can afford to sell coal. Of course, such a situation might arise from other causes, as, for instance, more accessible strata or greater quantities of coal or better mining facilities or lower wages. These advantages might be lawful in themselves, and not at all within the statute, and would be proper data to be considered in fixing the quota of cars. The law, however, deals with the interstate carrier. It may not in any way become a party to complainant's unfair advantage over other shippers in affording greater facilities pro rata to one shipper than to another. It is a creature of the law, and amenable to the varying provisions thereof. It was quite within the power of Congress to enact that a railroad shall not lend its great advantages to any enterprise which in any way seems to discriminate in favor of or against any

person dealing with it. That it is doing so in this case is beyond question.

The fact that the new rule would work hardship upon complainant or place it at disadvantage is one which the court may not consider. Complainant's claim in the premises, as appears from the bill, comes within, and is repugnant to, the statute, and cannot be sustained. This finding is in accordance with the decisions in U. S. ex rel. Pitcairn Coal Company v. B. & O. R. R. Co. (C. C.) 154 Fed. 108, and Logan Coal Co. v. Penn. R. R. Co. (C. C.) 154 Fed. 497, and by the decision of the Interstate Commerce Commission July 11, 1907, in the cases of Railroad Commission of Ohio v. Hocking Valley Ry. Co. and Wheeling & Lake Erie R. R. Co., 12 Interst. Com. R. 398.

Considerable space is given in the briefs to the question of jurisdiction. In view of what has been said above, it becomes unnecessary to pass upon that question further than to say that the demurrer is sustained, the bill dismissed for want of equity, and the temporary injunction dissolved. Mr. H. B. Arnold, counsel for the interstate commission, was allowed to, and did, file a brief herein.

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## HECHT v. YOUGHIOGHENY & LEHIGH COAL CO. et al.

(Circuit Court, N. D. Illinois, E. D. June 25, 1908.)

No. 28,536.

COURTS—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS—PARTIES.

Where an action is brought in a federal court on an arbitrator's award, a suit by the defendant therein to set aside the award for fraud is ancillary, but such fact does not give the court jurisdiction to bring in another party who is a citizen of the same state as the complainant to impeach an award in its favor made at the same arbitration, but which is separate and distinct from that between the other parties.

[Ed. Note.—Supplementary and ancillary proceedings, and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.]

In Equity. On demurrer to bill.

Mayer, Meyer & Austrian, for complainant.
Cassoday & Butler, for defendant Youghiogheny & Lehigh Coal Co.
Knapp, Haynie & Campbell, for defendant Illinois Steel Co.

KOHLSAAT, Circuit Judge. This cause is now before the court on demurrer filed by defendant steel company to the bill, from the allegations of which it appears: (1) That complainant and defendant steel company are citizens of Illinois, and that the defendant coal company is a citizen of Wisconsin. (2) That complainant and one Charles Kaestner, as copartners, under the name and style of Charles Kaestner & Co., entered into a contract with defendant coal company on March 20, 1899, for the construction of certain coal rigs. (3) That on April 21, 1899, said Kaestner & Co., entered into a contract with the Universal Construction Company for three portable towers and several bridges, to be used in constructing said rigs,

and were so used. (4) That afterwards complainant succeeded to the rights of said firm of Kaestner & Co. and defendant steel company succeeded to the rights of said construction company. (5) That such dealings were had that the three parties, being unable to agree, submitted their several rights under said contracts to arbitration. (6) That the arbitrator rendered an award on February 1, 1906, wherein he found the complainant indebted to the defendant coal company in the sum of $5,633.03, and to the defendant steel company in the sum of $8,000. (7) That afterwards defendant coal company brought suit at law in this court to recover the amount so awarded it, which suit is now pending, and that defendant steel company is threatening to bring suit at law in the state court of Illinois upon its said award. The bill further charges that the persons signing the agreement of submission for complainant and defendant steel company, respectively, did so without authority so to do; that he, in the absence and without the knowledge of complainant, inspected said rigs and secretly conferred with defendant coal company's representatives with reference thereto, and took from it other statements, without giving complainant any opportunity to rebut or explain; that the whole award—that is, each and both allowances—were a fraud upon complainant, and should be vacated and set aside. The prayer is to that end and for general relief.

The demurrer is general, but the briefs are addressed to the question of jurisdiction. The coal company has filed its answer. It is sought by complainant to make the steel company defendant herein upon the ground that the bill is ancillary to the said suit of the coal company. As a general rule, it may be said that a suit is ancillary when it is in a sense a continuation of the former suit. No question is made as to the right to file this bill against the coal company. It is a continuation, in a way, of the matters there involved. As to the steel company, it is an original suit. The submission and award are in no sense in a different situation from what would exist, had they been more separate and distinct and upon different instruments. The only ground for treating them as in any way interdependent is that the award is in each case alleged to be fraudulent. An adjudication to that effect with reference to the company's award would not be binding or even persuasive in a suit in a state court upon the award to the steel company. It would, no doubt, simplify proceedings if the question of fraud could be disposed of in a hearing as to both. That might be ground for consolidation were both cases now pending here. Certainly the situation presents no ground for taking jurisdiction in order to avoid a multiplicity of suits. It cannot be the law that complainant by bringing its bill to set aside the whole award as ancillary to a suit which involves only the rights of the coal company can drag into this court one who is, in legal effect, a stranger to the award to the coal company. If there were some interdependent relations between the coal company and the steel company, as there were in the insurance cases, and as exist in will cases, it might be otherwise; or, if there was some common property subject to the direction of the court, or something to be apportioned, a different rule would apply, and the authorities presented would be in point.

Defendant steel company is not an indispensable or even necessary party in adjusting the coal company's claim. Its claim may be enforced or set aside without in any manner affecting that of the coal company. It seems well settled that a bill will lie to set aside an award for fraud or mistake, while at the same time those matters may be set up in an action at law. The former, however, being more complete and effectual, is deemed the more satisfactory method. But this rule does not invest the federal court with jurisdiction to bring in a stranger lacking diversity of citizenship on any of the grounds urged upon this hearing.

The demurrer is sustained.

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## TUSKA v. UNITED STATES.

(Circuit Court, S. D. New York. May 22, 1908.)

No. 5,030.

CUSTOMS DUTIES—CLASSIFICATION—FLAGS—"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), does not include small silk flags mounted on slender wooden staffs about 4½ inches long.

[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.

The decision below, which is reported as G. A. 6,654 (T. D. 28,373), affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by A. L. Tuska.

The Board's opinion reads as follows:

HOWELL, General Appraiser. The merchandise in question consists of small flags of various nations, including that of the United States. The flags are made of silk, and each one is mounted on a slender wooden staff about 4½ inches in length. They were returned by the appraiser as manufactures in chief value of silk, and were assessed with duty by the collector at the rate of 50 per cent. ad valorem under the provisions of Tariff Act July 24, 1897, c. 11, § 1, par. 391, Schedule L, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670). They are claimed to be properly dutiable as "toys" at 35 per cent. ad valorem under paragraph 418 of said act (Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674]).

The importers have endeavored to prove that these flags are commercially known as toys; but we think the testimony falls far short of showing that they are uniformly and generally recognized and dealt in as toys. It is true that some of the witnesses have testified that they sell them to toy dealers, but this is not sufficient to establish the commercial designation of the articles as toys. In re Borgfeldt, G. A. 5,467 (T. D. 24,768). As was said in that case: "Toy dealers handle many articles which are clearly not toys. Among such articles may be mentioned playing cards, chess sets, and golf sticks." The witnesses who have testified that they sell these flags to toy dealers state that they are used in prize packages and also as a "penny toy"; but other equally competent witnesses testify that they sell them to caterers and confectioners, and that they are used at social functions for favors, for pairing off couples at cotillions, and for table decorations. A trade catalogue of Messrs. Annin & Co., of New York, who are "manufacturers of flags, ban-

ners, decorations, and patriotic novelties of every description," was admitted in evidence (illustrative Exhibit A), and it appears therefrom (page 16) that flags precisely similar to the goods here in question are described therein as "Japanese silk flags * * * appropriate for Christmas tree decorations." There is some testimony to the effect that the articles are used to decorate doll houses, toy camps, etc.; but this only indicates that the articles may become parts of toys, and does not prove that they are toys in the condition as imported. There is no provision in the tariff for "parts of toys," and it has uniformly been held by the courts and this Board that part of a toy is not classifiable as a toy. G. A. 4,999 (T. D. 23.303).

In our opinion these flags are not toys. The evidence satisfies us that they are not so known commercially, and they are certainly not designed as playthings for children. The mere fact that they might be played with by children does not constitute them toys. As was said in Wanamaker v. Cooper (C. C.) 69 Fed. 465: "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." The flags in question are undoubtedly articles of utility which are used for decorative and other similar purposes.

We hold that they are properly dutiable as assessed, and, accordingly, overrule the protests and affirm the decision of the collector in each case.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importer.
D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. Decision affirmed.

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## CLEMMENS v. WASHINGTON PARK STEAMBOAT CO.

(Circuit Court, E. D. Pennsylvania. July 7, 1908.)

No. 89.

1. CARRIERS—CONNECTING CARRIERS—TICKETS—PRESUMPTIONS.
   Where plaintiff purchased a ticket from defendant steamboat company entitling her to ride by steamboat to a pier or landing at a park, and by trolley from the pier to the center of the park, there being no coupon or other statement on the ticket to indicate that any part of the contract was to be performed by any other carrier than the defendant, it would be presumed that plaintiff was to be under defendant's care during the whole trip, and the burden was on defendant to show that such was not the fact, and that the trolley car was managed by another carrier, for whose negligence defendant was not responsible.

2. SAME—QUESTION FOR JURY.
   Where plaintiff purchased a ticket which on its face indicated that defendant steamboat company controlled the transportation by steamboat and trolley to plaintiff's destination, and defendant, in an action for injuries to plaintiff on the trolley road, introduced certain testimony showing that the trolley was operated by another company, whether such was the fact was for the jury.

Motions by Defendant for New Trial and for Judgment Notwithstanding the Verdict.

Goodman & Mitchell, for plaintiff.
Charles H. Downing, for defendant.

J. B. McPHERSON, District Judge. In my opinion judgment notwithstanding the verdict cannot be entered in favor of the defendant company. The verdict has established its negligence, and also its lia-

bility as master for the conduct of the motorman, and the sole question, therefore, upon this motion for judgment, is whether there was sufficient evidence concerning its liability for the motorman's conduct to require the point to be submitted to the jury. As I think, such evidence was present, and could not be disregarded as trivial. The plaintiff's ticket was a single contract, both in form and substance, entered into with the defendant alone, which entitled her to a ride by steamboat to the pier or landing at Washington Park, and also to a ride by trolley from the pier to the center of the park. There was no separate coupon upon which her right to be transported by the car depended, and there was nothing else upon the face of the ticket to suggest that any part of the contract was to be performed by any other carrier than the defendant. The presumption, therefore, arose that she was to be (in legal contemplation) under the defendant's care and oversight during the whole trip between Philadelphia and the park. It is true that the defendant, in the effort to shift liability from its own shoulders to the shoulders of another, offered evidence tending to rebut this presumption, and to prove that the trolley car was managed and controlled by the Washington Park Amusement Company. But, while the evidence thus offered—unsatisfactory as it was, and especially when one considers that more and better evidence must have been at the defendant's command—might have had the desired effect, if it had been conceded to be true or had been accepted by the jury, it must not be forgotten that the credibility of the principal witness was denied in argument, and was a matter exclusively for the jury, and also that the presumption of the defendant's liability, arising upon the face of the ticket, was equivalent to testimony in the plaintiff's favor, and thus presented a controversy concerning the vital fact of the steamboat company's relation to the motorman, which no other tribunal than a jury could properly solve.

The defendant's motion for judgment notwithstanding the verdict is overruled, and to this action by the court an exception is sealed.

The motion for a new trial is also overruled.

## GOODRUM et al. v. BUFFALO.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1908.)

No. 2,746.

1. INDIANS—ALIENABILITY OF ALLOTTED LANDS OF THE QUAPAW INDIANS.
Under Act Cong. March 2, 1895, c. 188 (28 Stat. 907), and patents issued thereunder, declaring the land inalienable for 25 years thereafter, *held*, that the disability to convey runs with the land, and disqualifies the heir, as well as the immediate allottee, to convey within the prescribed period.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 37.]

2. SAME—RULES OF THE COMMON LAW INAPPLICABLE.
The general government, exercising a tutelary supervision over such Indians, as wards of the nation, it is *held*, has the right to attach any condition or qualification it sees fit to grants of the reservation lands of the tribe in severalty. So, notwithstanding such grantees may be citizens of the United States, and notwithstanding the patent may run to the allottee and his heirs, the common-law rules respecting a limitation upon alienation, being inconsistent with the prior estate in fee granted, would not extend beyond the natural life of the immediate allottee, as also the doctrines of estoppel, have no application to the instance of said patent.

3. SUBMISSION OF CONTROVERSY—JUDGMENT—RES ADJUDICATA.
Notwithstanding the general rule that a judgment between parties sui juris, where the court has jurisdiction over the subject-matter and the parties, is conclusive of every question of fact and law in contestation, and cannot be attacked in a collateral proceeding, a judgment rendered by the United States Court in the Indian Territory, under a stipulation between a Quapaw Indian and a white man, submitting, under the provisions of local law, for decision the question of the power of such Indian allottee, or his heir, to convey his or her allotment within the 25-year period of limitation under Act Cong. March 2, 1895, c. 188, 28 Stat. 907, adjudging the validity of such conveyance, *held* to be invalid, when interposed to defeat the action of ejectment by the Indian heir against the prevailing party in such proceeding, for the following reasons: (1) Because the stipulation of submission, in the affidavit thereto, omitted a material fact, which is jurisdictional in character; (2) because the stipulation and the judgment do not describe the land in suit; (3) because, as to the power of alienation of such land, the Indian allottee and his or her heir, within the limitation period of 25 years, was not a person sui juris, capable of assenting to such submission; and (4) because the United States Court in the Indian Territory, being itself a creature of Congress, with limited jurisdiction, was not invested with jurisdiction to extend by mere decretal order a power of alienation over such lands denied by another act of Congress to such Indian.

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

For opinion of the court below, see 104 S. W. 942. See, also, 104 S. W. 944.

This is an action of ejectment, instituted by the defendant in error, Arthur Buffalo, a minor, by J. F. Robinson, his guardian, against the plaintiffs in error, for the recovery of certain lands in the Quapaw reservation in the Indian Territory. The title of the defendant in error was derived as follows: On September 26, 1896, a patent was issued by the United States to John Medicine, a Quapaw, as an allottee of the reservation lands of said tribe of Indians. Said John Medicine died in 1896, leaving as his sole surviving heirs a daughter by the name of Ollie and a son named James Medicine. There-

after the said Ollie Medicine died intestate in 1901, leaving as her sole heir the defendant in error, Arthur Buffalo. In April, 1903, said James Medicine died, leaving the defendant in error as his sole heir. The answer of the defendants, while in effect admitting that Arthur Buffalo was such surviving heir at law, set up a deed of conveyance from said Ollie, made subsequent to the death of said patentee, John Medicine, to the plaintiff in error, C. D. Goodrum, under which he claims. The answer further pleaded that in October, 1899, there was submitted an agreed statement of facts, entered into between said Ollie and the plaintiff in error, C. D. Goodrum, to the United States Court at Vinita, Ind. T., which recited that said Ollie had sold to said Goodrum all her right, title, and interest to the land in question; that there was then a balance of $52.25 of the purchase money due and unpaid, and that because of the fact that by the patent to said John Medicine and the act of Congress under which it was issued the said lands were inalienable by the patentee for a period of 25 years there was a question of law as to whether the said Ollie was competent to sell or dispose of said property so inherited, and therefore it was submitted to said court to determine the validity of said sale to said Goodrum, and whether or not he should pay to said Ollie the balance of the purchase money; that under said submission said United States Court at Vinita adjudged that the sale so made by said Ollie to the plaintiff in error was valid, and directed that upon payment of the balance of said purchase money she should execute to the said Goodrum a deed to said land, which had accordingly been done. The answer then set up title to the interest of said James Medicine in said lands, acquired in the same manner and under a like judgment of the said United States Court at Wagoner, Ind. T., under a like submission on stipulation, and under a deed made by him in pursuance of the judgment therein. The judgment below was for the defendant in error, which was affirmed by the Court of Appeals in the Indian Territory, to reverse which this writ of error is prosecuted.

Dennis H. Wilson, Preston S. Davis, Luman F. Parker, Jr., and Orion L. Rider, for plaintiffs in error.

W. H. Kornegay and Cooter, Thompson & Thompson, for defendant in error.

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

PHILIPS, District Judge (after stating the facts as above). The questions presented for decision are of great public importance, and are such as to demand definite determination. The history of the relation of the United States government toward the reservation lands of the Indians, both as to their tribal and individual status and rights, shows that because of the limited qualification of the Indians to exercise the functions of self-government and to appreciate and preserve their individual property interests, so as to become self-supporting and cease to be a charge and burden to the national government, the Indians have ever been regarded and treated as the "wards of the nation." Throughout the dealings with them, both by treaties and legislative enactments, the general government has, from a sense of justice to the Indians, as well as from a conception of sound public policy, found it to be wise and obligatory to safeguard these dependent subjects in their property rights against the mastery and craft of the white man. So long as their reservations remained communistic, the property of the tribe, as such, was not jeopardized by attempted acquisition by outsiders; but when their tribal relations were disrupted, at the solicitation of the government commissioners, and it was proposed to allot

the lands in severalty among those entitled thereto, Congress was confronted with a grave responsibility and duty it could not in honor shirk. The problem was experimental. The underlying policy in this rearrangement of treaty stipulations with the Indians was to stimulate in them a spirit of self-assertion and reliance, by inculcating the habit of industry and self-support. Feeling a strong misgiving as to their capacity and inclination to hold their allotments, to establish and maintain the family home, to soon conquer their inherent indolence and wastefulness, and apprehensive of their lack of virtue and moral courage to withstand temptation to part with their inheritance for "a mess of pottage," the whole legislation of Congress touching the allotment of Indian lands expresses on its face this feeling of distrust and a determined policy to put the allottees on probation during this experimental period. Accordingly, while authorizing the allotments in severalty, Congress conceded the lands, with a firm cable attached to hold them to the exclusive use and possession of the Indians, without qualification restricting the power to divest themselves of the use and title until after the fixed period.

The usual pertinent provision found in the acts of Congress was to retain the title in the government in trust for the allottees for a period of 25 years, after which the Secretary of the Interior was authorized to issue to them or their heirs a patent in fee to the lands. See Act Feb. 8, 1887, c. 119, 24 Stat. 388. In the case of the Quapaw Indians, who manifested reluctance to disrupt their tribal relations and to relinquish their reservation to the government, with a view to allotment in severalty, the National Council assented to the proposal March 23, 1893, which was ratified and approved by Act Cong. March 2, 1895, c. 188, 28 Stat. 907, which provides that:

"The Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith: provided, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

This was in accordance with the settled policy of the government of continuing these wards of the nation in a state of comparative tutelage for the further period of 25 years after such allotment as essential to their education and qualification to intelligently and safely exercise the jus disponendi over their lands, with the exception that under the supervision and approval of the Secretary of the Interior short-term leases might be made. As evidence of the fact of the continued wardship of the Quapaw Indians and their dependence upon the national government for guardianship and tutelage, Congress each year makes appropriations out of the public treasury for their education, blacksmith and assistants, and tools, iron, and steel for blacksmith shops.

The form of the patent granted in the case under consideration recited that the United States—

"does give and grant unto the said [patentee], and to [his or her] heirs, the said tract above described, but with the stipulation and limitation, contained in the aforesaid act, that the land embraced in this patent shall be inalienable for the period of twenty-five years from and after the date hereof, to have and to hold the same, together with all the rights, privileges, and im-

munities and appurtenances of whatsoever nature thereunto belonging, unto the said [patentee], and to [his or her] heirs, forever, provided as aforesaid that said tract shall be inalienable for the said period of twenty-five years."

The language of the act and the patent could not have been more exact and clear to express the purpose and policy of the government to deny the power and right of these allottees to dispose of the lands in any manner until after the stated period of 25 years. As the greater includes the lesser, no contract, agreement, or obligation in form entered into by the allottee or his heirs within the limitation period could possibly have the effect to operate as, or result in, a transfer of the title to these lands to a third party. There is but one opinion among the courts, with the single exception of the ruling in said United States Court of the Indian Territory, as to the construction of such acts of Congress and patents made thereunder, and that is that any and all schemes and devices resorted to for the purpose of acquiring title to the Indian allotments during the period of such limitation are abortive; and this for the palpable reason that it is a period of absolute disability on the part of the Indian to alienate his lands.

In Laughton v. Nadeau (C. C.) 75 Fed. 789, there was an attempt to obtain title to Indian land through an administration proceeding in the probate court. It was held that when the lands are allotted to members of the tribe, under the supervision and care of the government, the allottee could not be deprived of said land by any such proceeding; that the parties dealing with the Indians must take notice of the public treaties and acts of Congress, and may not obtain such lands as bona fide purchasers, against the restriction on alienation, even where such restriction is not expressed on the face of the patent.

In Taylor v. Brown, 5 Dak. 335, 40 N. W. 525, the Supreme Court of Dakota held that where a patent was issued to Indians under Act March 3, 1875, c. 132, 18 Stat. 420, providing that the land so acquired shall not be subject to alienation or incumbrance for five years after the patent, a deed executed by the patentee within the period, though the patent on its face was an absolute conveyance and did not show that the patentee was an Indian, was absolutely void, and that no adverse possession could be predicated of a deed executed by the patentee within the period, so as to avoid a deed made by the patentee to another after the five years had elapsed.

In Sheldon v. Donohoe, 40 Kan. 346, 19 Pac. 901, the Supreme Court of Kansas held that a white man, who had been adopted as a member of an Indian tribe, who made a deed purporting to convey to another white man a tract of land, which under the treaty could not be alienated except to the United States or some member of the tribe, could not convey title to the grantee; so that, although the vendee had thus come into possession, he could be evicted, because the deed was absolutely void, the purchaser could not claim any right in the land in violation of the treaty, nor could he indirectly build up an adverse possession, estoppel, or limitation, as the transaction was void ab initio.

In Beck v. Flournoy Live Stock & Real Estate Company, 65 Fed. 30, 12 C. C. A. 497, this court made no uncertain pronouncement upon this question. The real estate company undertook to acquire posses-

sion by lease of large tracts of land belonging to the Winnebago Indians in the state of Nebraska. When the government ordered the agent to put the cattle companies off the lands the latter brought a bill of injunction to restrain him. It was ruled that in view of the treaties and acts of Congress these leases were void. The patents issued to the allottees referred to the act of Congress under which they were issued, and the granting clause, which contained the limitation, "without right of alienation as stipulated in the act of Congress aforesaid." After discussing the various provisions of the statute, Judge Thayer expressed the view that it was manifest from an inspection of the various acts of Congress it did not intend to authorize the Indians to whom the allotments had been made in severalty to lease or otherwise dispose of the allotted lands; that the limitation upon the power of alienation was made to protect the Indians from the greed and superior intelligence of the white man. He then said:

"Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings, and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians."

In Wiggan v. Conolly, 163 U. S. 56, 62, 16 Sup. Ct. 914, 916, 41 L. Ed. 69, Mr. Justice Brewer, speaking to a case growing out of the allotment to the Ottawa Indians in Kansas, said:

"This treaty of 1867 introduced a new limitation upon the inalienability of lands patented to a minor allottee; that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add, with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge."

Counsel for plaintiffs in error undertake to meet the force of these authorities with the contention that the limitation upon alienation is inconsistent with the estate in fee conveyed by the grant, and that on principles of the common law it should be limited in its operation to the life of the immediate patentee, and therefore upon his death his heirs had the right of disposal without restraint. We make no contention that at common law it was against the policy of the law to allow restraints to be imposed upon the alienation of an estate in fee. In our judgment, this and kindred rules of the common law respecting the title and the alienability of lands have no applicability to this case. In Beck v. Flournoy Live Stock & Real Estate Co., supra, the contention was made that, because the act of Congress had conferred the right of citizenship upon the Indian allottees, power to dispose of the allotted lands went as an incident of citizenship; that Congress could

not transform the Indians into citizens without, by intendment, conferring upon them the power to sell and dispose of their property as persons sui juris. But the court said:

"We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges, and immunities of citizens, while it retained for the time being, the title to certain lands in trust for their benefit, and withheld from them for a certain period the power to sell, lease, or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real estate, and to withhold from the donee for a season the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit, without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being of the right to alienate it."

In Jackson v. Thompson, 38 Wash. 282, 80 Pac. 454, it was held by the Supreme Court of Washington that a deed from the United States to an Indian, forbidding alienation, deprived the grantee of the power to dispose of the property by will. The patent conveyed the land to the grantee and his heirs, with the stipulation, contained in the sixth article of the treaty, that said tract shall not be alienated or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, to continue in force until certain conditions. The patent contained the usual habendum clause. The contention was there made that the language of the patent was conclusive, and that the limitation upon alienation continued in force only during the life of the patentee. It was argued there, as here, that the limitation was purely personal and did not run with the land; that the granting clause, standing alone, conveyed a fee-simple estate, which was strengthened by the habendum clause, "to have and to hold the said tract of land unto the said John Puyallup, and to his heirs, forever." It was further contended, as here, that the restriction in the patent was void, because it was repugnant to the grant of an absolute fee. The court said:

"The Indians are wards of the government. These arrangements and provisions are in their interest and by their consent, as indicated in the solemn treaties executed. The government, from the necessities of the case, in consideration of the inexperience of the Indians, was compelled to insert these provisions in deeds issued to them to prevent them from becoming the prey of sharpers and speculators, who would for an insufficient consideration obtain their lands; the ultimate result being that the Indians would become pensioners of the government, and the mutual interests of the Indians and the government demanded some such regulation."

The specious argument was there made, against continued restriction, that as the heirs of the Indians increased the restrictions would become burdensome and impracticable. Of this the court said:

"This is a condition which is within the power of the general government to relieve whenever the necessity arises. There can be no question that under authority the word 'alienate' means, among other things, the power of disposition."

The discussion of this question by Judge Dick, in Smythe v. Henry (C. C.) 41 Fed. 705, is instructive as well as pertinent. The Legislature of North Carolina passed an act for the benefit of the Cherokee Chief Juneluska, the first section of which conferred upon him the rights and privileges of a citizen of the state. The second section authorized the Secretary of State to convey to him in fee simple the tract of land in question, with a limitation against alienation, except for the term of two years from time to time, with the right, however, to dispose of it by devise. This was held to be a donation act, and the limitation was intended to guard his inexperience in business matters against the craft of the white man and to protect him from temptation which might induce him to make an improvident disposition of his property. It was there insisted that the restriction imposed by the second section upon the right of alienation was inconsistent with the first section, conferring upon him the rights, privileges, and immunities of citizenship. The court held that, when the state conveyed the land for the purpose in question, it had the right to impose any restrictions it deemed proper upon the grant; that the statutory power of the Legislature was superior to the rules and usages of the common law; that the presumptions and rules of law which usually apply to grants, such as forfeiture, reverter, estoppel, and the like, were suspended. The court said:

"The power of alienation regulated by statute must be strictly complied with, so that the policy and object of the statute may not be defeated."

So that, although this Indian attempted to convey the land by deed and then accepted a lease back from his grantee, it was held that his possession was not that of the lessor, so as to put in operation the statute of limitations in favor of his grantee; that, the deed from him being void, his acceptance of the lease of the land did not prevent his descendants from disputing the title of his grantee.

The language of the statute under which the patent was issued to John Medicine is "that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents." It is a limitation attached to and running with the land, in no wise dependent upon the life or death of the patentee. It was as much within the policy and purpose of the government to see that the heirs of the allottee, in case of his death, were protected against alienation of the land, as the allottee himself; otherwise, they might become a charge upon the public, and the beneficent policy of the government in bringing about the allotment of lands in severalty would be thwarted.

Not having full confidence in his ability to hold this land under his purchase from the heir of the allottee, Goodrum and his adviser evidently conceived the idea of resorting to a submission by stipulation to the United States Court in the Indian Territory, whereby the judgment or decree might be had in his favor, so that, if the Indian or his minor child might thereafter undertake to eject him or have his deed nullified, he could plead that judgment as an estoppel. The sub-

mission by stipulation to the United States Court in the Indian Territory was under the following provision of the statute of Arkansas, at the time in force in the territory:

"Parties to a question which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment as if an action were pending."

As such proceeding, without suit, summons, or voluntary appearance of the defendant, without issue made by pleadings, was unknown to the common law, it must be conceded that its validity depends upon a strict compliance with the special statute conferring jurisdiction upon the court. The statute expressly provides that "it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties." Therefore this affidavit is an essential, indispensable part of the submission, without which the jurisdiction of the court was not put into operation.

The statute of the state of Wisconsin contains the identical provision. In Town of Plainfield v. Village of Plainfield, 67 Wis. 525, 30 N. W. 674, Lyons, J., said:

"The required affidavit is essential to the jurisdiction of the court to render a valid judgment on the matter submitted. Without it the decision of the court is not a judgment, which can be enforced as a judgment in an action, or which may be appealed. At most it is a mere award, as in a common-law arbitration. This record contains no such affidavit, and it is conceded that none was made."

The court held that no appeal would lie from such decision, because the judgment was coram non judice. Therefore the suit was dismissed.

California has a like statute. In White v. Clark, 111 Cal. 164, 44 Pac. 164, both stipulators made affidavit:

"That the above and foregoing statement of the case, containing the facts above stated, is a real controversy, and the contention is in good faith to determine the rights of the parties."

The court held that the judgment was not the whole record, as it was not a part of the original submission, but relates to dates subsequent to that of the affidavit. It said:

"The affidavit annexed to the agreed case is insufficient to authorize the court to entertain the proceedings. Instead of showing that the controversy is real, its language is that the statement of the case is a real controversy; and, instead of stating that the proceedings are in good faith, it states that the contention is in good faith."

It was, therefore, held to be bad.

In Ellis v. Pacific Railroad, 51 Mo. 200, the court discussed the effect of a judgment condemning lands for the use of the railroad, where the validity of the judgment was brought in question in a collateral proceeding in the action of ejectment. Under the statute the party seeking to condemn was authorized to go into court when no agreement as to the taking of the land could be had with the owner.

The petition in the condemnation proceeding did not disclose on its face that the parties were unable to agree. Sherwood, J., said:

"In this statutory and summary proceeding, this legal coup de main, in derogation of common law and common right, the utmost strictness is required in order to give validity; and unless, upon the face of the proceeding had, it affirmatively appear that every essential prerequisite of the statute conferring the authority has been fully complied with, every step, from inception to termination, will be coram non judice. Under the statute above mentioned the refusal of the owner to relinquish is a jurisdictional fact, in the absence of which even a court of general jurisdiction would be powerless by judgment of condemnation to wrest property from its owner. And authorities are not wanting, either in point of numbers or respectability, which hold that quoad these summary proceedings, courts of general jurisdiction stand upon the same footing as those tribunals whose jurisdiction is special and limited. It follows as an inevitable sequence from these premises that the judgment of condemnation was utterly worthless and could be of no avail as a matter of defense"—citing Lind v. Clemens, 44 Mo. 540; Murtaugh v. City of St. Louis, Id. 479; Reitenbaugh v. Chester Val. R. R. Co., 21 Pa. St. 100.

Goodrum was the only party who made affidavit to the submission in question to the court, which was as follows:

"C. D. Goodrum, of lawful age, being duly sworn, on his oath says that he is one of the above-named parties, and that the proceeding is in good faith to determine the rights of the parties thereto."

It will be observed that there is an entire omission of the requirement of the statute that "it must appear by affidavit that the controversy is real." Waiving any discussion of the question as to whether or not under the language of the statute, "The parties to a question * * * may agree," etc., requires that both parties should make oath, the affidavit made by only one of the parties omits entirely one essential requirement—that the controversy is real. The very purpose of this requirement was to prevent feigned issues or moot questions from being submitted to the determination of the court, necessitating an appeal to the court to settle the controversy between real litigants. As the jurisdiction of the United States Court was wholly dependent upon the stipulated case submitted, counsel for plaintiffs in error recognized the fact that it was not sufficient merely to put in evidence the judgment of the court. They therefore presented the agreed stipulation and affidavit as essential to confer jurisdiction on the court. The absence of the required affidavit, as shown by the record, did not authorize the court to proceed to judgment at all.

There is another objection to the stipulation of submission to the United States Court upon which the judgment was predicated, and also to the judgment. The stipulation describes the land as located in township 24, range 29, and the judgment follows the same description; whereas the land sued for in this action is located in township 29, range 24. This variance, in so far as the plea of res adjudicata is concerned, justified the judgment of the United States Court appealed from in this case, notwithstanding this defect was overlooked by the respective counsel.

Aside from these criticisms, the proceeding was not effectual to create an estoppel by judgment, notwithstanding the well-recognized rule, contended for by counsel for plaintiffs in error, that judgments

of courts of record having jurisdiction over the subject-matter and the parties are binding on the parties and their privies in estate, and cannot be attacked in a collateral proceeding. The Indian who consented to the stipulation for submission to the judgment of the court for such purpose was not a person sui juris. The submission required, as the very basis of its recognition, the acquiescence and consent of the Indian thereto. The effect of the act of Congress, under which the patent was granted, was to deny to the Indian the exercise of any consent whereby the restriction upon the power of alienation could be removed. If the Indian could create no estoppel against himself or herself by deed of conveyance, how could he or she create an estoppel, by consenting to a judgment as the basis of an estoppel, effectual to alienate the land, in direct contravention of the act of Congress? The allottees of these lands, during the probationary period of 25 years, were under as much disability to alienate them by contract, or deed, or voluntary submission to a court, as if they had been under the disability of coverture or minority. The disability of the minor to do these things is imposed by the common law. The disability of these Indians is imposed by statute. It must, therefore, logically and necessarily follow that the record and judgment of a court, disclosing on their face that the disqualified Indian was entering into an agreement for submission of the question of his right to dispose of these lands, was in no wise different from such a proceeding participated in by a minor infant. It is a wholesome rule of law that a party may not accomplish by indirection that which he could not do directly. That which Goodrum undertook to do by stipulation with this Indian could not become the subject of a controversy to be submitted to the jurisdiction of the United States Court, so as to build a foundation to support the plea of res adjudicata. In White v. Clark, 111 Cal. 164, 44 Pac. 164, under a statute like that of Arkansas, providing for submission to the court, without pleading, of a matter in controversy between the parties, it was held that a mere statement that the party claimed said land as a homestead fell short of conferring upon him any interest in the land or right to question the title; that whether the party would have a right to enter the land as a homestead under the United States statutes or that the patent under which the defendant claimed title was void could not be the subject of a civil action in the courts of the state. This evidently was for the reason that as the homestead act confers the right upon the homesteader of occupancy, upon which no other party can be entitled to enter, and which cannot be conveyed by the homesteader during the period of improvement, it could not be the subject of a real controversy, in contemplation of the statute, and therefore any judgment predicated upon such a controversy could be of no value.

It is transparent on the face of the proceedings in the United States Court, resulting in the judgment relied upon by Goodrum as an estoppel, that it was not an honest proceeding. If Goodrum earnestly desired a judicial determination of the power of the Indian to convey the land in question, why did the parties content themselves with the conclusion of the United States Court? Naturally enough, they would have at least sought the judgment of the Appellate Court in the In-

dian Territory. Relying, as Goodrum's answer does, upon the deed executed to him by Ollie Medicine, made pursuant to said decree of the territorial court, the situation presents an anachronism, and an anomaly in law. The Congress, representing the sovereignty of the nation, created the estate, affixing to it the quality of inalienability for the period of 25 years. Without the creator's consent the grantee was without the power to convey. Where and how did the territorial court acquire such jurisdictional power? The court itself was but the creature of Congress. It was not invested with the power to confer upon this Indian authority to convey away her allotted lands which the sovereign government, creating the estate and the court, declares shall not be done for 25 years after allotment.

This conclusion is sustained, on principle, by the ruling in Bigelow v. Forrest, 9 Wall. 339, 19 L. Ed. 696. Under the confiscation act certain lands of French Forrest were condemned and sold; Bigelow becoming the purchaser in that proceeding. Upon the death of Forrest his son and heir brought suit to recover the lands, and made the contention that under the joint resolution of Congress, which declared that condemnation under the act should not work a forfeiture of the title of the offender beyond his natural life, the title of Bigelow terminated with the death of Forrest. It was contended there, as here, that the decree of the court confiscating the property in effect ordered all the estate of Forrest to be sold, including the fee, and that, although the decree was voidable, it was not void. That was a proceeding in rem, where the property was within the jurisdiction of the court, and where there was even authority to confiscate and sell; but it was held that the extent of the court's power was limited by statute. The court said:

"It is argued, however, on behalf of the plaintiff in error, that the decree of confiscation in the District Court of the United States is conclusive that the entire right, title, interest, and estate of French Forrest was condemned and ordered to be sold, and that, as his interest was a fee simple, that entire fee was confiscated and sold. Doubtless a decree of a court having jurisdiction to make the decree cannot be impeached collaterally; but under the act of Congress the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so, it would have transcended its jurisdiction."

The principle of this ruling was affirmed in Day v. Micou, 18 Wall. 156, 21 L. Ed. 860, and Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

It should be understood, once for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of the title to their allotted lands within the period of limitation prescribed by Congress.

The judgment of the United States Court of Appeals in the Indian Territory is therefore affirmed.

EWERS et al. v. BUFFALO.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1908.)

No. 2,747.

In Error to the United States Court of Appeals in the Indian Territory.

See 104 S. W. 944.

Dennis H. Wilson, Preston S. Davis, and L. F. Parker, Jr., for plaintiffs in error.

W. H. Kornegay and Cooter, Thompson & Thompson, for defendant in error.

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

PHILIPS, District Judge. This case is the counterpart of that of C. D. Goodrum et al. v. Arthur Buffalo, a Minor, etc. (No. 2,746, just decided by this court) 162 Fed. 817. The only difference of note in the facts is that the lands here in question were allotted to Mary Joseph, a Quapaw Indian, who was the wife of John Medicine, named in said case No. 2,746, through whom the lands in question descended to Arthur Buffalo, defendant in error.

For the reasons stated in the opinion in case No. 2,746, the judgment of the United States Court of Appeals in the Indian Territory is affirmed.

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SCOTT et al. v. QUEEN ANNE'S R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1908.)

No. 730.

1. RAILROADS—FORECLOSURE SALE—CLAIMS ENTITLED TO PRIORITY OVER MORTGAGE.

A railroad mortgage provided that in case of default the trustee, at the request of 50 per cent. of the bondholders, should take possession of the road and all of the mortgaged property and operate or sell the same, as the bondholders might direct. The company became insolvent and was earning insufficient income to pay expenses, when a committee was appointed representing practically all of the bondholders and stockholders, and they deposited their bonds and stock. The committee took full charge and management of the property and operated the same until a sale was negotiated, having full authority to vote the stock deposited and to pledge the bonds or stock to secure money for operating expenses, and in fact exercised all of the powers which the trustee was given by the mortgage in case of default, which default occurred shortly after its appointment. A sale was negotiated by the committee for the benefit of the bondholders and stockholders who transferred their bonds and stock to the purchasers to be used in payment, receiving bonds and stock of the new company therefor. Such sale was consummated through a friendly foreclosure suit, and the decree confirming the same required the purchasers, they having knowledge of all the facts, to pay any claims which should be adjudged prior in equity to the mortgage. *Held*, that the management of the road by such committee was virtually that of the

bondholders, and that indebtedness incurred by it for expenses and supplies in operating the road after the bondholders might have taken possession by the trustee was superior in equity to the mortgage debt and entitled to priority of payment from the corpus of the property, and therefore to be paid by the purchasers.

2. SAME—OPERATING EXPENSES—ADVERTISING.

Bills for advertising the road, its trains, etc., contracted by the committee while in the management, were for legitimate operating expenses and entitled to priority as such equally as though they had been contracted by the trustee in possession.

Cross-Appeals from the Circuit Court of the United States for the District of Maryland, at Baltimore.

For opinion below, see 148 Fed. 41.

N. P. Bond, Edward Duffy, B. H. Hartogensis, and J. Kemp Bartlett, Jr. (Ralph Robinson and L. B. Keene Claggett, on the briefs), for appellants.

George Forbes, John C. Rose, Charles McH. Howard, and W. H. DeC. Wright (E. P. Keech, Jr., T. Wallis Blakistone, George Whitelock, David Fowler, Marbury & Gosnell, Roger W. Cull, John F. Williams, Foster & Foster, George R. Willis, J. Maulsby Smith, Charles P. Coady, Leon E. Greenbaum, Morris A. Soper, and Ritchie & Janney, on the briefs), for appellees.

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

PRITCHARD, Circuit Judge. We have carefully considered the various assignments of error herein and the contention of appellants with respect to the same, and, after mature deliberation, are of opinion that the same are without merit. We have also considered the very able and exhaustive opinion of the learned judge who tried the cause below and fully concur in the views therein expressed, and are therefore of opinion that the decrees rendered are eminently proper ones in view of the law and the facts as found by the master.

It was evidently the intention of the bondholders that the securities committee should have full and complete control of the operation and management of the road in order that the same might be placed in a condition where it could be disposed of to the best advantage, and under these circumstances it would be inequitable and unfair to deprive the creditors whose claims are involved in this controversy, of their rights.

The opinion of the lower court, as we have said, is clear and comprehensive, and feeling as we do that the findings of fact are amply justified by the evidence, and that it is in harmony with the law of the case, we adopt the same as the opinion of this court. It reads as follows:

"The bill in this case was a general creditors' bill against the Queen Anne's Railroad Company, filed February 20, 1904. The bill alleges that the railroad company was largely indebted to the complainant for arrears of rental for three steamboats owned by the complainant, and leased to and used by the railroad company in the operation of its road, and alleges that the defendant company was also largely indebted to many other creditors for supplies and materials furnished for the operation and maintenance of its lines of rail-

roads and ferries, and that if the numerous creditors who were pressing for payment were allowed to enforce their claims by suits the result would be to deprive the railroad company of the means of operating its system of railroad and ferries and to destroy its power to earn revenue and to meet its obligations. The bill alleged that there was secured by a mortgage of the railroad three series of bonds: First, a series of first preference 5 per cent. bonds aggregating $330,000; second, a series of consolidated mortgage bonds, of which $865,000 were outstanding, and also a series of income mortgage bonds aggregating $600,000.

"The bill alleged that the corporation was insolvent, and that in order to protect the holders of the bonds as well as all the other creditors, it was absolutely essential that the railroad property should be kept and maintained and disposed of as an entirety and that any other course would result in the utter dissipation and waste of the corporate assets and property. The bill prays for the appointment of a receiver with power to operate the railroad and the ferries and steamboats, leased, controlled, and operated in conjunction with the railroad, with all the usual powers given to receivers in like cases to continue the business and maintain the integrity of the system of railroads and ferries.

"On the same day the defendant railroad company answered admitting the allegations of the bill and consented to the appointment of a receiver as prayed. On the same day the receiver was appointed as prayed. He was authorized to pay the interest on the $330,000 first preference bonds, all the rentals, taxes, and fixed charges necessary to prevent such defaults as would imperil the integrity of the system of railroads, and the debts for wages, services, materials, and supplies growing out of the operation of the railroad within a period not exceeding six months anterior to the date of the decree. The receiver proceeded to execute the powers given to him and operated the railroad and connecting ferries for about 12 months, when he delivered possession to the purchaser under the foreclosure sale.

"On November 26, 1904, the International Trust Company, the trustee named in the mortgage, filed a petition praying leave to file a bill of complaint for the foreclosure of its mortgage of the railroad property. Leave was granted, and on the same day the bill was filed asking for a decree for sale subject to the $330,000 first mortgage preference bonds. Upon the consent of the Queen Anne's Railroad Company a decree was entered as prayed. The receivership case and the foreclosure case were consolidated, and a sale was made and ratified for the sum of $480,000. The purchasers reported were Henry P. Scott and Nicholas P. Bond. Of the purchase price $30,000 was paid in cash and the purchasers also delivered to the trustee $865,000 of the first mortgage consolidated bonds, being the total amount issued, also $600,000 of the income bonds, and stock of the railroad company of the par value of $883,300, and the receiver was by order of court directed to deliver possession to the purchasers.

"The decree for sale provided that, in addition to the $30,000 to be paid in cash at the time of the sale, the purchasers should also pay, as the court might direct, such additional sums in cash as might be required to pay all liens or claims prior in equity to said mortgage (except the first mortgage preference gold bonds) to be determined by the court; the balance of the purchase money to be satisfied by the surrender of first consolidated mortgage bonds.

"The foreclosure sale and purchase were really the carrying into effect of an agreement which had been already made between the purchasers and the holders of the first consolidated bonds, and the holders of the income bonds and the owners of the stock by which they were all to receive from the purchasers securities in a new transportation company which was to consolidate under one management this railroad and other lines of transportation. The purchasers were fully cognizant of the previous history and management of the road and its securities and are to be treated as affected by any circumstances which would affect the bondholders themselves. There was no surplus income at any time, and no diversion, as the revenue was never in any one year sufficient to pay the running expenses, and if the claims now in controversy are paid they can only be paid out of the corpus of the mortgaged property.

"The solution of the question raised by the exceptions to the master's report depend upon whether or not there are present in this case special circumstances which give rise to a peculiar equity in favor of the claimants. It is quite clear from the facts appearing in the case that the purchasers at the foreclosure sale obtained the bonds with which they propose to pay for the property under such circumstances that whatever equities affected them in the hands of those from whom they were obtained now affect them at the hands of the purchasers.

"Since the case of Gregg v. Metropolitan Trust Company, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, decided by the Supreme Court in March, 1905, it is to be regarded as settled that supplies furnished to a railroad are not under any general rule, where there has been no diversion of income, entitled to precedence over a mortgage lien, recorded before the supplies were furnished, where there are no special circumstances affecting the mortgage bondholders' claim to priority. There having been no diversion in this case, the inquiry will be addressed to the question whether there were any special circumstances which ought to create an exception to the general rule.

"The mortgage foreclosed is dated March 1, 1901. It provides that, if the railroad shall fail to pay any semiannual installment of interest or fail to keep the property free from all taxes and other liens, then the trustee may take possession of all the mortgaged property, and, if requested in writing by 20 per cent. of any series of bonds and indemnified against liability, shall be bound to take possession subject to the right of a majority in amount of the outstanding bonds to countermand such action. Also, it is provided that in case of such default on the written request of 50 per cent. of all the bonds outstanding the trustee shall take possession of the railroad and property and all books, records, papers, accounts, and money of the railroad and all management and control thereof and manage and operate the same and receive the income thereof, and apply the same first to the management of the railroad and to making such repairs thereon as may be needed to keep the same in good working order, next to the payment of the interest and principal of the bonds, or, on written request of 50 per cent. of the bonds in default, to sell all the property. It is also provided that in every case of default the duty of the trustee should be subject to the right and power of the majority in amount of the bonds to direct and control the trustee's action, or to order more effectual remedies, and also that 50 per cent. or more of the bonds outstanding might at any time remove the trustee and appoint a new one.

"It was the summer excursion business of the railroad and its steamers which was depended upon for revenue. It was found, however, after the summer of 1902 that there had accumulated a large floating debt, and that the financial condition of the railroad was altogether bad. The holders of the first consolidated mortgage bonds and the income bonds were driven to act in order to keep the railroad a going concern until they could get a purchaser for it. The owners of the bonds were very largely also the owners of the stock, and practically they were the owners of the road subject to the $330,000 of preference bonds. The semiannual interest coupons on the bonds due September 1, 1902, were paid, but it was certain that default would be made in the payment of the coupons falling due March 1, 1903, and something had to be done to preserve the credit of the railroad and keep it going. To attain this end the holders of the first consolidated mortgage bonds, the holders of the income bonds, and the holders of the stock united together and on November 29, 1902, appointed a committee which became known as the 'Securities Committee.' This committee from the first represented 75 per cent. of the bondholders and stockholders, and during its active existence all the bondholders and substantially all the stockholders made themselves parties to the agreement by which the committee was appointed.

"This committee of five entered upon the duty of preserving and maintaining the railroad as a going concern. They held their first meeting on December 6, 1902, and, as appears from their minute book, between that date and February 21, 1904, when the receiver was appointed by this court, they held 42 meetings. During that time the directors of the company held but one meeting, and the stockholders one meeting. It is to be seen from their minutes, and from what they actually did, that the committee in exercising the

powers given it by the agreement under which it was appointed exercised supreme control over the railroad and its property and directed everything that concerned it and give to it the credit which kept it going. By the terms of the appointment the depositors of the securities gave to the committee power to represent the depositors in any measure or action of any kind necessary or proper, to accomplish the purposes of their appointment, to superintend the operation of the railroad by its officers and directors, and to confer with them as to the management and operation of the road with the same powers as the depositors might have, to vote all shares of the capital stock in order to enforce official action on the part of the directors, and to select and elect directors in accordance with the opinion of the committee, and to negotiate a sale of the securities and property and franchise of the company; a sale, however, before consummated to be submitted to a meeting of the security holders. The committee, for the purpose of raising money to operate the road most effectually and to provide new equipment and additions, were authorized to pledge the securities deposited, and, if unable to sell the property, were authorized to form a new company to take it over, also to institute proceedings to foreclose the mortgage or to postpone such proceedings.

"As the committee had all the powers that the bondholders had and all the powers of the stockholders, with the power to change the trustee designated by the bondholders' mortgage, and to change the directors, and as the purpose of their appointment was to keep the road running until a reorganization or sale could be effected, it is quite clear that they could, in substance, do whatever any or all of the interest they represented could do. When we examine the minutes of the meetings of the committee and the testimony to see what they really did do, I think it becomes apparent that they in fact managed the railroad as persons having absolute control and possession would manage it. The committee authorized the purchase of additional passenger coaches and a locomotive. They negotiated with and employed a new general manager, and when his management proved disappointing to them they discharged him. They took in charge matters connected with the terminals at Queenstown and Love Point and authorized contracts with regard to them. They authorized the purchase of new railroad ties. They investigated the causes of an accident to the steamer Queen Anne and directed the painting of the steamer Caroline. They authorized the compromise of disputed bills of the Dry Dock Company. They authorized contracts to be made for the supplies of coal. They authorized the purchase of a barge and additional engines, the building of a new station. They gave orders for a plan for lighting certain piers and for the erection of a derrick. Finally, after the committee had been thus in control of the property from January, 1903, for over a year, they negotiated with the present purchasers for a sale to them upon an agreed plan, and instructed their counsel in connection with the counsel of the purchasers to institute a suit for a friendly receiver to the end that the plan of sale which had been agreed upon should be faithfully carried into effect. The suit was instituted, and a receiver recommended, and, after a conference between the securities committee and the intending purchasers of the road, was appointed.

"It appears that the general manager selected by the securities committee reported directly to the committee, and that after the committee took hold and were furnishing the money to keep the road running and had authority to determine, subject to the ratification of the bondholders the terms of the sale, the board of directors as such practically abdicated; indeed, they were helpless to do anything. The chairman of the securities committee, Mr. Oler, testified that the committee practically took over the management of the road, and, as it had never been able to meet its expenses, the committee arranged to raise money to carry it along and keep up its credit with the people who sold it its current supplies, and that the expenditures were reported to the committee and controlled by it.

"By the terms of sale finally agreed upon for each consolidated mortgage bond, the holder was to receive $1,200 in stock of the Maryland, Delaware & Virginia Railroad Company, and for each income bond $50 of the said stock, and the holder of each share of the old stock was to receive $1 of the said new stock. It thus appears that what the securities committee did was just

what the trustee under the mortgage by direction of the bondholders would have had the right to do, viz., to take possession of the road and run it, making repairs and keeping it in running order and finally to sell it. When the trustee takes such possession, the debts incurred by the trustee in running the road are to be paid in preference to the lien of the bondholders whose agent the trustee is.

"In this case the situation was complex. There was an impending possibility that, its credit being exhausted, its business not paying its running expenses, the whole system of railroad and ferries might collapse, and the consolidated bondholders might lose everything. It was thought best that a committee composed of persons who held the bonds should endeavor to meet the difficulties, so the committee took charge, instead of the trustee under the mortgage. They worked faithfully and sedulously. They held meetings and kept careful minutes of their proceedings showing what things they ordered to be done and what contracts they directed should be made, what persons should be employed or discharged, and they borrowed money and put it into the treasury. Many and difficult questions of policy and detail were discussed and decided by them. They did sustain the credit of the company and did keep the road running and did effect a sale in the results of which the bondholders and stockholders participated, and they carried the transaction through by means of a nominal sale made by the court's decree, but in reality upon the terms previously arranged by the committee with the purchasers. It should be stated in justice to the gentlemen composing the securities committee, themselves large bondholders, and whose names undoubtedly gave financial standing to the railroad, that there is nothing in the case to indicate that they did not intend that the creditors who furnished the supplies and materials while they were managing the road should be paid out of the proceeds of the property. They represented the bondholders and were themselves bondholders, and they represented stockholders, but the bondholders alone had any substantial interest, as the company was insolvent and earning no income. With no adequate income out of which to pay the running expenses, what was there to meet the deficit except the proceeds of the property? To suppose that the committee were for over a year lending themselves to a scheme by which persons furnishing operating supplies to a general manager appointed by them and acting for them were to be left unpaid is to do them an injustice. In making the contract for sale of the property the purchasers were told that there was existing a floating debt of the railroad company for operating expenses. The existence of such a floating debt was mentioned in the agreement of sale, dated February 15, 1904, and an itemized statement was agreed to be furnished, although it does not appear that it was ever insisted upon.

"The contract of sale of February 15, 1904, begins by reciting the amount and nature of the outstanding securities of the Queen Anne's Railroad Company, including this recital: 'And whereas the said railroad company is indebted to various persons [including its indebtedness to said committee] as shown by the statement marked "A" herewith attached.' Then, after reciting that it is the wish of all the parties to the agreement that a new corporation shall be formed which shall acquire the said railroad property and other property and shall be bonded and capitalized as therein stated, it is further recited: 'And whereas it is the desire of the parties of the first part [that is, the securities committee and all the holders of securities of the Queen Anne's Railroad who joined in the contract of sale with the committee] to facilitate in every way the formation of such new corporation or the reorganization of the present Queen Anne's Railroad corporation, to the end that when the same is formed or reorganized and securities now owned by them shall be exchanged for the new securities in the name and on the terms hereinafter set forth.' 'And whereas the said parties of the second part [the purchasers] have agreed that they will endeavor within a reasonable time as hereinafter mentioned to carry the above purpose into effect; provided that the said parties of the first part will contract and agree to take the new securities of the character and to the amount hereinafter designated in exchange and full payment for the various bonds and stocks of the Queen Anne's Railroad now held by them, if and when the said parties of the second part shall be able to

deliver said new securities which said parties of the first part have agreed to do. Wherefore these presents are executed.'

"I think it clearly appears: That this whole reorganization arrangement for the benefit of the bondholders and stockholders of the Queen Anne's Railroad Company was one which could not be lawfully carried out to the exclusion of and destruction of the rights of the creditors of the road for operating expenses incurred by the securities committee in effecting the arrangement. That the agreement appointing the securities committee, and by which they acquired control of the bonds which they sold to the purchasers of the road, contemplated that the deficit in operating expenses should be borne by the bondholders, as is shown by a provision in respect to a plan of reorganization afterwards modified, in which it was provided that $135,000 of new bonds should be applicable to 'the repayment of the advances, loans, and indebtedness which may be made and incurred by said committee in carrying out the terms and purposes of this agreement, whether such indebtedness be incurred for the purpose of operating said railroad company in the most effective manner as hereinbefore set out, or providing new equipment and additions to the present property, or in providing expenses for the proper and effective carrying out of the objects and purposes of this agreement.' The scheme contemplated when the $135,000 of new bonds were specifically appropriated to debts and expenses could not be consummated, and in consequence the property remained in the hands of the committee and the receiver much longer than was anticipated, and the deficit grew larger. But, none the less, the effect was necessarily to pledge the deposited bonds for the debts incurred by the securities committee in operating the road as they proceeded to do after they accepted the appointment. All these matters were perfectly well known to the purchasers of the bonds and of the railroad. The securities committee was in fact and in effect the agent of the bondholders, and the debts they contracted in doing what they were appointed to do were in effect the debts of the bondholders.

"The default in the payment of interest on the consolidated bonds foreseen at the time of the appointment of the securities committee on November 29, 1902, to be inevitable, took place March 1, 1903. Upon that default happening, the trustee under the mortgage which secured the bonds was by it authorized to take possession upon request of 25 per cent. of the holders of the consolidated bonds. As the securities committee did in fact in the execution of their duties proceed to take over and operate the road, the responsibility of the bondholders for their action should fairly date from that point of time when the bondholders themselves through their trustee might have taken possession, viz., the first of March, 1903, and I think it follows that the bonds and the property on which they were secured are chargeable with the operating expenses of the road incurred from and after March 1, 1903.

"It follows that the exceptions to the master's report based upon the disallowance of priority to the operating expenses incurred after March 1, 1903, are sustained.

"Bills for advertising: I can see no reason for excluding them. The road, although hopelessly insolvent, was kept running by the bondholders for two purposes: First, to attract a purchaser; and, second, to obtain as much income as it could be made to produce. To do this public notice by advertisement of the running of trains was essential, and it seems to me in such a case as this the cost of the advertisements is a proper expense legitimately incurred to keep the road running.

"The findings of the master with regard to the validity of the several claims of creditors of the company, apart from their question of priority over the mortgage debt, appear to me to be correct, and they all appear to me to be for expenses for which the trustee under the mortgage would have been liable if the trustee by direction of the bondholders had formally taken over the road and run it, and therefore they are such as the bondholders are liable to pay; they having, in substance, done indirectly the same thing through the securities committee."

For the reasons hereinbefore stated, the decrees of the Circuit Court appealed from are affirmed.

# CHICAGO, ST. P., M. & O. RY. CO. et al. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. May 25, 1908.)

No. 2,701.

1. CARRIERS—INTERSTATE COMMERCE—INDICTMENT FOR GRANTING REBATES.
An indictment against a railroad company for granting rebates in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), need not set out a particular description of the device resorted to, but is sufficient where it avers the kind of property shipped, the time and place when and where shipped, the consignee, the existing legal tariff for such shipment, the payment thereof by the shipper, the subsequent payment of the rebate by the carrier to the shipper, and the time and amount of such payment.

2. SAME—ELEMENTS OF OFFENSE—REFUNDING OF ELEVATOR CHARGES.
A railroad company whose published schedule rate for the carriage of oats in interstate shipment from Minneapolis to Duluth or Superior was five cents per 100 pounds, and which received payment from a shipper at such rate, but, on shipments intended for through transportation over the lakes, later refunded to the shipper the elevator charges for transferring the grain from its cars to vessels after the termination of its own carriage amounting to one-half cent per bushel, was guilty of granting a rebate or concession from the published schedule rate, in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), and it was no defense to a prosecution therefor that competing roads granted a like concession, and that it was compelled to do the same in order to secure its fair share of the business, or that it treated all shippers alike, or that the concession was made by its officers in good faith and in the honest belief that it was lawful.

3. SAME—CONSTRUCTION OF STATUTE—"WILLFUL" GRANTING OF REBATES.
The use of the word "willful" in Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), to characterize offenses thereunder, conceding it to apply to the granting of rebates from the published schedule rates, does not require that there should have been an evil intent to constitute the offense, but it is sufficient if the act was done knowingly and purposely.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7468–7481, 7835–7836.]

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

For opinion below, see 151 Fed. 84.

Thomas Wilson, for plaintiffs in error.

Charles C. Houpt (Paul A. Ewert, on the brief), for the United States.

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

ADAMS, Circuit Judge. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, a common carrier of interstate commerce, and H. M. Pearce, its general freight agent, were found guilty in the court below of granting rebates to the Spencer Grain Company, a corporation doing business in Minneapolis, Minn., in violation of Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), known as the "Elkins Act." They were indicted in 50 separate counts for granting that number of rebates from the rate named

*Rehearing denied Sept. 14, 1908.

in the tariffs and schedules of rates then published and filed by the carrier with the Interstate Commerce Commission for carrying oats from Minneapolis to Duluth, Minn., over a route which passed through some portion of the state of Wisconsin. They were found guilty on all counts, and one fine of $20,000 and $2,000 was imposed upon the two named defendants, respectively, for punishment. This writ of error is prosecuted to secure a reversal of that judgment.

Only one out of 50 counts of the indictment appears in the record, and, as this is conceded to be fairly representative of them all, we here reproduce it. After alleging that the defendant railway company was a corporation and common carrier of interstate commerce between Minneapolis through the city of Superior, in the state of Wisconsin, to the city of Duluth, in the state of Minnesota, and that defendant Pearce was the general freight agent of the railway company, it proceeds as follows:

"That on the 26th day of December, 1905, the said Spencer Grain Company did deliver certain property, to wit, one (1) carload of oats * * * consigned to Cargill Commission Company, Duluth, Minn., to the said common carrier aforesaid, at the said city of Minneapolis, for transportation by the said common carrier, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, by interstate commerce to the said city of Duluth before mentioned, and the said common carrier did immediately, upon and in pursuance of such delivery of said property, so transport the same by interstate commerce over its said route or line of railway hereinbefore mentioned, running from the said city of Minneapolis to the said city of Duluth, * * * upon which said property and for the transportation thereof, as aforesaid, the said Spencer Grain Company did thereupon pay to the said common carrier, and the said common carrier did receive from said Spencer Grain Company, the freight rates and charges for the transportation of said property set forth in the tariffs and schedules then showing the legal rates and charges established by said common carrier for such services, then in force and effect upon its said route, to wit, five cents (5c) for each one hundred pounds (100 lb) thereof, copies of which tariffs and schedules * * * had theretofore been, by said common carrier aforesaid, published as required by law, and by it filed with the Interstate Commerce Commission of the United States, as required by law. * * * That the said [defendants] did on the 15th day of February, A. D. 1906, at the said city of Minneapolis * * * 'willfully and unlawfully grant and pay to the said Spencer Grain Company' * * * certain rebates of the said freight rates and charges so paid as aforesaid, and certain concessions in respect to the said transportation of said property, whereby the said property was by the said corporation and common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Duluth, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules; that is to say, a rebate, refund, and concession of one-half cent (½c) per bushel on each bushel of said oats * * * so as last aforesaid mentioned, delivered and transported. * * *"

Before entering upon a consideration of the assignment of errors, we will briefly state certain uncontradicted facts. Before 1903 the railway company had undertaken to transport grain from Minneapolis to Buffalo on through bills of lading issued by it. In such cases it had carried it from Minneapolis to Superior or Duluth over its own road, and there delivered it to vessels to be carried by them over the lakes to Buffalo, making its own contracts with the navigation companies and paying them for their service. Finding this arrangement unsatisfactory, shipments of grain for over the lakes were made by the

railway company over its own line only, to specified consignees at Duluth or Superior, with a memorandum in the shipping bill that they were for over the lakes to Buffalo. It was found by the railway company to be impossible to get any of this business for carriage over its line to the incipiency of the lake transportation without absorbing the charge for elevator service in removing the grain from the cars after their arrival at the end of its road to the vessels, because of the fact that other lines in natural competition with it for that business were so absorbing that charge. Accordingly the general freight agent gave directions for the solicitation of freight destined for Buffalo on the terms that the elevation charges at Duluth or Superior, as the case might be, would be assumed and paid by the railway company. Pursuant to such directions, and for the purpose of getting its share of the over the lakes business, the railway company accepted the grain specified in the indictment and all other grain offered to it at Minneapolis destined for Buffalo from Spencer Grain Company, or any other shipper at Minneapolis for carriage over its own line to the consignee thereof at Duluth or Superior, with an understanding and agreement that it would pay the elevation charge at the end of its route. Before the dates of the respective shipments mentioned in the several counts of the indictment, the railway company had published and filed with the Interstate Commerce Commission, as required by law, schedules showing the rates and charges for the transportation of grain like that mentioned in the indictment over its line from Minneapolis to Duluth or Superior to be five cents for each 100 pounds, and had never published or filed any schedule showing that it absorbed the elevation charges on over the lakes business. This schedule rate and charge remained unchanged until after the transactions involved in this indictment. The legal rate of five cents per 100 pounds was in each of the instances specified in the indictment first paid by or for the Spencer Grain Company, the shipper, to the railway company, and afterwards the shipper made a claim against the railway company for the elevation charge, which amounted to one-half of a cent per bushel, which it had paid, and this was repaid to it by the railway company. The evidence discloses that all shippers of grain from Minneapolis over the railway company's line destined for Buffalo over the lakes were treated alike; that no discrimination between shippers in that line of business was intended or practiced; and that any officer or agent of the railway company representing or acting for it in the matter of making or executing this agreement with the Spencer Grain Company did so in good faith, believing it to be legal and proper.

There are a large number of errors assigned, but most of them fall within two main propositions advanced in brief and argument: (1) That the indictment is insufficient in law; and (2) that the proof is insufficient to establish guilt.

Is the indictment good? It is first challenged by general demurrer and afterwards by objection to evidence on the ground that it failed to state an offense. This last-mentioned method of questioning the sufficiency of an indictment has heretofore met with our disapproval (Morris v. United States [C. C. A.] 161 Fed. 672, recently decided by us); but this is unimportant, inasmuch as the demurrer

seasonably and effectually questioned it. The test of a good indictment, as frequently declared by this court and by the Supreme Court, is whether all the essential elements of the offense are stated with sufficient clearness and certainty to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, to enable the accused to understand the nature of the accusation against him, to intelligently prepare to meet it, and to plead the judgment rendered thereon, whether of conviction or acquittal, as his protection against another prosecution for the same offense. The indictment sought to charge the offense denounced by the first section of the Elkins act (32 Stat. 847), which, when read in connection with Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and its amendments, enacts in effect that every person or corporation engaged in the business of interstate transportation who shall offer, grant, or give any rebate or concession in respect to the transportation of any property in interstate commerce whereby such property shall by any device be transported at a less rate than that named in the tariffs, published and filed by such carrier with the Interstate Commerce Commission, shall be deemed guilty of a misdemeanor. The substantial elements of the offense are few. There must be (1) the granting or giving of a rebate (2) from the published and filed rates (3) for the transportation of property (4) by a carrier engaged in interstate commerce. The indictment in our opinion contains all these elements, and they are specified with all the detail and certainty required by the rule just referred to. There is no particular description of the device resorted to by the defendants to accomplish the unlawful transportation, but this is not necessary. Armour Packing Co. v. United States, 153 Fed. 1, 82 C. C. A. 135. There are found in the indictment clear and definite allegations showing the kind of property shipped, the time and place when shipped, the consignee to whom shipped, the existing legal tariff or rate for such shipment, the payment thereof by the shipper to the carrier, the subsequent payment of the rebate or concession by the carrier to the shipper, the time when it was paid, and the amount thereof. These details afforded all the required certainty and the indictment was clearly sufficient. Thomas v. United States, 156 Fed. 897, 84 C. C. A. 477.

The indictment before us and before the Supreme Court in the Armour Packing Company Case, which was for the offense of receiving a rebate, in violation of the same statute we are now considering, disclosed no greater certainty or particularity of statement than this one, and it was held sufficient by both courts. We see no reason to depart from that holding.

As defendant Pearce, according to stipulation of the parties and the undisputed evidence, was the active agent of the defendant railway company in all the acts and transactions involved in this case, and as the legal consequences of such acts and transactions involve him in like manner as they do the railway company, we shall not, as we proceed with this opinion, attempt to distinguish between them.

Was the proof sufficient to sustain the charge? The main features of the case which in the opinion of learned counsel for defendants

require a negative answer to this question will, we think, not sustain them in their contention. There is evidence tending to show that the sole purpose and object of absorbing the cost of elevation by the railway company was to enable it to get its fair share of the initial transportation of grain destined for Lake Erie ports; that it was no part of the railway company's duty under its contract with the shipper to pay the cost of elevation, and that its duty was done and its transportation ended when the cars containing the grain were delivered at the elevator where it could be safely and conveniently reloaded into vessels; that other lines competing with the railway company for the same business absorbed the elevation charge just as the railway company did and that it treated all alike. Let these facts be conceded and the important fact remains incontrovertible that the railway company actually received as a net result less than 5 cents per 100 pounds for all the service it could or did render the shipper, namely, for the transportation of the grain in question from Minneapolis to the end of its road at Duluth, at a time when the legal tariff and rate was five cents per 100 pounds. By so doing did it not, in some way, make a concession to the shipper "whereby the property was transported at a less rate than that named in the tariffs scheduled," etc.? In our opinion the fact that other railroads competing for the over the lakes business absorbed the elevation charge, and that it was necessary for the defendant company to do so to secure participation in that business, cannot alter the legal effect of what was done. We suppose the main reason which in times past moved railroad companies to makes rebates or concessions in individual cases was to secure business for their lines, and that the spirit of competition in the race for business brought about the practice of so granting rebates and concessions. This practice, we understand, was the vice aimed at in recent legislation which has for its main object the equalization of rates between given points for the same service. We are unable to see how the fact that no duty was imposed upon the railway company under its contract with the shipper to pay elevation charges incident to transferring the grain from its car to the vessels on the lake can be of any avail to the defendants in this case. The contrary seems true to us. The fact that no such duty rested on the railway company seems to us to make against rather than in favor of defendants' contentions. If the railway company had no duty in that particular, inasmuch as the elevation service was a necessary part of the through transportation, the act done by it was a voluntary contribution of something of value to the shipper which in fact reduced his outlay for transportation over the defendants' line and thereby facilitated the defendants in the accomplishment of their avowed object to secure a reasonable share of that trade. The fact that defendant railway company treated all shippers of the same class of property for the same destination alike might be important and conclusive on a charge of discrimination; but, when the charge involved is granting a rebate or concession from a fixed tariff or rate in violation of a statute in clear terms making that particular act an offense, we are unable to appreciate the pertinency of evidence disclosing no violation of another and different provision of the interstate commerce law.

Witnesses produced by defendants testified that the payment of the elevation charge by the railway company had nothing to do with the established tariffs and rates between Minneapolis and Duluth, and was not intended by the parties to constitute a rebate or concession from the legal rates of freight. We think this evidence was incompetent and immaterial. It amounted to nothing more than the opinion of witnesses concerning the law of the case or the legal effect of the facts proved. Every one is presumed to intend the natural consequences of his acts, and, if their legal effect amounts to the grant of a rebate or concession from the fixed rate, it makes little difference what the opinions of witnesses concerning it may be.

The learned trial judge advised the jury that "the law requires the carrier to adhere to the published rate as an absolute standard of uniformity"; that the provision requiring publication of the schedule of rates was made "in order that the man having freight to ship may ascertain by an inspection of the schedules * * * exactly what will be the cost to him of the transportation of his property between the points named in the schedule." He also told them that the law gave the shipper the right to know, by an inspection of the schedules, exactly what the cost to his competitor was for the transportation of his property between the same points. This was a correct interpretation of the statute. Chicago & A. Ry. Co. v. United States, 156 Fed. 558, 84 C. C. A. 324. Private arrangements between a carrier and one or more shippers, not disclosed by the published and filed schedules, which have the effect to reduce rates from those so scheduled, disturb the essential standard of uniformity, and, whatever be the understanding or intent of the parties, thwart the legislative intent, and cannot be permitted. There was also much evidence tending to show, and in our opinion satisfactorily showing, that the officers of the railway company intended no wrong, but acted in the best faith, honestly believing that the absorption by them of the elevation charge in question, in order thereby to secure a share in the over the lakes business, did not constitute a rebate or prohibited concession within the meaning of the Elkins act.

This last-mentioned evidence is strongly relied upon by defendants' able counsel as a complete defense in this case. They call attention to the rulings of the Interstate Commerce Commission in the Matter of Allowances to Elevators by the Union Pacific Railroad Company, 10 Interst. Com. R. 309, and Id., 12 Interst. Com. R. 85, and to the cases of Detroit, etc., Ry. Co. v. Int. Com. Comm., 74 Fed. 803, 21 C. C. A. 103, Int. Com. Comm. v. Detroit, etc., Ry. Co., 167 U. S. 633, 644, 645, 17 Sup. Ct. 986, 42 L. Ed. 306, Wight v. United States, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, and Int. Com. Comm. v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414, as a justification for their honest belief that their act in absorbing the elevation charges in question constituted no offense. These cases have all been critically examined, and they are found to relate generally to the "unjust discrimination," the "long and short haul." and "schedule" clauses of sections 2, 4, and 6, respectively, of the interstate commerce act of February 4, 1887 (24 Stat. 379), and, while expressions are found in them which might well have afforded

ground for belief by defendants that their act in absorbing the elevation charge in question was justifiable and lawful, they do not purport to decide the question involved in this case. Indeed, they are not relied upon as authority for granting a rebate or concession within the contemplation of the Elkins act.

Knowledge of the rulings in these cases by defendants, together with the evidence of the witnesses on the subject of their good faith, are claimed to constitute a demonstration that no willful or evil intent, no bad faith, actuated defendants in doing what they did, but that they did what they did in the honest belief that it was lawful and permissible. It is argued that the adjective "willful" found in that part of section 1 of the Elkins act qualifying the failure "to file and publish the tariffs or rates and charges as required by said acts or strictly observe such tariffs until changed," etc., is by necessary implication and connection carried forward and made to qualify the misdemeanor afterwards denounced in the granting or giving of rebates or concessions. Assuming that such is the true meaning of the act, it is argued that no offense is made out by the proof because the essential element of willfulness—that is, the evil mind, the criminal and willful intent to do wrong—is absent. Support is found for this argument in the following authorities:

Bishop on Criminal Law, §§ 287, 288, in which it is said:

"There can be no crime, large or small, without an evil mind. In other words, punishment is a sequence of wickedness, without which it cannot be. * * * 'Actus non facit reum nisi mens sit rea.'"

Felton v. United States, 96 U. S. 699, 24 L. Ed. 875, treating of the violation of the law governing the distillation of spirits (Act July 20, 1868, c. 186, § 16, 15 Stat. 131), which required an act to be done or omitted "knowingly and willfully" to constitute an offense, in which it is said that "doing or omitting to do a thing knowingly or willfully implies not only a knowledge of the thing but a determination with a bad intent to do it or to omit doing it."

Evans v. United States, 153 U. S. 584, 594, 14 Sup. Ct. 934, 38 L. Ed. 830, where it is held that the words "willfully misapplies," found in section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497), in relation to offenses against the national banking laws, contemplates and presupposes an "evil design."

Potter v. United States, 155 U. S. 438, 446, 15 Sup. Ct. 144, 39 L. Ed. 214, construing the meaning of section 5208 of the Revised Statutes and the subsequent act of July 12, 1882 (22 Stat. 166, c. 290, § 13 [U. S. Comp. St. 1901, p. 3497]), which imposes a penalty upon any one who should willfully certify a check unless the drawer had on deposit at the time an equal amount of money, where it is held that the word "willful" as there employed implies not only a knowledge of the thing "but a determination with a bad intent to do it or to omit doing it." Spurr v. United States, 174 U. S. 728, 19 Sup. Ct. 812, 43 L. Ed. 1150, where the Chief Justice reiterated the doctrine of the Felton, Evans, and Potter Cases touching the meaning of the words "willful violation" when employed in a statute, and observed that: "The wrongful intent is the essence of the crime."

This argument, when made, impressed us strongly. It seemed contrary to natural justice and in conflict with the fundamental principle underlying the administration of criminal law as recognized by the Supreme Court in the foregoing cases to punish parties who had reason to believe and did honestly believe that what they did was lawful and right. This, however, seemed doubtful and dangerous doctrine, and commanded our most serious consideration. In most cases the evil mind or bad intent accompanies the doing of a wrongful act, and no difficulty arises in the disposition of a case involving an offense malum in se. It is only when an offense malum prohibitum is charged that the application of the general doctrine becomes doubtful. To hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous criterion. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them. In view of considerations like these the general doctrine alluded to has been modified in its application to statutory offenses. In the Spurr Case, 174 U. S. 728, 19 Sup. Ct. 812, 43 L. Ed. 1150, the Chief Justice clearly perceived the difficulties just suggested, and, after reviewing the prior cases and restraining the general doctrine that the word "willful" when employed to express the quality of an act denounced by a statute involves an evil intent or bad purpose, said:

"If an officer certifies a check with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact."

In the Armour Packing Company Case, supra, this court, answering the contention there made that the evidence disclosed no criminal intent on the part of the shipper who was there charged with receiving a rebate in violation of the provisions of section 1 of the Elkins act, said:

"A corrupt purpose, a wicked intent to do evil, is indispensable to a conviction of a crime which is morally wrong. But no evil intent is essential to an offense which is mere malum prohibitum. A simple purpose to do the act forbidden, in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense, which is not malum in se."

The Supreme Court, answering the same contention in the same case, when there for review, said:

"It is contended by the petitioner that there is nothing in the facts found in this case to show any intentional violation of the law; that, on the contrary, the petitioner believed itself to be within its legal rights in insisting upon the performance of its contract, and maintained in good faith that the interstate commerce act did not and could not interfere with it, and that the statute had no application to a shipment of goods for exportation in the manner shown in this case. While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases, within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does

not involve turpitude or moral wrong. In this case the statutes provide it shall be penal to receive transportation of goods at less than the published rate. * * * The stipulated facts show that the shippers had knowledge of the rates published, and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required."

The defendants in this case published and filed the tariffs and schedules fixing the legal rate of freight from Minneapolis to the end of their line at Duluth at five cents per 100 pounds for the transportation of grain. These tariffs and schedules remained unchanged and in force at the time they received the grain in question for transportation. They thereafter received from the shipper the full rate of five cents per 100 pounds carried, and afterwards paid back to the shipper one-half of one cent for each bushel of grain carried; the same being the amount which the shipper had been required to pay for the elevation charge at Duluth in order to continue the transportation beyond the terminus of defendants' line to its destination. This was done pursuant to an arrangement before then made between the defendants and the Spencer Grain Company and all other shippers of grain from Minneapolis destined to ports on Lake Erie, in order to secure their share of the initial transportation of such grain. Of these facts, we understand, there is no contradiction or doubt. They disclose acts intelligently performed, by the defendants, for an avowed purpose.

The only remaining question is whether the return by the defendants to the shipper of the elevation charge required to be paid and actually paid by the shipper or his consignee for their own purposes and in no sense for account of the railway company constituted a prohibited rebate or concession within the meaning of the Elkins act. The statement of this question, in view of conclusions already reached on debated questions of law, seems to us to admit of but one rational answer. This, however, was a criminal case, and the verdict of a jury on a fair submission of the facts to them was essential to a valid judgment against the defendants.

Was the case fairly submitted to the jury? The learned trial judge, after treating exhaustively the various questions debated by counsel which have already been disposed of by us, told the jury that they must, in order to find the defendants guilty, find the facts to be true as charged in the indictment, and also advised them that they must, in order to convict, believe that the effect of what was done was to have the grain in question "transported at a less rate than that named in the tariffs and filed by the defendant company, the carrier"; that the defendants did the acts complained of "knowingly and intentionally," and knew "that they were departing from the rate, and that the effect of what they were doing was to diminish the cost of the transportation of the property by the amount of that concession, and that they intended to do so." The charge as shown in the foregoing excerpts and elsewise submitted for the determination of the jury the vital questions whether the transaction as actually conducted between the defendants and the grain company had the effect of reducing the cost of transporting the grain in question below the schedule rates, and whether the defendants intended that such effect should follow as a result of what they did. These questions presented the very

nub of the case, and their answer, in view of the other incontrovertible facts of the case, determined the guilt or innocence of the defendants. We have carefully examined the charge as a whole, and find that it submitted the important issues in the case with clearness and eminent fairness to the jury for their consideration. The verdict as rendered responded intelligently to the questions submitted was supported by substantial evidence and ought not to be disturbed.

In view of the foregoing, we find no occasion to pass categorically upon the various assignments of error as they appear in the record. Their disposition is necessarily involved in the conclusions already reached.

The judgment must be affirmed.

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## GEIGER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1908.)

No. 768.

1. WORDS AND PHRASES—"GRAND INQUEST"—"INQUEST."

The term "grand inquest" has no other meaning than "grand jury"; the term "inquest" being used to indicate a body of men appointed by law to inquire concerning certain matters submitted to them.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3634.]

2. INDICTMENT AND INFORMATION—FORM—INTRODUCTION.

An indictment returned into a federal court, reciting that the "grand inquest" of the United States of America, inquiring for the body of the district of Maryland, do on their oath present, etc., was not objectionable for failure to show that it was returned by a grand jury.

3. BANKS AND BANKING — NATIONAL BANKS — OFFICERS — DEFENSES—INDICTMENT.

Rev. St. U. S. § 5208 (U. S. Comp. St. 1901, p. 3497), declares that it shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn on the association, unless, etc.; and section 5209 declares that every president, director, cashier, teller, clerk, or agent of "any association, who embezzles," etc. *Held*, that an indictment, charging that defendant, being then and there the cashier of a certain "national banking association," to wit, etc., was not fatally defective for failure to allege that the national banking association specified was a national banking association organized under the laws of the United States.

4. SAME—DOING BUSINESS.

An indictment against a national bank cashier for an offense against the national banking law was not defective for failure to allege that the bank was doing business at the time the alleged offenses were committed.

5. SAME.

Where an indictment against a national bank cashier for willful misapplication of the bank's funds and willful abstraction thereof alleged that a customer of the bank, prior to the maturity of a note held by the bank against it, delivered a check to the bank to pay the note when due, which check came into defendant's possession as cashier, and that defendant cashed the check and converted the proceeds, the indictment was not fatally defective for failure to allege in words as to who was the payee of the check, nor to charge that the bank was still the owner of the note.

6. SAME—NATURE OF OFFENSE.

Where a customer of a national banking association, whose note to the bank was about to mature, delivered a check to the bank to pay the note when due, and, the check coming into the hands of defendant as cashier of the bank, he cashed it and converted the proceeds, the loss was that of the bank, and defendant's offense a willful misapplication and abstraction of the bank's funds and credits, and not a mere breach of trust.

In Error to the District Court of the United States for the District of Maryland, at Baltimore.

George A. Solter and Albert S. J. Owens, for plaintiff in error.
John C. Rose, Dist. Atty., and Morris A. Soper, Asst. Dist. Atty.

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

McDOWELL, District Judge. The defendant below was indicted and convicted under section 5209, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3497). The indictment commences as follows:

"In the District Court of the United States for the District of Maryland.
"United States of America, District of Maryland—ss.:
"The grand inquest of the United States of America, inquiring for the body of the district of Maryland, do upon their oaths present that," etc.

The first objection to be considered is that the trial court overruled a motion to quash and a demurrer to the indictment, and refused to grant a motion in arrest of judgment, all of which were based on the fact that in the indictment the grand jury is described as the "grand inquest." If it be conceded that the body in question should in strictly technical language be described as the "grand jury," yet we are of opinion that the error, if such it can be called, is merely in a matter of form. The record preceding the indictment, reads:

"That heretofore, to wit, at a District Court of the United States for the District of Maryland, * * * William R. Hammond [and 22 others], good and lawful men of the district aforesaid, who, being impaneled, sworn, and charged to inquire for the United States of America, for the body of the district aforesaid, * * * present. * * *"

It is undeniable, as appears from this record, that the indictment was returned by the grand jury for the district of Maryland. The term "grand inquest" is not unknown, and has, so far as we are advised, no other meaning than "grand jury." In 1 Bouv. Dict. we find:

"Inquest. A body of men appointed by law to inquire into certain matters. * * * The grand jury is sometimes called the 'grand inquest.'"

In 1 Chitty's Crim. Law (5th Ed.) p. 306 (308), it is said:

"At common law it is perfectly clear that all persons serving upon the grand inquest must be good and lawful men. * * *"

In 2 Reeves Hist. Eng. Law, p. 461, and in Lesser's History of the Jury System, p. 97, will be found other illustrations of this use of the term "inquests." In the brief for the government in the case at bar it is said that the form here used has been in use in the district of Maryland for nearly or quite a century. From State v. Nixon,

18 Vt. 70, 46 Am. Dec. 135, 137, it appears that formerly the form used in the federal court in Virginia was:

"The grand inquest of the United States for the district of Virginia."

The defendant was found guilty as charged in counts 60, 62, 64, 65, 78, and 81, and was sentenced to five years' imprisonment under each count, the several terms to run concurrently.

The next objection we have to consider is based on the fact that in each of the counts in question the allegation is that:

"Said John W. H. Geiger, * * * being then and there the cashier of a certain national banking association, to wit, the Canton National Bank in Canton, Baltimore county, Maryland, unlawfully," etc.

It is argued that the language should have been "a national banking association organized under the laws of the United States." Section 5208, Rev. St., reads in part:

"It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless," etc.

In section 5209, under which the indictment was drawn, we find the language:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles," etc.

Clearly it is the officer or agent of a national banking association alone who can violate this section, and the indictment consequently in effect uses the language of the statute. It seems to us hypercritical to contend that the language used in this indictment is wanting in certainty. As it is found in an indictment returned by the grand jury of a federal court in the United States of America, the words "national banking association" can reasonably mean nothing other than an association organized under the acts of Congress. If the language used in the indictment is objectionable, the form insisted upon by the learned counsel for the defendant would seem also open to the same objection. "Organized under the laws of the United States" would by the same process of reasoning leave it doubtful if the United States of America was intended.

It is further objected that there is no allegation that the bank was doing business at the time of the alleged offenses. We find no merit in this objection. Jewett v. U. S., 100 Fed. 832, 838, 41 C. C. A. 88, 53 L. R. A. 568.

The sixtieth count in the indictment reads as follows:

"And the grand inquest aforesaid, upon their oath aforesaid, do further present that the said John W. H. Geiger on the 12th day of July, in the year of our Lord 1906, in the state of Maryland and district aforesaid, being then and there the cashier of a certain national banking association, to wit, the Canton National Bank, in Canton, Baltimore county, Maryland, unlawfully and with intent then and there to injure and defraud the said association, and without the knowledge or consent of the said association, its board of directors, committees, or any of them, did willfully misapply certain of the moneys, funds, and credits of the said association for the use, benefit, and advantage of him, the said John W. H. Geiger, and for the use, benefit, and advantage of a person and persons other than the said association, whose names are to the grand inquest aforesaid unknown, to wit, moneys, funds, and credits to the amount of three thousand five hundred dollars, in the manner and by the

means following, that is to say: He, the said John W. H. Geiger, by virtue of his position as cashier of the said association, was then and there in possession of a check drawn upon the said association for the sum of three thousand five hundred dollars, dated July 9, 1906, and signed by the Taylor & McCoy Coal & Coke Company, a body corporate, which said check had theretofore come into his possession as such cashier, to be used in the payment, when due, of a promissory note for the sum of three thousand five hundred dollars, which had theretofore been discounted by the said association for the use and benefit of the said Taylor & McCoy Coal & Coke Company, and the said John W. H. Geiger did then and there deliver said check to the said association before the payment of said note was due, and by virtue of the power of control, direction, and management which as such cashier he then and there possessed over the moneys, funds, and credits of said association, did then and there pay and cause to be paid and delivered, in exchange for the said check, to himself and said other person and persons, moneys, funds, and credits of the said association in the sum of three thousand five hundred dollars, a more particular description of which moneys, funds, and credits is to the grand inquest aforesaid unknown, without the knowledge or consent of the said association, its board of directors, or committees, or any of them, and with the intent then and there to injure and defraud the said association, and that the repayment of the same to the said association was not then and there in any manner secured, all of which the said John W. H. Geiger then and there well knew, and that the said money, funds, and credits to the said amount were then and there willfully and unlawfully appropriated and converted to the use, benefit, and advantage of the said John W. H. Geiger and to said other person and persons—contrary to the form of the statute in such case made and provided, and against the peace, government, and dignity of the United States."

Count 62 is in the same language, except that it charges willful abstraction.

Counsel for the defendant urges the following as defects in these two counts:

"The counts are defective because: (a) It is not alleged, in the description of the means and method of the offense, that the check was the property of the banking association, or that the bank was the owner or holder of the promissory note which the check was to pay, or that the check was to be paid to the association. (b) That if the check was delivered to Geiger 'as cashier' to pay a note which would subsequently fall due, such a duty was not one which would come within the scope of the duties of the cashier, and the cashier, therefore, was the agent of the person who had delivered the check to him. (c) That if the check was the property of the bank, and delivered to Geiger as the cashier thereof, the cashing of the same and conversion by him of the proceeds of the check was embezzlement, and not abstraction or misapplication."

We cannot perceive that it was necessary to allege that the bank was still the owner of the note. If it had been rediscounted, the cashing of the check and the misapplication and abstraction of the proceeds of the check would constitute the offenses charged in the two counts in question, if the loss fell on the bank, and not on the drawer of the check. It also was unnecessary to make allegation in words as to the payee of the check. It is alleged that the check—and, by necessary intendment, the power to cash it with apparent regularity—came into Geiger's possession "by virtue of his position as cashier, to be used in the payment, when due, of a promissory note. * * *" Under such allegation, although the check may have been payable to bearer or to Geiger, it seems to us necessary to consider that Geiger obtained the check as agent of the bank, that the check was in possession of the bank, and that the loss growing out of his misapplication of the pro-

ceeds was the loss of the bank. It was consequently the money of the bank that the defendant illegally abstracted and misapplied. The facts alleged cannot constitute a mere breach of trust by Geiger as agent of the maker of the check, because it is alleged that "as cashier" he obtained possession of the check. If, instead of giving the cashier a check, the Taylor & McCoy Company had on the day in question taken to the bank $3,500 in currency and had handed it to Geiger "as cashier," to be specially deposited for the payment of the note in question when due, it is clear that the loss resulting from an abstraction and misapplication of such fund by Geiger would fall on the bank; and such transaction does not seem to us to differ in legal effect and consequence from the transaction alleged. Whether or not the illegal taking of the money constituted embezzlement is immaterial. Under the allegations Geiger illegally abstracted and misapplied the money.

The remaining assignments of error are based on demurrers to the remaining counts upon which the defendant was found guilty. We think it unnecessary to consider the remaining assignments. The defendant was sentenced to only five years in jail, which is the minimum punishment under section 5209, Rev. St.

The judgment below will be affirmed.

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## STERLING COAL CO. v. SILVER SPRING BLEACHING & DYEING CO.

(Circuit Court of Appeals, First Circuit. July 2, 1908.)

No. 763.

1. SALES—CONTRACT—CONSTRUCTION—OPTION.

Where an instrument purported to embody an agreement that plaintiff was to furnish defendant with its entire consumption of coal, and also contained an absolute requirement that plaintiff should have 1,000 tons constantly in defendant's yard, and 3,000 tons on dock, and in transit to insure a continuous supply, the instrument fairly imported an agreement on defendant's part to accept the coal, as well as an obligation of plaintiff to deliver the same, and was therefore an enforceable bilateral contract.

2. SAME—ACTION FOR PRICE—RECOUPMENT.

Where plaintiff contracted to furnish defendant with its entire consumption of coal from May 1, 1902, to April 1, 1903, at certain specified prices, and neither party ever repudiated the contract because defendant was not bound to consume coal, such fact, if true, was no bar to defendant's right to recoup from the price of coal furnished any damages that it suffered in consequence of plaintiff's failure to furnish a sufficient supply.

3. SAME—CONTRACT—CONSTRUCTION—PLACE OF DELIVERY—"F. O. B. PHILADELPHIA."

A contract required plaintiff to furnish defendant with its entire consumption of coal between specified dates at $2.40 per long ton f. o. b. Philadelphia; the Eastern Coal Company, or any other mutually satisfactory concern, to freight, insure, unload, and haul to defendant's works for $1.35 per long ton, defendant's total payment to both parties being $3.75 per long ton delivered in defendant's yard at such times and in such quantities as defendant might direct, and plaintiff to have at least 1,000 tons constantly in defendant's yard and 3,000 tons on dock at Providence and in transit. *Held*, that the contract required delivery of the coal at defendant's yard; the words "f. o. b. Philadelphia" being used merely to fix the price up to that point.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 214.]

4. SAME—GUARANTY OF DELIVERY—WAIVER.
That defendant contracted with the Eastern Coal Company to freight, insure, unload, store, and haul the coal did not operate as a waiver by defendant of plaintiff's guaranty to keep a sufficient supply of coal on hand in defendant's yard.

5. SAME—WAIVER OF DEFAULT—SUBSEQUENT ACCEPTANCE.
Where plaintiff contracted to furnish defendant with its supply of coal during a certain period, defendant's acceptance of coal under the contract at a later time, after it had been damaged by plaintiff's failure to furnish coal as agreed, did not waive or extinguish defendant's cause of action already accrued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 458.]

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

Harry J. Jaquith and Walter H. Barney (Barney & Lee, on the brief), for plaintiff in error.

Seeber Edwards (Frank H. Swan and Edwards & Angell, on the brief), for defendant in error.

Before HOLMES, Circuit Justice, and COLT and PUTNAM, Circuit Judges.

HOLMES, Circuit Justice. This is an action of assumpsit brought by the plaintiff in error, hereafter called the plaintiff, for the price of coal sold and delivered to the defendant. The defendant does not dispute the debt, but sets up a claim in recoupment based upon an instrument which it says was the contract under which the coal was delivered. That instrument was as follows:

April 14, 1902.

Messrs. Sterling Coal Co.,
John C. Bradley, Vice-President,
Philadelphia, Pa.

Gentlemen: In accordance with agreement made last week between your Vice-President, Mr. John C. Bradley, and our Agent, Mr. James L. Crowell, you are to furnish us with our entire consumption of coal from May 1st, 1902, to April 1st, 1903, quality to be the same as has been furnished previously by you, price to be two dollars and forty cents ($2.40) per ton of 2,240 lbs., f. o. b. Philadelphia. The Eastern Coal Co., or any other mutually satisfactory concern, is to freight, insure, unload, store, and haul to our Works for the sum of one dollar and thirty-five cents ($1.35) per ton of 2,240 lbs. Our total payments to both parties to be $3.75 per ton of 2,240 lbs. delivered in our yard, said coal to be delivered at such times and in such quantities as we may direct. Payment for coal to be as heretofore. You agree to have at least one thousand tons of coal constantly in our yard, which amount is not to be stored during continuance of contract without being drawn from, but we are to be using from one part of the surplus as you are delivering in some other part. It is, however, at your risk and is not to be paid for until expiration of contract. You to have on dock at Providence, and in transit thereto, at least three thousand tons more, to make sure that we shall have sufficient supply of coal in case anything unusual should happen. In other words, you are to become responsible to us to the extent of four thousand tons of coal as a reserve supply to draw from.

Yours very truly,
Silver Spring B. & D. Co.,
Charles Warren Lippitt, Treasurer.

P. S. The above statement of our contract with the Silver Spring B. & D. Co. is correct, and is approved and accepted of by us.

Sterling Coal Company,
By John C. Bradley, V. P.

The case was tried by a judge without a jury, and he found that the foregoing instrument was the contract, and that the plaintiff did not deliver the "coal to the defendant at defendant's yard, or otherwise, at such times and in such quantities as the defendant directed, or in such manner as to have at least one thousand tons of coal constantly in said yard; and did not deliver coal in such quantities and at such times as to supply the defendant with coal necessary for its consumption when it was needed by the defendant for consumption." He also found that, in consequence of the plaintiff's failure to keep the defendant supplied according to contract, and in order to procure coal actually necessary for its consumption, the defendant bought 2138 tons of coal from the Eastern Coal Company and other parties, and was obliged to pay $10,281.20 in excess of the agreed price as a consequence. He found that the defendant bought only upon necessity, at the best rates obtainable, and acted in all respects in good faith, and was entitled to the above sum. The main question turns on the effect and construction of the document which we have recited, but it is proper to explain that the Eastern Coal Company was also a purchaser or received coal for other purchasers, that the coal was shipped to it in bulk, and that the trouble arose at the time of the great coal strike in 1902, because the Eastern Coal Company did not allot, or turn over when allotted, enough of the coal sent by the plaintiff to answer the defendant's needs. According to its view, it did not receive enough to satisfy what it regarded as demands of equal rank; but our opinion concerning the instrument makes it unnecessary to consider what were the special causes of the failure to deliver, or to apportion the blame.

It is said in the first place that the instrument was not a contract, but merely an offer—a unilateral undertaking by the plaintiff, the Sterling Coal Company, without consideration. The ground of the argument is that the defendant did not undertake to buy its consumption of coal from the plaintiff, but that the plaintiff simply promised to sell at the rates mentioned, if required. We do not so construe the paper. It purports to embody an "agreement" that the plaintiff is to "furnish" the defendant with its entire consumption of coal. This fairly imports that the defendant agrees to accept, as well as the plaintiff to deliver, and that meaning is confirmed by the absolute requirement that the plaintiff should have 1000 tons constantly in the defendant's yard, and the further provision as to the 3000 tons. The contract actually was signed about May 15, and at that time was in operation by its terms.

The only argument on the foregoing point that seems to us to have any weight is not that the defendant did not promise to buy its consumption from the plaintiff, but that it did not promise to consume, that theoretically it might stop operations, that therefore the incurring of any debt rested in its choice, and that an agreement cannot amount to a contract enforceable by law when one party retains the power to say whether he will be bound or not. Dennis v. Slyfield, 117 Fed. 474, 54 C. C. A. 520.

Whether such a purely theoretical freedom existed, and whether, if it existed, it could have been set against the practical necessity of

going on, if the plaintiff had seen fit to repudiate the agreement at the outset, we need not decide. The plaintiff did not repudiate it the defendant went on consuming coal and calling on the plaintiff to furnish it, and whatever may have been the original weakness of the paper, if any, there can be no doubt that it attached to the consumption that took place, and the demands that were made. As the coal that was furnished was furnished under this contract, nothing more needs be said to show that the defendant is entitled to recoup from the price due any damages that it may have suffered in consequence of the plaintiff's breach, if that is made out. American Cotton Oil Co. v. Kirk, 68 Fed. 791, 794, 15 C. C. A. 540; Crane v. Crane, 105 Fed. 869, 871, 45 C. C. A. 96; Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 81, 52 C. C. A. 25, 57 L. R. A. 696; Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 300, 58 C. C. A. 220, 61 L. R. A. 402; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529.

But it is said that if there was a contract, it only bound the plaintiff to deliver in Philadelphia. On that construction it is contended that the plaintiff performed its undertaking, or, if it failed, failed only through the default of the Eastern Coal Company, for which the plaintiff contends that it was not responsible. In aid of this construction the plaintiff showed, indeed the defendant in its notice of recoupment admitted, that the Eastern Coal Company contracted with the defendant, not with the plaintiff, to freight, insure, discharge, store, weigh and haul the coal to be delivered by the plaintiff to the defendant, with further details. We agree with the Circuit Judge, that these facts cannot affect the construction of the contract before us, especially as we think it perfectly clear on its face. It seems to have been signed after the contract with the Eastern Coal Company was made, and the latter seems to have been suggested and shaped for the defendant by the plaintiff, so that the plaintiff knew that it was reasonably safe in signing. But, safe or not, the plaintiff must stand to the guaranty it gave. The reason for the defendant rather than the plaintiff being the party to the agreement of the Eastern Coal Company may have been, in part, as the plaintiff suggests, that, the Eastern Coal Company being also a purchaser, the arrangement enabled the defendant to buy at carload prices and yet to take the coal in less quantities, as wanted. At all events it was a mutually satisfactory way of securing the transportation at the contract rate, a rate which, directly or indirectly, the defendant would have to pay.

The plaintiff relies on the words "f. o. b. Philadelphia." But those words are used merely to fix the price up to that point, as the contract goes on to establish the further sum to be paid to get the coal to the defendant's works. Nothing can make it plainer than it is made by the language used, that the words "Our total payments to both parties to be $3.75 per ton of 2240 lbs. delivered in our yard" are a stipulation by the defendant in its own favor, to which the plaintiff agrees, like the rest of the phrase, "said coal to be delivered at such times and

in such quantities as we may direct." In short, plaintiff guarantees delivery at the defendant's yard, at a price made up of two elements but both of them fixed at the plaintiff's risk. The rest of the document confirms what already is free from doubt. "You agree to have at least one thousand tons of coal constantly in our yard" explicitly makes the plaintiff responsible for delivery there. And again, "You to have on dock at Providence," etc. We deem further discussion unnecessary and with our decision upon this point a great part of the plaintiff's argument falls. It is immaterial whether the Eastern Coal Company was the agent of the plaintiff, as found by the Circuit Judge, or what contract the defendant had made with it. The plaintiff contracted to deliver at the defendant's yard, and as it failed to do so it must pay.

Some subordinate questions were argued, but they need little mention. It is said that making a contract with the Eastern Coal Company was a waiver by the defendant of the plaintiff's guaranty on that point. What we have said as to the time and the shaping of the contract, its effect, and the reasons for making it with the defendant rather than with the plaintiff, all are opposed to the notion that the defendant waived any of its rights. As is remarked by the Circuit Judge the parties continued to act on the assumption that the duty to deliver in Providence continued, and it is apparent from the testimony of the plaintiff's president that the plaintiff considered itself bound to deliver at the defendant's works. We find nothing in this point. We may add that the acceptance of coal under this contract at a later time, after the damage had been done, does not waive or extinguish the cause of action already accrued. See St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 164, 24 Sup. Ct. 47, 48 L. Ed. 130.

Again, the good faith of the defendant is impugned, it being especially insisted that the defendant, by buying of the Eastern Coal Company at a higher price, gave it a direct inducement to refuse, as it did, to let the defendant have all the coal it needed under its contract with the plaintiff; since it could then turn round and sell to the defendant the same coal at a large advance. An examination of the evidence satisfies us that there is no sufficient reason for reversing the decision of the Circuit Judge, or even to doubt that the defendant acted in good faith.

There is a discussion of the amount of damages, going into details. We think it unnecessary to say more upon this and other lesser matters than that after hearing lengthy oral argument we have read the evidence and the printed brief and that we see no reason why the judgment of the Circuit Court should not be affirmed.

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

KLUMPP et al. v. THOMAS.

(Circuit Court of Appeals, Third Circuit. May 14, 1908.)

No. 30.

1. CUSTOMS DUTIES — RELIQUIDATION — STATUTORY LIMITATION — PENDENCY OF PROTEST.
Under Act June 22, 1874, c. 391, § 21, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986), providing that in the absence of protest the settlement of duties shall become final one year after entry, the filing of a protest suspends the running of the statute until the protest is decided.

2. STATUTES—STATUTES OF LIMITATION—SUSPENSION OF OPERATION.
Statutes of limitation are statutes of repose, based on the likelihood that inaction for a protracted period would not occur unless a settlement had been made; and while litigation is going on, and the parties are using legal proceeding to effect a settlement, it would be at variance with the principles underlying limitations to hold that such statutes were then running.

3. CUSTOMS DUTIES—CURRENCY FLUCTUATIONS—FINALITY OF DECISION BY SECRETARY OF TREASURY AND BY BOARD OF GENERAL APPRAISERS.
It is provided in Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933), that decisions by the Board of General Appraisers shall be final and conclusive upon all parties unless appealed from, and in Tariff Act Aug. 27, 1894, c. 349, § 25, 28 Stat. 552 (U. S. Comp. St. 1901, p. 2375), that the Secretary of the Treasury may in certain cases of fluctuation in currency values order a reliquidation of the duty on the basis of the actual value of the currency. After said board, acting under said section 14, had decided that merchandise was dutiable on the basis of the metal value of the currency of the invoice, and the entry had been reliquidated accordingly by the collector, no appeal having been taken in the time prescribed by law, the Secretary of the Treasury ordered a further reliquidation at a higher value, under the authority of said section 25. *Held*, that the action of the Secretary, rather than the unappealed decision of the board, was conclusive.

4. SAME—COURTS—JURISDICTION—ACTION FOR REFUNDS.
This decision affirms the Circuit Court in holding that, under section 629, Rev. St. (U. S. Comp. St. 1901, p. 503), giving Circuit Courts jurisdiction over suits "arising under any act providing revenue from imports," an importer may maintain an action at law against a collector of customs who withholds refunds accruing under a decision by the Board of General Appraisers.

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

The case involves construction of the following statutory provisions:

"Sec. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury. * * * And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is proclaimed: * * * provided, that the Secretary of the Treasury may order the reliquidation of any entry at a different value whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."

Tariff Act Aug. 27, 1894, c. 349, § 25, 28 Stat. 552 (U. S. Comp. St. 1901, p. 2375).

"Sec. 21. * * * Whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, * * * such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent or consignee, be final and conclusive upon all parties." Act June 22, 1874, c. 391, § 21, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986).

"Sec. 14. * * * [The] board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the Circuit Court within the time and in the manner provided for in section 15 of this act." Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933).

"The Circuit Courts shall have original jurisdiction * * * of all suits at law or in equity, arising under any act providing revenue from imports." Extract from section 629, Rev. St. (U. S. Comp. St. 1901, p. 503).

Walden & Webster and Joseph M. Dohan, for plaintiffs in error.

J. Whitaker Thompson and Walter C. Douglas, Jr., for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Klumpp and others, on April 21, 1906, brought suit against Thomas, collector of the port at Philadelphia, to recover $3,148.35, being duties alleged to have been wrongfully collected and retained on merchandise imported by them from India. At the trial the court directed a verdict for the defendant. On entry of judgment, Klumpp sued out this writ.

The goods in question were imported in 1897 and 1898. At this time the metal value of the Indian rupee ranged from 19 to 22 cents, while its exchange value was about 32 cents, as stated in the consular certificates of the invoices. The collector liquidated at exchange value. The importer paid that amount and filed a protest, which on August 11, 1905, the Board of Appraisers sustained. The entries were then reliquidated by the collector at metal value basis. On November 15, 1905, no refund having been made, the Secretary of the Treasury notified the collector that satisfactory evidence had been produced to him showing that the true value of the rupee in India in United States money at the respective dates of importation of these shipments was more than 10 per cent. in excess of the valuations estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury for the quarters covering the importations. He instructed the collector to reliquidate the entries, and therein to reduce the money of the invoices to Unites States currency at the rate shown in the consular certificates. On December 15, 1905, the collector did so and adopted the original standard of liquidation.

It is contended by the importer that the collector was debarred from such action by the limitation statute (Act June 22, 1874, c. 391, § 21, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986]). Assuming, for argument's sake, that such statute applies where protests are filed, though the contrary has been held in Kendall v. Lyman, 161 Fed. 652, it is clear to us that no limitation would run while a protest was pending

and undecided. Statutes of limitation are statutes of repose, and are based on the likelihood that inaction for a protracted period would not occur unless a settlement had been made. But where litigation is going on, where the parties are using legal proceedings to effect a settlement, it would be at variance with the principles underlying limitations to hold that such statutes were then running. Hence the doctrine that the bringing of a suit suspends the running of a statute. "Fraud, or the pendency of a protest which tends to retard the proceeding, extends the time." United States v. Fox (D. C.) 53 Fed. 536. It would therefore seem that until the protest in this case was finally determined on August 11, 1905, the running of the statute was suspended. This view renders it unnecessary to discuss the question whether the act of 1874, quoted, applies to the power delegated to the Secretary of the Treasury under the act of 1894 referred to hereafter.

The reliquidation being in time, we are clear the Secretary of the Treasury had, under the facts which here existed, the right, under Act August 27, 1894, c. 349, § 25, 28 Stat. 552 (U. S. Comp. St. 1901, p. 2375) to order a reliquidation at a different value. In United States v. Whitridge, 197 U. S. 146, 25 Sup. Ct. 406, 49 L. Ed. 696, it was said:

"We are of opinion that, when the Secretary has satisfactory evidence of that state of facts, under the proviso he is authorized to order a reliquidation, in order to make the value in United States currency correspond with the actual value of the goods."

The action of the Secretary under the proviso was conclusive (Cramer v. Arthur, 102 U. S. 612, 26 L. Ed. 259; Hadden v. Merritt, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333; United States v. Klingenberg, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647), and warranted the reliquidation by the collector.

The importer had, therefore, no right to a refund, the case below was rightly decided, and its judgment is affirmed.

NOTE.—The following is the opinion of Holland, District Judge, in the District Court:

HOLLAND, District Judge. This is a motion for judgment against the United States for want of a sufficient affidavit of defense. The merchandise in question was imported in 1897 and 1898. The duties were assessed and collected upon a valuation expressed in the invoices in rupees, taken at the exchange value of the coin and not at the proclaimed value of the metal fixed by the Director of the Mint for the period in which this merchandise was imported. The importer protested, and was sustained by the Board of General Appraisers August 11, 1905, and immediately thereafter the collector liquidated the importations at the proclaimed value. On December 15th the Secretary of the Treasury, in accordance with the proviso in Act Aug. 27, 1894, c. 349, § 25, 28 Stat. 552 (U. S. Comp. St. 1901, p. 2375), directed the collector to reliquidate the duties on these importations upon a basis of the exchange value of the rupees—the money of the country from which the merchandise was imported. This reliquidation is set up as the only matter of defense; and, if lawful, it follows that the plaintiffs cannot recover.

The defendant, at the argument, however, urged in addition that the plaintiff could not maintain this suit, as no right of action against the collector exists for the adjustment of such a claim as is involved in this case, but that the statutory remedy alone can be pursued. While both reasons were urged

at the argument against the rule, the pleadings raise only the first. The Supreme Court has ruled that the Secretary has a right to order a reliquidation on the basis of exchange value of the invoice currency. U. S. v. Whitridge, 197 U. S. 135, 25 Sup. Ct. 406, 49 L. Ed. 696. It is true that he is not authorized to do so after the expiration of a year, except in case of fraud, and in cases where there has been a protest by the owner or importer. In this case there was a protest by the importer, sustained by the board, and the collector liquidated in accordance with the decision. The Secretary of the Treasury then, for the first time, was aware that in order to collect the proper amount of duties it was necessary to order a reliquidation, as the exchange value of the invoice currency was more than 10 per cent. greater than the bullion value; and within four months after the decision of the General Appraisers this final liquidation, in accordance with the order of the Secretary of the Treasury, was made as authorized by the proviso of the act of 1894. I am now of the opinion if these facts be established at the trial of the case, the plaintiff cannot recover; however this may be, the matter can best be disposed of at the trial when all the facts are established, and both questions raised on the record.

The rule for judgment for want of a sufficient affidavit of defense is discharged.

On Rehearing.

Upon a re-examination of the law and the facts in this case, we conclude (1) that the plaintiff is entitled to maintain this suit under section 629, Rev. St. (U. S. Comp. St. 1901, p. 503), as construed by the Supreme Court in Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; (2) but as the Secretary of the Treasury had a right under the act of 1894 to order the reliquidation of the entry, in accordance with the exchange value of the invoice currency, the plaintiff suffered no injury, and is not entitled to recover any money in the hands of the collector. The facts set up by the affidavit of defense were established at the trial; and for the reasons given on this last question in Klumpp v. Thomas (C. C.) T. D. 28.453, when the case was before us on the sufficiency of the affidavit, judgment is entered for the defendant.

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## McANDREWS v. CHICAGO, L. S. & E. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,439.

1. ACTION—"CAUSE OF ACTION"—ELEMENTS.
   The phrase "cause of action" comprises every fact necessary to the right to the relief prayed for.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 1.
   For other definitions, see Words and Phrases, vol. 2, pp. 1015–1019; vol. 8, p. 7598.]

2. SAME—"SUBJECT-MATTER OF THE ACTION."
   The "subject-matter of the action," in personal injury suits, is the circumstances and the facts out of which the cause of action arises.

3. SAME—"ACTION" DEFINED.
   An "action" is the means that the law has provided to put a cause of action into effect.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 85.
   For other definitions, see Words and Phrases, vol. 1, pp. 128–140.]

4. JUDGMENT—RES JUDICATA—QUESTION DETERMINED.
   A decision of the highest state court res judicata between the parties that plaintiff could not, by amendment after the expiration of limitations, file additional counts curing fatal omissions in the original declaration, was not conclusive against plaintiff's right to commence a new suit on the same cause of action under Starr & C. Ann. St. Ill. 1896, c. 83, par. 25,

giving the right to commence a new suit within a year after judgment, reversed or given against plaintiff, in a case in which limitations have run pendente lite.

5. LIMITATIONS OF ACTION—PLEADINGS—AMENDMENT—NEW ACTION.
Plaintiff sued for injuries in a state court for defendant's alleged negligence in moving a certain car which plaintiff was unloading. After limitations had expired, plaintiff filed additional counts, disclosing the same cause of action, but adding certain necessary allegations concerning the relationship of the parties to each other and the duties arising therefrom. It was held on appeal that these amended counts constituted a new cause of action, barred by limitations, and that, as the original declaration was insufficient because of such omissions, plaintiff's judgment could not be sustained. *Held*, that plaintiff was thereafter entitled to commence a new suit, based on the same facts, within a year after the final determination of the former one, under Starr & C. Ann. St. Ill. 1896, c. 83, par. 25, declaring that if judgment for plaintiff shall be reversed, and the time limited for bringing the action shall have expired pending the suit, plaintiff may commence a new action within a year after such judgment reversed or given against him.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 565.]

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

James C. McShane, for plaintiff in error.
Kemper K. Knapp, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. This writ of error is prosecuted to reverse a judgment of the court below sustaining a demurrer to plaintiff in error's replication to a plea of the statute of limitations, to which order sustaining the demurrer exception was duly taken—the plaintiff electing to stand by his replication.

The action was to recover for personal injuries received by the plaintiff on the 16th of July, 1901, while upon the tracks of defendant in error, in performance of his duty to the Illinois Steel Company of which he was an employé—the car on which he was then engaged in unloading having been placed on the tracks by defendant in error for the purpose of such unloading—the declaration averring that such car was struck, while plaintiff was engaged thereon, by a train of the defendant in error negligently backed upon the same, the defendant in error knowing, or by the exercise of ordinary care having reason to know, that the plaintiff in error was upon such car, and exposed to such danger. The action was commenced on the 9th day of November, 1906.

The statute of limitations having been pleaded, replication was filed, setting forth that on the 26th of November, 1901, and within two years after the date of the injuries, suit was commenced in the Superior Court of Cook County to recover damages for such injuries; that a declaration was filed in said suit—the declaration being in the terms of the declaration filed here, except its omission of the averment that the plaintiff in error, at the time of the accident, was in discharge of his duty as an employé of the Steel Company, and of the averment also, that the car had been placed by the defendant in error to be un-

loaded by the employés of the Steel Company, and of the further averment that the defendant in error knew, or by the exercise of ordinary care ought to have known, that the plaintiff in error was in a place of danger; that to such declaration a plea of not guilty was entered; that on the 17th of November, 1903, (more than two years after the injuries) by leave of court, additional counts were filed—the additional counts in effect correcting the omissions of the original declaration as indicated; that to said additional counts the plea of the statute of limitations was filed, it being alleged therein that the supposed cause of action was "another and different cause of action" from the one set forth in the original declaration; that a demurrer was filed to said pleas of the statute of limitations, and sustained; that upon trial, the jury returned a verdict in favor of the plaintiff in error for the sum of twelve thousand dollars; that motion for new trial and motion in arrest of judgment were overruled, and judgment entered on the verdict; that in the Appellate Court, to which the case was appealed, it was held that the original declaration in the cause did not state a cause of action, and was wholly insufficient to support a judgment for the plaintiff in error upon the verdict returned; and that the additional counts were filed more than two years after the injuries, and state another and different cause of action, barred by the statute of limitations; whereupon the judgment was reversed; and that such judgment of the Appellate Court, reversing the judgment of the Superior Court was, on the 14th of June, 1906, affirmed by the Supreme Court.

The statutes of Illinois provide that:

"In any of the actions specified in any of the sections of said Act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after"—an action for personal injuries being within the act therein named. Starr & C. Ann. St. 1896, c. 83, § 25.

If the section of the Illinois statutes above quoted applies, under all the circumstances stated, to the action now under review, the Circuit Court erred in sustaining the demurrer to the plaintiff in error's replication. If, on the other hand, the section quoted does not apply, the demurrer was rightly sustained. The whole question thus raised is one of interpretation.

The phrase "cause of action" comprises every fact necessary to the right to the relief prayed for. The "subject matter of the action," in personal injury suits, are the circumstances and facts out of which the cause of action arises. And "action" is the means that the law has provided to put the cause of action into effect.

Unquestionably the Supreme Court of Illinois has held that where, in a personal injury suit, the declaration fails to state facts constituting a cause of action, an attempted amendment to such declaration, supplying the facts that do make out a cause of action, but filed after the lapse of the statute of limitations, is a new and different cause of

action. Mackey v. Northern Milling Co., 210 Ill. 115, 71 N. E. 448; Eylenfeldt v. L. S. Co., 165 Ill. 185, 46 N. E. 266. From which it follows that in the state court between these parties, respecting this cause of action, it has been adjudicated that the plaintiff in error may not, by amendment after the lapse of two years, file counts that cure the omissions of the original declaration—this adjudication being res adjudicata as between the parties thereto, not upon any issue of fact raised, for no issue of fact was raised, but upon what, under the law of Illinois, can be done by amendment or additional counts, before trial.

Giving to that adjudication then, its full force, as constituting the law of this case between these parties, relating to the rights of amendment or the filing of additional counts, the question recurs, what is the plaintiff in error's right, if any, under section 25 quoted; for there has been no adjudication between these parties as to the application of that section to the right of plaintiff in error to bring a suit within the year named.

Were there any interpretation of that section by the Supreme Court of Illinois, governing the case now before us, we would probably feel ourselves obliged to follow it. But there is no such interpretation. True, as in Gibbs v. Crane Elevator Co., 180 Ill. 191, 54 N. E. 200, where the former suit had been determined by an involuntary nonsuit for failure to file a declaration within the time required by the statute, the court held that a new suit would not lie within section 25; but for this reason, that no declaration having been filed, the identity of the cause of action intended to be enforced by the suit could only be determined by parole testimony. And the other cases cited are determined by substantially the same consideration.

The action brought in the court below grows out of the fact that the plaintiff in error, an employé of the Illinois Steel Company, in discharge of his duty as such employé, while on a car being unloaded on the tracks of the defendant in error, and placed there by defendant in error to be so unloaded by such employé, was struck by a train of cars operated by the defendant in error at a time when defendant in error knew, or ought to have known, of the presence of the plaintiff in error, and under circumstances alleged to show negligence sued upon, and the facts, thus fully stated, constitute the cause of action. An inspection of the original declaration in the state court, unaided by parol evidence, shows beyond question, that that action grew out of the same facts so far as they were stated—disclosing precisely the same cause of action except for the omission of certain circumstances bearing upon the relationship of the parties to each other, and the duties arising thereon.

To supply the omissions does not, in our judgment, make the one "action" different from the other within the purpose of section 25. "A broad view of this section," to quote the opinion of the court in Wetmore v. Crouch, 188 Mo. 647, 87 S. W. 954—"a view that takes in as well, the remedy to be advanced as the mischief to be retarded, and that does not deal in 'mint and anise and cummin,' but goes to the weightier matter of the law—shows that it was in the legislative mind that a litigant should have a day in court—a trial on the merits of his cause." The merit of his cause is not what the pleader either

puts or inadvertently omits to put into the declaration—the merits of his cause are the existent facts that make the one liable to the other when properly stated in the declaration. And those facts, and the cause of action that was intended to be predicated upon them being the same in the action that was reversed, and in the action that is now brought, a case is made out, it seems to us, within the intent of the saving section. Lamson v. Hutchings, 118 Fed. 321, 55 C. C. A. 248. Indeed, insufficiency of the declaration is the most common cause for arresting judgments. And if it was the intention of the legislature to exclude such cause, and make the statute relate only to the infrequent and incidental matters which can be urged in arrest of judgment, it is fair to presume that the legislature would have used expressions calculated to convey that meaning.

The judgment of the Circuit Court will be reversed and the case remanded with instructions to overrule the demurrer to the replication; and to proceed further in accordance with this opinion.

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## EASTERN DREDGING CO. v. WINNISIMMET CO. et al.

(Circuit Court of Appeals, First Circuit. June 19, 1908.)

No. 759.

1. COLLISION—STEAM VESSEL AND SCOW DRIFTING AT NIGHT—NEGLIGENT MOORING.

The going adrift of a mud scow, without lights, lying at a wharf in the night with no one on board, in calm weather, was prima facie due to her being negligently moored, and is sufficient to charge her with fault for a collision with a ferryboat while so adrift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 85½.]

2. SAME—FERRYBOAT—FAILURE TO KEEP PROPER LOOKOUT.

A ferryboat, navigating Boston Harbor on a clear night, but when the water was dark, with the only lookout in the pilot house, was chargeable with fault, *held* to have contributed to a collision with a mud scow, low in the water and adrift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 211.]

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

See 138 Fed. 942, 159 Fed. 541.

Edward E. Blodgett (Blodgett, Jones & Burnham, on the brief), for appellant.

John O. Teele (Arthur P. Teele, on the brief), for appellee Winnisimmet Company.

William M. Blatt, for appellee Vanderbilt.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. In this case a collision occurred in the inner harbor of Boston between a mud scow, about 110 feet long, and the ferryboat City of Boston, which was plying regularly between Chelsea and Boston. The collision was of such violence as to sink the ferryboat. It occurred about 10 o'clock in the evening. The weather was clear and starlight, and yet it was dark on the water. There was said to be just wind enough to ruffle the surface of the

harbor, and this prevented the reflection of the lights on the shores, and, of course, somewhat darkened it. The scow was adrift, without any one aboard of her, which, of course, threw on her the burden of showing why she was adrift, and made out a prima facie case of negligence. It appears she had been left with her lines run out to the wharf, with no one aboard. There were no lights; but, as she was moored to the wharf, this did not charge her with fault. Some one in the neighborhood was employed to watch her, but was ignorant of her going adrift until about 9 o'clock in the evening. We have no occasion to trouble ourselves with reference to the negligence of the watch, either in not properly observing the scow or in not pursuing her, because, as the night was not a boisterous night, and, as we have said, with only sufficient wind to ruffle the water, the scow would not have been adrift if she had been properly moored. This was sufficient to charge her owners with negligence; and the District Court found her guilty, as to which the learned judge of that court was undoubtedly correct.

On the other hand, the District Court relieved the ferryboat from any liability. The facts as to her were that she had no lookout forward, although, of course, the main deck of an ordinary ferryboat affords an excellent opportunity for a lookout well forward and so near to the water that his eye can easily follow its surface. The only lookout was in the pilothouse, about 50 feet aft of the bow and some 20 feet above the water. The scow was not seen until the collision occurred, or at least not until so short a time before it occurred that it was impossible to avoid it. It was the opinion of the learned judge of the District Court that the lack of lookout forward might have been a fault, but he did not regard it as an efficient contributing fault. On the other hand, we think that this lack of a proper lookout was a very grave fault, and that the fault did contribute to the collision. The Supreme Court has been constantly rigid in holding vessels to maintaining lookouts as far forward and as near the water as possible. Especially where the water is dark, with otherwise a fairly clear night, it is important that the lookout should be as near it as possible, in order that his eye may follow the surface, and thus be in position to detect anything low down which may be approaching. While it may be true that there was no occasion to anticipate that a mud scow would be adrift in the harbor, without lights and without being manned, at that time of the night, various very small crafts, including even rowboats, were to be guarded against as a matter of reasonable and ordinary precaution. Whatever may be the custom with reference to ordinary ferryboats plying across a harbor like that of Boston, the law is even more strict with them than with ordinary seagoing vessels. Marsden on Collisions (5th Ed.) p. 383, refers to the fact that, while public convenience requires ferryboats to be running when other vessels may not be permitted to run, "more than ordinary care, vigilance, and caution are required" on their part; and again, at page 468, the learned author observes:

"The duty of ferryboats, and of vessels crossing the track of ferryboats, to keep a specially good lookout, has been insisted upon in many cases."

Beginning as early as The Genesee Chief, 12 How. 443, 463, 13 L. Ed. 1058, which was followed by a continuous line of decisions to the same effect, the Supreme Court observed as follows:

"Whenever a collision happens with a sailing vessel, and it appears that there was no other lookout on board the steamboat but the helmsman, or that such lookout was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as prima facie evidence that it was occasioned by her fault."

This, of course, means the fault of the steamer. Applying this rule to this case, it does not seem to be necessary to go further; but, again, in The Ariadne, 13 Wall. 475, 478, 20 L. Ed. 542, the opinion of the court, referring to the waters near the city of New York, spoke of them as being at all times crowded with shipping, and added:

"The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend."

Again, referring to the attitude of the lookout, the opinion says, on page 479 of 13 Wall. (20 L. Ed. 542):

"Every doubt as to the performance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated, until she vindicates herself by testimony conclusive to the contrary."

These expressions of the Supreme Court, which under the circumstances render the ferryboat prima facie guilty of contributory fault in this case, are in harmony with the views which all of us entertain, namely, that the lack of a lookout on the main deck was a grave fault, and that, with such a lookout, the scow would probably have been seen in season to have avoided her, so that it was a contributory fault in a positive and efficient manner. Therefore we are of the opinion that the damages and costs in the District Court should be divided.

The decree of the District Court is reversed, and the case is remanded to that court for proceedings in accordance with our opinion passed down the 19th day of June, 1908, and the appellant recovers its costs of appeal.

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## DAVENPORT et al. v. WINNISIMMET CO.

(Circuit Court of Appeals, First Circuit. June 19, 1908. Rehearing Denied July 20, 1908.)

No. 762.

COURTS—CONFLICTING JURISDICTION OF STATE COURTS AND COURTS OF ADMIRALTY—PROCEEDINGS FOR LIMITATION OF LIABILITY.

An action at law was brought in a state court by a passenger against the owner of a vessel to recover damages resulting from a collision. After trial, a verdict in favor of the plaintiff, and more than two years after the collision, the defendant instituted proceedings for limitation of liability in a court of admiralty. *Held*, that the admiralty court had power, by analogy with the powers exercised by courts of equity and bankruptcy, to permit the plaintiff in the state court to prosecute her action to judgment for the purpose of completing the liquidation of her claim for future

consideration in the limited liability proceedings, and that under the circumstances here such leave should be granted.

[Ed. Note.—Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

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

See 159 Fed. 257, 549.

William A. Davenport, for appellants.

John O. Teele (Arthur P. Teele, on the brief), for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This case refers to the same collision between a scow and a ferryboat which was under consideration in Eastern Dredging Company v. Winnisimmet Company, 162 Fed. 860. Mary L. Davenport was a passenger on the ferryboat, and claimed to have been injured by the collision. Inasmuch as we have held both vessels at fault, it appears, so far as we are concerned, that she was entitled to libel either the ferryboat or pursue the owners of the scow. She brought suit against the Winnisimmet Company, the owner of the ferryboat, in the superior court of the state of Massachusetts, alleging that the ferryboat was in fault. The action was brought on August 26, 1904, and a verdict for $2,600 was rendered on December 4, 1905. The defendant thereupon moved for a new trial, which motion was denied. Subsequently, on January 8, 1906, the defendant, the Winnisimmet Company, filed exceptions, as to which no action seems to have been taken. On April 25, 1906, it filed a supplemental answer, setting out proceedings for a limitation of liability in the district court, and praying that no further steps be taken in the superior court; and since that time the litigation in the superior court seems to have been suspended.

The owners of each vessel involved in the collision ultimately proceeded in the United States District Court for the District of Massachusetts for a limitation of liability; but the petition for that purpose by the Winnisimmet Company was not filed until April 2, 1906, which, as we have seen, was after the verdict in the state court. In the usual course, following the petition for limitation of liability, an order was entered in the District Court on April 16, 1906, restraining all persons from prosecuting suits against the Winnisimmet Company and against the ferryboat, and especially ordering that Mary L. Davenport be enjoined, which order was served on her on April 18, 1906. On July 11, 1906, she applied to the District Court, by a petition which sets out the substance of the facts which we have stated, and prayed that the injunction be modified to such an extent as to permit her to prosecute her action in the state court to final judgment, in order that the damages sustained by her might be liquidated without further trial. This application was refused by a decree entered on October 6, 1907, whereupon Mary L. Davenport seasonably appealed to us.

The assignment of errors complains that she should not be enjoined from prosecuting her action and taking out execution thereon, in the latter respect departing from her petition, which asks only that she might prosecute her action to judgment, so that the damages

might be liquidated. There is, however, sufficient in the assignment of errors to render this departure harmless. The husband of Mary L. Davenport joined in the appeal, and his name appears throughout the proceedings in such a manner as to show that he had brought a suit for expenses, etc., arising out of the injury to his wife; but we find here no record of the proceedings in that suit, so that we disregard him.

The opinion of the learned judge of the District Court does not apparently deny his power to permit Mrs. Davenport to complete in the superior court the liquidation of her claim; but it holds that, as the ferryboat was not at fault, Mrs. Davenport is not entitled to any relief whatever. So far as it denies her any relief, the conclusion we have reached as to the fault of the ferryboat requires that the decree should be reversed, and the District Court should be directed to allow the claim of Mrs. Davenport to share in accordance with the provisions of the statute for limited liability. Therefore the only question is whether the amount of damages to which she is entitled should be liquidated anew by the District Court, or whether that court may permit the proceedings in the superior court to go to judgment.

It is to borne in mind that this is not an ordinary appeal from an injunction, provided for by the act establishing the Circuit Court of Appeals and acts amendatory thereof. It is only a step in the proceedings of determining what claims shall be allowed to share in the proceeds; limited liability having been decreed. There is no suggestion that the damages awarded in the superior court are excessive, and therefore there is no fundamental reason why the District Court might not, and should not, permit the suit in the superior court to go to judgment. To do so would be strictly in analogy with all proceedings akin hereto. It is an admitted rule that, while courts of admiralty have no general equity jurisdiction, they proceed ordinarily on equitable principles. United States v. Cornell Steamboat Company, 202 U. S. 184, 194, 26 Sup. Ct. 648, 50 L. Ed. 987. It would be grossly inequitable, in the absence of anything showing that injustice would be done by allowing the completion of the proceedings in the superior court, to deprive Mrs. Davenport of a verdict obtained under the circumstances of this case, in consequence of a petition for limited liability filed after the verdict was obtained, and more than two years after the occurrence of the collision here involved, with the consequent loss of the labor and expense involved in the suit. Under such circumstances it cannot be questioned that, if a receivership was involved here, instead of a matter of limited liability, the equity court constituting the receivership would permit proceedings on the common-law side to run to their legitimate conclusion, nor that a court in bankruptcy would do the same. Indeed, paragraph "b" of section 3 of the bankruptcy act of 1898 contemplates all this, and the same may be said more positively as to paragraph "b" of section 11 of the same statute. Act July 1, 1898, c. 541, 30 Stat. 546, 549 (U. S. Comp. St. 1901, pp. 3422, 3426). It is the constant practice of courts in equity to permit liquidation of claims in suits already pending when the proceedings in equity were commenced, or, after the proceedings in equity are commenced, to direct new suits on the common-law side

for the same purpose. It is true that in all such cases the chancellor, or the court sitting in bankruptcy, in accordance with the broad rules of equitable practice, may regard the result of such litigation as purely advisory, if circumstances should seem to require that an investigation in reference thereto should be made. In the present case, as we have said, no circumstances of that character appear, and we do not find it necessary that the District Court should undertake to determine whether the entire amount of damages that may be awarded in the superior court should be allowed as a claim against the fund under its control.

It is true that section 4285 of the Revised Statutes (U. S. Comp. St. 1901, p. 2944), provides that, from and after the transfer of a vessel to a trustee according to the statutes of limited liability, "all claims and proceedings against the owner shall cease." It is also true that the closing sentence of admiralty rule 54 relating to this topic directs an order restraining the further prosecution of all suits against the owner. Literally interpreted, and regardless of the equitable practice to which we have referred, this phraseology might require that the proceedings in the superior court should be absolutely enjoined; and inasmuch as the statute has always been held to be remedial in the broadest sense, intended to protect the owners of vessels from being harassed by numerous suits in various jurisdictions, circumstances might arise where the letter of the statute and of the rule should be strictly enforced. Yet in applying any statute the common practice to which we have referred must be recognized, and in accordance with the usual rules of interpretation it must be accepted as qualifying it to the extent we have stated. This was done by the Supreme Court in connection with section 711 of the Revised Statutes (U. S. Comp. St. 1901, p. 577), giving the courts of the United States exclusive jurisdiction "of all matters and proceedings in bankruptcy," in Grant v. Buckner, 172 U. S. 232, 238, 19 Sup. Ct. 163, 43 L. Ed. 430. There it was held that even these unqualified terms did not prevent a court in bankruptcy from confirming the action of an assignee in taking up litigation in the state court, though the result was adverse. Such statutory phraseology is always subject to those well-settled equitable rules which are of general application. Therefore, notwithstanding the expressions which we have cited, and proceeding on the general rules of equity practice, we see no difficulty in the way of the District Court permitting the suit in the superior court to go to judgment for the purpose of establishing the amount to be proved in accordance with the statutes relating to limited liability.

The statutes of limited liability and the Supreme Court rules in reference thereto have received full discussion in The Benefactor, 103 U. S. 239, 26 L. Ed. 466, and in Providence & New York Steamship Company v. Hill Company, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038. The latter case was pressed by many important points, and the court had no occasion to consider the precise circumstances before us. A common-law action against the owners of the vessel charged at fault was brought in the Supreme Judicial Court of Massachusetts. Subsequently proceedings for limitation of liability were

commenced, and those proceedings were pleaded in the common-law suit. Nevertheless, the Supreme Judicial Court disregarded them. No application was made to the District Court for leave to proceed in the common-law suit for the purpose only of liquidating the damages, nor was the consent of the District Court to the proceeding in the common-law suit sought in any form. Fundamental questions of the effect of the statutes were involved and passed on, so that, so far as we are here concerned, the court only reiterated in a general way the special phraseology found in them and in admiralty rule 54. On the other hand, the earlier case (The Benefactor) looks more largely at all questions which may arise under the statute, and at all its various phases. At page 243 of 103 U. S. (26 L. Ed. 466) the opinion declares as follows:

"But this rule of procedure was not intended to abrogate, and, indeed, could not abrogate, the rule of law that res judicata, or a matter once regularly decided between parties in a competent tribunal, cannot be again opened by them, except in an appellate proceeding. Of course, therefore, the rule of procedure allowing a contestation of all liability is subordinate to this rule of law, and cannot apply where the question of general liability has already been adjudicated."

Again, at the foot of the same page, referring to original libels claiming damages against the vessel alleged in fault, the opinion observes:

"The petition for relief in the present case was justly liable to exception, so far as it sought to retry the question of fault and general liability as between the petitioners and the parties in the libel suits. That question is determined by the decree made upon the libels which had been filed, which decree could only be reviewed on appeal."

Then the opinion states, of course, what was clear, that the petition for limitation was free from objection, and should be sustained, notwithstanding the question of liability and the amounts of damages had already been determined on the original libels, so that there might be a pro rata distribution of the entire fund between all claimants. Of course, the fact that the proceedings there were by admiralty libels, while here they are by suits at common law, is not essential, because either is as subject to restraint by the limitation proceedings as the other.

The observations in Butler v. Boston Steamship Company, 130 U. S. 529, 532, 533, 552, 9 Sup. Ct. 612, 32 L. Ed. 1017, were only dicta, as there the limited liability proceedings were first commenced; but they are also ineffectual, as they observe only that, if it had been otherwise, the collateral proceedings would have been "suspended," without indicating any ultimate results inconsistent with what is observed herein.

We may add to these observations in The Benefactor that they may be subject to the qualifications which we have spoken of with reference to the ordinary power of the District Court to review collateral proceedings as the chancellor might do, and also, further, that the doctrine of laches, while it has some application under the circumstances before us, must nevertheless in some respects have especial limitations, growing out of the fact that, not only the interests of the

owner of the vessel who seeks the benefit of limited liability after permitting proceedings in a common-law court are involved, but also the interests of other claimants who may not thus be charged with any delay whatever with regard to any stage of the proceedings. It is sufficient for us to say that under the present circumstances Mary L. Davenport should have the relief for which she prayed, to the extent of permitting her to bring the proceedings in the superior court to the ordinary conclusion, subject to the directions subsequently to be given by the District Court with reference to her sharing with other claimants as to any judgment which she may obtain.

A question was made in the District Court with reference to an alleged supervening negligence on the part of the ferryboat, by which Mrs. Davenport sought to hold it and its owner responsible, even if there had been no contributing fault which aided in bringing about the collision. The Winnisimmet Company on this appeal rests entirely on the finding of the District Court before us in Eastern Dredging Company v. Winnisimmet Company, 162 Fed. 860, to the effect that the ferryboat was not guilty of fault so far as the collision itself was concerned, except that it argued this question of an alleged supervening fault. In other words, it discussed only the question of liability, and as to that it rested on the decision of the District Court, which we have reversed. Consequently we have been compelled to meet the other questions covered by this opinion, which were not presented to us by it.

The opinion of the Supreme Court in La Bourgogne, 28 Sup. Ct. 664, 52 L. Ed. ——, passed down on May 18, 1908, reminds us that it may be proper to refer to the topic of the time within which this appeal was taken, as in La Bourgogne there were two decrees, one which was entered immediately on the filing of the petition for limitation of liability, which enjoined all suits, including that of Mrs. Davenport, and which was entered on April 16, 1906, and the other the ultimate decree, to which we have referred, entered on October 26, 1907. The opinion in La Bourgogne renders it clear that the decree of October 26, 1907, may properly be regarded as the final decree, and the appeal was taken from this. In fact, in accordance with the common practice in cases of limited liability, the early order of April 16, 1906, was merely ex parte and entirely interlocutory, as is made clear in the case of the litigation between the owners of the steamer H. F. Dimock and the steam yacht Alva. Morrison, Petitioner, 147 U. S. 14, 15, 33, 34, 13 Sup. Ct. 246, 37 L. Ed. 60.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to proceed according to our opinion passed down the 19th day of June, 1908, and Mary L. Davenport recovers her costs of appeal.

## RUSSEL v. HUNTINGTON NAT. BANK.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1908.)

No. 748.

1. LIMITATION OF ACTIONS—FRAUD—TRUSTS—DISCOVERY OF FRAUD.
Where intestate was trustee of a secret trust, so far as complainant was concerned, limitations did not begin to run against his administratrix to recover for alleged breaches of trust until the right of action accrued on discovery of the fraud.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 486.]

2. TRUSTS—ACTION TO ENFORCE—LACHES.
Where complainant had no knowledge of an assignment for its benefit, under which intestate, its president, held and administered certain property as trustee, until the paper was found in his safety deposit box after his death, when it was first discovered that intestate had committed various breaches of trust as against complainant, after which suit was promptly brought against intestate's administratrix, complainant's right to recover was not barred by laches.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 571.]

3. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.
Errors not assigned will not be considered on appeal.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2968–2982.]

Appeal from the Circuit Court of the United States for the Southern District of West Virginia, at Huntington.

James P. Bush and Z. T. Vinson (Vinson & Thompson, J. W. Caperton, Frank E. Jennings, and Stoll & Bush, on the briefs), for appellant.

F. B. Enslow (Simms & Enslow, on the brief), for appellee.

Before PRITCHARD, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PURNELL, District Judge. Suit was instituted in 1905 in the circuit court of Cabell county, W. Va., to compel Minerva P. Russel, administratrix of John Hooe Russel, to account for the proceeds of the property of the Huntington Distilling Company, which is alleged to have come into the hands of said John Hooe Russel under an assignment made by said distilling company to the Huntington National Bank to secure $9,000, or about that sum, due from assignor to said bank, and, in case these proceeds were insufficient to pay said debt in full, then to require certain stockholders, of which said Russel was one, in said distilling company, to pay the balance of said debt out of alleged unpaid stock subscriptions. The administratrix aforesaid, a resident of Kentucky, though appointed in West Virginia, removed the cause to the Circuit Court of the United States. When a motion to remand was overruled, the cause was referred to a master, and upon the report of the master a final decree entered. From this final decree defendant, plaintiff in error here, appealed, and assigned the following as error:

"(1) Because the evidence showed that the plaintiff was guilty of laches, and for that reason was not entitled to the relief asked for in its bill and given

it by the Circuit Court. (2) Because the evidence showed that the plaintiff's claim was barred by the statute of limitation. (3) Because the court erred in holding that the evidence of the officers and stockholders of the plaintiff was admissible as against the representatives of the estate of the defendant's decedent, John Hooe Russel, pertaining to personal communications and transactions had with the said Russel in his lifetime. (4) The Circuit Court erred in holding that the relationship which the said Russel bore to the property turned over to the plaintiff bank as security for the payment of the debt held by it against the distilling company created such a trust relationship that the plea of limitations was not available as a defense against plaintiff's demand. (5) The court erred in holding that the defendant, Minerva Phelps Russel, administratrix, etc., could not invoke the doctrine of laches to defeat the plaintiff's claim. (6) And for other errors apparent upon the face of the record."

The first and second assignments, the two relied on in the argument here, are kindred in their nature and import—one in equity and the other statutory. Some doubt the justice and propriety of pleading the statute of limitation; but the Legislatures of many states have passed acts requiring executors, administrators, and others acting in a fiduciary capacity to do so, thus showing a wide difference of opinion on the subject. At all events it is a statutory plea, and proper to be made in a case where it arises and can be maintained. Appellant's intestate, Russel, was president of the bank, and both managing officer and assignee of the distilling company, acting in two fiduciary capacities, not necessarily conflicting, but capable of being made antagonistic. Says the Supreme Court in Prevost v. Gratz, 6 Wheat. 481, 5 L. Ed. 311:

"Length of time is no bar to a trust clearly established, and in a case where fraud is imputed and proven length of time ought not, upon the principle of eternal justice, to be admitted to repel relief. On the contrary, it would seem that length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample relief."

The syllabus of this case is:

"To establish a trust the onus probandi is on the party who alleges it. The trust seems to have been fully proven. In general, length of time is no bar to a trust clearly established to have once existed, and, where fraud is imputed and proved, length of time ought not to exclude relief."

The situation was unfortunate. Russel was president of the bank, and possibly exercised a controlling influence in the board of directors, who had implicit confidence in his integrity. At least no investigation of his acts as trustee seems to have been made during his life. After his death a condition was disclosed which pointed strongly to the fact that he had not faithfully discharged his trust, had made applications of funds belonging thereto which should not have been made, and now his administratrix sets up laches and the statute of limitations as a defense to a suit for the enforcement of the trust, to recover funds which rightfully did and should belong to the cestui que trust. Such defense is not tenable, certainly not in a court of equity, which is a court of conscience. The trust was kept a secret by Russel. No man ever may or will be permitted to take advantage of his own or his intestate's wrong in a court of equity. Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214, cited by appellee's counsel, discusses the question of laches as follows:

"Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of common law, but is ill adapted to the flexible remedies of a court of equity. The statutes frequently work great practical injustice; the doctrine of laches, never. True, lapse of time is one of the chief ingredients; but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed, complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay."

In this case the facts were well known to complainant and the delay in bringing suit was eight years. In the case at bar the breach of trust, on account of the peculiar circumstances, was not known until after the death of the trustee. On account of the circumstances, and the fiduciary relation which he occupied in both corporations, no one supposed he was acting in any way but bona fide to each, and nothing was known to the contrary until after his death, January 9, 1903, little over three years before suit was entered. The statute of limitations began from this discovery, when the right of action accrued, and under no circumstances can be a valid defense in a suit in equity. The defense must be equitable, not legal. Quoting from the opinion of the acting circuit judge, which learned opinion we adopt:

"The defense of laches must necessarily be liberally upheld and applied by courts of equity, because its basic principle is to prevent oppression and injustice, so easy of perpetration where loss of written evidence, removal of witnesses, death of parties, and the numerous other like causes incident to life, may wholly change conditions and render it impossible to know the right and truth of the matter. He who unreasonably delays his action until these conditions arise must lose his cause. In determining whether such delay is reasonable, the statute of limitation does not control; for a less period than the one provided by the statutory bar may, under given circumstances, be sufficient for this defense. While these principles are true, equity will allow no man, by his own fraudulent acts, by concealing a paper contract or evidence necessary upon which to base an action against himself, to take advantage of delay occasioned by such conduct on his part. He who appeals to equity must come with pure heart and clean hands. It is true to-day, as it was when Lord Loughborough decided Beaumont v. Boultbee, 5 Ves. 485, that no possible case can rightly stand under the beneficient administration of equity wherein 'a confidential agent and steward can impute neglect to his employer; for it is his duty to render an account, and a fair account, to his principal, and distinctly apprise him of the whole right he has. It is not for him to say that a person has been guilty of negligence whose negligence it was his duty to guard against with regard to his transactions with all persons, and particularly with himself.' "

Appellee, it seems, did not even know of the assignment to it of the deed or other paper writing under which Russel, its president, held and administered the property as trustee, until it was found in his safety deposit box after his death. He was the trustee of a secret trust as far as they were concerned. Under such circumstances, it would be inequitable to apply the equitable doctrine of laches, and

the statute of limitation did not begin to run until the right of action accrued on the discovery, much less time than that prescribed in the statute as a bar.

What has been said above is equally applicable to the third, fourth, and fifth assignments of error.

Errors not assigned according to the rule will be disregarded. Under rule No. 11 (150 Fed. xxvii, 79 C. C. A. xxvii), therefore, the sixth assignment is not considered. We have examined the record, and find no error in the decision of the Circuit Court; hence the same is in all respects affirmed.

Affirmed.

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## ALEXANDER MURPHY & CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. May 14, 1908.)

No. 35 (1,951).

CUSTOMS DUTIES—CLASSIFICATION—GRANITE "DRESSED"—MONUMENTS IN SECTIONS.

Tariff Act July 24, 1897, c. 11, § 1, Schedule B, pars. 117, 118, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636), relating to granite, etc., "and other building or monumental stone," "hewn, dressed or polished," and "unmanufactured or undressed," was intended to cover the general subject of building and monumental stone; and granite monuments imported in sections dressed, ornamented, and polished abroad and ready to be set up and leaded or cemented together are dutiable under said paragraph 118 as "granite * * * dressed."

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

Howard T. Walden (Joseph M. Dohan and Walden & Webster, on the brief), for importers.

Jasper Yeates Brinton, Asst. U. S. Atty. (J. Whitaker Thompson, U. S. Atty., on the brief), for the United States.

Before MOODY, Circuit Justice, and DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This case involves the proper classification of importations of granite. In pursuance of designs and specifications for monuments, these pieces of granite, consisting of die, base, and cap, were dressed, ornamented, and polished abroad to size, scale, and design, and were imported in that shape. After importation, the monuments are set up; the several pieces being cemented or leaded together. The collector classed the imports under paragraph 118 of the tariff act (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]), while the importer, by appeal to this court, seeks to classify under section 6, viz.:

"That there shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem."

Or under paragraph 97, which provides:

"Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem."

We are of opinion no error was made by the collector. Paragraph 118, under which the collector acted, viz., "freestone, granite, sandstone, limestone, and other building or monumental stone, except marble and onyx, not specially provided for in this act, hewn, dressed or polished, fifty per centum ad valorem," and paragraph 117, viz., "freestone, granite, sandstone, limestone, and other building or monumental stone, except marble and onyx, unmanufactured or undressed, not specially provided for in this act, twelve cents per cubic foot," were evidently meant to cover the general subject of building and monumental stone. In substance, paragraph 117 provided for importation thereof in crude state, described them as "unmanufactured or undressed," and levies a tax of 12 cents per cubic foot; while paragraph 118 provides that when such material was "hewn, dressed or polished" —that is, when the value had been increased from the crude to a "hewn, dressed or polished" state—they were taxed at 50 per centum ad valorem. Now it is clear that these articles which were finished parts of a monument, each dressed to scale and ornamented and polished to design, were aptly described as "granite * * * dressed or polished." They are of the general class of articles, viz., monumental stone, which paragraph 118 covered, and are therein more specifically designated as "granite or monumental stone dressed or polished," than in the broader generic language of section 6 as "articles manufactured in whole or in part." This conclusion is in accord with decisions in the Second circuit (Baldwin & Co. v. United States [C. C.] 144 Fed. 702, affirmed in 149 Fed. 1022, 79 C. C. A. 531), and results in that desirable uniformity of holding which avoids confusion in tariff construction at different points of entry.

The judgment of the court below is affirmed.

NOTE.—The following is the opinion of Holland, District Judge, in the court below:

HOLLAND, District Judge. This is an appeal by the importers from a decision of the Board of General Appraisers, affirming a decision by the collector of customs, and classifying certain parts of granite monuments, imported in condition ready to put together, to form a complete monument, as "granite, dressed or polished," under Act July 24, 1897, c. 11, § 1, Schedule B, par. 118, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636), against the contention of the importers that the same should be classified as an article of mineral substance under paragraph 98, providing for "articles and wares composed wholly in chief value of earthy or mineral substances or carbon, not specially provided for in this act," at 35 or 45 per centum ad valorem, or under section 6, as an "article manufactured in whole or in part, not provided for in this act," at 20 per centum ad valorem.

The report of the appraiser to the collector of customs was substantially as follows: "I beg to state that the merchandise is dressed and polished granite, specially provided for in paragraph 118, Tariff Act 1897, and properly dutiable thereunder as returned." Upon this report the collector imposed the duty upon the importation under paragraph 118, and his decision was approved by the Board of General Appraisers, upon the authority of the decision of the Circuit Court for the Southern District of New York, in

Baldwin v. U. S., 144 Fed. 702, affirmed by the Circuit Court of Appeals of the same circuit in 149 Fed. 1022, 79 C. C. A. 531. In that case, as stated in the syllabus, the court held: "Monuments in sections, consisting of pieces of dressed granite intended to be assembled and erected as monuments without further manipulation, are dutiable as dressed granite under paragraph 118 of the tariff act of 1897."

The importation in the case at bar is similiar to the one considered in the Baldwin Case; but it is urged section 6, under which it should be classified, was not before the court in that case. Whether it was, or not, is not now important, because the Circuit Court of Appeals of the Second District has decided the article should be assessed under paragraph 118, and any other ruling here would make a different schedule of rates at the port of Philadelphia from that charged at New York on the same importation. We are not inclined to so complicate the tariff law.

For these reasons, the decision of the Board of General Appraisers in this case is affirmed, and the appeal dismissed.

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## CONTINENTAL GIN CO. et al. v. MURRAY CO.

(Circuit Court of Appeals, Third Circuit. June 8, 1908.)

No. 37.

1. APPEAL AND ERROR—MODE OF REVIEW—CONVICTION FOR CONTEMPT.

An order of a Circuit Court adjudging a contempt for violation of an injunction against infringement of a patent, and imposing a punitive fine payable to the United States, is reviewable by the Circuit Court of Appeals on writ of error, but upon such writ only matters of law appearing on the record can be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 15; vol. 3, Appeal and Error, §§ 3441–3445.]

2. SAME—RECORD—EVIDENCE.

In the absence of a finding of facts, a special verdict, or a request for a ruling on the facts and bill of exceptions, the evidence taken in a Circuit Court is no part of the record, and therefore cannot be considered by the appellate court on a writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2367.]

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

See 126 Fed. 533; 141 Fed. 126; 149 Fed. 989.

Melville Church, for plaintiff in error.

Oliver Mitchell, for defendant in error.

Before MOODY, Circuit Justice, and DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

MOODY, Circuit Justice. The defendant in error, the Murray Company, brought suit against the plaintiff in error, the Continental Gin Company, in the Circuit Court for the District of Delaware, alleging infringement of patents. In obedience to the mandate of this court (149 Fed. 989), the Circuit Court entered an interlocutory decree for the Murray Company against the Continental Company for an injunction and account. Of this decree the other plaintiffs in error had due notice. The injunction commanded the defendants, its agents, officers, and servants, to desist from making, using, or selling,

or causing to be made, used, or sold, the articles with respect to which infringement was alleged. Subsequently, on motion of the Murray Company, these plaintiffs in error were adjudged by the Circuit Court guilty of contempt for disobedience of the injunction, and ordered to pay a fine of $250 to the use of the United States, $500 to the complainants as counsel fee, and the cost of the proceeding. This order was stayed, upon the giving of bond, pending appeal. Thereupon a writ of error was sued out, and assignments of error were filed. Upon this writ the cause is now before us. The second, third, and fourth assignments of error were not argued, and are deemed to be waived. The other assignments are as follows:

"First. That the court erred in adjudging the plaintiffs in error to be in contempt of the injunction order issued in said equity cause. * * *

"Fifthly. That the court erred in not discharging the rule to show cause issued against the plaintiffs in error, and in not dismissing the petition for said rule.

"Sixthly. That the court erred in not holding that the sale of apparatus, alleged to have been made in violation of the said injunction order, with a sale of apparatus purchased of a lawful licensee under the Murray patent, No. 472,607, in suit, and therefore a lawful sale, violative of no right of the complainant in said equity suit.

"Seventhly. That the court erred in adjudging that the facts disclosed by the record constituted in law a violation by the plaintiffs in error of the injunction order issued in said cause.

"Eighthly. That the court erred in adjudging that the purchase by the plaintiffs in error of the apparatus complained of from a lawful licensee of the Murray patent, No. 472,607, to wit, to Smith Sons Gin & Machine Company, constituted in law, a violation of the injunction order in said cause.

"Ninthly. That the court erred in adjudging that Smith Sons Gin & Machine Company, from which the plaintiffs in error purchased the apparatus complained of, was not a subsisting corporation.

"Tenthly. That the court erred in adjudging that Smith Sons Gin & Machine Company, from which the plaintiffs in error purchased the apparatus complained of, was not the holder of a lawful license to manufacture and sell under the Murray patent, No. 472,607, in suit.

"Eleventhly. That the court erred in adjudging that Smith Sons Gin & Machine Company, from which the plaintiffs in error purchased the apparatus complained of, did not manufacture said apparatus by virtue of a lawful license under the Murray patent, No. 472,607, in suit at its plant at Birmingham (Avondale) Alabama."

It is settled that a judgment like this may be reviewed in this court by writ of error. Matter of Christenson Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072. But upon that writ only matters of law can be considered. Bessette v. W. B. Conkey Company, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. The assignments of error argued before us seem chiefly, to say the least, to deal with matters of fact. Where, upon a writ of error, the plaintiff in error sought to review the facts, the Supreme Court has recently said:

"But this overlooks the vital distinction between appeals and writs of error, which has always been observed by this court, and recognized in legislation. An appeal brings up question of fact as well as of law, but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact." Behn v. Campbell, 205 U. S. 403, 407, 27 Sup. Ct. 502, 504, 51 L. Ed. 857.

We will not, however, delay to determine whether the assignments of error can all be disposed of on this principle, though clearly many,

and perhaps all, of them, are nothing but attempts to review the decisions of fact made by the judge of the court below. There is, however, an even more fundamental difficulty in this cause. There is no record in the proper sense of the word in which the assignment of error can be applied. The cause was heard in the Circuit Court upon affidavits, with exhibits attached. There was no finding of facts, nothing in the nature of a special verdict, no request for a ruling upon the facts, nor upon any question of law, and no bill of exceptions. There was a general finding made by the court "that the said defendants are in contempt of the injunction order heretofore issued in this cause." In a case where the trial court set aside its judgment, rendered and satisfied 17 years before, the Supreme Court, with expressed hesitation, looked into the affidavits, saying:

"As the order setting aside the original judgment refers to the notice of motion and annexed affidavits as the foundation of that order, and identifies those papers as they are found in the transcript, we are of opinion that they may be considered as part of the record, so far as the question of the authority of the court to make that order is involved." Bronson v. Schulten, 104 U. S. 410, 413, 26 L. Ed. 797.

"Looking to those affidavits, in connection with what is more strictly a part of the record," the court held that the order after the term had expired was beyond the authority of the court.

It is true that in the case at bar the judgment recited that the cause was heard "upon affidavits in support of and opposition to" the motion, but the affidavits were not, as in the case cited, specifically identified. We think this, together with the agreement of the parties to print the affidavits in the record, is not enough to take the case out of the general rule that, in the absence of finding of facts, a special verdict, or a request for ruling, and a bill of exceptions, the evidence taken in the court is no part of the record. In Suydam v. Williamson, 20 How. 427, 433, 15 L. Ed. 978, it was said:

"Evidence, whether written or oral and whether given to the court or the jury, does not become a part of the record, unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment." England v. Gebhardt, 112 U. S. 502, 5 Sup. Ct. 287, 28 L. Ed. 811; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; Baltimore & Potomac R. R. Co. v. Trustee, 91 U. S. 127, 130, 23 L. Ed. 260.

Applying this rule to the record, it leaves nothing in it except the motion for attachment, the order to show cause, and the judgment. Upon this record no error appears.

In conclusion, we think it not unfitting to say that, if we had felt at liberty judicially to examine the affidavits contained in the transcript, we should not have considered ourselves warranted in reversing the finding of the circuit court.

Judgment affirmed.

## KOHLER et al. v. NORTHERN ELECTRICAL MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,377.

1. CONTRACTS—CONSTRUCTION.

A contract, appointing plaintiffs exclusive sellers of defendant's product within certain territory, declared that if any difference or controversy should arise between the parties in respect to any machinery, and such difference or controversy should not be mutually amicably settled, then all obligations under the contract should be suspended at the option of either, to be declared by letter, and that if there was any failure to perform or pay by either party as agreed, and such failure should not be redeemed by performance or payment within 15 days, then all obligations should cease and terminate, except for adjustment of business previously done. *Held*, that the latter provision did not qualify the former separable provision with respect to controversies, and that defendant was entitled to suspend the contract on controversies arising, without reference to the fact that defendant was in the wrong in each controversy.

2. SAME—NOTICE OF TERMINATION.

Where a contract authorized suspension by either party on notice in case controversies should arise, and that, if controversies so arising were not settled within 30 days after notice of suspension, either party might finally terminate the contract by like notice, defendant having served notice of suspension, plaintiffs, having recognized the status by suing on the suspension as wrongful, acquiesced in the termination of the relationship without further notice.

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

Albert G. Welsh, for plaintiffs in error.

William F. Vilas, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. Plaintiffs in error began this action at law to recover damages on account of defendant's alleged wrongful termination of a contract with them. Trial by jury was waived. After plaintiffs had introduced all the evidence they had on the question of defendant's liability, they offered evidence respecting damages. To this an objection was addressed and sustained. Plaintiffs contend that the ruling was given in a way equivalent to holding as a matter of law that plaintiffs had failed to make a prima facie case of liability. Defendant, claiming that evidence in its favor and conflicting with plaintiffs' evidence was before the court, insists that the ruling amounted to a general finding on conflicting evidence in relation to the facts on which liability was asserted, and that consequently no question of law was saved by the exception to the ruling. The record is somewhat obscure, and we pass the point, because, if it be assumed that plaintiffs' version is the true one, our construction of a provision in the contract renders irrelevant all the evidence on which plaintiffs predicate their theory of defendant's liability.

The contract contemplated that during five years and within certain territory plaintiffs should be the exclusive sellers of defendant's product. The provision above referred to reads as follows:

"But it is mutually agreed, as a paramount and controlling provision to every other in this contract, that if any difference or controversy shall arise between the parties hereto, in respect to any machinery made by the company, its efficiency, utility, or compliance with warranty or specifications, or in respect to any point of duty or obligation claimed by either party to the other, or if there be any failure to perform or pay by either party as herein agreed, and such difference or controversy shall not be mutually amicably settled, or such failure redeemed by performance or payment, within 15 days after the date of notice in writing by either party of such complaint to the satisfaction of the other, then all obligations under this contract on either side shall be suspended at the option of either, to be declared by a letter mailed to the other at his ordinary post office address, and thereupon in such case, unless such difference or controversy be so settled, or such failure redeemed, within 30 days thereafter, either party may finally terminate this contract and all additional or continuing obligation thereunder for the future by like notice to the other by letter, whereupon all obligation thereunder shall cease and terminate, except for the adjustment of all business previously done hereunder."

Defendant gave notice of suspension in a letter that recited a number of controversies. Plaintiffs' proposition is that the undisputed evidence shows that defendant was in the wrong in each controversy, and therefore was not in a position to avail itself of the "suspension clause." The construction to be given to the contract was a matter of law, and we agree that the trial judge correctly ruled that defendant's right to suspend the contract was not limited as plaintiffs contend. By clear and undisputed evidence, from which but one inference of ultimate fact could properly be drawn, it was established that serious controversies of the kind mentioned in the "suspension clause" had arisen, and prior to defendant's notice of suspension had reached such a degree of acrimony that it was futile for the parties to attempt to get along with each other. Parties may lawfully provide in their contract that when such a situation develops either may end the relation for the future, without there being an inquiry as to who was at fault in starting the controversy. For the past the wrongdoer, of course, must account. Plaintiffs call attention to the provision that:

"If there be any failure to perform or pay by either party as herein agreed, [and] such failure [shall not be] redeemed by performance or payment within 15 days, then all obligations," etc.

This provision, in our judgment, does not qualify or color the other and separable provision with respect to controversies, namely:

"If any difference or controversy shall arise between the parties hereto in respect to any machinery, * * * and such difference or controversy shall not be mutually amicably settled, * * * then all obligations under this contract shall be suspended at the option of either, to be declared by a letter," etc.

A suggestion is made by plaintiffs that after all the contract was not terminated, because defendant failed to follow up its notice of suspension with a notice of termination in accordance with the terms of the contract. If controversies be not settled within 30 days after notice of suspension, "either party may finally terminate this contract by like notice." Though plaintiffs did not give notice by letter, as they might have done, they effectively recognized the status by bas-

ing this action on the suspension as the wrongful act that totally deprived them of the opportunity to make the profits they would have made if the relationship had not been ended by defendant.

The judgment is affirmed.

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## ERIE R. CO. v. POND CREEK MILL & ELEVATOR CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,404.

1. CARRIERS — TRANSPORTATION OF FREIGHT—CONTRACT—WHAT LAW GOVERNS.
Where a contract for through transportation of flour from Pond Creek, Okl., to New York, was made in Oklahoma, it was subject to the Oklahoma law to the extent that such law was not an invasion of the exclusive rights of the United States to regulate commerce between the states.

2. SAME—STATUTES—EFFECT.
Wilson's Rev. & Ann. St. Okl. 1903, § 707, declares that a consignor, by accepting a bill of lading or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; but that his assent to any other modification of the carrier's obligations contained therein can only be manifested by his signature to the contract. *Held*, that such provision should not be construed as merely affecting the vehicle through which a transportation contract can be proved, but was a valid exercise of legislative power affecting interstate commerce originating in Oklahoma, to which transportation contracts made in that state were subject.

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

Seymour Edgerton, for plaintiff in error.

Fred D. Silbur, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the court below was by the defendant in error, an Oklahoma corporation, against the plaintiff in error, a New York corporation, to recover damages for the loss of a certain shipment of flour from Pond Creek, Oklahoma, to New York, and resulted in a judgment for the value of the flour and interest from the date it ought to have been delivered. The bills of lading showed that although received by the Chicago, Rock Island & Pacific Railway Company, the shipment was to be to New York via the Union Steamboat Line and the Erie Railway Company; and contained a provision that the company (the C., R. I. & P. Ry. Co.) should not be responsible for any loss or damage by fire, unless it be shown that such damage or loss occurred through the negligence or default of the agents of the company. There was no evidence other than the delivery and acceptance of the bill of lading, tending to show that this provision was known to the defendant in error; also there was no evidence showing that the shipment was totally destroyed by fire (the only evidence on that subject being that it was in a fire). But for the purpose of this opinion, we assume that the destruction by fire at the transfer warehouse at Buffalo, where it was unloaded from the

steamboat, to be loaded on the cars of the railway company, wholly accounts for the non-delivery of the shipment at the point of destination.

Section 58, article 5, of Wilson's Rev. & Ann. St. Okl. 1903, on common carriers, is as follows:

"A passenger, consignor, or consignee, by accepting a ticket, bill of lading or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated. But his assent to any other modification to the carrier's right or obligations contained in such instrument can only be manifested by his signature to the same."

The contract between the parties is an Oklahoma contract, and to the extent that Oklahoma law is no invasion of the exclusive rights of the United States to regulate commerce between the states, is subject to Oklahoma law; and under the Oklahoma law above quoted, the exemption in the bill of lading plainly would not be binding upon the shipper, because he has not assented to the same in writing.

It is urged however, upon the authority of Richmond & Alleghany Railway Company v. Patterson Tobacco Company, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759, that the Oklahoma statutory provision is a law of evidence only—does not in any way affect the contract, but only the vehicle through which the contract can be proven—and is therefore not binding upon the federal courts sitting outside of the state. We cannot concur in this view. The Oklahoma statute does not forbid contracts looking to exemption from what would otherwise be the carriers' obligation at common law; if it did, it might be an invasion of the power conferred upon Congress; and that is the point decided in Richmond & Alleghany Ry. Co. v. Patterson Tobacco Company, supra. Neither that case, nor any case called to our attention, prevents a state from providing that no contract made within its territory shall be effective unless it is reduced to writing, and signed by the parties to be affected—a reasonable provision that does not regulate commerce between the states, but only the method in which contracts relating to such commerce shall be manifested. This disposes of the merits of the case.

We think that on the authority of Northern Transportation Company v. Isaac H. McClary, 66 Ill. 233, there was no error in allowing interest upon the damages found. The judgment of the Circuit Court will be affirmed.

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## ERIE R. CO. v. STAR & CRESCENT MILLING CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,405.

CARRIERS—CONNECTING CARRIERS—TRANSPORTATION OF FREIGHT—STORAGE—NEGLIGENCE.

Where a connecting carrier permitted flour to remain in its warehouse for 49 days before forwarding the same because of a shortage of cars, without notifying the shipper, knowing that the detention would be unusual, thereby preventing the shipper from protecting itself by insurance, and the flour was totally or partially destroyed by the burning of the

warehouse, the carrier was chargeable with such negligence as made it responsible for the loss of the flour, notwithstanding a provision in the bill of lading that no carrier should be liable for the loss of the goods or damage thereto by fire.

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

Seymour Edgerton, for plaintiff in error.
Fred D. Silbur, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the Circuit Court was by the defendant in error against the plaintiff in error, to recover damages for the loss of a certain shipment of flour from Chicago to New York, and resulted in judgment for the value of the flour and interest.

The bills of lading contained a provision that "no carrier 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 floods, or by fire." The flour having arrived in Buffalo by way of the lakes was, owing to a shortage of cars of the plaintiff in error, detained in the transfer warehouse for forty-nine days, at the end of which time it was either totally or partially destroyed in a fire in such warehouse.

There was evidence offered tending to show that at the time the flour was accepted, the car shortage at Buffalo was known to the plaintiff in error, but that no notice of that fact was given to the defendant in error; and no notice of the detention was given to the defendant in error during the forty-nine days that the flour was detained.

Assuming that the failure of the plaintiff in error to deliver the goods at the destination named in the bill of lading was due to the fire at Buffalo in the transfer warehouse of the plaintiff in error, we are compelled to affirm this judgment; for we think that the plaintiff in error's act in permitting the flour to remain in its warehouse without notice to the milling company, and with knowledge that the detention, owing to the blockade of cars, would be unusual, thereby preventing the milling company from protecting itself by insurance, was such negligence as made the railroad company responsible for its safety.

The judgment of the Circuit Court will be affirmed.

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## HILL v. FRANCKLYN & FERGUSON.

(Circuit Court of Appeals, Third Circuit. May 26, 1908.)

No. 29 (1,782).

1. CUSTOMS DUTIES—CLASSIFICATION—HEMATITE "IRON ORE"—"PIGMENTS."
Hematite iron ore in a form in which it cannot be used as a pigment is not dutiable as "pigments," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 58, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630), but as "iron ore," under Schedule C, par. 121, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636).

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3767.]

2. COURTS—UNIFORMITY IN DECISION—RULINGS IN OTHER CIRCUITS.
In suits of the character of customs litigation, uniformity in the judgments of the courts of first instance, as well as in those of the appellate tribunals, is desirable, and, where no direct attack has been made upon a prior adjudication by a Circuit Court of the questions subsequently sought to be raised in a similar suit in the Court of Appeals in another circuit, such prior adjudication should be followed, unless clearly erroneous.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 327.]

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

Jasper Yeates Brinton, Asst. U. S. Atty. (J. Whitaker Thompson, U. S. Atty., on the brief), for appellant.
Walden & Webster (Howard T. Walden, of counsel), for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The collector of the port of Philadelphia assessed the merchandise with which this case is concerned at 30 per cent. ad valorem, under Tariff Act July 24, 1897, c. 11, Schedule A, par. 58, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630). The importers claimed that it was properly dutiable, under paragraph 121 of that act, at 40 cents per ton. Both paragraphs are copied in the margin.[1]

The Board of General Appraisers sustained the claim of the importers, and on appeal from that decision the Circuit Court entered the affirming decree which is now for review.

In the brief for the appellant it is rightly conceded "that the merchandise in the present case is in all material respects similar to that passed upon by Judge Townsend" in the case of Francklyn et al. v. United States (C. C.) 119 Fed. 470. The decision in that case was made in November, 1902, and, as no appeal from it was taken, the court below properly declined to consider de novo the issue which it determined. In suits of this character, uniformity in the judgments of the courts of first instance, as well as in those of the appellate tribunals, is desirable, and where no direct attack has been made upon a prior adjudication by a Circuit Court of the question sought to be subsequently raised in a similar suit we think that the prior adjudication, unless clearly erroneous, should be followed. McCoach, Collector, etc., v. Philadelphia Trust, Safe Deposit & Ins. Co. et al., 142 Fed. 120, 73 C. C. A. 610.

It is contended, however, that the prior decision in this instance "was had upon an incomplete record, and wholly without any such

[1]Paragraph 58 (U. S. Comp. St. 1901, p. 1630): "All paints, colors, pigments, lakes, crayons, smalts and frostings, whether crude or dry or mixed, or ground with water or oil or with solutions other than oil, not otherwise specially provided for in this act, thirty per centum ad valorem; all paints, colors and pigments, commonly known as artists' paints or colors, whether in tubes, pans, cakes or other forms, thirty per centum ad valorem."
Paragraph 121 (U. S. Comp. St. 1901, p. 1636): "Iron ore, including manganiferous iron ore, and the dross or residuum from burnt pyrites, forty cents per ton: Provided, that in levying and collecting the duty on iron ore no deduction shall be made from the weight of the ore on account of moisture which may be chemically or physically combined therewith; basic slag, ground or unground, one dollar per ton."

convincing and unequivocal testimony as is found in the present record as to the proper description of the merchandise as 'pigment,'" and, in view of this contention, so much of the testimony in the present case as was not adduced in the preceding one has been considered with especial attention. But we have not been convinced by it, nor by the proofs as a whole, that this merchandise should have been classed as a "pigment," and not as "iron ore." Witnesses more or less experienced in handling similar merchandise have applied to it such inconclusive terms as "crude pigment," "dry material or dry coloring matter suitable for making paint," and the like; but that it is "in fact crude hematite ore, or iron ore," which "in its present state cannot be used as a pigment," is no less evident now than it was when Judge Townsend found it to be so.

We concur in that finding, and therefore the decree which in this case was based upon it is affirmed.

NOTE.—The following is the opinion of Holland, District Judge, in the Circuit Court:

HOLLAND, District Judge. This is an appeal by the United States from a decision of the Board of General Appraisers, which reversed the action of the collector of the port of Philadelphia in assessing duty at 30 per cent. ad valorem on certain hematite ore, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 58, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630). The importers claimed that the merchandise was properly dutiable at 40 cents a ton, under paragraph 121 of the same act (Schedule C, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]); and the Board sustained the claim of the importers, and from that decision an appeal was taken to this court.

It appears that the iron ore covered by this protest is identical with that covered by suit No. 3,202, Francklyn & Ferguson v. U. S. (C. C.) 119 Fed. 470. In this case the Circuit Court of the Second Circuit sustained the contention of the importers, and we are not inclined to make a decision contrary to the view taken by the Second Circuit.

The appeal in this case is therefore dismissed.

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THE EAGLE WING. THE R. & T. HARGRAVES. MONTGOMERY et al. v. CHATFIELD.

(Circuit Court of Appeals, Fourth Circuit. May 27, 1908.)

No. 619.

COLLISION—SAILING VESSELS MEETING—CHANGE OF COURSE BY PRIVILEGED VESSEL.

The finding of a trial court, based on conflicting evidence, that a collision at sea in the night between two meeting schooners was due solely to the fault of the privileged vessel in changing her course just prior to the collision, affirmed.

Pritchard, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

R. G. Bickford and Edward E. Blodgett (Eugene P. Carver, on the brief), for appellants.

Robert M. Hughes and James D. Dewell, Jr., for appellee.

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

GOFF, Circuit Judge. This case was fully and accurately stated in the opinion filed in the court below, and for purposes connected therewith we refer to the same. 135 Fed. 826. The testimony is conflicting, and it is no easy matter to find from it the fault to which the collision between the Eagle Wing and the Hargraves is to be attributed. This court, when the case was submitted to it, was under the impression, and so announced, that the weight of the testimony disclosed that the Hargraves was in fault and that the Eagle Wing was without blame, thereby reversing the finding and decree of the court below. On due consideration of a petition filed by the appellee, a rehearing was granted, after which counsel were fully heard on the particular points to which their attention had been called. The voluminous testimony submitted for our consideration has been critically analyzed and weighed in connection with the points made by counsel in their rearguments, which relate chiefly to the credibility of the witnesses and the conflict in their testimony, with the result that we reach the conclusion that in the finding heretofore made by this court in this case the credit given the witnesses produced in behalf of the Eagle Wing and the discredit suggested as attaching to those examined by the Hargraves (resulting in the finding of such facts as required the reversal of the decree appealed from) was not justified by the record. Reaching the conclusion we do that the Eagle Wing was solely at fault, it follows that the findings of the court below are without error, and that they must be affirmed. The opinion of that court, both as to the facts and the law applicable thereto, has our approval. Hence we do not deem it necessary to further discuss the case.

Affirmed.

PRITCHARD, Circuit Judge (dissenting). While not fully concurring in all the reasons stated by the court in the opinion heretofore filed in this cause, in which the action of the lower court was reversed, yet, under the circumstances and in view of the evidence, I am constrained to dissent from the opinion of the majority of the court in this instance.

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## THE ST. QUENTIN.

(Circuit Court of Appeals, Second Circuit. June 29, 1908.)

No. 220.

1. SHIPPING—LIABILITY FOR INJURY TO CARGO—EXCEPTED CAUSES.
   Where injury to cargo resulted from a cause excepted in the bill of lading, the carrier cannot be held responsible, unless his negligence is affirmatively shown.

2. SAME—PROOF OF NEGLIGENCE.
   Where a shipment of shellac from Calcutta to New York, made under a bill of lading excepting liability for loss or damage from heat, was injured by being subjected to an unusually high degree of heat, which caused it to fuse together, such fact alone is not sufficient to establish the negligence of the vessel; it being shown that it might occur without negligence, especially during the passage through the Red Sea, and that the shellac was stowed in a particularly well-ventilated part of the vessel.

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

J. Parker Kirlin and John M. Woolsey, for appellants.

Robinson, Biddle & Benedict (Roderick Terry, Jr., and W. S. Montgomery, of counsel), for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The bill of lading contains an exception of "loss or damage * * * from * * * heat or fire on board, in hulk or craft, or on shore." The District Court found that the injury to the shellac was undoubtedly caused by heat, and the evidence abundantly sustains that conclusion. Therefore the burden of establishing some negligence of the carrier rested upon the libelants, because, the injury having resulted from an excepted cause, the carrier was not responsible unless his own negligence was affirmatively shown. Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160; The Patria, 132 Fed. 972, 68 C. C. A. 397.

We are unable to concur with the District Court in the conclusion that such negligence is to be inferred from the fact that the condition of the shellac on the ship's arrival showed that it must have been subjected to a very unusually high degree of heat. That it was, and would in the nature of things, be subjected to a very high degree of heat on the voyage, especially through the Red Sea, is shown by the proof. That a very large part of it fused and ran together, although stowed in a particularly well-ventilated part of the ship, might indicate either, as the district judge inferred, that the ventilating apparatus was not properly employed or that this particular lot of shellac was of a grade peculiarly susceptible to heat, and thus fusible at a temperature lower than that to which it would be exposed with all proper attention to hatches and ventilators. Under the rule laid down in the cases cited we cannot find that there was negligence of the ship, which would deprive it of the benefit of the exception as to loss or damage from heat.

The decree is reversed, with costs, and cause remanded, with instructions to dismiss the libel, with costs.

NOTE.—The following is the opinion of Holt, District Judge, in the District Court.

HOLT, District Judge. The injury to the shellac in this case was undoubterly caused by heat. The bill of lading exempts the carrier from liability for damage caused by heat; but this, of course, does not exempt the carrier from liability for damage from heat caused by its own negligence. The Red Sea is notoriously a very hot place in summer, and, if the steamer had been obliged to stop there for several days, or any other cause for the application of extreme heat to the shellac had been shown, the question presented would have been different; but it appears from the evidence that this shellac was stowed in a particularly well-ventilated part of the ship, and, as there is no evidence that the ship's voyage was interrupted, it seems incredible, if the hatches were kept open and the ventilating apparatus properly employed, that there should not have been a constant current of air through the part of the ship where the shellac was stowed. The evidence, while showing that there were some hot days during the passage through the Red Sea, fails to show any unusual heat on this voyage, and the extraordinary condition of the

shellac on the ship's arrival shows that it must have been subjected to a very unusually high degree of heat. I cannot avoid the conclusion, from the evidence, that there must have been some negligence on the part of the officers of the ship, either in failing to keep the hatches open and the ventilating apparatus in good working order, or by which the shellac was subjected in some way to some extraordinary degree of heat. It is important, in such cases, for the protection of shippers, that the carrier be held strictly responsible. The carrier is entitled, of course, to the benefit of the exceptions in the bill of lading, when they properly apply; but, when their application involves the assumption that the carrier's negligence has brought about the condition of affairs which enables the carrier to raise a defense based upon an exception, it is obvious that the defense is untenable. The shipper, in such a controversy, is at a great disadvantage. All he knows is that the goods have been damaged. He can furnish no evidence as to how it occurred. In such a case, although the general rule is undoubtedly true that, when the damage is due to a cause which is excepted by the bill of lading, the shipper must prove that the damage has not been caused without the carrier's negligence, such proof may, in some cases, be furnished by the fact that the damage is so extraordinary that it could not have occurred without negligence.

My conclusion is that there should be a decree for the libelants, with the usual reference to fix the amount of damage.

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## LEONARD v. MERCHANTS' COAL CO.

(Circuit Court of Appeals, Second Circuit. June 29, 1908.)

No. 132.

1. ABATEMENT AND REVIVAL—JURISDICTION—WAIVER OF OBJECTION.

Under the New York practice followed by the federal courts in that state in actions at law, a defendant does not waive his right to object to the jurisdiction by including in his answer every defense upon which he relies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 19–21.]

2. SAME—FEDERAL COURTS—DISTRICT OF SUIT.

A foreign corporation sued in a federal court entered a general appearance and demurred to the complaint for want of jurisdiction; the complaint alleging no jurisdictional facts. An amended complaint was filed, alleging diversity of citizenship and that plaintiff was a resident of the district. Defendant answered, denying such allegation of residence, joining issue on the merits, and also pleading a counterclaim. *Held*, that it did not waive its objection to being sued in that district, and that, when on the hearing it appeared that plaintiff was not a resident of the district, it was entitled to a dismissal of the action.

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

Kneeland, La Fetra & Glaze and Stillman F. Kneeland, for plaintiff in error.

Joab H. Banton, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The cause of action set forth in the complaint was for commissions alleged to be due under a contract by which plaintiff was to act as sales agent for the defendant. The complaint was served with the summon. It contained no averments as to diversity of citizenship. Thereupon defendant served a general

appearance. Inasmuch as the complaint on its face did not state a cause of action within the jurisdiction of the court, the general appearance did not cure that defect or operate to give the court jurisdiction. Subsequently, defendant demurred to the complaint on the ground that the court had no jurisdiction of the cause of action. Obviously the demurrer was fatal, and in order to avoid its effect plaintiff amended his complaint so as to aver that he was a citizen of New York and defendant a citizen of West Virginia. He also averred that he was a resident of the Southern district of New York.

Defendant thereupon answered denying that plaintiff was a resident of the Southern district and alleging that he was a resident of the Eastern district. The answer also joined issue on the merits and set up a counterclaim for moneys alleged to have been laid out and expended for plaintiff at his instance and request. Upon the trial the testimony showed that the averments of the answer were correct as to plaintiff's residence. Thereupon the referee before whom the cause was tried stopped the taking of further proof on the merits and dismissed the complaint on the ground that the court had no jurisdiction of the person of the defendant, since the action was not brought in the district of the residence either of the plaintiff or of the defendant.

The objection was a sound one, and the only question here is whether defendant had waived its right to make it. Manifestly, it did not do so by filing general appearance, since at that time there had been no averment by plaintiff either as to his residence or citizenship. As soon as such averment was made, defendant promptly took issue with it. It in no way misled the plaintiff, who was advised by the answer that, unless he could show residence in the Southern district, his right to maintain action therein was challenged. Under the state practice as regulated by the Code of Civil Procedure, a defendant does not waive his right to object to the jurisdiction, by including in his answer every defense upon which he relies to defeat the action. Sweet v. Tuttle, 14 N. Y. 465; Gardner v. Clark, 21 N. Y. 399. There seems to be no good reason for departing from this practice when defendant includes a counterclaim. To do so would require defendant to make an election when not fully advised as to his rights. In this very case, plaintiff had verified a complaint which asserted residence in the Southern district, and defendant could not tell until the trial whether or not it could disprove this assertion and so avoid having to defeat recovery by other proof.

The judgment is affirmed.

## DR. A. REED CUSHION SHOE CO., Limited, v. FREW et al.

(Circuit Court of Appeals, Second Circuit. June 29, 1908.)

No. 260.

1. PATENTS—ASSIGNMENTS—EFFECT.
Mere assignments of patents for the manufacture of shoes, having cushioned insoles, did not carry the right to the assignee to use the patentee's name in connection with shoes manufactured under such assignments.

2. TRADE-MARKS AND TRADE-NAMES—TRANSFER—USE OF INDIVIDUAL NAME.
Where a patentee of cushion insoles, for shoes, registered a trade-mark consisting of a representation of a shoe on a cushion, and the words "Doctor A. Reed's," printed above the cut, the name so printed was not an essential part of the trade-mark, and hence, if a conveyance of the trade-mark gave any right to the use of the name, it was only in connection with the particular representation of a shoe on a cushion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 39, 40.]

3. SAME—UNLAWFUL COMPETITION—INDIVIDUAL NAME—ACQUIESCENCE AND USE.
Where the patentee of cushion insoles for shoes executed various licenses to manufacture shoes under such patents and acquiesced in the use of his name by complainant and other licensees for a considerable period, during which they expended large sums to advertise shoes made under such name, complainant was entitled to restrain the use of such name with the patentee's consent by others manufacturing cushion shoes under later patents obtained by the patentee for alleged improvements, the effect of which was to mislead purchasers to believe that such shoes were those manufactured by complainant under the original patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 84.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Evans v. Suess Ornamental Glass Co., 30 C. C. A. 376.]

4. PATENTS—SALE—RIGHTS OF INVENTOR.
An inventor, who disposes of his patents, does not thereby lose the right to describe himself, in connection with claimed improvements, as the inventor of the original device.

5. TRADE-MARKS AND TRADE-NAMES—USE OF INDIVIDUAL NAMES—CORPORATION.
Where an inventor parted with the right to manufacture under the original patents with the right to use his name in the sale of the patented article, after having patented certain improvements, was entitled to describe himself as the inventor of the original article in connection with the sale of the articles made under the later patents, a corporation of which he was president, and in which he had a substantial interest and its licensees to manufacture, under such later patents, were entitled to the same right.

[Ed. Note.—Right to use one's own name as a trade-name, see notes to R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 579; Kathreiner's Malzkaffee Fab. v. Pastor Kneipp Med. Co., 27 C. C. A. 357.]

6. SAME—SCOPE OF REVIEW.
Complainant, having acquired a patented device for making cushion insoles in shoes, was permitted by the inventor to use his name in connection with the manufacture and sale of such shoes, which by extensive advertisement became well and favorably known, after which the inventor made certain improvements on such soles and formed a corporation of which he was president, and in which he had substantial interest,

which licensed the right to manufacture and sell shoes under the later patents. *Held*, that such corporation and its licensees were only entitled to use the inventor's name in manufacture and sale of their shoes in connection with an express statement that such shoes were not those made under the original patent

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

For opinion of the court below, see 158 Fed. 552.

Archibald Cox, for complainant.

George C. Miller (William C. White, of counsel), for defendant.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. In 1894 Adam Reed, a surgeon chiropodist known as "Dr." Reed, devised a method of manufacturing shoes having cushions upon their insoles called "Cushion Shoes." In 1895, 1896, and 1900, respectively, he obtained three patents covering his invention, which were issued to him jointly with one George J. Winter. In 1897 he registered a trade-mark consisting of a representation of a shoe and a cushion. In the drawing accompanying the statement, the words "Doctor A. Reed's" were printed above the cut of a shoe resting upon a cushion. Those words, however, were not a necessary part of the trade-mark. The manufacture of shoes embodying the invention of Dr. Reed was commenced while the applications for the patents were pending and was carried on by manufacturers under licenses from the patentees. The shoes were offered for sale and sold as "Dr. A. Reed's Cushion Shoes." These licensee manufacturers having gone into liquidation, said patents and trade-marks were assigned by the patentees to the Metropolitan Bank of Buffalo, N. Y. From the Metropolitan Bank they passed, in 1901, to the firm of William Goodyear & Co., from which the complainant acquired its title. The complainant does not itself manufacture shoes under the Reed patents, but in 1901 licensed the J. P. Smith Company of Chicago, Ill., to manufacture men's shoes, and the John Ebberts Shoe Company of Buffalo, N. Y., to manufacture women's shoes, upon a royalty basis. The shoes made by both these manufacturers are of a high grade and retail for $5 per pair. Since 1902 large sums of money have been spent in advertising the shoes manufactured under these patents; the original name, "Dr. A. Reed's Cushion Shoes," being used. Stores have also been opened in different cities for the sale of these shoes exclusively. The result is that a large trade has been built up in them, and that they are well and favorably known to the public. In 1900 and 1901 Dr. Reed obtained two other patents for improvements in shoes having cushion insoles, and in 1904 he was granted an additional patent. In 1905 he became associated with certain other persons and a corporation, the defendant E. Z. Shoe Company, was formed, to which these three patents were assigned, and to which and its licensees Dr. Reed also conveyed the right to use his name in advertising and describing shoes. The purpose of the corporation was to license manufacturers to make shoes under the patents of Dr. Reed and use his name in connection therewith, upon a royalty basis. Dr. Reed became president of the corporation and owned one-fifth of its stock.

Since the formation of the defendant corporation, shoes embodying these later patents of Dr. Reed have been manufactured and sold by manufacturers licensed by it. These shoes have been inferior in quality, and have been sold at a lower price than the shoes manufactured by the complainant's licensees. These shoes were at first called the "E. Z. Shoe," and later the "Improved Cushion Sole Shoe," followed by the words, "Dr. A. Reed, Patentee." The words "Dr. A. Reed, Patentee" have also appeared alone on the straps and soles of the shoes. This use of the name "Dr. A. Reed" is what the complainant complains of in the present case. It is not contended that the defendants in any way imitate the products, devices, packages, or advertisments of the complainant or its licensees. The whole contention is in respect of the name.

The Circuit Court sustained the complainant's contention and enjoined the defendants, being said E. Z. Shoe Company, its licensees, and some of its stockholders, from making any use of the names, "Dr. A. Reed," "Dr. Reed," "Reed," or other similar name in connection with the sale of shoes. The defendants appeal from this decision, and the complainant also appeals because it was not awarded profits and damages.

In considering the rights of the parties, it must be borne in mind at the outset that Dr. Reed never expressly granted to the complainant, or to any of its predecessors in title, any exclusive right to use his name in connection with shoes embodying the invention of his patents. The mere assignment of the patents carried no such right. The name was not an essential part of the registered trade-mark, and, if its conveyance gave any right to use the name, it was only in connection with the particular representation of a shoe upon a cushion. The substantial rights of the complainant with respect to the name must be founded upon the acquiescence of Dr. Reed.

Now, Dr. Reed did acquiesce in the use of the name "Dr. A. Reed's Cushion Shoes" by the complainant and its licensees. This name had been used with his knowledge and approval to describe the shoes manufactured under the earlier patents long before their assignment to the complainant's predecessor in title. The same name was employed by the complainant's licensees, and large sums of money were spent to advertise it. Dr. Reed knew of such use and made no objection. The name became in a sense identified with the shoes manufactured under the earlier patents. Its use by others would give them the results of the labors and expenditures of the complainant and its licensees. Against this the complainant is entitled to protection. Dr. Reed, on the other hand, is entitled to make known to the public, in connection with the sale of shoes embodying his later inventions, the fact that he was the inventor of the original Reed cushion shoe. An inventor who disposes of his patents does not lose the right to describe himself in connection with claimed improvements as the inventor of the original device. Dr. Reed had no right to sell his improved shoe as the original shoe, but to prevent him in connection with the sale of the later shoe from describing himself as the inventor of the earlier one would be to give the complainant that which it neither bought nor paid for.

But it is urged that, if Dr. Reed could use his name in connection with the sale of shoes made under his later patents, he could not transfer such right to others. In considering this contention, we are not called upon to determine whether a patentee can assign to a stranger in connection with the sale of a patent the right to use his name. In the present case Dr. Reed became associated with several persons to use his later patents. Had they formed a partnership, manifestly Dr. Reed's name could have been used in the business. That they formed a corporation of which Dr. Reed was president and in which he had a substantial interest makes, in our opinion, no difference. As said by Mr. Chief Justice Fuller, in Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 136, 25 Sup. Ct. 612, 49 L. Ed. 972:

"We cannot perceive any practical distinction between the use of the name in a firm and its use in a corporation. * * * The formation of a corporation as an effective form of business enterprise was not only reasonable in itself, but the usual means in the obtaining of needed capital."

Nor do we think that there is any practical distinction between the manufacture and sale of shoes by licensees of the defendant corporation and such manufacture and sale by the defendant itself. Certainly the complainant whose own rights are based upon use by licensees is in no position to raise this question.

It is undoubtedly true that the motive actuating Dr. Reed and his associates in forming the defendant corporation was the desire to avail themselves of the reputation attaching to the name of Dr. Reed in connection with cushion shoes; but this motive was not necessarily illegitimate so long as the defendants did not palm off their shoes as those of the complainant or its licensees. As also said in Howe Scale Co. v. Wyckoff, Seamans & Benedict, supra:

"Doubtless, Remington and Sholes, in using the name 'Remington-Sholes,' desired to avail themselves of the general family reputation attached to the two names; but that does not in itself justify the assumption that their purpose was to confuse their machines with the complainant's or that the use of the name was in itself calculated to deceive. Remington and Sholes were interested in the old company, and Remington continued as general manager of the new company. Neither of them was paid for the use of his name, and neither of them had parted with the right to that use. Having the right to that use, courts will not interfere where the only comparison, if any, results from a similarity of the names, and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor, for those of another, and, if defendant so conducts its business as not to palm off its goods as those of the complainant, the action fails."

We are therefore brought thus far:

1. The complainant is entitled to protection in the use of the name "Dr. A. Reed's Cushion Shoes."

2. The defendants are entitled to use Dr. Reed's name in connection with the shoes embodying his later patents.

How are these rights to be reconciled? What decree will protect the rights of the one party without unduly trenching upon the rights of the other?

The answer to these questions is a simple one. The defendants upon their shoes, packages, and advertisements should be permitted to

state the whole truth, and no less. They should be allowed to say that their improved shoe is manufactured under patents of Dr. A. Reed later than those embodied in the original "Dr. A. Reed's Cushion Shoe," but that it is not such original shoe. The words "Dr. A. Reed, Patentee," upon the pull straps or soles of shoes, standing by themselves, are misleading. They may state the truth, but their vice is that they fail to state the whole truth. Such use of the words should be restrained.

It is urged, however, that any use by the defendants of Dr. Reed's name will cause confusion, that purchasers may still be misled, and that unscrupulous dealers are furnished with a ready means for deceiving. But the defendants cannot be held responsible for the deception of others. The complainant chose to adopt as a trade-name the name of a living person, when innumerable distinctive names were open to it. It is entitled to full protection against fraud and deceit, but is not in a position to complain of mere confusion.

For these reasons we think the injunction granted in the decree of the Circuit Court too broad. As already pointed out, it enjoins the defendants from making any use of the names "Dr. A. Reed," "Dr. Reed," "Reed," or any name substantially like them in connection with the sale or offering for sale of shoes. It should be so modified as to permit the defendants, in connection with the sale and offering for sale of shoes made under said later patents of Dr. Reed, to use a statement to the effect, in substance, that such shoes are made under such patents, and that Dr. Reed, the inventor, was the inventor of the original "Dr. A. Reed Cushion Shoe," but that such shoes are not the original shoes. Only the use of the entire statement should be permitted, and it should be embraced in a single paragraph printed from the same sized type.

The following is a specific example of such a notice as we deem proper:

Improved Cushion Sole Shoe, Dr. A. Reed, Patentee, 1900, 1901. But this is not the original Dr. A. Reed Cushion Shoe previously patented.

The other provisions of the decree, including the provision for costs, except as necessarily modified by the foregoing changes, should be retained.

The decision of the court denying an accounting was correct.

The decree of the Circuit Court is reversed, without costs to either party in this court, and the cause is remanded to the Circuit Court, with instructions to enter a modified decree in favor of the complainant, in accordance with this opinion.

## CONSOLIDATED RUBBER TIRE CO. et al. v. DIAMOND RUBBER CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. June 3, 1908. On Rehearing, June 17, 1908.)

No. 261.

1. COURTS—PRECEDENTS.
   Where a Circuit Court of Appeals has sustained the validity of a patent after full consideration in a contested case, it is not required to re-examine the question de novo in a second case on the same evidence or additional evidence which is merely cumulative.

2. PATENTS—INVENTION—RUBBER TIRED WHEELS.
   The Grant patent, No. 554,675, for a rubber tired wheel, was not anticipated, and discloses invention. Also, *held* infringed.

3. SAME—DECREE GRANTING INJUNCTION—LIMITATION OF INJUNCTION.
   A decree enjoining infringement of a patent may properly provide that it shall not apply to a sale by defendant of articles made by the defendant in another suit brought by complainant in another circuit in which the patent was adjudged void; but the proviso will not be extended to cover other articles made in the latter circuit, where the question of such right is not directly involved under the evidence.

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

A final decree of the Circuit Court, entered March 2, 1908, sustained the two claims of letters patent No. 554,675 to Arthur W. Grant for improvements in rubber tired wheels and ordering an injunction and an accounting. The patent was sustained by this court in an action by complainant against the Firestone Tire & Rubber Company; the decision being filed January 30, 1907. 151 Fed. 237. The opinion of this court upon appeal from the order granting a preliminary injunction in the present action is reported in 157 Fed. 677.

Charles K. Offield (C. C. Linthicum and Philip B. Adams, of counsel), for appellant.

Paul A. Staley, Border Bowman, Thomas W. Bakewell, and Charles W. Stapleton, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This appeal is in the nature of a reargument of the questions decided in the Firestone Case. It is not here upon newly discovered evidence, for the additional testimony was as available in that case as in this. There is more testimony it is true but it is cumulative merely. The counsel are the same, the issues are the same. The judge of the Circuit Court correctly states the situation as follows:

"The question in this case was presented and tried out before Judge Platt and before the Circuit Court of Appeals; evidence was taken and experts examined. One side gave evidence that the wires would hold the tire firm and immovable, and the other side gave evidence that they would not. Now, in this case, you have called more experts giving the same kind of evidence, that the wires would not allow the tires to tip, but in my opinion that evidence is merely cumulative, and could not, in the nature of the case, present

any such different result that this court would be justified in not following the opinion of the Circuit Court of Appeals. Of course, if your defense was that this defendant does not infringe, that would be an entirely different question, but the only question argued here is as to the validity or invalidity of the patent.

"That question having been once tried out and a decision made, I do not see what right any other defendant had to go over the same evidence and call upon the court to go over it again, particularly when the decision of the Circuit Court of Appeals is controlling. In my opinion the only point in this case, that of the validity of the patent, has been decided by the Circuit Court of Appeals."

We think the judge was justified in so holding. If courts are to examine defenses in patent cases de novo, as often as they are presented, litigation will continue until the resources of the defendants or the patience of the complainant, and possibly the patience of the court, are exhausted. The question of the capacity of the tires to rise slightly and re-adjust themselves when subjected to severe lateral strain, was one of the principal questions litigated in the Firestone Case and, as we pointed out in our opinion, the tendency to do this was admitted by the defendant's expert. He says:

"There is no doubt that when lateral pressure is applied to one side of the exposed portion of the tire, there is a tendency to roll the tire out of the channel."

The tests made in that case convinced us that this tendency actually existed and that we were safe in assuming as established a proposition about which the experts on both sides agreed and the truth of which was demonstrated in open court.

The impossibility of proving or disproving in any satisfactory manner the existence of this tipping tendency by the observation of the vehicle in actual use or the examination of a worn out tire, will be admitted after a moment's reflection. The human eye cannot detect the movement of the tire when driven rapidly against a trolley rail or other obstruction at an angle of 45 degrees. So too a worn out tire with cuts and abrasions along its entire periphery may have the tipping capacity in question. The fact that tires have been produced in court which were rusted in the steel channel, is not important unless it be proved that they were subjected to severe lateral strain.

A tire used on asphalt pavements or on smooth park roads would probably remain in place if but one wire were used. We do not lose sight of the fact that the testimony shows that many of the tires from Chicago received rough usage but this testimony avails little in face of the experiment which showed us the bottom of the tire rolled up by lateral strain and re-seated the moment the strain was removed. This record presents nothing new which would warrant us in changing our former decision.

Another volume of 500 pages has been added to the library which has accumulated during the last ten years through the efforts of many defendants who seem determined to use what they, in effect, assert to be a useless device. The indomitable persistency with which these people have fought for the right to use the Grant tire is more persuasive evidence of its merits than the opinions of experts.

If the Willoughby, Latta and other tires are as good as Grant's why do not these defendants use them? The almost frantic efforts which have been made to use the Grant tires are inconsistent with the argument that they show no inventive genius and we are more and more convinced that we were right when we said that "no successful rubber tire can be made without embodying the distinguishing features of the Grant patent."

The decree is in the usual form, it restrains the defendant from any further infringement of the Grant patent and orders a reference to compute the profits and damages by reason of such infringement. Tires which do not infringe, the defendant is at liberty to sell. The presumption is that the complainants will not seek to prevent the defendant from doing a legal act and will not attempt to make it account for tires which it has a right to sell. Should such an attempt be made, it can be disposed of by the court upon facts then presented. Such questions frequently arise when the complainant attempts to compel an accounting for devices not passed upon by the court at final hearing.

When this cause was before the court upon an appeal from the order granting a preliminary injunction we recognized as proper the following clause in the order:

"Nothing in this injunctional order shall prevent, or is intended to prevent or enjoin the defendant from handling, using or selling rubber tires and rims covered by the Grant patent, * * * manufactured by the Goodyear Tire & Rubber Company having a right to manufacture, use and sell such tires under a judicial decree in a litigation in the federal courts in the district of Indiana heretofore pending between this complainant and such parties, wherein it has been judicially determined that said Grant patent is invalid and void."

We see no reason why this language should not be inserted in the decree and direct that it be amended accordingly. The amendment fully recognizes the applicability of the doctrine of Kessler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065, to the case at bar. Whether it should be given a broader interpretation is a question upon which we express no opinion, deeming it more prudent to wait until the facts are fully developed.

There is no occasion for attempting at this time to anticipate the future and to provide for a contingency which may not arise.

Having said what the defendant may not do, it is unnecessary and unwise to attempt, further than as above stated, the difficult task of telling what it may do.

The decision in Kessler v. Eldred, must, of course, be respected by the complainants and followed by the master. If doubt should arise whether it applies to a given state of facts the court can determine the right of the parties on learning what the facts are. It is safer to base decisions upon facts rather than upon conjecture. To provide in a decree that the defendant is not enjoined from making, using and selling devices which do not infringe or which have been licensed, seems unnecessary. The doctrine of Eldred and Kessler, if carried to the extent contended for by the defendant will introduce radical and far-reaching limitations upon the rights of patentees. These questions may not arise in the case at bar but if they should,

the court should have the facts, and all the facts, before attempting to decide them.

The decree is affirmed, with costs.

## On Rehearing.

PER CURIAM. The decree should be amended as requested in the petition by substituting for the clause quoted in our opinion the following:

"Nothing in this injunction shall prevent or is intended to prevent, or enjoin this defendant from handling, using and selling rubber tires and rims covered by the Grant patent, manufactured by the Goodyear Tire & Rubber Company, having a right to manufacture, use and sell such tires under a judicial decree in the federal courts of the Sixth circuit; or manufactured by the Kokomo Rubber Company, having a right to manufacture, use and sell such tires under a judicial decree in the district of Indiana, Seventh circuit; or manufactured by the Victor Rubber Tire Company, under a judicial decree in a litigation in the federal courts in the Sixth circuit, wherein in such litigations it has been judicially determined that the said Grant patent is invalid and void."

The mandate is stayed until August 1, 1908, with leave to apply to any member of the court for an extension of the stay on proof that a petition for a writ of certiorari has been duly filed.

The request that we direct that the printed records in the Goodyear, Kohomo, and Firestone Cases be sent to the Supreme Court as physical exhibits is denied. Although we see no objection to this course being taken, we do not feel at liberty to direct it, as it is for the Supreme Court to determine whether changes in the record shall be made. The application should therefore be made to that court or a justice thereof.

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## BOWERS v. ATLANTIC, GULF & PACIFIC CO.

(Circuit Court, S. D. West Virginia. November 19, 1907.)

No. 95.

1. PATENTS—SUIT IN EQUITY FOR INFRINGEMENT—NECESSARY PARTIES.

In a suit in equity by a patentee for infringement, where the bill discloses that complainant contracted to convey to another an interest in the patent by way of assignment or license, the court will regard such contract as having been carried out for the purpose of determining whether or not the assignee or licensee is a necessary party either as sole or joint complainant.

2. SAME—CONVEYANCE BY PATENTEE—ASSIGNMENT OR LICENSE.

A conveyance by a patentee to another of the sole and exclusive right and license to use and to build for use within territory described the machines of the patent, with certain express exceptions, and also reserving to the patentee the right to build machines in said territory for use outside thereof, is a mere license, and not an assignment, and the grantee cannot maintain a suit for infringement of the patent in his own name, unless against the patentee, nor is he a necessary party to such a suit in equity by the patentee, although he is a proper party if his interests will be affected by the decree, and on seasonable objection by the defendant may be made a party in the discretion of the court.

In Equity. On plea to amended bill.

J. H. Miller and W. E. Chilton, for complainant.

R. H. E. Starr and Malcolm Jackson, for respondent.

KELLER, District Judge. The object of the plea is to compel the plaintiff to join as a party plaintiff the Bowers Southern Dredging Company, upon the ground that the latter company owns what amounts to an exclusive license within the territory described in the amended bill as that wherein the acts of infringement stated in the bill are alleged to have occurred. The amended bill, in paragraphs 20, 21, and 22, under the provisions of equity rule 21, makes the following statement and avoidance of one of the supposed defenses to the bill:

"(20) And your orator further shows unto your honors that it is claimed and pretended by the respondent that at the time of the commencement of the suit herein, and for more than six years prior thereto, the Bowers Southern Dredging Company, a corporation created under the laws of the state of Texas, owned and possessed certain exclusive rights and privileges to practice the inventions covered by said letters patent in the territory where the infringing acts of the respondent hereinbefore alleged were committed, and that said exclusive rights are charged by the allegations of the bill of complaint to have been infringed by the respondent, for which reason it is claimed and pretended by the respondent that the Bowers Southern Dredging Company is a necessary and indispensable party complainant herein, and must be joined as a party complainant herein with your orator, and that your orator cannot alone maintain this suit, and for that reason it must be abated; but your orator avers that such pretense of the respondent is unsound both in point of law and fact, and in that behalf your orator avers the facts to be as follows: That on July 6, A. D. 1899, your orator entered into a written agreement with Charles Clarke & Co., a copartnership consisting of Charles Clarke, R. P. Clarke, and Charles Clarke, Jr., all of Galveston, in the state of Texas, whereby it was covenanted and agreed that a corporation should be formed called the Bowers Southern Dredging Company, and immediately after its formation said Charles Clarke & Co. should convey to it certain dredging machines containing the inventions covered by your orator's patents owned by said Charles Clarke & Co., and certain unfinished contracts for dredging, and that immediately after the formation of said corporation your orator should convey to it the sole and exclusive right and license to use in the territory (hereinafter described, and to build for use in said territory), but in no other place or places, during the lives of your orator's patents herein sued on, hydraulic dredging machines covered by said letters patent, reserving to your orator, however, the right to build in said territory and sell to the United States government for use therein one of such machines, and also the right to build such machines in said territory for use outside thereof, and also the exclusive right to build, use, and sell machines in said territory for mining purposes—that is to say, for recovering the precious metals from the bottoms of waterways—that the territory covered by said proposed license commenced at the boundary line between the United States and Mexico on the Gulf of Mexico, and extended to Key West near the southern point of the peninsula of Florida, being that portion of the Gulf of Mexico within the jurisdiction of the United States, together with its tributary waters, save and except Matagorda Bay and its tributaries, and the Mississippi river and its tributaries north of the city of Memphis, in Tennessee.

"(21) And your orator further shows unto your honors that thereafter the corporation provided for in said agreement of July 6, 1899, was created under the laws of Texas and was called the Bowers Southern Dredging Company; that immediately after its incorporation said Charles Clarke & Co. conveyed to it the said dredging machines and other property and unfinished contracts which by said agreement they had covenanted to convey; that, after the formation of said corporation, your orator did not convey nor has he ever

conveyed to said corporation Bowers Southern Dredging Company the sole and exclusive or any right and license to use in said territory, or to build for use therein during the lives of the patents sued on or either of them, any hydraulic dredging machine covered by said letters patent or either of them, nor any exclusive or other right or license under said patents or either of them, but the said Bowers Southern Dredging Company continuously after its incorporation and up to the time of the commencement of this suit made and used and is now using in the territory aforesaid hydraulic dredging machines containing the inventions patented by the letters patent sued on herein, and without protest or hindrance from your orator and by and with his knowledge and implied consent.

"(22) And your orator further shows unto your honors that this suit was instituted and is being prosecuted with the knowledge and consent of the Bowers Southern Dredging Company, and for its use and benefit, as well as for the use and benefit of your orator. * * *"

The plea asserts this very defense, substantially as previsied in the bill, except that it denies (on information and belief) complainant's allegations that he has not conveyed to the Bowers Southern Dredging Company the rights admitted by him to have been agreed to be conveyed, and that the present suit is being prosecuted for any "proper use or benefit" of complainant personally.

The complainant has now caused this plea to be set down for argument under the provisions of equity rule 33, challenging its legal sufficiency on two grounds, viz.: (1) That on the merits the plea is insufficient in law to show that the Bowers Southern Dredging Company is either a necessary or proper party complainant; and (2) that the plea is too vague and indefinite, and that it is insufficient to raise the allegations it seeks to raise by reason of the fact that it does not contain sufficient averments of fact, but consists too largely of mere conclusions of law.

Before addressing ourselves to the consideration of these questions, or either of them, let us consider the prayer of the amended bill and see what relief is prayed for therein. The bill, inter alia, prays:

"That the said respondent be directed to pay to your orator the damages he has sustained and the gains, profits, and advantages realized by the respondent from and by reason of the infringement aforesaid, together with its costs of this suit."

The bill further prays for injunction and general relief.

This prayer, taken in connection with the averments of the bill in respect to the equitable interest of the Bowers Southern Dredging Company in the patents within the territory mentioned in the bill, make it clear that the plaintiff herein seeks to recover all damages and profits accruing from the alleged infringement, as well those equitably belonging to the Bowers Southern Dredging Company, as those, if any, equitably belonging to plaintiff personally. This fact is further revealed by the averment in paragraph 22 of the amended bill that this suit is being prosecuted with the knowledge and consent of the Bowers Southern Dredging Company, and for its use and benefit, as well as for the use and benefit of the plaintiff. Notwithstanding the language of the bill heretofore quoted, and contained in paragraphs 20, 21, and 22, it is apparent therefrom that the Bowers Southern Dredging Company is equitably entitled to an execution of the license agreed by Bowers to be conveyed to it, and it stands in the

same relation to this suit as though that license had been executed in writing. Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 580. In Wheeler v. McCormick, Fed. Cas. No. 17,499, Judge Woodruff, in discussing this subject and the doctrine that equity will regard that as done which ought to be done, says:

"When the reissues were obtained, it was the plain duty of Wheeler to make and deliver to the others such assignments as the agreements provided for, and such as would have invested them with the legal title jointly with himself. Until then Wheeler might have sued at law upon his legal title for the joint benefit. In equity their title was (in the absence of any proof of a release, reassignment, or of a rescission of the agreement) as clear as his was at law. To this extent equity would regard that as done which ought to be done, and in equity their equitable title and immediate right to share the proceeds of a recovery made them necessary parties to a suit to recover for and to restrain infringements, if that objection is raised. True, the complainant testifies that the agreement 'as far as the transfer of interest in the patents, as called for in that writing, was never acted upon.' This is not sufficient to avoid the effect of the agreement. It does not show that any change was made in the relations of the parties to the reissued patents."

In the above case the equitable right was that of an assignee, or joint owner, but the principle is equally applicable, sub modo, to an exclusive licensee, or a licensee whose interests are alleged to be affected by an alleged infringement, and such licensee has as much standing in a court of equitable jurisdiction as though the agreement fixing its rights had been reduced to writing and delivered.

Referring to the maxim in equity that "equity regards that as done which ought to have been done," Story says (1 Eq. Jur. [13th Ed.] 68):

"The true meaning of this maxim is that equity will treat the subject-matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties might have executed them. * * * The most common cases of the application of the rule are under agreements."

See, also, Snell, Eq. 37.

At any rate, even under the averments of the amended bill, the Bowers Southern Dredging Company may be looked upon as an oral licensee of the patentee to the extent contemplated by the agreement, and its interest in the subject-matter of the suit is not denied in the bill, but is admitted, and complainant asserts that he sues for its use and benefit.

Much has been said by counsel in argument about what constitutes an "exclusive" license and what a "simple" license; and I think that in very many cases these terms have been used with little, if any, regard to their entire accuracy when measured by the rights actually conferred. In Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923, hereinafter referred to, Mr. Justice Gray holds that the exclusive right under the patent within and throughout a specified part of the United States to be an "assignment," properly speaking, and to vest in the assignee a title to so much of the patent itself, with the right to sue infringers. A contract merely giving to the grantee a right to make or use, or vend, or to make, use, and vend, the invention within a specified district, is manifestly a simple

license, and conveys no sort of interest in the patent itself, and such a licensee's rights cannot be affected by any infringements of the patent within the specified district. A grant such as was contemplated by the agreement referred to in the amended bill is manifestly different from either that denominated as an "assignment" by Mr. Justice Gray in the case above mentioned, or the character of "simple" license just illustrated, and partakes of the nature of both, being so far exclusive as to prevent any one, even the patentee, from doing those things as to which the exclusive right is conferred upon the grantee, and, as to things permitted to the grantee and also reserved to the grantor, or his subsequent grantees, being assimilated to what I have called a "simple" license. Such a grant seems to be of the character denominated by Judge Lowell in Hammond v. Hunt, post, an "exclusive" license. I think the confusion and uncertainty have arisen from the fact that many courts and text-writers seem to have applied the term "exclusive license" to such a grant as Mr. Justice Gray says is properly an "assignment."

Addressing ourselves to the question whether the Bowers Southern Dredging Company is a necessary or proper party to this suit, it may be said that, as a rule, where the courts have decided that an exclusive licensee for any purpose was not a "proper" party to a suit in equity for the infringement of a patent under which the licensee claimed, it was apparently because no interest of the licensee could be affected by the decree. Thus in Nellis v. Pennock Mfg. Co. (C. C.) 13 Fed. 455, Judge McKennan, in answering the contention that Wheeler, Melick & Co. had such an interest in one of the patents that they were necessary parties to the suit, shows that these parties had an agreement with the former owner of the patent, whereby they acquired "the exclusive right under said recited letters patent to manufacture and sell a certain hay elevator, which has a movable point, which also serves as and performs the functions of prongs or barbs to sustain the hay." This language, it is pointed out by the learned judge, does not constitute an assignment of an exclusive interest in the entire monopoly for the whole or any part of the United States. "It is a license only to manufacture and sell exclusively a specified form of hay elevator, covered by the Walker patent, the beneficial ownership of it as to all other forms of hay forks, and the legal title to it, remaining in D. B. Rogers & Sons. * * * Under all the decisions, the representatives of such an interest are not indispensable parties to a suit upon the patent. Nor are they even proper parties here, because the decree asked for will not affect their interests, and they have since the commencement of this suit released to the complainants all rights and interest which they might have under the patents in suit." It is undoubtedly true that the owner of the whole or any undivided part of the monopoly is as necessary a party to a suit in equity for the infringement of a patent, as in a suit at law for damages.

In considering the question whether the Bowers Southern Dredging Company ought to be made a party to this proceeding for any purpose, we are left in some doubt by the authorities. That it is beneficially interested in the litigation is both admitted by the bill

itself and also appears from averments therein anticipative of the defense made by the plea, and from similar averments in the plea. However, under all the authoritative decisions that I have been able to find, the matter resolves itself now to a question addressing itself to the sound discretion of the court under general equity principles, and not dependent at all upon any open question as to the proper construction of section 4898, Rev. St. (U. S. Comp. St. 1901, p. 3387). I frankly confess that, were the proper construction of that section an open question, I might be inclined to hold that, where the section says that the patentee or his assigns or legal representatives "may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States," an agreement like the one referred to in the bill would, when executed, convey an undivided interest in the patent itself, and I have thought that certain language in the opinion in Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 579, gave color to that view. My personal view was predicated upon the use, in the statute, of the words "an exclusive right" as contradistinguished to the words "the exclusive rights," and therefore protecting the grant or conveyance of any one or more of the substantial property rights under the patent where they had become the exclusive property of a grantee, to the extent of requiring that such grantee should be made a party to any suit for the infringement of such rights under the patent. That question, however, is no longer on open one. In Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923, the court, by Mr. Justice Gray, says:

"The patentee or his assigns may, by instrument in writing, assign, grant, and convey either (1) the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States. Rev. St. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer short of one of these is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. St. § 4919 (U. S. Comp. St. 1901, p. 3394); Gayler v. Wilder, 10 How. 477, 494, 495, 13 L. Ed. 504; Moore v. Marsh, 7 Wall. 515, 19 L. Ed. 37. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer and cannot sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff. Rev. St. § 4921 (U. S. Comp. St. 1901, p. 3395); Littlefield v. Perry, 21 Wall. 205, 223, 22 L. Ed. 577; Paper Bag Cases, 105 U. S. 766, 771, 26 L. Ed. 959; Birdsell v. Shaliol, 112 U. S. 485–487, 5 Sup. Ct. 244, 28 L. Ed. 768. And see Renard v. Levenstein, 2 Hem. & Mil. 628. Whether a transfer of a particular right or interest under a patent is an assignment does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use, and vend two patented machines within a certain district is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district because the right, although limited to making, using, and vending two machines, excluding all other persons, even the patentee, from making, using, or vending like machines within the district. Wilson v. Rousseau,

4 How. 646, 686, 11 L. Ed. 1141. On the other hand, the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license. Such, for instance, is a grant of 'the full and exclusive right to make and vend' within a certain district, reserving to the grantor the right to make within the district to be sold outside of it. Gayler v. Wilder, above cited. So is a grant of 'the exclusive right to make and use,' but not to sell, patented machines within a certain district. Mitchell v. Hawley, 16 Wall. 544, 21 L. Ed. 322. So is an instrument granting 'the sole right and privilege of manufacturing and selling' patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271. See, also, Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 Sup. Ct. 61, 27 L. Ed. 862."

In Birdsell v. Shaliol, 112 U. S. 485, 486, 5 Sup. Ct. 244, 28 L. Ed. 768, 769, Mr. Justice Gray, speaking for the court, said:

"A licensee of a patent cannot bring a suit in his own name at law or in equity for its infringement by a stranger. An action at law for the benefit of the licensee must be brought in the name of the patentee alone. A suit in equity may be brought by the patentee and the licensee together. Gayler v. Wilder, 10 How. 477, 493, 13 L. Ed. 504; Littlefield v. Perry, 21 Wall. 205, 223, 22 L. Ed. 577; Paper Bag Cases, 105 U. S. 766, 771, 26 L. Ed. 959. In a suit in equity brought by the patentee alone, if the defendant seasonably objected to the nonjoinder of the licensee, the court might, as Judge Lowell did in Hammond v. Hunt, 4 Ban. & A. 111, Fed. Cas. No. 6,003, order him to be joined. But, when a suit in equity has been brought and prosecuted in the name of the patentee alone, with the licensee's consent and concurrence, to final judgment, from which, if for too small a sum, an appeal might have been taken in the name of the patentee, we should hesitate to say that the licensee, merely because he was not a formal plaintiff in that suit, could bring a new suit to recover damages against the same defendant for the same infringement."

The above cases are binding authority upon this court upon the points (1) that the holder of such a right as would be conferred by an executed agreement such as the one referred to in the amended bill in this case is merely a licensee, and not an assignee; (2) that such a licensee cannot sue in his own name in equity, except in a case where the infringer is the patentee himself; and (3) that such a licensee is not a necessary party to a suit in equity for an infringement, but, where the objection is seasonably made by the defendant, is a proper party if his interests are to be affected by the decree, and may be made a party in the discretion of the court.

The only remaining question is whether the court in the exercise of a sound discretion should direct that the Bowers Southern Dredging Company be made a party defendant in this case. The case of Hammond v. Hunt, referred to in Birdsell v. Shaliol, supra, and also reported in Fed. Cas. No. 6,003, in which Judge Lowell sustained a plea for want of parties, is interesting, in that it held that an "exclusive licensee" is a necessary party to a suit in equity for infringement, and defined what Judge Lowell calls an "exclusive license" to be "one which does not amount to an assignment by reason of something reserved to the patentee, as in Gayler v. Wilder, 10 How. (51 U. S.) 477, 13 L. Ed. 504, where the patentee excepted out of his

grant the right to make machines within a certain part of the territory granted." The Supreme Court designated the license in Gayler v. Wilder a "mere license," but, as that term was used in contradistinction to the term "assignment," I am of opinion that it is not improperly called an "exclusive license" by Judge Lowell, and I also think the license referred to in Gayler v. Wilder was, in many respects, similar to that contemplated in the agreement recited or referred to in the amended bill in this case, and that, if the decision in Hammond v. Hunt were settled law, it would be necessary to hold that the Bowers Southern Dredging Company was a necessary party in the case. However, I do not so read the Supreme Court cases, but, recalling the cautious language of Mr. Justice Gray in the concluding paragraph quoted from Birdsell v. Shaliol, supra, I do think that the licensee is a proper party to the case, and, even though it is averred by the plaintiff in his amended bill that the suit is being prosecuted in the name of the patentee with the knowledge and consent of the licensee, as well as for its benefit, it is entirely proper for the court, for the purpose of finally concluding all persons interested, and thus preventing the possibility of future litigation touching the same subject-matter, to require the licensee to be joined as a proper party plaintiff thereto. See Story on Equity Pleading (10th Ed.) c. 4, § 72, pp. 73–75.

In accordance with this view, an order may be entered sustaining the plea for want of proper parties plaintiff, but with leave to further amend the amended bill herein within 30 days from this date by joining the Bowers Southern Dredging Company as a party plaintiff.

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## KAISER et al. v. BORTEL et al.

(Circuit Court, N. D. New York. July 28, 1908.)

PATENTS—SUIT FOR INFRINGEMENT—MISJOINDER OF PARTIES OR CAUSES.

Joint owners of one patent, one of whom is also sole owner of another patent, cannot join in a suit in equity for the infringement of both, although it is alleged that the devices of the two are capable of conjoint use and are so used by complainants, and that defendants jointly infringe both patents, where it is not alleged that they make, vend, or use any single device which infringes both.

In Equity. On demurrer to bill of complaint in suit for infringement of two patents on the grounds there are two separate and distinct causes of action stated, and that all the parties complainant are not interested in both, that there is a misjoinder of parties complainant, and the bill does not charge conjoint use of device of both patents by the defendants in one and the same structure.

Robinson, Martin & Jones, for complainants.
Howard P. Denison, for defendants.

RAY, District Judge. Lipman Kaiser, complainant, is "the sole owner of all rights and privileges granted and secured or intended to be granted and secured by said letters patent" viz., patent to Ruggiero and Bongiorno for "Horn for phonographs or similar machines,"

No. 770,024, dated Sept. 13, 1904. The complainant Alfred R. Cunnius is the owner of a one half interest in letters patent issued to him March 7, 1905, for "Trumpet for talking-machines," No. 784,385, and he has assigned the other half interest therein to the complainant Kaiser. The suit is for infringement of both letters patent. The inventions or devices described in both letters patent are capable of conjoint use, and complainants do so use them; but there is no allegation that defendants so use them, or that complainants are united in business as copartners, or otherwise, except it is alleged that they do conjointly use the said patented inventions. Kaiser has not transferred any interest in the patent for horn for phonographs to Cunnius so far as appears. The bill of complaint contains the following:

"(6) * * * That the inventions and improvements shown, described, and claimed in said letters patent Nos. 770,024 and 784,385, are of such a character as to be capable of conjoint use in one and the same device, and are thus conjointly used by your orators in one and the same device."

"(9) * * * That the said defendants, * * * in infringement of the aforesaid letters patent Nos. 770,024 and 784,385, did, as your orators are informed and believe, unlawfully and wrongfully, and in defiance of the rights of your orators, in the city of Syracuse, in the county of Onondaga, and state of New York, and within the Northern district of New York, and elsewhere in the United States, jointly make and use, and vend to others to be used, horns for phonographs or similar machines and trumpets for talking-machines, substantially similar in some or all of the material parts thereof, to the improvements set forth and claimed in the aforesaid letters patent Nos. 770,024 and 784,385, and that they still continue so to do. * * *

"(10) * * * That the said defendants have made and sold and used, and are making, selling, and using, large quantities of the said infringing horns for phonographs or similar machines and trumpets for talking-machines, and have large quantities on hand which they are offering for sale, and that they have made and received large profits and advantages therefrom, but to what extent and how much exactly your orators do not know and pray discovery thereof."

Here is an allegation that both defendants have infringed each patent; but, for anything that appears, Cunnius has no interest whatever in the infringement of letters patent No. 770,024, horn for phonographs, except that he and Kaiser do use the invention of both patents conjointly; but this fact gives Cunnius no interest in the right to enjoin defendants from infringing that patent or in a recovery of profits or damages for such infringement. That cause of action resides in Kaiser solely. He owns the patent and all interest in it. What right has Cunnius to maintain an action against the defendants for their infringement of that patent? And how is he interested in the question of such infringement, how does it affect him? That he is using it with Kaiser, presumably with Kaiser's consent, does not make him joint owner or a sole licensee. As to the other patent, No. 784,385, "trumpet for talking-machines," both complainants are owners, and both are interested to maintain the suit, and as defendants are "jointly" making and using, and vending to others to be used, the said patented device, both defendants are properly united in the one action so far as that patent and that infringement is concerned.

We have this state of facts, viz.: Kaiser and Cunnius own one patent, Kaiser owns the other patent, Kaiser and Cunnius use the patented devices conjointly, and they are capable of being so used, and so

far they are united in business; but the extent of the right of Cunnius in the horn for phonographs patent is measured by the mere fact that he and Kaiser do use that invention conjointly with the other. We imply a license to Cunnius so to do—a consent that he may—but this is far from showing an interest in Cunnius to enjoin others from infringing that patent. So far as appears, the infringement of each patent by defendants is a separate and distinct act. It is not charged that defendants jointly make and use, or vend to others to use, a single device which infringes both patents; that is, they do not make or sell an infringing device which embodies in one and the same structure the inventions claimed in both of the patents in suit. That a separate and distinct action by Kaiser alone on his patent No. 770,024 against both defendants would lie is plain. So far as appears, the infringement of the patent owned by him solely in no way affects or concerns Cunnius or the patent or patented invention in which he has an interest. As to the other patent both complainants and both defendants are necessary parties. It is not even alleged that the investigation of the validity of the one patent involves that of the other or that the investigation of the acts constituting an infringement of the one patent in any way involves an investigation of the acts constituting an infringement of the other. I do not understand that, where the objection is taken in time, the mere fact that two complainants own a patent for one invention, and one of them owns another patent for another invention, and two or more persons are jointly infringing both patents, that one suit by both complainants may investigate both matters simply for the reason that the patented devices are capable of conjoint use and both complainants do use them conjointly. It is true that the law abhors a multiplicity of actions when it may be avoided, but this does not justify the union in one action of two distinct subject-matters in which only one of the complainants is concerned. The fact that these patented devices are capable of conjoint use by both defendants is not an allegation that they do use them conjointly, and that therefore an investigation of the acts alleged to constitute an infringement of the one will involve an investigation of the acts alleged to constitute an infringement of the other. The court may go far to permit the joinder of different causes of action in a patent case where the issues are largely the same and the evidence must be substantially the same as to infringing acts even if both complainants are not legally concerned in both causes of action, provided both complainants have some equity or equitable interest in all the patents infringed, so that their interests are affected by the infringement.

I find no case that is on all fours with this. In Huber and Boyle v. Myers Sanitary Depot (C. C.) 34 Fed. 752, Huber owned one of the patents sued upon and was sole and exclusive licensee of the other patent sued upon, which was owned by complainant Boyle. The defendant made and sold machines each of which infringed both patents. Huber was entitled to maintain the action on his own patent and also on the Boyle patent by joining Boyle as complainant (North v. Kershaw, 4 Blatchf. 70, Fed. Cas. No. 10,311), but still Boyle was not interested in the patent owned solely by Huber. However, the apparatus or machine made and sold by defendant infringed both pat-

ents. Hence the proof of infringement as to both was largely the same, and Boyle was a necessary party, in any event as to the Boyle patent, but not as to the Huber patent. There is little difference between that case and the one now before this court in one aspect that of involving both patents in the one litigation, except that there the machine made by defendant infringed both patents, while here both defendants infringe each patent, but not by making or selling a single apparatus or device which infringes both patents. In so infringing they act jointly. In the Huber Case both complainants and the defendant were necessary parties as to the Boyle patent, but not as to the other, still, both patents being infringed by the defendant, such defendant could not be harmed by litigating both patents in the same suit. The acts of the defendants in infringing both patents must be investigated, if two actions were brought, twice over, while, if only one action was brought, the defendants would be saved the trouble and expense of going over the same evidence on that subject twice. Here the situation is somewhat different. As Cunnius has no interest in the Kaiser or horn patent, and one of the devices made by one defendant and one device made by the other infringe one patent only, and the other device made by the one defendant and the other device made by the other defendant infringe the other patent only, the trial of the question of infringement of the one patent in no way aids or involves the question of the infringement of the other patent. Still each defendant must answer as to the validity of each patent and as to his infringement of it in one suit, or in two suits, if two are brought, and if Cunnius is content to be a complainant as to his patent, or the one in which he has an interest, in the same suit with Kaiser on his patent and submit to the delay and expense incident to the trial of the infringement of the Kaiser patent, I do not see how one or both of the defendants can seriously complain. Uniting both causes of action in one suit in some aspects aids the defendants. In no way can it seriously embarrass them. Cunnius, in effect and to some extent, seems to be an oral licensee of the Kaiser patent, but not a sole licensee.

In Sharples et al. v. Moseley Mfg. Co. (C. C.) 75 Fed. 595, both complainants owned one patent sued upon, and one of the said complainants owned the other patent in suit, of which the other complainant was exclusive oral licensee. The single device made by defendant infringed both patents. Judge Wheeler said:

"The entire right of both patents is in the plaintiffs between them without any outstanding interest to menace the defendant in any other suit."

If two suits had been brought against the defendant, both complainants would have been necessary parties complainant in each suit, and the evidence as to the infringing acts in the one would have been a substantial duplication of that in the other. However, Judge Wheeler based his decision on the ground stated. I am not willing to hold that two complainants each owning a patent solely may sue in one action a defendant who is making two devices, one of which infringes one of the patents sued upon, and the other of which infringes the other patent sued upon, on the ground that the two complainants own the entire

right to both patents, so that there is no outstanding interest to menace defendant in another suit, and I do not think that is the fair import of Judge Wheeler's decision. In that case the one act and device of the defendant infringed both patents, and both the complainants were interested in and necessary parties to a suit for the infringement of each patent. Such is not this case.

In Chisholm et al. v. Johnson (C. C.) 106 Fed. 191, 210, 214, there were three complainants. They sued as copartners and sought relief in that capacity. The patents were not owned by the firm, however, but it was operating under them. Presumably the firm was licensed to use them. As here, the full or specific extent of their rights did not appear. Two of the patents sued upon were owned by all three of the complainants jointly or in common, in their individual capacity, and the two other patents sued upon were owned solely by one of such complaints. In that case the complainants waived damages and profits, so that it became a question of an injunction merely. The bill also alleged that the four patents sued upon were capable of conjoint use in the same structure, and that the defendant so used them in his alleged infringing structure. Hence the defendant's infringing act injured all the complainants, although in unequal degrees. All the complainants, as copartners operating under all the four patents, were injured by the same act of the defendant. Of course, in that case, the defendant might contest the validity of all four patents, and this would or might involve four distinct issues, for there were four alleged inventions. This he could do in a single suit as well as in two, three, or four suits. He might succeed as to one or more, but not all; but, costs being in the discretion of the court, he would not be harmed, seriously at least. In the Chisholm Case, Judge Bradford, near the close of his opinion, says:

"The objection of misjoinder of parties, had it been taken by demurrer or plea, possibly would have been entitled to greater weight. The joinder of patent owners as complainants, where some of them have no legal ownership of or legal interest in some of the patents sued on, is a course which generally should not be encouraged. But the objection having been first raised by answer, and not having been brought to the attention of the court until final hearing, it cannot, in view of the particular circumstances of this case, be sustained."

Here the objection is raised by demurrer. I am of the opinion that the difficulties can be remedied by amendments to the bill of complaint, but that the demurrer must be sustained. If the defendants' patented inventions are capable of conjoint use by the defendants in one structure, and they are so using them, this averment should be in the bill of complaint. It is not there even by fair inference. So the business relations or connections of the complainants as between themselves in the use of these patents and the nature and extent of their right to use the inventions covered thereby should be more fully set forth. When this is done, the court can see whether it is a proper case for the trial of all the questions involved in one suit, and whether these complainants should be permitted to unite the two causes of action in one bill. I do not think the authorities cited will permit me to overrule this demurrer.

In 1 Foster's Federal Practice (3d Ed.) § 77, pp. 225, 226, it is said:

"A bill to enjoin the infringement of several distinct patents has been held multifarious, but if all the patents are infringed in the use of or manufacture of a single machine, process, manufacture, or composition of matter, and it is so alleged, the bill is good. It has been said that the complainant 'should aver that said inventions are capable on conjoint as well as separate use, and are so used by the defendants.' An amendment adding such an averment will be allowed upon a demurrer."

See Hayes v. Dayton (C. C.) 8 Fed. 702; Shickle v. South St. Louis F. Co. (C. C.) 22 Fed. 105; Thomas H. El. Co. v. Sperry El. Co. (C. C.) 46 Fed. 75; Louden M. Co. v. M. W. & Co. (C. C.) 96 Fed. 232; Gamewell F. A. Tel. Co. v. Chillicothe (C. C.) 7 Fed. 351; Nellis v. McLanahan, 6 Fish. Pat. Cas. 286, Fed. Cas. No. 10,099.

I think Foster, supra, correctly states the rule as applicable to patent cases. This same view is taken in Daimler Mfg. Co. et al. v. Conklin (C. C.) 145 Fed. 955, per Hazel, District Judge.

The demurrer is sustained, but without costs, and complainants may have 30 days in which to serve an amended bill.

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## TRUAX v. GEORGE F. CHILDS ADJUSTABLE PARLOR CHAIR CO. et al.

(Circuit Court, N. D. Illinois, N. D. March 5, 1894.)

No. 21,790.

1. PATENTS—ANTICIPATION.

Devices and publications leading up to, but not fully accomplishing, a desired end, do not anticipate an invention which for the first time effectively meets all requirements and successfully accomplishes such end.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 71.]

2. SAME—INFRINGEMENT—SURGICAL PUMP.

The Allen patent, No. 424,944, for a surgical pump for use in the transfusion of blood and for similar purposes, in which it is necessary that the flow of the liquid as to volume and speed should be subject to the most delicate and exact control by the operator, was not anticipated and discloses invention; also *held* infringed.

In Equity.

Offield & Towle, for complainant.
J. H. Whipple, for defendants.

GROSSCUP, District Judge. The bill in this case is to enjoin the defendants from infringing Letters Patent 365,327, 424,944 and 425,015, covering an alleged improvement in instruments for the transfusion of blood and other purposes. The first patent was granted on June 21, 1887, and the two latter April 8, 1890. The defendants allege anticipation, non-patentability, and non-infringement.

The complainant relies chiefly upon the claims of the two patents last named, and in the view I have taken of this case, it is unnecessary to consider more than the claims of the second patent No. 424,944.

The conception of the transfusion of blood from one individual to another is not new. The complainant, who comes in under the rights of Allen, the patentee, claims no patent upon that conception, and could

obtain none had it been original with Allen. Neither are the devices for the general purpose of pumping or transmitting fluids by means of an elastic hose, encircling the inside of a metallic case, and subjected to pressure from a roller revolved thereon, new. These devices were in use for many years before Allen's patent, and could, when the idea of transfusing blood was conceived, have been easily adapted to that purpose, had there been nothing in the operation that required further consideration than the mere transmission of the blood fluid from one person to another.

Allen, however, is entitled to be regarded as a pioneer in the field of adapting these old devices to this highly useful purpose. The only thing that approaches an anticipation of his effort in this direction is the French publication of July 15, 1874, which discloses an apparatus consisting of a tube of rubber, rolled on the interior of a wheel, on which is pressed a roller set in motion by a crank. The tube once filled, the roller, in turning, forces the liquid forward, and thus leaves a vacuum, which, in turn, draws in a new quantity of the liquid. It was so adjusted that at each revolution of the crank, there passed through three centimetres cubes of blood, thus permitting of the exact measurement of the quantity transfused.

This publication is a sufficient guide to the construction of an instrument, by which the old devices of an elastic rubber tube, within a metallic case, operated upon by a roller, may be adapted to the new purpose of transfusing blood. If Allen has made no advance upon the thought thus set forth, complainant is not entitled to the relief now sought. But, while the general device was old, and this French publication pointed out a method of its adaptation to a new purpose, the field of practical instruments for this purpose remained unoccupied until Allen entered it with his first invention. Provided with the old device and the French hint to its new adaptation, he began his labors which have resulted in the present perfected and highly useful surgical pump.

The subject-matter upon which his invention was to operate was, in all essential respects, practically novel, and highly delicate. The transfusion of blood from one individual to another, or of fluids into, or from, individuals, required considerations not applicable to the uses to which these pumps had been previously put. The old devices were, possibly, capable of measuring the quantity of fluids passed, and of being so adjusted as to regulate the rapidity or volume of the flow. In none of them, however, was there any means of such regulation, except by a stoppage of the flow, and readjustment of the roller; and in all of them, when employed in the transfusion of blood, there was great danger of the introduction of air, or of the coagulation of the fluids, whereby, in a majority of cases, death was caused. At just this point, and in this respect was the defect of the previous devices as surgical pumps. In his first invention, Allen created a device whereby the fluid could be transmitted by continuous moving pressure from one point to another, without exposing it either to the air, or the danger of coagulation. In his later devices, and especially in the one No. 424,944, he introduced a method, whereby the volume and speed of the moving liquid could be controlled by an apparatus independent of the

mechanism which operated the roller. This, for the first time, put into the power of the surgeon, the most delicate control of the flow, harmoniously with its uninterrupted continuance. Possessed of this instrument the surgeon could without appreciable suspension of the current, either reverse it, or cause it to be enlarged or diminished. I regard this as not simply advantageous but highly essential to an effective surgical pump. Allen seems to have been the first to realize that this mechanical effect could be accomplished only by the combination in one instrument of two moving mechanisms wholly independent of each other. He accomplished this by a mechanism which is described in his patent as follows:

Within the case is the arbor G, one end of which is journaled in the front plate, and the other, in the back plate. * * * Attached to the arbor G, and extending laterally therefrom, is the bar I, to the opposite extremity of which is hinged the bar J, which is in turn, connected with the riller carriage L, for the roller end. Beyond the carriage L, the arm J is prolonged into the curved spring piece K, which curves inward and backward, so that its extremity rests against the arbor G, when the pressure of the roller upon the tube is released.

The independent mechanism combined with the foregoing to regulate the pressure of the roller upon the tube is described as follows:

"The arbor G is chambered concentrically and within this chamber is placed a supplemental arbor H, capable of turning within the arbor G, and projecting outside of the case A, on the opposite side to that upon which the crank is located. A thumb piece is fixed upon the outer end of the arbor H, for turning the same, and arm P, is fixed upon the arbor H, and projects laterally upon the same through the arbor G, which is slotted for that purpose. The slot through the arbor G extends sufficiently far round to admit of the arm P being moved. * * * The slot is also locked at the point at which the curved portion K rests upon the arbor, and the arm P and curved part K are therefore in position to act upon one another."

The effect of this combination was such that by a pressure upon the thumb piece upon the side of the case opposite to that of the crank, the arm attached to the inner arbor would thrust the arm attached to the outer arbor, and connected with the carriage of the roller, out ward against the tube or, by a reverse motion, release it. This increase of pressure was easy, gradual, and within the control, at every point, of the surgeon, and at three different points, caused the roller to be locked independently of the fingers of the surgeon. The mechanism, in effect, put the pressure of the roller and, therefore, the flow of the fluid transmitted effectually under the finger of the surgeon. In my opinion, this was a patentable advance upon all previous devices, or published conceptions. It made what was previously known adaptable, for the first time, in this delicate way, to the purposes of surgery. It was anticipated as every useful invention has been, by devices and suggestions leading up to this accomplishment. But, this combination is the first accomplishment, in point of needed delicacy, of the end sought. The French publication and the previous devices called to my attention, undoubtedly carried Allen far toward the result attained, but they fell short of pointing out a surgical pump of the operation of which the surgeon was the complete master without interruption. Allen's invention put within the power of the surgeon, not simply the flow and pressure of the blood, but such regulation without the intervention

of a moment's delay. This is a high consideration and a great advance, in view of the purpose to which it is put. It means, in many cases, the saving of life where a moment's interruption would bring on death. I am impelled, by these considerations, to grant to the complainant a liberal construction of the claims of patent 424,944. In my judgment, he is entitled to claims 1, 2, 6, 7, and 8 of that patent.

The defendants' device without question borrows the central thought of complainant's invention. It is a combination in all respects essentially like the complainant's device, except that the radical motion of the roller is produced by a moving wedge instead of the revolving bar. It is not necessary to determine whether these two mechanisms are mechanical equivalents. It is my judgment that they are, but whether this be true or not, the defendants device infringed upon the more general claim which I have allowed.

For the foregoing reasons, an injunction will issue as prayed for in the bill.

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## GLENDINNING, McLEISH & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 22, 1908.)

No. 5,151.

CUSTOMS DUTIES—CLASSIFICATION—HANDKERCHIEFS.

Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 345, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), provides for handkerchiefs, hemmed, hemstitched, etc.; the duty being increased for each of these stages of elaboration. And paragraph 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), provides a still higher rate for "handkerchiefs * * * in part of lace * * * not elsewhere specially provided for." *Held*, that it was the intention of Congress to advance the duty in accordance with the advancement of the goods in condition, and that hemstitched lace-trimmed handkerchiefs are dutiable under the latter rather than the former paragraph.

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,688 (T. D. 28,594), in which the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York.

The opinion filed by the Board reads as follows:

HOWELL, General Appraiser. The goods in question are linen handkerchiefs, which are hemstitched and lace trimmed. They were assessed with duty at the rate of 60 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), the pertinent portion of which reads as follows: "Handkerchiefs * * * and other articles made wholly or in part of lace, or in imitation of lace, * * * composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act." They are claimed to be dutiable under paragraph 345 of said act (30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]), which reads as follows: "Handkerchiefs composed of flax, hemp, or ramie, or of which these substances, or either of them, is the component material of chief value, whether in the piece or otherwise, and whether finished or unfinished, not hemmed or hemmed only, fifty per centum ad valorem; if hemstitched, or imitation hemstitched, or revered, or with drawn threads, but not embroidered or initialed, fifty-five per centum ad valorem."

There is no dispute in this case as to the facts nor as to commercial designation. The goods are concededly linen handkerchiefs which are hemstitched

and trimmed with cotton lace. The only question presented for decision is: Which of the two paragraphs above cited more specifically provides for such handkerchiefs? In their brief, counsel for the importers claim that the articles are covered by both of the paragraphs, and they insist that the provision for "handkerchiefs, hemstitched," in paragraph 345, is more specific, because it is without limitation; whereas, the provision in paragraph 339 for handkerchiefs in part of lace is qualified by the words "not elsewhere specially provided for."

If these articles were covered by both provisions, the presence of the phrase "not elsewhere specially provided for," in paragraph 339, might, under a familiar rule of construction, become controlling. We do not think, however, that the goods are covered by both paragraphs. In our opinion the two paragraphs relate to different classes of handkerchiefs. In paragraph 345, Congress has fixed one rate of duty for flax handkerchiefs, if not hemmed or hemmed only, and a higher rate for those hemstitched or imitation hemstitched, but not embroidered or initialed. Handkerchiefs made in part of lace, which are more fancy articles, are provided for in paragraph 339 at a higher rate. We think it was manifestly the purpose of Congress to include in the latter paragraph all linen handkerchiefs made in part of lace, whether such handkerchiefs were hemmed, hemstitched, imitation hemstitched, or otherwise.

In paragraph 345, the rate of duty is fixed on the handkerchiefs according to the way in which they are finished, whether with a hem only, or hemstitched or revered, or with drawn threads; whereas, in paragraph 339 the rate is fixed according to the material (lace) of which they are composed, in part, at least, and this, we think, is a much narrower description for handkerchiefs which are both hemstitched and made in part of lace than is the provision for "handkerchiefs, hemstitched." The handkerchiefs here in question, with the lace removed, would be hemstitched handkerchiefs, and as such would be specially provided for in paragraph 345; but with the lace trimming they are advanced beyond hemstitched handkerchiefs, and are what are generally recognized as "lace-trimmed" handkerchiefs.

Furthermore, if the contention of the importers is correct, then all linen handkerchiefs, though made in part of lace, would be dutiable under paragraph 345, for this paragraph not only provides for hemstitched handkerchiefs, but for handkerchiefs not hemmed, or hemmed only, or imitation hemstitched, and undoubtedly all handkerchiefs made in part of lace would fall within one of these classes. We believe such a result would be repugnant to the intent and meaning of the statute.

Counsel for the importers argue that by the use of the word "only" after the word "hemmed," in paragraph 345, Congress had indicated its intention to limit the provision for hemmed handkerchiefs to those that have nothing more done to them, while no such limitation is placed upon the provision for hemstitched handkerchiefs. In this view a handkerchief with a plain hem and made in part of lace would be excluded from classification under paragraph 345, and would be dutiable under paragraph 339 at 60 per cent. ad valorem; while a hemstitched lace handkerchief, a more fancy article, would be dutiable under paragraph 345 at only 55 per cent. ad valorem. There could be no good reason for imposing the higher rate on a handkerchief made in part of lace and having a plain hem, while admitting lace handkerchiefs, when hemstitched or imitation hemstitched, at the lower rate. It is quite clear to us that the use of the word "only" was for the sole purpose of distinguishing between handkerchiefs with plain hems, which are made dutiable at 50 per cent. ad valorem, and those with hems fastened by the hemstitch, on which the rate of duty is 55 per cent. ad valorem. We hold that the handkerchiefs here in question, being made in part of lace, are properly dutiable as assessed.

The protest is, accordingly, overruled, and the decision of the collector is affirmed.

Benjamin A. Levett, for importers.
J. Osgood Nichols, Asst. U. S. Atty.

PLATT, District Judge. Decision affirmed.

## In re YOUNG.

(District Court, E. D. Pennsylvania. June 25, 1908.)

No. 1,724.

BANKRUPTCY—OPPOSITION TO DISCHARGE—ENTRY OF APPEARANCE.

Under general orders in bankruptcy No. 32 (89 Fed. xiii, 32 C. C. A. xiii) a creditor is not entitled to enter an appearance for the purpose of filing objections to a bankrupt's discharge after the return day named in the order to show cause, at least without good cause shown for the delay.

In Bankruptcy. On motion to dismiss specifications of objection to bankrupt's discharge.

J. Howard Weatherby, for bankrupt.

Robert J. Byron and Sidney L. Krauss, for objecting creditors.

J. B. McPHERSON, District Judge. Judge Holland has twice decided the question raised by the bankrupt's motion to dismiss the specifications to his discharge. Following the authority of Re Ginsburg, 130 Fed. 627, 12 Am. Bankr. Rep. 459, and Re Grant (D. C.) 135 Fed. 889, the motion to dismiss is hereby granted.

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## OREGON ROUND LUMBER CO. v. PORTLAND & ASIATIC S. S. CO. et al.

(District Court, D. Oregon. May 25, 1908.)

No. 4,893.

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

A man casually employed to work on a barge in coaling a ship in port does not sustain such contractual relations as a seaman as to exempt him from the general rule relative to assumption of risk.

2. SHIPPING—SINKING OF VESSEL—UNSEAWORTHINESS.

The sinking of a vessel while being properly handled, without undue stress of weather or other known external cause, was presumptively due to unseaworthiness.

3. SAME—LIMITATION OF LIABILITY—PRIVITY OF OWNER.

In a suit by a corporation for limitation of liability as owner of a vessel for a loss due to unseaworthiness, the privity of libelant with its condition, within the meaning of Rev. St. § 4283 (U. S. Comp. St. 1901, p. 2943), is measured by that of its managing officers.

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

4. SAME—CAPSIZING OF BARGE—UNSEAWORTHINESS.

A barge, leased by libelant corporation to one of the respondents to be used in coaling a vessel in port, while being unloaded alongside the vessel capsized, and the cargo was lost and one person drowned. The immediate cause of the capsizing was the unusual quantity of water in the hold, which had come in during the latter part of the time she was being loaded. The evidence tended to show that she was loaded and was being unloaded in the usual and proper manner. She was an old vessel, and had been twice extensively overhauled and repaired, the last time some five years before. The superintendant and the manager of the libelant had both been through the hold only a few days previously, but without lights; and it did not appear that they made more than a casual

examination, nor had she been surveyed by any one having skill, and there was evidence that some of her interior timbers were broken. *Held*, that the sinking was attributable to her unseaworthiness, which was not without the privity of libelant, and that it was not entitled to a limitation of liability.

5. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

Respondent's intestate was hired to pump on a barge from which coal was being discharged into a steamer, and a short time thereafter, while so at work, the barge capsized by reason of unseaworthiness, and he was drowned. He was a carpenter, not acquainted with the work, and was not instructed nor warned of any danger, which in fact was not apprehended by those in charge until immediately before the sinking. *Held*, that he did not assume the risk from the unseaworthy condition of the barge, of which he had no knowledge or means of knowledge, and that the owner was liable in damages for his death.

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

In Admiralty. Proceedings for limitation of liability.

This is a libel and petition in behalf of the Oregon Round Lumber Company for the ascertainment of liability, and, if any be adjudged against it, then for a limitation thereof, as it respects the sinking of the barge Monarch, whereby certain coal, the property of the respondent Portland & Asiatic Steamship Company, was lost, and one Otto Pannier was drowned. The petitioner was the owner of the barge, and on December 23d leased it to the respondent Portland & Asiatic Steamship Company, to be employed in carrying coal from the bunkers or docks of the respondent Oregon Railroad & Navigation Company in Albina to and alongside of the steamship Arabia, which was lying at the Montgomery dock, with a view to coaling the ship. A bargemaster was furnished with the barge, and subsequently the libelant employed Pannier to operate a hand pump to assist with the discharge of water from her hold. It is averred, in effect, that the barge was sound, staunch, and in all respects seaworthy for the purposes for which she was to be employed, but that she sank by reason of the lessee's negligence and carelessness in loading her with coal, so that she was not equally and evenly loaded, causing her to heel and list, thus producing an unusual and unnecessary strain upon her timbers and forcing her seams and butts to open and leak, and in unloading her in such a way that all the coal was taken from one end, instead of by distribution evenly about her deck, so that one end and side of the barge was forced under water, causing her to turn over and sink, which resulted in the loss of the coal aboard and the death of Pannier. The barge being appraised, her value was fixed at $250. The respondent Portland & Asiatic Company claims damages for loss of the coal aboard, and the respondent the administrator of the estate of Pannier claims damages for the death of decedent.

Williams, Wood & Linthicum and Hogue & Wilbur, for petitioner.
Snow & McCamant, for respondent Portland & Asiatic S. S. Co.
A. C. Spencer, for respondent Oregon R. & N. Co.
H. H. Riddell and E. B. Dufur, for respondent administrator.

WOLVERTON, District Judge (after stating the facts as above). Preliminary to an examination of the cause upon its merits, the question has again been presented as to whether Pannier, being engaged in a maritime service, was subject to the rule relating to the assumption of risk incident to his employment. I held, on a previous hearing on exceptions to the libel, that a seaman, in his employment as such, was not subject to the rule, and this under the authority of Lafourche Packet Co. v. Henderson, 94 Fed. 871, 36 C. C. A. 519. From a further

consideration, on reargument of the principle, I am convinced that the doctrine of that case, while sound, does not apply to the one in hand, and that the ordinary rule should obtain here. In the Packet Company Case a sailor entered into contract or articles to ship as a seaman, and while engaged in that service was injured. It was held that as to him the rule of assumption of risk did not apply, because he was not at liberty to refuse the work, and could have been arrested and returned to the ship, had he deserted and declined to do the bidding of the master; so that there was presented a technical case of a seaman shipping under contract as a sailor. The case here is quite different. Pannier was simply employed as a hand to go aboard of the barge, and was under no articles to embark as a sailor or seaman. He was not bound to remain in the employ of his employer a minute after the conditions became apparent to him, if he had not so desired. His was the position practically of a longshoreman engaged in duty aboard the ship while in port, and his relations to his employer must be subordinated to the rules governing in such cases. Many cases attest his assumption of the risk of his employment in such a relation. I will allude briefly to some of them. In the Maharajah (D. C.) 40 Fed. 784, the workman was a longshoreman, engaged to work at a winch on board ship while in discharge of her cargo, and was injured. It was held that he assumed the risk of the dangers attending his employment. This case was affirmed on appeal to the Circuit Court of Appeals. 49 Fed. 111, 1 C. C. A. 181. In The Serapis, 51 Fed. 91, 2 C. C. A. 102, the workman was a stevedore. The circumstances attending the injury were very similar to those in the case of The Maharajah, and the holding was the same. So in The Luckenbach (D. C.) 53 Fed. 662, which was the case of a fireman employed on a tug, the rule was applied. Pannier's duty does not distinguish his employment from the employment of the several parties involved in these cases, and there is no reason for the application of a different rule as to him. The question, therefore, whether Pannier did in reality assume the risk of the mishap resulting in his death is resolved into one of fact, which will be considered later.

The primary inquiry must necessarily be whether the petitioner has incurred any liability, and, if it has, then whether it is entitled to a limitation thereof. It is pertinent, therefore, to ascertain whose acts were the conducing cause of the capsizing or sinking of the barge. To relieve the record of confusion, it should be stated that it is alleged by the libel that the respondents the Portland & Asiatic Company and Oregon Railroad & Navigation Company were lessees of the barge; whereas the Portland & Asiatic Company was the only lessee, while the coal was obtained from the Oregon Railroad & Navigation Company, and the towing was done by the Henderson, a boat owned by neither. Under the pleadings, the first issue is, was the barge seaworthy when leased? And the second, whether the lessee handled and navigated the barge in such a way as to cause her to capsize.

The barge was of the model pattern, 170 feet in length, 38 feet beam, and about 8 feet depth of hold, and was constructed in 1877. There is but little testimony as to the manner of her use until after she was in a measure reconstructed in the year 1900. J. A. Johnson

purchased her in May of that year from George W. Weidler, at a consideration of $500, and took her to Lewis river for repairs. The repairing was done while she was in the water, and without docking, beaching, or putting her on the ways. Her deckhouse was torn away, and her deck lowered a foot; entire new beams and decking being supplied. One keelson was put in anew, and the others repaired. A new king-post was supplied, so with the bulkhead, and a system of cross-bracing carried through her frame for reinforcement and to render her more stable and durable. In connection with the deck and beams, new posts, braces, and tendons were put in. Two or three pieces of the planking were taken from the hull and new ones substituted, and the barge was recalked where needed. Large quantities of salt were found in her salt boxes, which were in good condition, and about two tons more of salt were added. The work was commenced in May and continued to the following December, and, when completed, her owner and the workmen considered that she was in good A 1 condition. Being thus repaired, she was used about two years for transporting wood, ties, and other lumber, carrying upon her decks from 400 to 600 and 700 tons, and even more, at a time. It is related that a load of 450,000 feet of green lumber was left lying upon her deck for nearly three months at one time without removal. Capt. Hosford, with Gerspach, became interested in the barge later, and in November, 1902, she was again repaired; this time by taking out the transom, shortening the planking by six inches or more, because the ends were found to be decayed more or less, and putting in the transom anew. Planking to the extent of about 100 feet was removed and replaced upon the hull, and the vessel recalked, consuming about nine bales of oakum, all at a cost of $613. Hosford and Gerspach sold to the libelant a part interest in the barge in the fall of 1902, and the remainder in the spring of 1903, at which time they (Hosford and Gerspach) affirm she was in good condition. During the time that Hosford and Gerspach owned her, they used her for transporting ties, and carried near 800 tons upon her at one time. They say that 700 tons was about her carrying capacity.

D. C. O'Reilly, manager of the lumber company, testifies that at the time his company finally purchased the barge she was in good condition; and such is the opinion of his brother, R. J. A. O'Reilly, also interested in the libelant company and the superintendent thereof. The purchase price paid by the lumber company was $2,700. During the company's use of her, it loaded her with ties out of Lewis river, in weight running from 700 to 800 tons. The company made no repairs in any way, except to furnish a new steam boiler and siphon, a few days before she was leased to the Portland & Asiatic; the barge being supplied also with a hand pump. D. C. O'Reilly testifies that he had been in the barge several times, and that at the time she was leased to the Portland & Asiatic she was in good, seaworthy condition; also, on cross-examination, as follows:

"Q. When did you last inspect the barge? A. About three or four days before the Oregon Railroad & Navigation Company took her. Q. That is, this last time? A. Yes. Q. You went through her? A. Yes; I went into her hold. Q. Whereabouts was it? Where was she when you inspected her

then? A. Laying at our moorings. Q. At your dock? A. Yes. Q. What was the occasion? What was the purpose of your inspection? A. Well, when I go down on the barges, I generally go into all of them—see what shape they are in. It is a matter of general custom. Q. What did you do in the course of that inspection? A. How do you mean? I went down through her hold. Q. Just looked her over—that is all? A. Yes. Q. Made no tests of any kind? A. No. Q. Was she leaking any then? A. No; she was lying there, light. They always have three or four inches of water in them."

And R. J. A. O'Reilly testifies that he was down in her hold about 10 or 12 days before she was leased, when the new siphon was put in, and that, so far as he could see, her condition was "all right—in good shape." And on cross-examination:

"Q. You say you examined the barge a few days before this accident? A. No; I was in the hold of the barge when we put this new siphon in. That is probably 10 or 12 days before. Q. You went in there for that purpose? A. Yes; and then I went all through the hold, too. Q. You didn't make any particular inspection of it? A. I looked around. That is about all the inspection you can make—see anything that is wrong."

This comprises, in substance and effect, the testimony of libelant on the subject of the seaworthiness of the craft. Prior to the leasing in this instance, the barge was used by the Portland & Asiatic Company for transferring coal on the Elleric from her after hatch to her bunker, and was engaged in this service from December 9th to the 16th. William J. Seaman was the bargemaster aboard. He made an examination of the barge, so that he became acquainted with her condition. He testifies that when he went aboard the barge had just been siphoned out by a steamer; that he did not then go into her hold, but did a little later—in fact, that he went into her hold every day; that he moved the pump that was forward aft to the cabin; that in doing so he went down the forward hatch, and thence the full length of the boat, walking upon her keelsons; that there were three keelsons, two of which seemed to be sound; that one of them, the main keelson, was broken entirely in two, and that it stood apart 4 or 4½ inches, which tended to render the vessel unseaworthy; that there was a regular network of braces and cross-timbers in the barge; that some of the braces ran from the sides to the bottom of the keelson, and others were fastened to the ribs above, and some ran from the keelsons fore and aft, being quite lengthy; and that witness noticed that one of the bracings had forced out a plank, thus producing an aperture admitting the water quite freely. The witness further relates that during the time D. C. O'Reilly made inquiry of him as to what he thought of the barge's condition, and that he told O'Reilly that he "thought she was in pretty bad shape, mighty poor old box, something like that." And on redirect examination he states that the main braces running from the side keelsons forward to the main keelson were pulled away from the keelson, being within a foot of the break therein, which had a tendency to weaken the frame of the barge.

In rebuttal of this testimony, D. C. O'Reilly says that he was down in the barge a day or two before the accident, and that he did not see any break in the keelson; that he had been in her several times during the time he owned her; and that if there had been any broken keelson, he thought he would have known it. He also says that he saw noth-

ing of the bracing being pulled apart from the keelson. It was further developed that he went as far aft in the hold and along the keelson as where the siphon was put in, and that he took no lantern or other light with him.

Edward Dewyl affirms that he knew the boat, and that the keelson had been broken for years.

The barge was leased to the Portland & Asiatic Company on the evening of the 23d of December, 1904, and was taken alongside the Oregon Railroad & Navigation Company coal docks on the morning of the 24th. The arrangement for the barge was made by telephone, between D. C. O'Reilly, representing the lumber company, and Capt. Conway, of the Portland & Asiatic Company. The lumber company was to furnish a man with the barge, whose duties, O'Reilly testifies, "were to act as watchman and caretaker of the barge, represent our interests, and report to us any ill treatment or ill usage of the barge—keep her tied up." Further on he explains what relation the bargemaster sustained toward the loading of the barge. He "was to criticise the way it was loaded or unloaded, and, if attention was not paid to his objections and criticisms," then he was to report to the lumber company, and the company would take it up with Capt. Conway. On cross-examination the witness further testifies that it was part of the duties of the bargemaster to attend to the pumping and to keep the barge free from water, and "to represent the owners in watching how the barge was handled. * * * He was there to report in case it was not loaded properly or unloaded." This testimony shows quite clearly the duty and authority of the bargemaster; and that officer, it may be said, acted entirely within his authority. It may be that he did not act with the promptness and energy that the exigencies called for; otherwise, he was faithful to his employment.

The lessee loaded from 125 to 130 tons of coal on the barge on the day of the 24th, and, the two following days being holidays, nothing further was done until the 27th, when the loading was continued, and was completed on the morning of the 28th. At about the noon hour of the 28th the barge was taken in tow by the Henderson, and carried alongside of the Arabia, and made fast with her stern up stream. At the suggestion of Doyle, the bargemaster, the loading was begun on the forward end of the barge, and continued back to about the center; and the barge was left in that way over the two holidays. On the 27th, after the loading had continued until evening, the Oregon Railroad & Navigation steamer Hassalo came by, and took off some 25 to 30 tons of coal. Later the Harvest Queen took off coal for her use, but at the direction of Doyle coaled from another quarter of the barge, so that the barge would not be left on a strain by reason of unloading unevenly. Doyle asserts that he was able to keep the water out of the hold of the barge by the use of the engine and siphon until the morning of the 28th; that is, that he was theretofore able to pump out in 10 hours what would run in in 24. On the 28th the water gained upon him so rapidly that he reported to O'Reilly shortly before 11 o'clock, but was unable to get any reply until after the barge had been towed alongside of the Arabia. It was while he was away to luncheon that the Henderson took her in tow, and he intercepted her at the Arabia.

This was near 1 o'clock, or thereafter. He set the siphon to work again, but without making headway. The stevedores began unloading from the forward starboard quarter, and continued so until it was found that the barge was listing upon the outer or port side, whereupon, at the request of Doyle, and also of O'Reilly, who had arrived at the dock in the meantime, the coal was shoveled from the crest on the opposite side, and the barge righted again upon nearly an even keel. The work thus continued until between 4:30 and 5 o'clock, when the barge capsized outward from the ship and sank.

All the witnesses who were at all acquainted with the proper manner of loading a model barge concur in the opinion that she should have been loaded by distributing the tonnage about her deck evenly as the work was going on; that is, by starting in at either end, and putting on from 10 to 15 tons as it would run aboard from the chute, and then shifting backward or forward a few feet, according as the loading was started, putting on about the same amount at each shift, until the deck was covered, and then going over the deck again and again in the same way until the full load was on. Mr. D. C. O'Reilly says:

"A barge of that character should be loaded with her lines—that is to say, to keep her shape, to keep her hog-chains taut; and to do that she has got to be loaded evenly, tier by tier, and unloaded the same way, or, if there is any difference, it should be taken off—the center should be lightered first, if anything," thus keeping her on an even balance to the end.

This was practically the method adopted and employed for loading by the lessee, under the supervision of Smith and by the suggestion of Doyle; but at the end of the day of the 24th coal had been placed aboard extending only to the middle of the barge. This had the effect to put the boat down by the bow and up by the stern, in which position she remained for two days, and until the 27th, when the loading was taken up again, and completed on the 28th. After the holidays, probably in the early part of the 27th, R. J. A. O'Reilly was at the dock, and, noticing that "the coal was a little heavy in one place," directed the bargemaster to arrange to have the barge dropped down, and the coal distributed more evenly, which was done. And the witness says that he (the bargemaster) "started in loading her properly," and that at that time she had on in the neighborhood of 100 tons of coal. This witness further relates that he went to the Montgomery dock, to the Arabia, between 3 and 4 o'clock, and went aboard the barge; that the offshore rail and deck were two inches under water; that they were taking coal off the inside forward corner, which would naturally list her off shore; that he looked down the forward hatch, and it seemed as though there were between two and three feet of water in her; that she was down by the stern, and the water was deeper aft; that the siphon was working; that he arranged later to have the coal taken off straight across, and to have it shoveled over from the top, and that as the work progressed she straightened up, but that she seemed to be getting a little deeper in the water all the time; that he noticed no one was working the hand pump on the bow, and that, as he was coming aboard the Arabia, he saw a man standing there, ap-

parently doing nothing; that he asked him if he wanted to work, and he said, "Yes"; that thereupon witness said to him:

"We need some more pumping on the barge. The siphon doesn't seem to be doing as much as is necessary. Go down there and report to the barge foreman. He will put you to work."

Witness further states that the man went down immediately; that the barge foreman showed him the pump, and he went to work pumping; that witness went back to the dock, and tried, through telephone, to get the steamer Hustler to come and siphon the barge out, but was unsuccessful; that he then went back to his office, and when he arrived there was informed that the barge had capsized. Witness further testifies that he thinks the deck was still awash when Pannier went aboard, but that he took no notice as to that, and that the pump where Pannier was put to work was 60 or 70 feet distant from where the deck was under water. When asked respecting his recollection touching the load as to being heavy in the center, he answered that it was about even; that the coal was in heaps; that it was not an evenly spread load, but seemed to be heavier by the stern than elsewhere, and was apparently about the same weight from the stern to midship; from midship it was a little lighter—not much. Further, witness says he did not think there was any danger of the barge going over; otherwise, he would not have put Pannier on, or left their own men on, and that he thought there was a chance, if they could get the coal straightened up and the boat eased up a little at the stern, of the thing coming out all right.

F. S. Gandy, a witness for the respondent Portland & Asiatic Company, who was in charge of the unloading of the barge, testifies more particularly than any other touching the final capsizing of the barge. He says, in effect, that for the last half hour she had been on an even keel, "only just going one way and then the other," the guards being level with the water; that a large steamer went by, and, as the swell struck the barge, she came to the side of the ship, and hung over so far that he shouted to the men to come to the side of the ship; that—

"on the receding swell, as the wave took her, she started the coal. The coal all slid, and then the barge went right with it. She went with it when the coal slid. That is what tipped the barge. The water in the hold is what—the barge turned turtle—made it turn turtle. If she had been an empty barge, she would have come back—righted herself."

Witness further testified that Pannier did not try to come to the side of the ship when he sang out; that the last witness saw of him he had hold of the pump, and that there was no show in the world for him to get out; that the coal went clear of him, but that he sank with the barge.

The witnesses—the O'Reillys, Kelly, Murray, Kane, Gandy, and Smith (who superintended the loading), as well as Doyle, the bargemaster—all testify that the barge was properly loaded; and Supple, Murray, Kelly, Gandy, and Seaman concur in saying that, if the boat had been staunch and seaworthy, the taking off of 25 to 30 tons of coal from any quarter would not have had the effect to strain her or to open her seams and butts. Seaman, however, who saw the barge

while loading, from across the river, and just about the time she went over, thinks that she was loaded too heavy in the center, but, being so far away, he was not sure of his impression. Edward Dewyl, a witness who saw the barge from the same viewpoint, testifies that it seemed to him that the barge was loaded too heavily in the center. Gandy thinks that the barge was "hogged" a little bit, which would indicate that she was loaded light in the center.

A little further as to Pannier. Kane says O'Reilly put Pannier to work at the pump, and that he worked there steadily until the barge went down. He (Pannier) went aboard and around by the starboard side to the forward end, where the pump was located. Doyle testifies that he did not think there was any danger of the barge capsizing at the time, but knew that it was getting in bad condition; that he did not tell Pannier that he was in any special danger; that Pannier knew as much about it as he did; that the men were all talking about the barge; that at one time, when the Hustler came along, he heard the workmen telling the boy (meaning Pannier), "Boy, now you are pumping for your life," but that witness did not know whether they were joking him, or were serious about it. Doyle further testifies that he went up forward as the boat came by, and heard the longshoremen pass the remark: "It is all off now. She is about gone"—and that Pannier was standing there listening; that he was up pretty close to where the men were working, and could have heard it all.

This is a sufficient review of the evidence, although in a cursory way, to give an intelligent idea of the situation, both as it pertains to the seaworthiness of the barge and the manner in which it was handled by the lessee, and as to the employment of Pannier, and the libelant's relative responsibilities in the premises. It seems to be conceded by proctors for libelant that it was incumbent upon libelant to furnish a seaworthy craft, or, rather, that its warranty attending the demise imposed such an obligation. It is insisted, however, that under section 4283, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2943), the unseaworthiness, if it existed at the time of the demise, must have been a thing within the privity or knowledge of the libelant; otherwise, libelant is entitled to a limitation of liability.

Of course, the libelant being a corporation, the requisite privity or knowledge of its corporate and managing officers and agents would be tantamount to privity or knowledge of the corporation itself. The corporation, though said to be soulless, must possess animation and vitality, which is infused always through its authorized officers and agents; and its will, knowledge, persuasion, and policy are only the will, knowledge, persuasion, and policy of such managing officers and agents. There must be responsibility lodged somewhere, and the corporation, in simple justice, must be held to as strict and full accountability as individuals. It not infrequently transpires that a vessel, after entering upon her voyage or engaging in the service for which she is dispatched, becomes unseaworthy, and damage ensues, without any apparent cause from stress of weather or collision in any way, or undue or negligent abuse in handling and navigating her, and in every

such case the presumption obtains that she was unseaworthy at the time of entering upon her service. How else could her condition be accounted for? In the case of The Arctic Bird (D. C.) 109 Fed. 167, the barge, the subject of libel, was taken in tow, having cargo on board, and, having proceeded for six hours on her voyage, sank without receiving injury from any known source, and without encountering strong wind or rough sea. The court held it was to be presumed that the barge was unseaworthy at the outset; otherwise, there was no cause or way to account for her action in failing to perform the functions for which she was dispatched. The court quotes, as authoritative, from Dupont De Nemours v. Vance, 19 How. 162, 15 L. Ed. 584, as follows:

"As to what constitutes seaworthiness, it has been uniformly held that if a vessel springs a leak, and founders, soon after starting upon her voyage, without having encountered any storm or other peril to which the leak can be attributed, the presumption is that she was unseaworthy when she sailed."

And also from Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012:

"If a defect without any apparent cause be developed, it is to be presumed it existed when the service began."

It may be, however, that the unseaworthiness was occasioned or incurred without the privity or knowledge of the owner. It is then that section 4283, Rev. St. (U. S. Comp. St. 1901, p. 2943), comes to the aid of the owner and limits his liability to the value of his craft, so that the liability becomes in effect the liability of the craft only. Such a case was presented by The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366, where the steamer was lost through a defect in her boiler, causing an explosion. A competent person was employed to make an inspection, who failed to discover the defect, and the court declared that privity or knowledge thereof, the defect not being patent, could not be imputed to the managing officers of the corporation, and hence not to the corporation itself, and that, unless the defect was apparent, or of such character as to be detected by an unskilled person, the knowledge thereof could not be so imputed to the corporation. See, also, Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438.

Other cases might be cited to the same purpose. I am constrained to the view, however, that the case at bar does not come within the principle there announced. It is rather to be controlled by the authority of The Republic, 61 Fed. 109, 9 C. C. A. 386. No expert or other person was appointed or required by either the manager or superintendent of the lumber company to make a survey of the barge Monarch to determine with respect to her seaworthiness or fitness to undergo the service to which she was appointed under the demise; but these officers depended solely upon their own skill and ability for ascertainment as to her condition. They were thus dependent upon their own diligence, and for their lack of diligence in discovering at least what was or would have been apparent upon inspection to an unskilled person the corporation would be responsible. In the case last cited, after tracing somewhat the history of the limitation act, the court says:

"The English courts have always construed the acts as intending to exempt the shipowner when he himself has not been in any way to blame, and to deny him the limitation of his liability only when personal blame is attributable to him [citing authorities]. Undoubtedly, by our statute, as by the English statutes, the common-law liability of the shipowner is not restricted in cases where his personal neglect has been an inducing cause of the loss. It was the intention of Congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts [citing authorities]. A loss is not occasioned without the knowledge or privity of the shipowner when it arises from his personal neglect to inform himself of the defective condition of his vessel; the vessel being under his immediate personal supervision."

The effect of the act is stated with conciseness and perspicuity by Mr. Justice Gray, in Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 440, 9 Sup. Ct. 469, 471, 32 L. Ed. 788, as follows:

"That act leaves them [the shipowners] liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of their master and crew."

The O'Reillys were the manager and superintendent, respectively, of the libelant. They have testified fully as to their knowledge of the condition of the barge at the time of the demise. They show that each of them was in the hold of the barge from time to time, one of them only a short time before she was given into the charge of the Portland & Asiatic Company, and made observations as to her condition. But it is clear that neither of them made any critical or careful examination at any time, with proper lights to aid them in determinng her condition. Neither of them would say with persuasion that the keelson was not broken, as asserted by Seaman, or that the other conditions as portrayed by the latter did not exist. The craft had been long in use, had been twice overhauled, and required the recent protection of a new siphon, with an engine, to keep her hold free of water. It is at least questionable whether the repairs of 1900 were made with good judgment or proper skill, and it is certain that the barge was afterwards subjected to severe usage. Nor does the evidence bear out the contention that the barge was misused in loading and unloading to such an extent as to cause her to leak and finally capsize, if she had been seaworthy at the start. There is, and can be, no suggestion of overloading. The loading was practically carried on under the advice of Doyle, the bargemaster, and one of the O'Reillys, who was at the dock on the morning of the 27th, and it was concluded in a manner that has the approval of a number of men who were versed in the proper way of loading such a craft. The O'Reillys both say she was properly loaded, except one of them seems to think she might have been slightly heavy in the center. Doyle and one of the O'Reillys were directing as to the manner of unloading, so that no blame can attach to the employés of the Portland & Asiatic Company in relation to that service.

Libelant's strong contention is that the cause of the wreck was, first, in loading the barge on the 24th from her bow back to her center with 125 to 130 tons of coal, and permitting her to remain up by the stern

for two days, and in overloading her in the center, which forced her ends up and caused her seams and butts to open, thus causing her to leak abnormally. As to the manner of loading her, Supple, who was an expert in the construction and management of a model barge, was of the firm opinion that it did not hurt her at all, as it was the usual way adopted for loading a barge. Smith, who supervised the loading of the barge, testifies that the load was put on tier by tier until three were aboard, which completed the work, and the first tier was carried back half the distance at the end of the first day; and, as evidence that it did no harm, the bargemaster testifies that no unusual leakage became apparent until the morning of the 28th.

The second contention is likewise untenable. Seaman and Dewyl are evidently mistaken as to the overloading in the middle of the barge. They were not sure of that themselves, and the current of testimony is so strong to the contrary I am led to believe that there was no sufficient inequality in the respect suggested to account for the mishap. Nor could the taking of coal from the barge on the evening of the 27th by the Hassalo and Harvest Queen have affected her vitally, or even materially, if she had been a seaworthy craft. This is the consensus of opinion of several competent witnesses. The case is not dissimilar to that of Forbes v. Merchants' Exp. & Transp. Co. (D. C.) 111 Fed. 796. In that case the barge, with her cargo, sank at the dock during the night after being loaded. The only peril to which she had been subjected was that from the swells caused by passing vessels, and it was held that the presumption arose from such facts that the barge was unseaworthy, and that her sinking was due to that cause, in the absence of evidence establishing some other adequate cause. As applicable here, I quote from the opinion of the court:

"Vessels ordinarily seaworthy withstand the swells of passing vessels, and this barge did not. The inference is that she was not seaworthy. If upon this occasion she was not equal to the strains successfully withstood by other vessels lying at that dock, the inference would be that she had become weakened and was in need of repairs. What other vessels met without injury caused her to sink. The swells were nightly present. Their influence was known. They were the usual, common accompaniments of navigation. The respondent's barge, to be deemed seaworthy, should have been able to withstand them. The Northern Belle, 9 Wall. 526, 19 L. Ed. 748. She was an old boat. She had survived the use for which she had been constructed, and been rehabilitated for purposes of a freight barge, and it was the duty of her owner to give her the attention that vessels of her age and decrepitude require. She had not been thoroughly examined and overhauled since the respondent first repaired her, and her bottom had not been examined for several months before the accident. The presumption is, from her sinking, that she was not seaworthy, and the court is unable to discover sufficient facts overcoming this presumption. Therefore the respondent must be held not to have discharged the burden, which rests upon it, of showing that she was seaworthy against ordinary conditions."

I quote, also, the language of Goff, Circuit Judge, in Donaldson v. J. W. Perry Co., 138 Fed. 643, 644, 71 C. C. A. 93:

"The appellant claims that the barge was improperly unloaded; that a portion of the cargo was removed from one part of the vessel, and thereby she was left on an uneven keel, with the result that a leak was sprung. The cargo was unloaded in the usual way. It is quite evident that the barge was not seaworthy, and that she was not able to withstand the dangers incident to

the voyage she had undertaken. The water causing the damage entered through an opening three inches long in the bottom of the barge. A vessel leaking because of the removal of a portion of its cargo, whereby an uneven keel was caused for a few hours, can hardly be classified as seaworthy."

It is very evident that the immediate cause of the barge overturning was the water in her hold. If she had been rid of that, she would have sustained her load without accident. The testimony does not show any sufficient reason by which to account for her taking in water in such great volume, beginning on the morning of the 28th of December. She had not been subjected to any stress of weather, nor were the swells occasioned by the passing and repassing of other water craft of sufficient force to affect her. The loading, as has been shown, was not of a nature to produce the abnormal leakage, so that it must necessarily be presumed that the barge was unseaworthy when she entered upon her service. Important facts as to her bad condition were brought home to the managers of the lumber company, which, together with their omission to conduct a proper examination of her, renders them negligent of duty, and the company must be held to a privity or knowledge of her unseaworthy condition.

From these considerations, the libelant is not entitled to a limitation of its liability, and must respond to the Portland & Asiatic for the entire value of the coal lost by reason of the barge capsizing.

The next feature of the controversy pertains to the right of recovery by the administrator of his estate for the death of Pannier. It is urged that Pannier assumed the risk of the mishap; that the dangers of his service were open, obvious, and apparent; and that, by accepting and continuing in the service, he took upon himself the burden of liability, thus relieving the libelant of all accountability for his injury. The principle upon which the assumption of risk is maintained is well established, and we need not discuss it further, nor dilate upon it. The rule may be conceded, as announced by Mr. Chief Justice Lord, in Brown v. Oregon Lumber Co., 24 Or. 315, 33 Pac. 557, that:

"In accepting the service, he [the employé] not only assumes the risks reasonably to be anticipated as incident to it, but he also assumes that he has the capacity to understand the nature and extent of such service and has the requisite ability to perform it."

Yet, with these things, there is to be considered the employé's knowledge and appreciation of the dangers he was to encounter. If he had not the knowledge, was not warned nor instructed, and did not understand, or could not, by the exercise of common prudence, have understood or formed a correct and full estimate of the real situation he was to and did encounter, then it could not he said that he assumed the hazard of his employment. If he did appreciate the danger, then the hazard attending the service was his own. Stager v. Troy Laundry Co., 38 Or. 480, 485, 63 Pac. 645, 53 L. R. A. 459. The entire doctrine is comprehensively stated in a very recent case from the Supreme Court of Oregon. Millen v. Pacific Bridge Co. (Or.) 95 Pac. 196, 198. The court says:

"The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care

should know, the risks to which he is exposed, he will as a rule be held to have assumed them; but where he either does not know, or, knowing, does not appreciate, such risks, and his ignorance or nonappreciation is not due to negligence or want of due care on his part, there is no assumption of risk."

This is not a case coming within the principle alluded to in Carlson v. O. S. L. R. Co., 21 Or. 450, 452, 28 Pac. 497. Pannier was not employed to put the barge in repair, or in a safe and suitable condition for use; nor can it be said that as to him he embarked in the service of rescuing the craft from a known and appreciated peril. O'Reilly, seeing Pannier apparently without employment, said to him:

"We need some more pumping on the barge. The siphon doesn't seem to be doing as much as is necessary. Go down there and report to the barge foreman. He will put you to work."

And thus was his employment effected. There was nothing said as to the hazard attending the service, nor was Pannier instructed, or in any way warned, that he was about to encounter any danger whatever. True, when Pannier went aboard, the guard and a portion of the deck were probably awash on the port side of the barge. But Pannier went aboard by way of the starboard or inshore side, and, going around to the bow of the vessel, he took his position at the pump, and continued at his work incessantly until the time of the mishap. From his position, he could not see that the deck was under water, because the coal intercepted his vision, and it is altogether probable that he was never aware that that condition of the barge existed. The testimony of Doyle would seem to indicate that some of the boys from the Hustler, a passing steamer, sang out to Pannier that he was pumping for his life, and that Pannier was within hearing of the longshoremen when they were remarking as to the situation: "It is all off now. She is about gone"—and using other like expressions. But it is a fair deduction from the testimony that the boys from the Hustler were joking with Pannier, and that Pannier did not hear the conversation between the longshoremen. It is absolute that he was taking no part in such conversation, and, being at work faithfully at his post of duty, it is improbable that he heard any considerable part of it. Pannier was a carpenter and joiner by trade, and there was no testimony offered showing his acquaintance with the duties and the hazards incident to the occupation of a mariner or longshoreman in service on shipboard. It is altogether improbable that he had any adequate appreciation of the risk he was incurring by going and remaining aboard of the barge to assist in pumping the water from her hold. Even O'Reilly, Gandy, and Doyle did not seem to think the barge was in imminent danger until within a short time previous to her capsizing; and certainly neither O'Reilly nor Doyle instructed or warned Pannier of his danger. I am strongly impressed that Pannier neither understood nor appreciated the risk that he was incurring when he went aboard for duty, nor during the time of his service, unless it might have been immediately before the barge capsized. He was still pumping when the mishap occurred, and failed to make any attempt to come to the side of the ship when Gandy shouted to the men. Possibly he did not hear the warning. The libelant was negligent in its duty to Pannier, in that it did

not give Pannier the proper instruction or warning as to the danger he was incurring to himself, and, Pannier not having appreciated such danger and hazard, libelant is liable to his estate for the damage it has sustained by reason of his death.

The amount of coal lost by the respondent Portland & Asiatic Steamship Company was 441 tons, and its value $4.33¾ per ton, aggregating $1,912.84. To this should be added loss of the iron tubs and coal chutes, value $175. The libelant, therefore, is liable to the respondent Portland & Asiatic in the sum of $2,087.84, to which should be added legal interest from the date of the mishap causing the loss.

The respondent Strauhal, as administrator, is entitled to recover the amount of the present value of Pannier's estate, taking into account his expectancy of life, and the probable accumulations during that period. He was a little over 31 years of age, and his expectancy of life about 34 years. He was healthy and vigorous, sober and industrious, and it is related that in the last two years of his life he saved as his earnings $500, which he paid over to his sister, under some arrangement that they had between them for possible future care of himself by his sister. Outside of this, it is shown that Pannier, shortly previous to his last employment, was earning $3 per day. But, without following the testimony further, here is sufficient to show that his probable net earning capacity was $250 per year. According to the Northampton Tables, the present sum that will produce an annuity of $250 during his expectancy of life, invested at the rate of 4 per cent. per annum, is $3,660. Such is the basis of deduction adopted in The D. S. Gregory and The George Washington, Fed. Cas. No. 4,100, and I am impressed that it is fair and equitable. The sole question under the Oregon statute is, what has the estate lost by the death of the decedent? And this rule measures the amount of the administrator's recovery. The respondent Strauhal is therefore entitled to recover from the libelant the sum of $3,660, to which should be added interest at the legal rate from the time of the death of Pannier.

The respondent Oregon Railroad & Navigation Company has incurred no liability whatever, and the cause should be dismissed as to it.

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## CALL et al. v. LOS ANGELES-PACIFIC CO. et al.

(Circuit Court, S. D. California, S. D. July 1, 1908.)

PUBLIC LANDS—DEED EXECUTED BY ALIEN OCCUPANT—VALIDITY.

One M., an alien, who had not declared his intention of becoming a citizen of the United States, but who was an occupant of a tract of public land, executed a deed, by which he purported to convey to defendant railroad company a strip for right of way over such land. The land was at that time within the limits of a railroad grant and had been reserved from entry or sale. Subsequently the grant was forfeited and the land restored to the public domain, and M., who had in the meantime declared his intention to become a citizen, made a homestead entry thereof and later received a patent under which complainants acquired title. *Held*, that the right of way deed was a nullity both because M. was an alien, who could not under the policy of the land laws acquire any right in the land, and because it was at the time re-

served and not subject to disposition thereunder, and that, being void as against public policy, the subsequent title acquired by him did not relate back to give it validity.

Oscar A. Trippett, H. M. Barstow, and Joseph H. Call, for complainants.

Wm. Singer, Jr., Guy Shoup, and John D. Pope, for defendants.

ROSS, Circuit Judge. By their amended bill of complaint, the complainants allege: That they are, and were at the time of the commencement of this suit, the owners as joint tenants in fee, and in actual possession of that certain land situated in Los Angeles county, Cal., known as lots 3, 4, 5, and 6, of section 31, township 1 south, range 16 west, of the San Bernardino base and meridian according to the United States survey thereof, and that the said land is also described as follows: A tract of land of 141 acres, more or less, bounded on the south by the Pacific Ocean in the Bay of Santa Monica, for a distance of one-half mile, and on the west by a tract of land heretofore and during the year 1893 in possession of and claimed under a settlement right of one F. M. Valenzuela. That the said land was, on the 5th day of August, 1896, surveyed by the United States, and the township plats of such survey were on that day approved by the Surveyor General of the United States for the state of California, and duly filed in the local land office of the United States, prior to which 5th day of August, 1896, it was unsurveyed land of the United States. The amended bill alleges: That prior to the year 1893 one Juan Jose de Pena and Maria Valenzuela de Pena, his wife, had unlawfully entered upon the said land, the same then being reserved land of the United States not subject to settlement or entry; that the said Pena and wife had unlawfully erected a cabin on the land, and resided therein during the year 1893 with one Joseph Moynier; that Pena was the head of the family and the husband of the said Maria Valenzuela de Pena; that in the year 1893 neither Pena, his wife, nor the said Moynier was a citizen of the United States, nor had either of them declared his or her intention to become such; that they then were aliens and citizens of France; and that after the said alleged settlement on the said land, and prior to March, 1893, the said Juan Jose de Pena was convicted of a felony in the superior court of the county of Los Angeles, state of California, and during that year was serving a term in the penitentiary of the state of California.

The amended bill then alleges: That by an act of Congress approved July 27, 1866 (14 Stat. 292, c. 278), the Atlantic & Pacific Railroad Company was incorporated and authorized to construct a line of railroad and telegraph from Springfield, in the state of Missouri, to the Pacific Ocean, and to aid in the construction of such road there was granted to the company a large amount of land along said line; that, in pursuance of that act, the said Atlantic & Pacific Railroad Company did, in the year 1872, file in the office of the Secretary of the Interior its map designating its line of railroad and definitely fixing the same from Springfield to the Pacific Ocean at the town of Ventura; that the alleged land of the complainants fell within the indemnity or 30-mile limits of that railroad grant; that by

section 23 of the act of Congress approved March, 1871 (16 Stat. 573, 579, c. 122), the Southern Pacific Railroad Company was authorized to construct a line of railroad from the Tehachepi Pass, via Los Angeles, to the Colorado river at Ft. Yuma, and to aid in the construction of that road a similar grant of lands was made to the Southern Pacific Railroad Company as was made to the said Atlantic & Pacific Railroad Company by the aforesaid act of July 27, 1866; that in the year 1871 the said Southern Pacific Railroad Company filed its map of general route, and in the year 1873 its map of definite location of said railroad from Tehachepi Pass, via Los Angeles, to the Colorado river, and thereafter constructed the said railroad in all respects as required by law; that the said alleged lands of the complainants fell within the granted or 20-mile limits of the said grant to the Southern Pacific Railroad Company; that on April 3, 1871, the Commissioner of the General Land Office, by an official order duly made, withdrew and reserved from settlement, from pre-emption, and from homestead entry, all of the lands designated by odd numbers falling within the 20-mile limits of the said grant to the Southern Pacific Railroad Company between the Tehachepi Pass and the Colorado river, including in such reservation and withdrawal the said alleged lands of the complainants; that on the 22d day of April, 1872, by another order duly made, the Commissioner of the General Land Office withdrew and reserved from settlement, from pre-emption, and from homestead entry, all of the sections of land designated by odd numbers within 30 miles of the line of route of the said Atlantic & Pacific Railroad Company within the state of California, including in such withdrawal and reservation the said alleged lands of the complainants; that the said Atlantic & Pacific Railroad Company failed to construct any part of its road in the state of California, as provided for by the aforesaid act of July 27, 1866, or at all; that by an act of Congress approved July 6, 1886, the grant so made to that company, including both primary and indemnity lands, was forfeited to the United States and retaken because of the company's breach of the conditions of the grant; that on the forfeiture of the said grant to the said Atlantic & Pacific Railroad Company by the said act of July 6, 1886, a controversy arose between the Southern Pacific Railroad Company and the United States as to the title to the lands embraced within the overlap of the grant of the said Southern Pacific Railroad Company and the grant of the said Atlantic & Pacific Railroad Company so forfeited to the United States in 1886; that on the 23d day of June, 1888, the Secretary of the Interior of the United States, having under consideration the adjustment of the land grants of said Atlantic & Pacific and Southern Pacific Railroad Companies, by an official letter and decision duly made, ordered that all of the lands within the granted limits of the grant made to the said Southern Pacific Railroad Company by the act of March 3, 1871, situated also within the indemnity limits of the grant to the said Atlantic & Pacific Railroad Company of July 27, 1866, should continue and remain in reservation pending adjudication by the courts, or until such time as the Interior Department might deem it proper to remove the reservation; that the said order of the said Secretary of the Interior included within the lands so reserved the

said alleged lands of the complainants; that on the 18th day of October, 1897, in a suit pending in the Supreme Court of the United States between the United States and the Southern Pacific Railroad Company, it was finally adjudged by that court that the said Southern Pacific Railroad Company did not and could not acquire under its said grant of March 3, 1871, either as granted or as indemnity, any of the lands falling within the 30-mile limits of the grant made to the said Atlantic & Pacific Railroad Company by the act of July 27, 1866; that all of the said lands in such conflict were owned by the United States; that the said forfeiture did not in any way inure to the benefit of the said Southern Pacific Railroad Company; and that on the 13th day of April, 1898, the Commissioner of the General Land Office, by an official letter and decision duly made, ordered that all of the lands within the conflicting limits of the said grants to the said Southern Pacific Railroad Company and said Atlantic & Pacific Railroad Company be restored to settlement and entry under the homestead and pre-emption laws, which order was made in view of the said decision of the Supreme Court of the United States and included in said order of restoration the said alleged lands of the complainants.

The amended bill further alleges, upon the complainants' information and belief: That on March 27, 1893, Maria Valenzuela de Pena, wife of the said Juan Jose de Pena, and Joseph Moynier, duly made and executed to the defendant Southern Pacific Railroad Company a deed, which was duly acknowledged and thereafter duly recorded in the records of Los Angeles county, Cal., on the 11th day of April, 1893, purporting to convey to said Southern Pacific Railroad Company a strip of land 100 feet wide, and extending for a distance of one-half mile along the northern shore of the said Pacific Ocean, through the said alleged lands of the complainants, a copy of which deed is annexed to the original bill; that at the time that instrument was so executed the land therein described was reserved land of the United States, not subject to homestead or pre-emption entry or settlement; that at that time, and for many years thereafter, the said Joseph Moynier was an alien, to wit, a citizen of France, and had not declared his intention to become a citizen of the United States; that he was not then, nor was he for many years thereafter, entitled to make any settlement or entry under the homestead or pre-emption laws upon any land of any character, and especially was not authorized to settle upon or enter upon any reserved land of the United States; that the said Juan Jose de Pena was then still in the penitentiary of the state of California, and was then also the husband of the said Maria Valenzuela de Pena; that neither he nor his said wife ever made a bona fide settlement upon the land in controversy and never received any patent or other title thereto from the United States; that on the restoration of the land in controversy to entry, and on September 21, 1898, the said Joseph Moynier made homestead entry at the United States land office at Los Angeles, Cal., for the aforesaid lots 3, 4, 5, and 6, section 31, township 1 south, range 16 west, San Bernardino base and meridian; that at the time of making homestead proof, and in order to procure an entry upon the said land, the said Joseph Moynier on Sep-

tember 21, 1898, in accordance with the provisions of section 2290 of the Revised Statutes of the United States, make an affidavit before the register and receiver that he was not acting as the agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land so entered, or any part thereof, and that he did not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, and that he had not directly or indirectly made, and would not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he might acquire from the government of the United States would inure in whole or in part to the benefit of any person except himself, and after having made such affidavit and proof to the satisfaction of the said register and receiver, and having paid the fees required by law, a certificate of entry in due form was issued to him for such land as a homestead; that on the 22d day of January, 1904, the said Joseph Moynier made proof by himself, and corroborating witnesses, before the United States land office at Los Angeles, that he had entered, and duly complied with the homestead laws of the United States, for said lots 3, 4, 5, and 6, being the northwest fractional quarter of section 31, township 1 south, range 16 west, S. B. M., and duly made proof to the satisfaction of the register and receiver that he was admitted to citizenship of the United States on the 5th day of December, 1903, and that he had declared his intention to become a citizen of the United States on the 31st day of August, 1896, and that he had actually established his residence upon the said land in November, 1897, and on that day had built a house of lumber, 16 by 22 feet in size, of a value of $50, and a stable of a value of $50, fencing of a value of $30, and cleared the land to the value of $150, and had planted a vineyard to the value of $50, and that he, the said Joseph Moynier, had not, prior to said homestead proof, sold, conveyed, or mortgaged any portion of the said land; that thereafter, on the 11th day of November, 1904, the proper officers of the United States duly and regularly issued to the said Joseph Moynier a patent conveying to him the land so entered by him, and duly and finally determining on that date that the facts set forth in the application and proofs of the said Moynier were true, and that the said Moynier did first declare his intention to become a citizen of the United States on the 31st day of August, 1896, and did first become a citizen of the United States on the 5th day of December, 1903, and that he did first settle upon said land in November, 1897, and that he did then build his said home and made his said improvements as he alleged and proved that he had done, and that he had not sold, conveyed, or mortgaged any portion of the said land prior to the date of his said homestead proof; that at no time prior to April 13, 1898, when the land in controversy was restored to entry and settlement, was the said Joseph Moynier a settler or a bona fide settler under the homestead laws of the United States upon the land in controversy; that the pretended deed of the said Moynier to said Southern Pacific Railroad Company was, when so executed, and at all times since has been, void and of no effect, and in violation of the provisions of sections 2288, 2289, 2290,

and 2291 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1385–1394).

The amended bill further alleges: That by immediate and mesne conveyances the complainants have purchased from and under the said Joseph Moynier the whole of the land in question; that since April 13, 1898, complainants and their predecessors in interest have been in the actual, exclusive possession of the whole thereof, and during the said time have continuously cultivated the whole thereof as a farm; that they purchased the said land in good faith, believing that they were acquiring a good title to the same from and under the said Joseph Moynier, for a valuable consideration, to wit, the sum of $4,200, which sum the complainants paid on the 1st day of March, 1905, without either of them having any actual knowledge or notice, other than such constructive notice given by the record of the said pretended deed, that the defendants or either of them, or their or either of their predecessors, had or claimed to have any title, interest, or easement upon the said land, and in good faith believing that the title to said land was vested in the said Joseph Moynier by said patent from the United States, in fee, and free and clear from any rights of way or easements or servitudes of any kind; that the said land lies upon and along the shore of the Pacific Ocean, upon the north coast of Santa Monica Bay, for a distance of half a mile, and is of great value, largely on account of its water front; that it is valuable for the construction of wharves, for shipping purposes, and for fisheries, and other purposes as water front land; that the said land, commencing at the line of high tide, is abrupt and elevated, rising to a height of from 6 feet to over 50 feet upon the line of high tide; that the only means of access thereto is by a passageway or road along the shore situated at the line of high tide, and which has a width of 8 feet; that the defendants claim and pretend that they have a right to said 100-foot strip along the ocean through the complainants' said alleged land, under and by virtue of said pretended deed from said Maria Valenzuela de Pena and Joseph Moynier to the said Southern Pacific Railroad Company; that the said defendants have caused said pretended deed to be recorded in the office of the recorder of Los Angeles county, Cal.; that they have caused maps to be made and published, exhibiting upon such maps the alleged tract of the complainants, with a railroad right of way staked out and located upon and over the same of 100 feet in width, and for one-half mile along the seashore, as land conveyed to said Southern Pacific Railroad Company by the said pretended deed of the said Joseph Moynier; that the said pretended deed clouds the title of the complainants; that the said acts and claims of the defendants thereunder greatly embarrass the complainants in their title, and greatly affect the market value of the alleged land of the complainants; that the defendants threaten to, and, unless enjoined, will continue to, exhibit the said deed and maps, and make such pretended claims to the said strip of land; that they claim that the said deed to the defendant Southern Pacific Railroad Company is a valid deed conveying a strip 100 feet wide over the alleged land of the complainants, and threaten to, and, unless enjoined, will, go upon the said land of the complainants, and commence, prosecute, and complete the con-

struction of a railway for a distance of over 2,600 feet over and upon the alleged land of the complainants, and occupy the water front of the said tract of land, and will thereby obstruct and destroy the access from the alleged land of the complainants to the ocean and from the ocean to the said alleged land of the complainants, and will so tear up the ground, and excavate the same, as to always obstruct the access to said land from other lands lying adjacent to the same and along the coast; that the said acts of the defendants so threatened and about to be committed will change the nature of the alleged lands of the complainants, and practically destroy its market value for residence, business, and wharfage, and other purposes, and valuable uses, to the complainants' damage in a sum exceeding $30,000; that the said defendants, in asserting a claim to the said strip of land, do so under and by virtue of the said pretended deed executed by the said Maria Valenzuela de Pena and Joseph Moynier to the defendant Southern Pacific Railroad Company, and deny the effect and validity of the patent issued by the said United States to Joseph Moynier under which the complainants hold their title to the whole of the land therein described; and that, in threatening to construct said railroad, and thereby destroy the access to and from the alleged lands of the complainants, the said defendants likewise claim the right so to do under and by virtue of the said pretended deed of the said Joseph Moynier, denying the validity and effect of the said patent; that the said defendants have combined and conspired with other persons unknown to the complainants to deny to the complainants the right claimed by them under the said patent, and, to carry into effect such conspiracy, have caused the aforesaid deed of the said Maria Valenzuela de Pena and Joseph Moynier to be recorded in the office of the recorder of Los Angeles county, and have actually commenced the construction of a railroad along the coast over the alleged lands of the complainants, and are still engaged in constructing and completing the same; that the land in controversy has a value exceeding $30,000, for residence, business, and wharfage uses; and that the damage to the alleged lands of the complainants on account of the construction of the said railway as so threatened under the claim of right by virtue of the said pretended deed, will exceed the sum of $30,000.

The prayer of the bill is for a temporary injunction restraining the defendants from entering upon the land in controversy, and from constructing any railroad thereon, and from taking or removing the earth or rock therefrom, or from in any way depriving the complainants of free access to their said alleged land, and from claiming any right thereto under or by virtue of the said pretended deed from Maria Valenzuela de Pena and Joseph Moynier, and that upon final hearing such injunction be made permanent; that the alleged deed from Maria Valenzuela de Pena and Joseph Moynier to the defendant Southern Pacific Railroad Company be canceled; that an accounting may be had of all damages that may have been sustained by the complainants before or during the trial of the cause, in the construction of the said railroad or otherwise, or in the commission of any of the acts or things alleged to have been committed or threatened by the defendants; that the court may finally determine what, if any, right or easement the de-

fendants, or either of them, have over or upon the alleged lands of the complainants, under said deed; and that if it shall be found that the defendants, or either of them, have any right or easement therein, the court will define and determine the extent thereof, and will require any railroad to be constructed over and upon the alleged land of the complainants to be constructed so as not to interfere unnecessarily with the access thereto, or to the water, from said land, and will require the said railroad to be built at a suitable elevation above the line of high tide, and with suitable overgrade and undergrade and other crossings, for roads, highways, and railroads to and from and over the alleged land of the complainants, and to and from any wharves which may be constructed by the complainants or their assigns, upon the said land, and for such further relief as may seem equitable.

The Los Angeles Pacific Company made default, but the defendant Southern Pacific Railroad Company answered the amended bill, denying any title in the complainants of any character to any of the land described in the deed from Maria Valenzuela de Pena and Joseph Moynier to the defendant Southern Pacific Railroad Company.

By its answer, the Southern Pacific Railroad Company admits and alleges that on March 22, 1893, Joseph Moynier duly made, acknowledged, and delivered to it the deed last referred to, and that the deed was duly recorded April 11, 1893, in the records of Los Angeles county.

"(3) Admits and alleges that on September 21, 1898, the said Joseph Moynier, then and for many years theretofore a homestead settler upon and occupant of the land, duly made homestead entry under the general land laws of the United States, in the proper land office of the United States, of and for lots 3, 4, 5, and 6, of section 31, township 1 south, range 16 west, San Bernardino base and meridian, situated in the county of Los Angeles, state of California, and embracing all the lands described in the deed referred to in the first paragraph of this separate answer, and that thereafter such proceedings were had as that on January 22, 1904, a patent was duly issued by the United States conveying unto the said Joseph Moynier all of the said lots and land in this paragraph described.

"(4) Alleges that on March 8, 1902, the grantee named in the deed referred to in the first paragraph hereof, by instrument in writing, duly transferred title to, and right of exclusive possession of, the lands described in the deed referred to in the first paragraph of this separate answer, unto it (this defendant), and it (this defendant) thereby became, has ever since remained, and still is, the owner and entitled to exclusive possession of all lands described in the said deed.

"(5) Alleges that it (the defendant) has no knowledge nor information about such matters, and on that ground denies that complainants, or either of them, purchased or attempted to purchase from the said Joseph Moynier the lands described in the third paragraph of this separate answer, or any part thereof, and in this behalf alleges that, were it in any wise true that complainants did make or attempt to make such purchase, it was with knowledge of the record of the deed referred to in the first paragraph of this separate answer, and subject, subordinate, and servient to the right and title transferred by said deed and fed and perfected by the patent to Joseph Moynier, hereinbefore referred to.

"(6) Denies that the land described in the deed referred to in the first paragraph of this separate answer is of great value, or of any value in excess of $500, on account of its water frontage, or its availability for the construction of wharves, or for shipping purposes, or for fisheries, or for all such and all other purposes as water front land, and denies that the

only means of access to said land is by a passageway or road having width of about eight feet along the shore at the line of high tide.

"(7) Denies that construction of its (this defendant's) railroad over the land described in the deed referred to in the first paragraph of this separate answer will occupy the water front of said land, or will obstruct or destroy access of any land to or from the ocean, or to or from adjacent lands, or will change the nature of any land or destroy its market values for residences, business, wharfage, or other purposes or uses, to complainants' injury or damage in a sum exceeding $30,000, or in any sum whatsoever.

"(8) Denies that the lands described in the amended bill of complaint as having been purchased by complainants for $4,200 have any value, for all uses and purposes whatsoever in excess of the said sum alleged to have been paid therefor, or that construction of its (this defendant's) railroad on the land described in the said deed referred to in the first paragraph of this separate answer would damage said land, or complainants' right, title, or interest therein, in the sum of $30,000, or in any sum whatsoever.

"(9) Alleges that the matter in dispute in this case does not equal nor exceed, exclusive of interest and costs, the sum or value of $2,000, for which reason, and the other reasons set forth in its (this defendant's) demurrer herein, it (this defendant) denies the jurisdiction of this court to hear or determine this case."

To this answer the complainants filed a replication.

At the trial the respective parties presented a "Stipulation as to Evidence," stipulating in evidence the various decisions and acts of Congress referred to in the pleadings, and also the following:

"Subdivision 4.

"Item 12. Lots 3, 4, 5, and 6 of section 31, township 1 south, range 16 west, San Bernardino meridian, is within indemnity limits of the land grant made unto the Atlantic & Pacific Railroad Company by the said act of Congress of July 27, 1866, and within primary limits of the land grant made unto the Southern Pacific Railroad Company by the said act of Congress of March 3, 1871.

"Item 13. The official plat of survey of the lots described in the foregoing item 12 was approved by the United States Surveyor General for California on June 20, 1896, and duly filed in the United States land office at Los Angeles on October 5, 1896.

"Item 14. On September 21, 1898, one Joseph Moynier, then an occupant of the land described in item 12 hereof and qualified to make entry thereof under the general homestead laws of the United States, made and filed in the United States land office at Los Angeles his homestead entry of the said land, and such proceedings were thereafter had in the said Los Angeles land office and General Land Office of the United States, as that on November 1, 1904, the United States, by its proper officers, duly issued unto the said Joseph Moynier, under and in pursuance of his said homestead entry, United States patent, in proper form, for the said land.

"Subdivision 5.

"Item 15. Exhibit A to complainants' bill of complaint herein is a true copy of the original deed and certificate of acknowledgement and correctly shows the date and place in the records of Los Angeles county, when and where the same was duly recorded, and Joseph Moynier, party to the said deed, is the Joseph Moynier referred to in item 14 hereof.

"Item 16. On February 28, 1905, said Joseph Moynier duly made, executed, and delivered his deed of grant purporting to convey to George H. Blount the lands described in item 12 hereof, which deed was on March 1, 1905, duly recorded in the office of the county recorder of Los Angeles county, Cal., in Book 2248, p. 149, of Deeds; and on March 1, 1905, the said George H. Blount duly made, executed, and delivered his deed of grant purporting to convey to plaintiff Joseph H. Call the said lands described in item 12 hereof, which deed was on March 1, 1905, duly recorded in the office of the county

recorder of said Los Angeles county in Book 2241, p. 143, of deeds, and at that time said Joseph H. Call duly paid to the said Joseph Moynier $4,000 gold coin, in consideration of the said conveyances from Joseph Moynier to George H. Blount and from George H. Blount to Joseph H. Call. At the time of purchasing said lands, Joseph H. Call believed that said deeds from Moynier to Blount and from Blount to him (Joseph H. Call) conveyed to him (Call) an absolute title in fee simple to the whole of said lands, and at that time he (Joseph H. Call) had no actual knowledge that the Southern Pacific Railroad Company had or claimed to have any title, interest, or estate in said lands. On April 26, 1905, said Joseph H. Call by deed of grant duly transferred to George C. Call all of his right, title, interest, and estate in and to the lands described in item 12 hereof, which deed was recorded in said Los Angeles county records in Book 2705, p. 120, of Deeds, and on August 25, 1906, said George C. Call by deed of grant duly transferred unto said Joseph H. Call and L. Dora C. Call, husband and wife, as joint tenants, all of his right, title, interest, and estate in and to the said lands described in item 12 hereof, which said deed is of record in said Los Angeles county in Book 2825, p. 133, of deeds.

"Item 17. On March 8, 1902, the Southern Pacific Railroad Company named in the deed copied as Exhibit A to complainants' bill of complaint duly transferred all its property and property rights, including such (if any) property or property right as was acquired by or in virtue of the said deed, unto the defendant Southern Pacific Railroad Company."

Certain witnesses were also examined by the respective parties, several of them in respect to the value of the strip of land described in the deed from Moynier to the Southern Pacific Railroad Company; each of them giving the reasons for the valuation so placed upon the strip: The witness Curtis stating that it is worth about $25,000, the witness Bixby stating that it is worth about $35,000, the witness Blount stating that it is worth about $35,000, and the complainant Call testifying that, in his opinion, the value of the strip, if taken for railroad purposes, together with the damage to the remainder of the tract, would be over $40,000. The latter witness also testified that at the time he made his purchase from Moynier he had no actual notice of any kind that the defendant railroad company claimed any interest in the property, and that, before purchasing the land, he caused the Title Insurance & Trust Company of Los Angeles to furnish him a certificate, showing a clear title in Moynier to the land with the single exception of a traveled wagon road along the beach.

Such being the pleadings of the parties, and the facts as shown by the record, the law governing the case may, I think, be briefly stated. The objection made to the jurisdiction of the court on the ground of insufficiency of the amount in controversy is disposed of by the testimony last referred to in the statement of the case. Manifestly, the real question in the case is whether the deed of March 27, 1893, from Moynier to the Southern Pacific Railroad Company, was or was not a valid instrument. By it Moynier undertook to—

"grant and convey unto the said party of the second part (the Southern Pacific Railroad Company), and to its successors and assigns forever, all of that certain strip or parcel of land lying, being and situate in the county of Los Angeles, in the state of California, and described as follows, to wit: A strip or tract of land one hundred feet wide, lying equally on each side of the located line of the said company's railroad where the same is located through the southwest quarter of section thirty-one, township one south, range sixteen west, S. B. M., being more particularly described as follows, to wit: Commencing for the same at a point in the center line of the said

railroad where said center line intersects the east line of said quarter section, and running thence westerly along said center line of said railroad along the coast above the line of high tide, embracing a strip of land fifty (50) feet wide on each side of said center line to the westerly line of said tract and the eastern line of land of E. N. Valenzuela, a distance of half mile more or less, and containing an area of six acres of land, more or less."

The strip of land embraced by that deed the complainants allege they own in fee, which allegation the defendant railroad company denies, and alleges it owns, by virtue of the deed from Moynier, the subsequent patent issued to him by the government in pursuance of his homestead entry, and the conveyance from the grantee of the Moynier deed to the defendant railroad company. It seems too obvious for argument that the validity of the deed from Moynier to the Southern Pacific Railroad Company depends wholly upon the laws of the United States, and that therefore it is a federal question. See Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 433, 27 Sup. Ct. 350, 51 L. Ed. 553.

Was that deed of any validity? I think not. It was, in my opinion, a nullity for two reasons:

First. Because at the time it was made Moynier was an alien and had not then declared his intention to become a citizen of the United States, and he was therefore then incapable of acquiring any land under the homestead laws.

Second. Because the land itself was then reserved by the government from any disposition under such laws.

The contention that when Moynier afterwards acquired the government title to the tract embraced by his homestead entry (including the strip here in controversy), under and by virtue of its homestead laws, such title related back and fed the conveyance that he had attempted to make, is, I think, an attempt to put the doctrine of relation to an unwarranted use. That doctrine is a fiction of the law, adopted by the courts for purposes of justice. It cannot, in my opinion, be properly resorted to for the purpose of giving effect to an act which was not only unauthorized and illegal, but absolutely void as against public policy. In Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272, it was distinctly adjudged by the Supreme Court that a contract by a homesteader to convey a portion of a tract, when he shall acquire title from the United States, is against public policy and void. A fortiori, is a complete nullity a pretended conveyance by one claiming to be a homesteader, but who was at the time an alien, and who had never declared his intention to become a citizen of the United States.

I think the complainants are entitled to judgment.

Ordered accordingly.

## PEOPLE'S UNITED STATES BANK v. GOODWIN et al.

(Circuit Court, E. D. Missouri, E. D. June 23, 1908.)

No. 5,593.

1. STATUTES—CONSTRUCTION OF REVISED STATUTES—REFERENCE TO ORIGINAL ACTS.

Acts of Congress enacted before 1873, parts of which were incorporated in the Revised Statutes, and which were thereby repealed, may be referred to in construing the provisions taken therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 302–306.]

2. REMOVAL OF CAUSES—NATURE OF CONTROVERSY—ACTIONS AGAINST UNITED STATES.

To render an action against an officer of the United States removable from a state to a federal court by certiorari under Rev. St. § 643 (U. S. Comp. St. 1901, p. 521), which provides for such removal of suits "against any officer appointed under or acting by authority of any revenue law of the United States * * * or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law," etc., the acts which constitute the cause of action must have some rational connection with official duties under a "revenue law," and in some way affect the revenue of the government, and such fact must appear on the face of the complaint in the action or the petition for the writ. An action for libel against the Assistant Attorney General for the Post Office Department and an inspector of such department, based on the promulgation by them of a fraud order against the plaintiff, does not meet such requirements and is not removable under said section.

On motion to set aside order for writ of certiorari and to quash the writ.

This action was instituted in the circuit court for the city of St. Louis, state of Missouri, to recover damages for an alleged libel charged to have been wrongfully and maliciously written, composed, and published by the defendants. It was sought to remove the cause from the state court to this court upon the ground that there was a federal question involved, but a motion to remand it to the state court was sustained upon the ground that the complaint did not show that there was such a question in the case. 160 Fed. 727. It is now sought to remove it to this court by certiorari under section 643, Rev. St. (U. S. Comp. St. 1901, p. 521). The petition for certiorari alleges: That the defendant Goodwin was the Assistant Attorney General for the Post Office Department of the United States, and the defendant Fulton, inspector in charge of the post office inspectors of the United States at the time and for some time prior to the acts complained of in the declaration; that all of said acts were committed by them solely in their capacity as officers of the United States in the Post Office Department thereof, in the discharge of their official duties, and not otherwise; that the action was commenced by plaintiff on account of acts done by defendants under authority of the revenue laws of the United States, and under and by virtue of their offices aforesaid, which said offices were occupied by them all the time mentioned in the declaration, and they therefore pray for a removal of the cause from the state to this court, and that a writ of certiorari issue for that purpose in pursuance of section 643, Rev. St. (U. S. Comp. St. 1901, p. 521).

The petition is duly verified by defendants, and also has certificate of counsel, as prescribed by that statute. The granting of the writ was resisted by counsel for plaintiff, who appeared specially for that purpose; but the court, owing to the importance of the issues involved, granted an order for the writ with leave to plaintiff to file a motion to set aside this order and quash the writ. By consent of parties, the issuance of the writ was waived, and a transcript of the pleadings in the state court filed as a return in the same manner as if a writ of certiorari had been issued. In pursuance of

the leave granted, plaintiff filed a motion to set aside the order for the writ and quash it. There are several grounds assigned in the motion, but the substantial one alleged for the quashing of the writ is that "the petition does not allege or show that the petitioners are or were officers under any revenue law of the United States or otherwise within the terms of section 643, Rev. St. (U. S. Comp. St. 1901, p. 521)." The motion may therefore be properly treated as a demurrer to the sufficiency of the petition and the jurisdiction of this court to grant the writ upon the allegations of the petition. Virginia v. Felts (C. C.) 133 Fed. 85.

Barclay & Fauntleroy, for plaintiffs.

H. W. Blodgett, U. S. Atty., and T. P. Young, Asst. U. S. Atty., for defendants.

TRIEBER, District Judge (after stating the facts as above). The importance of the questions of law involved, and the ability with which the case has been argued by counsel, and the fact that the precise question involved in this proceeding has never been determined by the Supreme Court or the Circuit Court of Appeals for this circuit require a more full review of the statute in question and the principles of law which will aid in a construction thereof than would ordinarily be necessary. The section under which the proceeding is instituted is lengthy and was digested by the compilers of the Revised Statutes from a number of acts, some of which have been repealed since the enactment of the Revised Statutes; but, as the petition is based solely upon the claim that the defendants committed the acts complained of by the plaintiff under and by virtue of the revenue laws of the United States, it is unnecessary to refer to any other part of that section than the one relating to "any officer appointed under, or acting by, authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under, or by, authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law."

The constitutionality of the act is not questioned; that having been fully determined in Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648, and Davis v. South Carolina, 107 U. S. 591, 2 Sup. Ct. 636, 27 L. Ed. 574. Although under section 5596, Rev. St., all acts of Congress passed prior to the 1st day of December, 1873, any portion of which is embraced in any section of the Revised Statutes, are repealed (United States v. Bowen, 100 U. S. 508, 25 L. Ed. 631), still, when there is a doubt as to the construction of a section of the Revised Statutes, it is proper to refer to the original acts from which the section was taken for the purpose of ascertaining the true intent of Congress, and this is especially so where the act authorizing the revision directs marginal references, as is the case in the act authorizing the Revised Statutes. United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; Barrett v. United States, 169 U. S. 218, 18 Sup. Ct. 327, 42 L. Ed. 723.

The first act passed by Congress on that subject (excepting Act Feb. 4, 1815, c. 31, 3 Stat. 198, which was intended to be of short duration only, during the then existing war between the United States and Great Britain, extended by Act March 15, 1815, c. 94, § 6, 3 Stat.

233, and re-enacted by Act March 3, 1817, c. 109, 3 Stat. 396, for the term of four years), was Act March 2, 1833, c. 57, 4 Stat. 633, entitled "An act to provide for the collection of duties on imports." Section 3 of that act, in so far as it is necessary to quote it for the determination of the issue involved in this case, is as follows:

"That in any case where suit or prosecution shall be commenced in a court of any state against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for, or on account of, any right, authority or title set up or claimed by such officer or other person under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution at any time before trial, upon a petition to the Circuit Court of the United States, in and for the district in which the defendant shall have been served with process * * * which petition, affidavit and certificate shall be presented to the said Circuit Court if in session, and if not, to the clerk thereof at his office, and shall be filed in said office and the cause shall thereupon be entered on the docket of said court and shall thereafter be proceeded in as a cause originally commenced in that court; and it shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of certiorari to the state court requiring said court to send to the said Circuit Court the record and proceedings in said cause."

The cause which led to the enactment of this act was the attempted nullification of the tariff laws by one of the states of the Union and was upon the recommendation of President Jackson in a special message to Congress. 2 Richardson's Messages and Papers of the Presidents, p. 610. A history of the causes which led to the enactment of the act may be found in the opinion of Mr. Justice Strong in Tennessee v. Davis, supra.

In view of the title of the act, it had been held that it applied only to duties on imports, and not to cases arising under the internal revenue laws. Stevens v. Mack, 5 Blatch. 514, Fed. Cas. No. 13,404, where Judge Benedict held that it did not even apply to cases arising under the internal revenue laws. In Philadelphia v. Diehl, 5 Wall. 720, 728, 18 L. Ed. 614, Mr. Justice Clifford, delivering the opinion of the court upon the same matter, said:

"Undoubtedly the original act was passed for the protection of officers of the revenue and persons acting under them, charged by law with the collection of import duties."

The first act of Congress intending to extend the provisions of the act to the internal revenue laws was Act June 13, 1864, c. 173, 13 Stat. 223, 241, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt and for other purposes." Section 50 of that act is as follows:

"That the provisions of the act entitled 'An act to provide for the collection of duties on imports,' approved March 2, 1833, now in force, shall be taken and deemed as extended to and embracing all cases arising under the laws for the collection of internal duties, stamp duties, licenses or taxes which have been, or may be hereafter enacted; and all persons duly authorized to assess, receive or collect such duties or tax under such laws are hereby declared to be, and to have been revenue officers within the true intent and meaning of said act and entitled to all the exemptions, immunities, rights, benefits and privileges therein enumerated or conferred."

By Act July 13, 1866, c. 184, 14 Stat. 98, 171, entitled "An act to reduce internal taxes and to amend an act entitled 'An act to provide

internal revenue to support the government, to pay interest on the public debt and for other purposes,' approved June 30, 1864, and acts amendatory thereof," the section of the act of 1864 above quoted was repealed by a proviso in section 67, and in lieu thereof what is practically now that part of section 643, Rev. St. (U. S. Comp. St. 1901, p. 521), under which it is sought to remove this cause to this court, enacted. As this matter is fully discussed in Philadelphia v. Diehl, supra, it is sufficient to refer to that case.

There can be therefore no doubt but that under the act now in force all persons acting under or by authority of any revenue law, whether custom or internal revenue, are included. The question then to be determined is: Are the petitioners, who were officers under the Post Office Department of the United States, revenue officers within the meaning of that section of the law, and, if so, are the acts which form the basis of this suit of such nature as would justify the claim that they were acting under the revenue laws of the United States?

Assuming, without deciding, that the Assistant Attorney General for the Post Office Department is an officer of that department, and not of the judicial, and that the acts of both of these officers complained of were in the discharge of their official duties, and not otherwise, as alleged in their petition for certiorari, are they entitled to have this cause removed to this court under the provisions of that statute? The first question to be determined is: What are "revenue laws" in the ordinary meaning of the words as defined by the courts of the United States?

It is hardly possible to determine that question by a general statement to cover every possible phase, and, at all events, in the language of Mr. Justice Harlan, in Twin City Bank v. Nebeker, 167 U. S. 196, 202, 17 Sup. Ct. 766, 42 L. Ed. 134:

"What bills belong to that class (for raising revenue) is a question of such magnitude and importance that it is the part of wisdom not to attempt by any general statement to cover every possible phase of the subject."

He then quotes with approval from section 880 of Story on the Constitution on that point, which is as follows:

"What bills are properly bills for raising revenue in the sense of the Constitution has been a matter of some discussion. A learned commentator supposes that every bill which indirectly or consequentially may raise revenue is, within the sense of the Constitution, a revenue bill. He therefore thinks that the bill for establishing the post office, the mint, and regulating the value of foreign coins belongs to this class and ought not to have originated in the Senate. But the practical construction of the Constitution has been against his opinion. And, indeed, the history of the origin of the power already suggested abundantly proves that it has been confined to bills to levy taxes in the strict sense of the word, and has not been understood to extend to bills for other purposes which may incidentally create revenue. No one supposes that a bill to sell any of the public lands or to sell public stock is a bill to raise revenue in the sense of the Constitution. Much less would a bill be so deemed which merely regulated the value of foreign or domestic coins or authorized a discharge of insolvent debtors upon an assignment of their estates to the United States giving a priority of payment to the United States in cases of insolvency, although all of them might incidentally bring revenue into the Treasury."

In Peyton v. Bliss, Woolw. 170, Fed. Cas. No. 11,055, Mr. Justice Miller defined a "revenue law" to be:

"Any law which provides for the assessment and collection of a tax to defray the expenses of the government."

In The Nashville, 4 Biss. 188, Fed. Cas. No. 10,023, the court defined a "revenue law" to be:

"A law whose principal object is the raising of revenue and not one under which revenue may incidentally arise."

In United States v. Norton, 91 U. S. 566, 568, 23 L. Ed. 454, the court, after quoting Webster's lexical definition of the term "revenue" ("The income of a nation, derived from its taxes, duties or other sources, for the payment of the national expenses"), say:

"The phrase 'other sources' would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Post Office Department when there should be such excess as there was for a time in the early history of the government. Indeed, the phrase would apply in all cases of such excesses. In some of them the result might fluctuate; there being excess at one time and deficiency at another. It is a matter of common knowledge that the appellative 'revenue laws' is never applied to the statutes involved in these classes of cases."

And thereupon the court held that the act of Congress entitled "An act to establish a postal money order system," approved May 17, 1864, is not a revenue law within the meaning of the act entitled "An act in addition to the act entitled 'An act for the punishment of certain crimes against the United States, approved March 26, 1874.'" The court in its opinion cites with approval from United States v. Mayo, 1 Gall. 396, Fed. Cas. No. 15,755, where Mr. Justice Story held that the phrase "revenue laws" meant "such laws as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government."

In United States v. Hill, 123 U. S. 681, 685, 8 S. Ct. 308, 31 L. Ed. 275, it was sought to maintain a writ of error in the Supreme Court upon the ground that the money sought to be collected by the action was for fees collected by a clerk of a court of the United States for naturalizations and therefore within that part of section 699, Rev. St. (U. S. Comp. St. 1901, p. 568), which confers upon the Supreme Court jurisdiction on error without regard to the sum or value in dispute in any civil action brought by the United States for the enforcement of any revenue law thereof, and it was held:

"The precise question for decision is whether this section which provides for the payment by the clerk into the Treasury of the surplus moneys received by him as the fees and emoluments of his office, is a 'revenue law,' within the meaning of that clause of section 699 which is relied on, and we have no hesitation in saying that it is not. As the provision relates to the jurisdiction of this court for the review of the judgments of the Circuit Courts, it is proper to refer to the statutes giving jurisdiction to those courts to see if there is anything there to show what the term 'revenue law,' as here used, means. Looking then to section 629 of the Revised Statutes, we find that by the fourth subdivision the Circuit Courts have been granted original jurisdiction 'of all suits at law or in equity arising under any act providing for revenue from imports or tonnage,' and 'of all causes arising under any law providing internal revenue.' And again, by the twelfth subdivision, 'of all suits

brought by any person to recover damages for any injury to his person or property on account of any act done by him under any law of the United States for the protection or collection of any of the revenues thereof.' This clearly implies that the term 'revenue law,' when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue—that is to say, a law which is directly traceable to the power granted to Congress by section 8, art. 1, of the Constitution—'to lay and collect taxes, duties, imposts, and excises.' * * * Certainly it will not be claimed that the clerk of a District Court of the United States is an 'officer of the revenue': but there is nothing to indicate that the term 'revenue' has any different signification in this subdivision of the section from that which it has in the other. The clerk of a court of the United States collects his taxable 'compensation,' not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any 'revenue law,' properly so called, but out of a statute governing an officer of a court of the United States."

In Millard v. Roberts, 202 U. S. 429, 436, 26 S. Ct. 674, 50 L. Ed. 1090, section 880 of 1 Story on Constitution, hereinbefore set out, is again quoted with approval and followed.

In Campbell v. James (C. C.) 3 Fed. 513, 516, it was sought to have a postmaster declared to be an officer of the revenue within the meaning of section 989, Rev. St. (U. S. Comp. St. 1901, p. 708); but this was denied by the court, and Judge Blatchford, then circuit judge and shortly thereafter one of the justices of the Supreme Court, in his opinion on that subject, said:

"It is clear that the word 'revenue,' in all these forms of expression, means only the revenue from customs. The act does not relate to revenue from any other source. * * * Under said section the words 'other officers of the revenue' would never have been construed to mean a postmaster. * * * This is the view held by the Post Office Department itself, for in the report of the Postmaster General to the President, of November 8, 1879, reference is made to this suit, and to the decision on it, by the interlocutory decree, adverse to the defendant James, and it is stated that 'there is no provision of federal law to secure "certificates of probable cause" to United States officials, other than treasury officials, in cases of adverse judgments for acts done in their official capacity.' This is unquestionably a correct view."

The cases relied upon by defendants to sustain the contention that they were officers acting under a revenue law are United States v. Bromley, 12 How. 88, 13 L. Ed. 905; Warner v. Fowler, 4 Blatchf. 311, Fed. Cas. No. 17,182; Ward v. Congress Construction Co., 99 Fed. 598, 39 C. C. A. 669.

In the Bromley Case the question before the court was whether an action under Act Cong. March 3, 1845, entitled "An act to reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds in the revenue of the Post Office Department," was removable to the Supreme Court by writ of error under the provisions of Act May 31, 1844, entitled "An act to amend the judiciary act passed the 24th of September, 1789," which provides:

"That final judgments in any Circuit Court of the United States for the enforcement of the revenue laws of the United States, and for the collection of the duties on merchandise imported therein, may be examined and reversed or affirmed in the Supreme Court of the United States, without regard to the sum or value in controversy in such action, at the instance of either party."

And it was held that that act "in its title is declared to be an act to reduce the rates of postage, and for the prevention of frauds on the revenue of the Post Office Department. In its character and object it is a revenue law, as it acts upon the rates of postage and increases the revenue by prohibiting and punishing fraudulent acts which lessen it," and therefore within the meaning of the act of May 31, 1844. The cause was an action of debt under Act March 3, 1845; the declaration charging that:

"The defendant was the captain of the packet boat Empire, which regularly performed trips, at stated periods, between two places, from one to the other of which places the United States mail was regularly conveyed, under the authority of the Post Office Department, to wit, between Albion and Rochester, and that the said packet boat, and the said defendant so being such captain, and the managers, servants, and crews of the said packet boat, did, while the said defendant was such captain thereof, and while the said packet boat did regularly perform trips, at stated periods, between the said places, the said United States mail being regularly conveyed, under the authority of the Post Office Department, from one to the other of the said places, transport and convey, otherwise than in the mail, divers letters, packets, and packages of letters, to wit, 10 letters, 10 packets, and 10 packages of letters, then and there being mailable matter, other than newspapers, etc., and which said letters, packets, and packages of letters did not, nor did any or either of them, have relation to any part of the cargo of the said packet boat, from one to the other of the said places, from one to the other of which said places the United States mail was then and there regularly conveyed as aforesaid, under the authority of the Post Office Department, contrary to the intent of the act."

It was therefore clearly an action to recover penalties for the violation of that part of the act of Congress which was enacted as shown by the title of the act, as well as its plain language "to increase the revenues of the Post Office Department." It may be conceded that that case is authority for the proposition that certain acts of officers of the Post Office Department, or, for that matter, of any other department of the government, may be acts under a revenue law, and still it is not decisive of the issue involved in this action. It certainly is not conclusive authority to the point that all acts by officers of that department are acts under "a revenue law." Questions affecting the rates of postage would probably be such, as the revenue of the government would be affected thereby. But nothing in plaintiff's declaration or defendant's petition for the writ of certiorari discloses anything whereby the revenues of the government were or can in the remotest degree be affected by the acts charged. United States v. Norton, supra, where the Bromley Case is distinguished.

Warner v. Fowler, supra, was decided in the Circuit Court for the Southern District of New York by Judge Ingersoll in 1859. It was there held that a postmaster was a revenue officer within the meaning of section 3 of the Act of March 2, 1833, citing United States v. Bromley as conclusive authority for this ruling. But this case has been clearly overruled by the same court in Victor v. Cisco, 5 Blatchf. 128, Fed. Cas. No. 16,934, and Stevens v. Mack, 5 Blatchf. 514, Fed. Cas. No. 13,404, and at least by implication by what was decided by the Supreme Court in Philadelphia v. Diehl, supra.

In Victor v. Cisco, it was sought to remove a cause under that act

against an assistant treasurer of the United States; but the writ of certiorari was denied by Judge Shipman upon the ground that it was not embraced within the provisions of the act of 1833.

In Stevens v. Mack, decided in 1867, it was held by Judge Benedict that the act of March 2, 1833, applied only to cases arising under the revenue laws for the collection of duties on imports, and not to cases arising under the law for the collection of internal revenue. This construction of the act of 1833, as stated by Judge Benedict in his opinion, and also that of the Supreme Court in Philadelphia v. Diehl, must have been the view of Congress, otherwise it would not have provided by the acts of June 30, 1864, and July 13, 1866, that section 3 of the act of 1833 shall be applicable to all cases arising under the laws for the collection of internal duties. Had Congress desired to extend the benefits of that act to the officers of all departments of the government which might, incidentally, collect moneys which have to be covered into the treasury, and for that reason become revenue, it would have used language which would have left no doubt as to its intention.

In legislating on the subject of original jurisdiction of the Circuit Courts of the United States, Congress used such language. Subdivision 4 of section 629, Rev. St. (U. S. Comp. St. 1901, p. 503), provides:

"Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, * * * of all causes arising under any law providing internal revenue, and all causes arising under the postal laws."

Had Congress intended to extend the provisions of section 643 to causes arising under the postal laws, is it unreasonable to presume that it would have used language as free from ambiguity as it employed in the above? It may have been an oversight, but the courts are as powerless to correct an oversight as they are when the omission is intentional. In view of the fact that these two (sections 629 and 643) were prepared by the same digesters and enacted by Congress at the same time, ought not the well-known maxim that "an affirmation in a particular case implies a negation in all others" apply?

In Benchley v. Gilbert, 8 Blatchf. 147, Fed. Cas. No. 1,291 it was sought to remove, under this act, an action against a United States commissioner to recover money alleged to have been illegally exacted by him as costs and fees in a criminal proceeding before him; but it was held by Judge Woodruff that the action would not lie. The learned judge in his opinion said:

"In short, the officers contemplated by section 67 of the act of 1866 are officers whose authority to perform their official duties is derived from the internal revenue law, either by appointment or other express authority conferred by it. In the discharge of their official duty, to whatever that duty relates, they act under that law and under its protection. This is gathered not only from the language of the particular section, but also from the language and manifest intent of the acts of 1833 and 1864. The legislation of 1833 was for the protection of officers of the customs; that of 1864 and 1866 for the protection of internal revenue officers and their subordinates."

In Ward v. Congress Construction Company, the removal was sustained upon the ground that the act in controversy was ordered by the Secretary of the Treasury, who is "the officer administering the rev-

enue laws of the United States, acting under color of his office." It is unnecessary to express an opinion on that case, as no one will contend that any officer connected with the Post Office Department, and especially these defendants, are "officers administering the revenue laws of the United States." It is the Treasury Department which, by law, is charged with the administration of all revenue laws, customs and internal. If the fact that some acts of the officers of a department performed in pursuance of an act of Congress result in the collection or receipt of moneys which must necessarily be paid into the Treasury of the United States, and thereby become available for the payment of the governmental expenses, makes that department and all the officials under it persons acting under "the revenue laws" of the United States within the meaning of section 643, it is hard to imagine a case against any officer of the United States which would not be removable under that section.

Officers of the judicial department, clerks and marshals, collect all fines and penalties imposed under the criminal laws of the United States; the marshals of the United States collect fees for their services from litigants—and all these moneys, whether collected for fines and penalties or fees for services performed by these officers, are required to be paid into the national treasury, and are, of course, available and used for defraying the expenses of the government under the appropriation acts of Congress. The Department of the Interior is charged with the sale of the public lands and the collection of all revenues arising from the public domain; the War and Navy Departments are authorized to sell many articles when they cease to be of further use for the purposes of these departments; the Department of Commerce and Labor collects certain fees in naturalization cases—and all these moneys are required by law to be paid into the Treasury to be used in the same manner as moneys collected under the revenue laws. Do these facts make all the officials and employés of those departments officers acting under "the revenue laws" of the United States within the meaning of section 643? The mere statement of these facts is a conclusive answer to the defendants' contention.

In my opinion, to permit the removal of a cause under this section of the law, the acts which constitute the cause of action must have some rational connection with official duties under "a revenue law," and in some way affect the revenue of the government. It could hardly be claimed that even a revenue collector, if sued for some act claimed to have been committed in the performance of his official duties, would have the right to remove the cause under section 643, if neither the declaration nor petition for certiorari showed that the act for which he was sued was in fact in the performance of an official duty imposed on him by law, having some relation to the collection of revenue for the government. These facts must appear on the face of the complaint in the action or in the petition for the writ of certiorari; otherwise a national court is without jurisdiction. Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386. To merely state the opinion of the petitioner or his counsel that such a question is involved is insufficient to justify the granting of the writ.

In Salem & L. R. Company v. Boston & L. R. Co., Fed. Cas. No. 12,249, it was sought to remove a cause under the act of 1833; the petition reciting:

"And the said defendants further representing that in the defense of said suit or prosecution they claim right, authority, and title to do all the acts which have been done by them, and all the acts which they intend to do in the premises, under a revenue law of the United States, to wit, under the second section of an act of Congress approved July 7, 1838, entitled 'An act to establish certain post routes and to discontinue others,' and under other revenue laws of the United States."

Mr. Justice Curtis, in denying the petition, said:

"Having granted the right of removal in a case where the act complained of was done under or by color of the revenue laws of the United States—in other words, when there is a question to be tried, whether a justification or excuse can be made out under those laws—and having provided for a petition to be filed showing 'the nature of such suit of prosecution,' the inference is that its nature must be shown for the purpose of determining whether it be a case the removal of which is authorized. And, if so, the petition must show a case of such a nature that there is to be tried in it a justification or excuse in some way arising under the revenue laws of the United States. * * * *It is not enough that the petition should show that a certain suit or prosecution has been commenced against him and then should allege that he intends to rely upon some revenue law of the United States in his defense. He must so far exhibit the nature of the case, including not only the grounds of the claim or complaint, but his defense thereto, that upon the facts it may appear that some material question may arise under those laws. Otherwise the petition would not state a case for removal, but only the request of the petitioner and his opinion and that of his counsel that he had such a case. I do not think the just interpretation of the act authorizes a writ of certiorari upon such a statement of the mere opinion of the petitioner and his counsel.* In compliance with the requirement of the statute to state the nature of the case, facts, and not merely opinions or conclusions of law, should be set forth, so that it may appear whether in judgment of law such a case exists as enables the petitioner to call for a removal." (The italics are mine.)

A reference to the pleadings in this case, the declaration, as well as the petition for certiorari, as set out in the statement of facts preceding this opinion, will show that they are within the objections so distinctly stated by Mr. Justice Curtis.

In reaching these conclusions, the court is not unmindful of the distinction which may be made between "revenue acts" and "bills for raising revenue," as that term is used in section 7, art. 1, of the Constitution, but does not deem it necessary to pass upon that question. All that is decided herein is that this action, as it appears from the pleadings, the plaintiff's petition, and the defendant's petition for the writ of certiorari, is not against these defendants as persons "acting by authority of any revenue law of the United States or acting under or by authority of any such officer on account of any act done under color of his office, or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law," within the meaning of the provisions of section 643, Rev. St. (U. S. Comp. St. 1901, p. 521).

The motion to quash the writ of certiorari must be sustained.

## GROSSCUP v. GERMAN SAVINGS & LOAN SOCIETY et al.

(Circuit Court, D. Oregon. June 8, 1908.)

No. 2,147.

1. MORTGAGES—FORECLOSURE SUIT—ISSUES DETERMINABLE.
   In a foreclosure suit, the court cannot undertake to determine the right of a party who sets up a legal title which is adverse, and, if valid, paramount, to the title of both mortgagor and mortgagee.

2. RECEIVERS—TITLE TO AND POSSESSION OF PROPERTY—SALE UNDER EXECUTION FROM ANOTHER COURT.
   While mortgaged property is in the hands of a receiver appointed in a foreclosure suit, with authority to enter into possession, to care for the property, keep the buildings insured, pay the taxes, and collect the rents and profits, it cannot be sold under an execution issued out of another court, and such an attempted sale is ineffectual to effect a transfer of title to the equity of redemption from the original holder to the purchaser, although it may subrogate the latter to the rights of the judgment plaintiff and render him a proper party in the foreclosure suit, where by statute the judgment is made a lien.

In Equity.

On July 25, 1894, the German Savings & Loan Society instituted a suit to foreclose a mortgage given by defendants Van B. De Lashmutt and wife on the south two-thirds of lot 3, block 22, in the city of Portland, with other realty, to secure a loan of $25,000. William L. Starr and his wife, Nannie Starr, were also made parties defendant. A little later, to wit, on August 13, 1894, upon the application of complainant in such suit, S. Goldsmith was appointed receiver under the following order: "Upon reading the bill of complaint and the affidavit of B. Goldsmith herein, and on hearing Milton W. Smith, of counsel, it is ordered that S. Goldsmith be appointed receiver of the property described in said bill during the pendency of this suit, and until the right of redemption under the mortgage sought to be foreclosed in said bill shall have expired, with authority to take possession of and care for said mortgaged premises, to pay the taxes on the same, to keep the buildings insured from loss by fire, and to collect the rents and profits thereof during said period, all subject, however, to the further orders of this court." The receiver entered at once into possession of the realty, and has so continued ever since, and, among other things, has collected the rents. One Bridget Lavin was the owner of the realty prior to June, 1887, and on the 7th day of that month executed a deed for the same to Van B. De Lashmutt. On January 7, 1890, De Lashmutt and wife executed the mortgage upon which the suit was instituted. Subsequently, on April 7, 1893, De Lashmutt and wife deeded the property to defendant W. L. Starr, who is the son and heir of Bridget Lavin. Lavin made and published a will on May 1, 1886, whereby she devised the property in question to Starr. She died on June 20, 1892, in the state of California, and a little later Starr had the will probated upon his own petition, showing that at the time of making the will Lavin was of sound mind and memory and not under any restraint. By their answer to the loan society's original bill, Starr and wife set up that Starr was seised in fee of the land by inheritance from his mother, and that at the time of the execution by her of the deed to De Lashmutt she was of unsound mind and incapable of making the conveyance, and that such deed was without validity and void; hence that De Lashmutt was not seised of the premises at the time of the execution of the mortgage to the loan society, and that the mortgage is also null and of no effect. The complainant thereupon, by an amendment of its bill, set up that the said deed was executed for a fair consideration, to wit, $10,000, paid by De Lashmutt at the time, and without any knowledge or notice that Lavin was non compos mentis, or incapable of making such deed, if the same be true, as alleged in the answer, and that complainant took and received its mortgage from De Lashmutt in good faith, without any notice or

knowledge of such condition. Subsequently Starr and wife filed their cross-bill, setting up the same matter as contained in their answer, asking affirmative relief that both the deed and mortgage be declared null and void. The pleadings have been formulated under this cross-bill, putting the cause at issue. By the cross-bill Starr also claims title under the will and devise of his mother. On November 25, 1899, Nannie Starr sued W. L. Starr, her husband, in the circuit court of the state of Oregon for Multnomah county, for support, and thereafter obtained a decree, which, with costs and accumulations, amounted, on May 19, 1902, to $281.25. Execution was issued on the judgment on that date, and levy made upon the lot involved here, which was sold at sheriff's sale on August 4, 1902, for $300.50, and purchased by Thomas Dobson. In due time a deed was executed to Dobson, and Dobson conveyed to Louis J. Goldsmith. On October 31, 1905, B. S. Grosscup, having succeeded to all the title and interest of the loan society in its mortgage, filed an original bill, in the nature of a supplemental bill, setting up the fact that he had so succeeded to the ownership of such mortgage, and, further, that through the suit of Starr v. Starr in the state court, and the execution and sale of Starr's interest in the premises in question, and the sheriff's deed, and the subsequent deed of Dobson, Goldsmith had succeeded to the title and interest of Starr in the equity of redemption; and praying that Goldsmith be made a party to the foreclosure, that Starr be required to show cause why Goldsmith has not succeeded to his equity, and for a foreclosure as demanded in the original bill.

Williams, Wood & Linthicum, for complainant
Milton W. Smith, for defendant society.
R. and E. B. Williams, for defendant De Lashmutt.
Martin L. Pipes and Henry St. Rayner, for defendant Starr.
L. E. Latourette, for defendant Goldsmith.

WOLVERTON, District Judge (after stating the facts as above). Two questions are involved at this stage of the controversy, and these only were submitted at the argument: First, whether, in a foreclosure proceeding, the court should entertain jurisdiction to determine relative to the fee-simple title of the realty mortgaged, alleged to be paramount to the title of the mortgagor, which, if found to be as alleged, will operate to defeat the mortgage; and, second, whether, while the realty mortgaged is in the hands of a receiver appointed under a foreclosure proceeding, with authority to enter into the possession of such realty, to care for the same, to keep the buildings thereon insured and pay the taxes, and to collect the rents and profits during his incumbency, the property can be sold under execution issued out of a court other than that in which the foreclosure is pending, and thereby effect a transfer of title from the original holder of the equity of redemption to the purchaser. Both questions are of vital consequence to the litigants, and I have given them the careful attention that their importance suggests.

As a matter of practice, it is said to be "well settled that in a foreclosure proceeding the complainant cannot make a person who claims adversely to both the mortgagor and mortgagee a party, and litigate and settle his rights in that case." Dial v. Reynolds, 96 U. S. 340, 341, 24 L. Ed. 644, citing Barbour on Parties in Equity, 493. The syllabus of the case states very well what the court evidently intended to decide. It is as follows:

"A bill of foreclosure is bad, for misjoinder of parties and for multifariousness, where persons are made defendants thereto who claim title adversely

to the mortgagor and the complainant, and the latter seeks in that suit to litigate and settle his rights."

Other cases go further, as in Summers v. Bromley, 28 Mich. 125, where the principle is stated thus:

"It is not competent in a foreclosure suit, whatever the pleadings, to proceed to litigate and settle the right of a party who sets up a legal title which, if valid, is adverse and paramount to the title of both mortgagor and mortgagee."

After setting out the rule as laid down in 2 Jones on Mortgages, § 1859, as follows:

"Only the rights and interests under the mortgage and subsequent to it can properly be litigated upon a bill of foreclosure. One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. * * * This prior claim is not a subject-matter of litigation in the foreclosure suit, and remains unaffected by it"

—Mr. Justice Gordon, in California Safe-Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power Co., 12 Wash. 138, 40 Pac. 732, says:

"This rule is upheld by the great weight of authority upon the question."

So it is held in Banning v. Bradford, 21 Minn. 308, 18 Am. Rep. 398, that:

"A mortgagee cannot maintain an action to foreclose his mortgage against one who claims the premises described in the mortgage, by a title adverse, and, if valid, paramount, to that of the mortgagor."

If this be so as to the mortgagee, the rule must necessarily operate with the same vital cogency against one who, as defendant or by intervention, seeks to interpose a title paramount to that of the mortgagor to destroy the validity of the mortgage. Such a thing is not permissible in a suit by a purchaser against the vendor for specific performance, or by a grantor against the grantee for reformation of a deed, as there exists no privity of contract wherein to found the suit on such relationship. Adopting the language of the court in the case last cited:

"The only proper parties are the mortgagor and the mortgagee, and those who have acquired rights or interest under them in the mortgagor's estate; for these are the only persons having any rights or obligations growing out of the mortgage, or interested in any manner in the subject-matter of the action. A stranger claiming adversely to the title of the mortgagor, as he is not affected by the mortgage, is in no way interested in the foreclosure suit. It can make no difference to him whether the mortgage is valid or invalid, whether it be discharged or foreclosed, whether the estate mortgaged, the only estate which can be affected by the decree, remains in the mortgagor or is transferred to another."

The present suit, in the ramifications taken by the pleadings, affords an apt illustration of the results to which the inquiry would lead if the rule were otherwise than as we have ascertained it to be. Not only is Starr seeking to impeach the title of De Lashmutt by reason of the alleged mental incapacity of Mrs. Lavin to make the deed to him, but he is also striving to have an accounting decreed as between himself and De Lashmutt as to the rents and profits—a matter so inordi-

nately collateral to the cause of suit as that the primary inquiry would be entirely diverted for the time being by pausing to settle it. It is not only cumbersome, and likewise burdensome, but it leads to confusion and consequent delay, to step aside to attend to such merely collateral and disconnected interests before the real issue can be disposed of. Nor is the case of Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309, in any way opposed to the rule. It emphasizes the rule as one of practice, and characterizes a bill combining the two controversies as multifarious; and, while it declares the proper practice to be that the objection for multifariousness cannot be taken advantage of by the defendant except by demurrer, plea, or answer, yet it further asserts that it is a thing wholly within the discretion of the court to take the objection either at the hearing or upon an appeal. But, further, as to the nature of that case, a tax title was acquired subsequent to the execution of the mortgage upon which suit was entertained to foreclose. The title, while subsequent to the mortgage, was made, under the local statute, paramount in right to all preceding titles. The holder of this title was made a party defendant to the suit to foreclose, and was duly served, but made default, and a decree was entered in due course declaring the mortgage to be a lien upon the mortgaged premises, paramount to the lien and interest of each of the defendants. The premises were sold under the decree, and the question came up in an independent action, in the nature of ejectment, in a purely collateral way, whether the owner of the tax title was foreclosed of his interests in the foreclosure proceeding. It was held that he was, to the extent, at least, that the decree precluded him from claiming title under the tax deed in the ejectment action; but in the course of the consideration of the subject the court distinctly declared that:

"As a general rule, a court of equity, in a suit to foreclose a mortgage, will not undertake to determine the validity of a title prior to the mortgage and adverse to both mortgagor and mortgagee, because such a controversy is independent of the controversy between the mortgagor and the mortgagee as to the foreclosure or redemption of the mortgage, and to join the two controversies in one bill would make it multifarious."

Here the objectionable and multifarious matter has been brought into the record by the defendant Starr, and the complainant has been compelled to come to an issue as to it. But now complainant insists that he ought not to be required to litigate as to such purely collateral matter along with his foreclosure. In view of the great prolixity of inquiry that the objectionable issues involve, I am of the firm opinion that the court ought not to entertain jurisdiction to consider them in this proceeding. No especial good can come from so doing, and Starr has not been remediless otherwise, allowing his cause to be just.

Now, as to the second question. The general rule seems to be that property in the hands of a receiver is exempt from judicial process and sale, unless through permission of the appointing court. 23 Am. & Eng. Enc. (2d Ed.) 1090. As it respects a sale through execution, under a paramount judgment, during the possession of a receiver, the rule has been quite uniformly adopted to the effect that it cannot be made without leave of the court, and that, if so made without leave,

the purchaser will acquire no title in the property sold. Such, in effect, is the holding in Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322. That case was brought by a judgment creditor to set aside a fraudulent transfer and to subject the realty involved to the payment of his judgment. A receiver was appointed, who entered and retained possession during the pendency of the suit. Execution had been issued, and levy made, under a previous or paramount judgment, prior to the appointment of the receiver, but the sale was consummated subsequent thereto. In disposing of the case, the court says:

"It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made; and, in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless."

And further:

"As we have already said, it is sufficient, for the disposition of this case, to hold that, while the estate is in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose; and upon this ground we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser."

The doctrine of this case has not been departed from by the federal Supreme Court. Heidritter v. Elizabeth Oilcloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Hitz v. Jenks, 185 U. S. 155, 22 Sup. Ct. 598, 46 L. Ed. 851. In the last case, it is said:

"And the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly without prejudice to the rights of persons having prior legal or equitable interests; and the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court, either for liberty to bring ejectment or to be examined pro interesse suo, and this though their right to the possession is clear."

See, also, Virginia, T. & C. Steel & Iron Co. v. Bristol Land Co. (C. C.) 88 Fed. 134; Minot v. Mastin, 95 Fed. 734, 37 C. C. A. 234.

State courts hold to the same doctrine. Pelletier v. Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837; Edwards v. Norton, 55 Tex. 405; Ellis v. Water Co., 86 Tex. 109, 23 S. W. 858; Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; Robinson v. Atlantic & Great Western Railway Co., 66 Pa. 160. Noting the subject-matter of these cases in the order of their citation, the first and third were for appointment of receivers for insolvent corporations, the fourth upon dissolution of an insolvent copartnership, the second upon a bill for specific performance, and the fifth under a foreclosure proceeding; but in all the view is

entertained that an execution sale of property while in the possession of a receiver will not operate to pass the title. The principle which lies back of the doctrine is that property, either in the actual or constructive possession of the receiver, is in the custody of the law—that is, in the hands of the court—and to suffer it to be sold or dealt with through the process of another court, whereby title is conferred, would be to deprive the appointing court of adequate dominion over the res to effectively administer and dispose of it for the purposes for which it was taken into custody. It is only through leave of the appointing court that one will be suffered to insist upon the enforcement of any alleged paramount claim, right, or title; and, while the receivership proceeding may not, and usually will not, operate to divest such claim, right, or title, yet its enforcement, except by the appropriate leave of court, must remain in absolute abeyance until the conclusion of such proceeding.

Some early cases in New York are relied upon as being opposed to this doctrine and the authorities which support it. The first cited is Foster v. Townshend, 2 Abb. N. C. 29, decided by the Court of Appeals in January, 1877. There the receiver brought an action to set aside a deed and an assignment of a mortgage, because they were executed relative to the property while in the hands of the receiver. The transfers were effected by private arrangement, and not through execution sale, and the receivership was peculiar to a statute providing for the sequestration only of the rents and profits of the husband's real estate for application towards an allowance provided by decree for the maintenance of the wife and children. After a reference to the nature of the possession by the receiver for the purposes of the sequestration, the court concluded that the possession could only be for the collection of such rents and profits, which in no way affected the title to the realty, and it was finally decided that the conveyance and assignment were not void, as the execution of them in no way disturbed the receiver's possession. This case is clearly distinguished from Wiswall v. Sampson and others following it. Another case is Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347. In this the sale under execution was upon a junior judgment, and was consummated after the termination of the receivership. It was held that the purchaser acquired the superior title, as the title acquired through the receivership was by virtue of the debtor's own conveyance to the receiver (required by statute) and the latter's sale to the purchaser. In the course of the opinion rendered, Mr. Justice Comstock, speaking for the court, says:

"I see nothing even to suggest a doubt of the validity of a title acquired by sale under a judgment, which is a legal lien upon the land sold prior and paramount to the title or possession of a receiver. It may be that the creditor should ask leave of the court of chancery before he proceeds to sell, or that the purchaser acquiring the title should make a like application before he brings his ejectment. If, however, he fails to do so, the question is merely whether the court will consider him in contempt and punish him accordingly. The sale itself is but the assertion of a legal right, and it cannot be illegal and void on the ground that the leave of an equitable tribunal is not first asked and obtained. It may be that the case of Wiswall v. Sampson, in the Supreme Court of the United States (14 How. 52, 14 L. Ed. 322), goes to the extent of laying down a different doctrine. If so, we are constrained to say that we cannot follow that decision."

So, also, in Albany City Bank v. Schermerhorn, 9 Paige, Ch. 372, 38 Am. Dec. 551, the court makes use of language indicating the view that the levy of an execution upon real estate will work no disturbance of the receiver's possession, and that a purchaser under the execution sale could, upon appropriate proceedings, avail himself of his possession. To the same purpose is Albany City Bank v. Schermerhorn, 10 Paige, Ch. 263. However, in a much later case, the Court of Appeals of New York seems to have adopted the doctrine of Wiswall v. Sampson, by citing it as authoritative, and delaring that a sale under execution without leave of court, where property is in the custody of the law, is wholly illegal and void, although the cause was one involving personalty. This case goes far toward overturning the former holdings of the court in that state. Wiswall v. Sampson is somewhat questioned in the Holladay Case (C. C.) 29 Fed. 226; but the eminent jurist sitting does not go so far as to controvert its soundness in principle. No other cases have been brought to my attention that seem to impinge upon the doctrine.

It is argued that a distinction should be made between a receiver appointed in a case like that of Wiswall v. Sampson, where the purpose was to dispose of the property and to marshal the funds arising therefrom, according as the ultimate adjudication with reference thereto might require, and one appointed like the present, in a foreclosure proceeding, where the duty imposed was to collect the rents and apply them to the mortgage indebtedness. It should be noted that the appointment gives further authority than this. The receiver is empowered to care for the property, keep up the insurance, and pay the taxes, so that the authority is about as full as that ordinarily conferred. It is difficult to understand why there should be such a distinction. The property in either case is placed in the custody of the law. The hand of the court is upon it; and, if the process of another court is inadequate to seize and transfer it, so that title will vest in the one case, there seems to be no potent reason why it should operate effectively in the other. In either case the custody of the court must necessarily be disturbed, and there will be the invasion of one jurisdiction by another, thus leading to the very complication that it is the policy of the law to prevent. Nor is it patent that it can make any difference that the sale on execution is of an equity of redemption, instead of the paramount title. The principle involved remains the same. I am of the opinion, therefore, that the execution sale under Mrs. Starr's decree is void and ineffective to vest title in Dobson, and hence that Goldsmith is not the owner of the equity of redemption. I think, however, that Goldsmith has a lien by subrogation to the right of the judgment creditor, Mrs. Nannie Starr. It has been held that an attachment under the California Code is effective to confer a lien, as the mere levy of the process would in no way disturb the possession of the receiver. In re Hall & Stilson Co. (C. C.) 73 Fed. 527. And such will probably be the result as applied to an attachment under the Oregon statute. The reason for the lien attaching would operate with greater force as applied to a judgment or decree cast by force of the statute without the necessity of a

levy. Mrs. Starr's decree against Starr became effective, therefore, to impress the realty of Starr with a lien from the time of its docketing. Beyond this, a void sale under the decree would, I am inclined to think, operate to subrogate the purchaser to the rights of the judgment creditor, upon the same principle that a void foreclosure will subrogate the purchaser under the decree to the mortgagee's rights and lien, and empower the latter to foreclose in his own right. Such being the case, Goldsmith is entitled to have his lien paid out of any surplus that may remain after the payment of the plaintiff's mortgage and other prior and superior liens, if any.

Starr must be decreed to be the owner of the equity of redemption, subject to the lien of Goldsmith for the amount of Mrs. Starr's decree against him, including the costs thereof.

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## LINDSLEY v. NATURAL CARBONIC GAS CO. et al.

(Circuit Court, S. D. New York. June 12, 1908. On Motion for Preliminary Injunction July 1, 1908.)

1. COURTS—JURISDICTION OF FEDERAL COURT—STOCKHOLDERS' SUIT.

A stockholders' suit in a federal court is not subject to the requirements of equity rule 94, where it involves a constitutional question which gives the court jurisdiction, regardless of the citizenship of the parties, and complainant and the corporation and its directors are evidently united in interest.

2. SAME—STAYING SUIT IN STATE COURT—SUIT AGAINST STATE.

A suit in a federal court against an Attorney General of a state to enjoin the enforcement of an unconstitutional state statute by the institution of criminal proceedings for its violation is not within the prohibition of Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), as one to stay proceedings in a state court, nor of the eleventh constitutional amendment as a suit against the state.

[Ed. Note.—Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.]

3. INJUNCTION—SUBJECTS—CRIMINAL PROSECUTIONS.

The jurisdiction of a federal court of equity to enjoin the enforcement of an unconstitutional state statute to protect the property rights of complainant from irreparable injury is not defeated by the fact that the means of enforcement provided by the act are by criminal prosecutions for its violation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 179.]

4. CONSTITUTIONAL LAW—VALIDITY OF STATUTES—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

Act N. Y. May 20, 1908, "for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters," which prohibits the pumping of mineral waters or carbonic acid gas from wells drilled into the rock, or the doing of any act or thing whatsoever whereby the natural flow from any mineral spring is impeded, etc., is not so clearly unconstitutional or beyond the police powers of the state as to justify a federal court in granting a preliminary injunction to restrain its enforcement at suit of a landowner engaged in pumping gas for sale from wells drilled into the rock on its lands.

5. SAME—DETERMINATION OF VALIDITY OF STATUTES—JUDICIAL AUTHORITY AND DUTY.

A federal court of first instance, acting upon affidavits, which pronounces a state statute unconstitutional, assumes a grave responsibility justified only by most exceptional circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 43–46.]

In Equity. On motion to set aside temporary restraining order.

Morris & Plante (Alton B. Parker, of counsel), for complainant.

Rockwood, Scott & McKelvey, Charles C. Lester, Thomas & Oppenheimer, and William S. Jackson, for defendants.

WARD, Circuit Judge. The plaintiff, a citizen of New Jersey and a stockholder and bondholder of the defendant the Natural Carbonic Gas Company, brings this bill, on his own behalf and on behalf of all other stockholders and bondholders of the said company, against the Natural Carbonic Gas Company, a corporation of the state of New York, the Attorney General of the state of New York, certain citizens of the state of New York, who compose the "Citizens' committee in charge of the movement to restore the Saratoga mineral waters and the prestige of the Saratoga Springs as a national health resort," and the defendant Frank H. Hathorn, who is co-operating with them, asking that the defendant the Natural Carbonic Gas Company be enjoined from complying with, and the other defendants enjoined from enforcing, as they threaten to do, the act of May 20, 1908, entitled "An act for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters," on the ground that the same is unconstitutional, violating especially the fourteenth amendment to the Constitution, because it deprives the defendant the Natural Carbonic Gas Company and the complainant of its and his property without due process of law and takes its and his property for public and private purposes, or both, without compensation, and deprives it and him of the equal protection of the laws.

The act is as follows:

An act for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters.

The people of the state of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow or producing an unnatural flow of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock, or pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow or producing an unnatural flow, of natural carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, is hereby declared to be unlawful. Pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow, of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock, or pumping, or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow of, natural carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, by reason whereof the natural flow from any mineral spring or any mineral well belonging to any other person or corporation, is impeded, retarded, diminished, diverted or

endangered, or the quality of its waters is impaired, or the quantity of its carbonic acid gas or mineral ingredients diminished, is hereby declared to be unlawful. Pumping, or otherwise drawing by artificial appliance from any well made by boring or drilling into the rock, that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing an unnatural flow of, carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful. The doing of any act or thing whatsoever whereby the natural flow from any spring or well of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, is impeded, retarded, diminished, diverted or endangered, or the quality of its water is impaired, or the quantity of its carbonic acid gas or mineral ingredients diminished, is hereby declared to be unlawful.

Sec. 2. Any citizen of the state may maintain an action to restrain any person or corporation from committing any of the unlawful acts specified in section one of this act, in any city or town in which said citizen is assessed for and is liable to pay, or within one year before the commencement of the action has paid, a tax.

Sec. 3. The Attorney General may at any time, in the exercise of his discretion, bring and maintain an action in the name of the people of the state of New York, to restrain any person or corporation from any of the unlawful acts specified in section one of this act. It shall be the duty of the Attorney General to institute and prosecute such an action, upon the written request of ten citizens of this state who are assessed for taxes therein and whose aggregate assessments amount to not less than $10,000, and who shall state, in writing, facts and circumstances showing any such unlawful act or acts and give an undertaking with sureties to be approved by a Justice of the Supreme Court to indemnify the people against the costs of such action.

Sec. 4. The provisions of section 870 of the Code of Civil Procedure shall apply to any action brought under this act and no person shall be excused from answering on the ground that his examination would tend to convict him of crime, but such answers shall not be used against him in any criminal prosecution for violating the provisions of this act.

Sec. 5. Nothing in this act contained shall be construed to affect the Onondaga salt springs reservation, located in Onondaga county, or the springs of any county adjacent thereto.

Sec. 6. This act shall take effect immediately.

The bill alleges that the complainant is a citizen and resident of the state of New Jersey and the owner and holder of 5 first-mortgage gold coupon bonds of the value of $500 each of the Natural Carbonic Gas Company, and of 19 10-year 6 per cent. debenture bonds of the value of $7,500, and of 35 shares of preferred capital stock, and of 27 shares of the common capital stock of the said company of the value of $100 each; said first-mortgage bonds being secured by a mortgage upon the premises of the said company consisting of 21 acres of land in the village of Saratoga Springs upon which it has erected valuable buildings containing costly machinery and in which it is doing a business of the value of more than $50,000 a year. The bill admits that the defendant gas company pumps through wells made by boring or drilling into the rock on its lands mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, and that, when the said mineral water is raised to the surface, it extracts the gas which it compresses and sells throughout the United States. It is also alleged that the enforcement of the statute will ut-

terly destroy the value of the gas company's property and of the complainant's interest therein.

The act, read in connection with the business of the gas company, provides that:

> First. Pumping mineral waters or gas from any such well is unlawful. Second. Pumping mineral water or gas from any such well by means whereof the natural flow from any mineral spring or any mineral well belonging to any other person or corporation is impeded, retarded, diminished, diverted or endangered or the quality of its waters is impaired or the quantity of its carbonic acid gas or mineral ingredients is diminished is unlawful. Third. Pumping from any such well mineral waters for the purpose of extracting, collecting, compressing, liquefying or vending such gas as a commodity otherwise than in connection with the mineral water or other mineral ingredient with which it is associated is unlawful. Fourth. Doing any act or thing whereby the natural flow from any such well is impeded, retarded, diminished, diverted or endangered or the quality of its waters is impaired or the quantity of its carbonic acid gas or mineral ingredients is diminished is unlawful.

An order to show cause why a preliminary injunction as prayed for should not issue with a restraining order in the meantime was granted, returnable June 19th, and the defendants now move to vacate the restraining order.

It is objected, in the first place, that the complainant cannot assert his rights as a stockholder because of his failure to comply with the ninety-fourth rule in equity. Inasmuch as the jurisdiction of the court depends not only upon diversity of citizenship, but upon constitutional grounds, the rule is not applicable. It was enacted to prevent collusive actions in the federal courts by nonresident stockholders on the ground of diversity of citizenship, and also to prevent stockholders from asserting rights of a corporation which should be asserted by its directors. In this case the court has jurisdiction because of the constitutional questions raised, and it is quite evident that the gas company and its directors must be in entire sympathy with the bill. Kimball v. City of Cedar Rapids (C. C.) 99 Fed. 130. Individual stockholders proceeded in the cases of Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and Ball v. Rutland Railroad Company (C. C.) 93 Fed. 513. Besides, the complainant, in his character as creditor of the gas company and holder of bonds secured by mortgage on its premises, is entitled to assert his rights on behalf of himself and of all other bondholders. This was done by the trustee of the bondholders in the case of Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.

It is next objected that this court cannot issue an injunction to stay proceedings in the state court (section 720, Rev. St. U. S. [U. S. Comp. St. 1901, p. 581]), nor enjoin the state (eleventh amendment to the Constitution), nor as a court of equity enjoin criminal prosecutions. The acts declared by the statute to be unlawful became misdemeanors under section 155 of the Penal Code of New York, and punishable under section 15 by imprisonment in the penitentiary or in the county jail for not more than one year, or by a fine of not more than $500, or both. So far as section 720 is concerned, it does not apply, because no proceedings, civil or criminal, have been begun in the state court. Fisk v. Union Pacific Railroad Co., 10 Blatchf. 518,

Fed. Cas. No. 4,830. In respect to the eleventh amendment, this is not a suit against the state. Smyth v. Ames, supra. Finally, although it is the general principle that courts of equity cannot enjoin criminal proceedings, still there are exceptions to the rule. Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584, Mr. Justice Brown, speaking of that case in Davis v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778, said:

"Plaintiff seeks to maintain its bill under the exception above noted, wherein, in a few cases, an injunction has been allowed to issue to restrain an invasion of rights of property by the enforcement of an unconstitutional law, where such enforcement would result in irreparable damages to the plaintiff. It cites in that regard the case of Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, in which, under a law of Texas giving express authority to a railroad company or other party in interest to bring suit against the railroad commissioners of that state, a bill was sustained against such commission to restrain the enforcement of unreasonable and unjust rates, and in the opinion a few instances were cited where bills were sustained against officers of the state, who, under color of an unconstitutional statute, were committing acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding. Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, 558."

See, also, Camden Co. v. City of Catlettsburg (C. C.) 129 Fed. 421. It is worth observing that no such objection was made or considered in Smyth v. Ames, supra.

Coming now to the question of the constitutionality of the statute, I am referred to only three cases similar to the one under consideration, viz.: Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477; Given v. State, 160 Ind. 552, 66 N. E. 750; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 756, 44 L. Ed. 729. In the first case, a law forbidding the burning of oil in flambeau lights, which was obviously intended to prevent waste, was held to be constitutional. In the second case, a law making it a penal offense to let gas or oil escape for more than two days after it was struck was held constitutional. Each of these laws was regarded as an exercise of the police power of the state. In Ohio v. Indiana, the title of the statute referred to considerations of safety, but it was treated by the Supreme Court as aimed solely against waste. Oil and gas being minerals and to be regarded as real estate, the Supreme Court considered with care the decisions of the highest courts of Indiana to determine the rule of property of that state in such subterranean supplies, and concluded that by the law of Indiana the surface owner had a right to take and reduce to his possession as much oil and gas as he wanted, but that he must do so with reference to the rights of all others interested in the same source of supply, and therefore must do so without unnecessary wastefulness. The statute was, accordingly, held constitutional. Justice McKenna, speaking of this decision in the subsequent case of Bacon v. Walker, 204 U. S. 311, 316, 27 Sup. Ct. 289, 290, 51 L. Ed. 499, said:

"Of pertinent significance is the case of Ohio Oil Company v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. There a statute of the state of Indiana was attacked, which regulated the sinking, maintenance, use, and operation of natural gas and oil wells. The object of the statute was to prevent the waste of gas. The defendants in the action asserted against the statute the ownership of the soil, and the familiar principle that such ownership carried with it the right to the minerals beneath, and the consequent privilege of mining to extract them. The principle was conceded, but it was declared inapplicable, as ignoring the peculiar character of the substances, oil and gas, with which the statute was concerned. It was pointed out that those substances, though situated beneath the surface, had no fixed situs, but had the power of self-transmission. No one owner, it was therefore said, could exercise his right to extract from the common reservoir in which the supply was held without, to an extent, diminishing the source of supply to which all the other owners of the surface had to exercise their rights. The waste of one owner, it was further said, caused by a reckless enjoyment of his right, operated upon the other surface owners. The statute was sustained as a constitutional exercise of the power of the state, on account of the peculiar nature of the right and the objects upon which it was exerted, for the purpose of protecting all of the collective owners."

Subterranean waters are like the deposits of oil and gas in Indiana in having no certain course and in being formless and self-transmitting. The law of the state of New York as to the rule of property in subterranean percolating waters seems more restricted than the law of Indiana in respect to oil and gas. Forbell v. City of New York, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666. In this case the right of the surface owner was limited to taking only so much of the subterranean supply as was necessary to the fullest enjoyment and usefulness of his land as land, without the right by pumping to appropriate the waters as a commodity to be supplied to others. Upon this reasoning in the Forbell Case the city of Brooklyn was enjoined from operating its great and costly pumping plant for supplying water to the public at the suit of a farmer whose land it had made unfit for the cultivation of celery and water cresses.

It is to be noted that oil and gas are of no value to the land as land, and have no value for any purpose when united. One surface owner may want oil, and another gas, or, if one wants both, he must use them separately. The statute of Indiana protected owners who wanted gas from the unnecessary waste of it by owners who wanted oil; but gaseous spring water, though of no value to the land as land, has a value in itself, and the interests of the surface owners are either in the naturally charged water or in the gas alone. The statute of New York protects the surface owner who wishes the charged water against the owner who wishes only the gas. The Forbell Case seems to treat the use of percolating water as an adjunct of the land as the primary use to be preferred to and protected against the secondary use as a commodity apart from the land. Here, again, the gaseous water differs from ordinary water, in that its value lies, not in its use for the land as land, but in its use as a health-giving beverage when drunk on the land or bottled and sold as a commodity for use elsewhere.

In accordance with the authorities cited, it may be that the state of New York, though not the owner of the springs, and though not legislating for the safety, health, or morals of the community, may, in

the exercise of its police power, regulate the subterranean mineral waters within its domain for the common benefit of persons interested in them, and that it may limit the use of them to the natural flow and declare pumping unlawful—certainly such pumping as endangers the rights of other persons interested in the same source of supply—and, further, that it may declare unlawful as a secondary use the pumping of such waters by the surface owner for the purpose of vending the gas to be extracted from them. The presumption is that the statute is constitutional. To justify the restraining order the unconstitutionality should be clear. As it is not, I feel compelled to vacate the restraining order.

On Motion for Preliminary Injunction.

At the argument on the motion for preliminary injunction, an objection to the statute of New York on the ground of unconstitutionality was pressed which had not been considered on the motion to vacate the restraining order. It was that the defendant the Natural Carbonic Gas Company was denied the equal protection of the laws, in violation of the fourteenth amendment of the federal Constitution, in that the statute forbids pumping only in the case of wells that go into the rock. The last lines of the first section of the statute apply to acts generally, whereas all the rest of the section applies solely to acts connected with wells bored into the rock. These lines are as follows:

"The doing of any act or thing whatsoever whereby the natural flow from any spring or well of that class of mineral waters holding in solution natural salts or an excess of carbonic acid gas is impeded, retarded, diminished, diverted or endangered, or the quality of its water is impaired or the quantity of its carbonic acid gas or mineral ingredients diminished is hereby declared to be unlawful."

The owner of wells in fissures or that merely reach the rock may, subject to this restriction, increase the natural flow of the water or of the gas and impound the gas to be sold as a commodity.

Assuming that the complainant, in his character as bondholder of the defendant the Natural Carbonic Gas Company, has the right to urge it, this objection causes much doubt, because there does seem to be a discrimination between persons carrying on the same business. The seat of the gas is in the rock. If the mineral waters and the gas come from a common source of supply, it would seem to follow that the pumping of any well, whether bored into the rock or merely reaching the rock, would diminish the supply of each; but, if so, the pumping of wells not bored into the rock which injures other wells is made by the statute unlawful, and there is no practical discrimination.

A federal court of first instance, acting upon affidavits, which pronounces a state statute unconstitutional, assumes a grave responsibility justified only by most exceptional circumstances. The Legislature must be presumed to have acted with full information on the subject regulated and with an honest purpose. Although I do not discover it in the papers submitted, there may be a reasonable basis for the discrimination between wells that go into the rock and wells that do not. At all events, pumping of wells that do not go into the rock, which re-

sults in injury to any other well, is unlawful and may be enjoined just as the pumping of wells that go into the rock may be enjoined. It is to be presumed that the courts of the state of New York, if asked to enforce this law, will refuse a preliminary injunction, if it be made clear that the law does unreasonably discriminate between persons carrying on the same business.

The motion for preliminary injunction is denied.

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DE BARY et al. v. DUNNE, Collector of Internal Revenue.

(Circuit Court, D. Oregon. June 15, 1908.)

No. 3,063.

INTERNAL REVENUE—SUIT TO RECOVER TAX PAID—CONDITION PRECEDENT.

Rev. St. § 3226 (U. S. Comp. St. 1901, p. 2088), which provides that no suit shall be maintained to recover back any internal revenue tax claimed to have been illegally or erroneously collected until an appeal shall have been taken to the Commissioner and a decision had therein, unless such decision shall have been delayed more than six months, is not merely a statute of limitations, but prescribes an absolute condition precedent, which is not waived by a failure to plead it, and without compliance with which a suit cannot be maintained; but where, before payment of the tax, a claim for its abatement was presented to the Commissioner in accordance with the rules of the department, and rejected, the same was equivalent to an appeal, and an appeal after payment on the same grounds was not necessary to authorize a suit.

On Motion to Dismiss.

This is an action to recover from the collector of internal revenue the sum of $209.99, with interest as prayed for, on the ground that the money was illegally exacted and collected as license fees from the plaintiffs as wholesale and retail liquor dealers within the state and district of Oregon. It is alleged that the plaintiffs were importers of wines and liquors, and as such conducted the business of wholesale liquor dealers in the city of New York, and paid annually the special tax imposed by the government, but that they never at any time conducted said business in the state of Oregon; that the defendant, notwithstanding, exacted of the plaintiffs the tax named, upon the assumption, which is untrue in fact, that plaintiffs were conducting a wholesale and retail liquor business within the state. The defendant admits the receipt of the tax, but denies that the plaintiffs were not conducting a wholesale and retail liquor business within the state and district of Oregon, and further alleges that said tax was paid voluntarily. The reply puts at issue the affirmative allegations of the answer.

Williams, Wood & Linthicum, for plaintiffs.

W. C. Bristol, U. S. Atty., for defendant.

WOLVERTON, District Judge (after stating the facts as above). After the issues had thus been formulated, the defendant moved the court to dismiss the action upon two grounds: First, that it was prematurely brought; and second, that the court is without jurisdiction to hear and determine the same. The motion is based upon section 3226, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2088), which provides that:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * *

until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein."

It is further provided that:

"If such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

The period referred to is two years next after the cause of action accrues. It is a thing beyond dispute that the general government has the right to prescribe the conditions upon which it will subject itself to the judgments of the courts in the collection of its revenues. In pursuance of that principle, Congress has adopted a system of taxation, and in connection therewith a system of corrective justice, also, creating special, but appropriate, tribunals, and providing the means for obtaining relief therein by those who may feel themselves aggrieved through the illegal acts of the government's officers and agents. Nichols v. United States, 7 Wall. 122, 19 L. Ed. 125; Cheatham et al. v. United States, 92 U. S. 85, 23 L. Ed. 561. So it has come about that the common-law right to sue a revenue officer for the recovery of taxes illegally exacted has been superseded by statute, and the remedy accorded thereby is deemed to be exclusive. Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901; Schoenfeld v. Hendricks, 152 U. S. 691, 14 Sup. Ct. 754, 38 L. Ed. 601.

In Nichols v. United States, supra, the court, having under consideration the question whether cases arising under the revenue laws are within the jurisdiction of the Court of Claims, said incidentally that:

"An equal provision has been made to correct errors in the administration of the internal revenue laws. The party aggrieved can test the question of the illegality of an assessment, or collection of taxes, by suit; but he cannot do this until he has taken an appeal to the Commissioner of Internal Revenue. If the Commissioner delays his decision beyond the period of six months from the time the appeal is taken, then suit may be brought at any time within twelve months from the date of the appeal. Thus it will be seen that the person who believes he has suffered wrong at the hands of the assessor or collector, can appeal to the courts; but he cannot do this until he has taken an intermediate appeal to the commissioner."

While it may be objected that the particular question here discussed was not presented by the facts of that case, yet the observations of the court indicate clearly and explicitly what its firm impression was as to the meaning of the statute. The statute there referred to is Act July 13, 1866, 14 Stat. 111, c. 184, § 44, of which the one here sought to be invoked is an amendment. But the effect for present purposes has not been changed. In a later case (Collector v. Hubbard, 12 Wall. 1, 20 L. Ed. 272, which was an action like the present, but was instituted in a state court, and taken to the Supreme Court by writ of error), the court said:

"Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether, at the pleasure of the lawmaker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation. Suits for such causes of action are

absolutely prohibited until the taxpayer shall appeal to the Commissioner of Internal Revenue, and until the appeal has been decided, unless the decision is postponed longer than six months, in which case he is at liberty to sue within one year from the time when his appeal was taken."

In a still later case (Cheatham v. United States, supra, which was on error to the Circuit Court of the United States), wherein a suit was instituted against the collector to recover a sum of money paid under protest, in which the statute of 1866 was drawn in question, Mr. Justice Miller says:

"In the internal revenue branch it [the general government] has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax."

Again the Supreme Court says, speaking through Mr. Chief Justice Waite, in United States v. Savings Bank, 104 U. S. 728, 26 L. Ed. 908:

"An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress Until an appeal is taken to the Commissioner no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid."

This language has especial reference to section 3226, which I have quoted above, and which is the amendment of the law as it stood when the previous cases were decided. Considering the language of these cases, there can be no possible doubt what the judgment of the Supreme Court of the United States is touching this section. The conditions there prescribed are intended to be conditions precedent to bringing an action for the recovery of money paid under an illegal exaction by a government officer.

These authorities, it seems to me, settle the question beyond peradventure. But, notwithstanding, it is now insisted on the part of the plaintiffs that, the defendant having appeared and answered to the complaint, thereby subjecting himself to the jurisdiction of the court, he cannot be heard to say that the plaintiffs have not complied with the statute giving a right of action. In support of this position plaintiffs' counsel cite an authority from this court, decided in 1868. Hendy v. Soule, Fed. Cas. No. 6,359. That was a case to recover for an alleged illegal exaction by the revenue officer of a tax for account of a manufacturer's license. Judge Deady compares the act to the ordinary statute of limitations, and, reasoning from this postulate, he concludes that, the defendant having appeared and answered without insisting upon the objection by demurrer or plea in abatement, he thereby waived the question, which was thought to be personal to the pleader, and could not be heard concerning it thereafter. The Supreme Court of the United States, however, in the case of Cheatham v. United States, supra, has spoken explicitly touching this same matter. The trial court instructed the jury that the act imposed a condition without which the plaintiff could not recover, and was

not merely a statute of limitations. Answering this question, the court spoke as has been above quoted. But it further says:

"From this assessment plaintiffs had an undoubted right to appeal to the Commissioner, and urge any of the reasons which they now rely on to show that it was illegal. They paid it without such appeal; and, in doing so, we think they come within the provisions of the section which forbids suit unless an appeal has been taken."

And the instruction of the trial court was accordingly sustained. Thus it would seem that the Supreme Court was of a different opinion, and that the statute could not be likened to the ordinary statute of limitations. If the section had merely limited the time of bringing action to the period of two years, then there would be an entire analogy. But it goes further, and positively prescribes that until an appeal shall have been duly made no suit shall be maintained in any court for a recovery of the tax. Nothing could be more explicit than this. And it seems to me that there could be no waiver of such a statute by the appearance and answer to the merits. In the case of Hendy v. Soule the question was not raised by the counsel in the case, and the distinguished jurist, having in mind the recent statute, could not well reach a conclusion without taking note of it. But the conclusion, as will be seen, was not in line with the decisions of the Supreme Court of the United States which followed, and hence it cannot be considered authority in the present controversy.

It is quite true that, if the United States should bring an action for the recovery of a tax, the defendant could set up the illegality thereof as a defense; and this, without first having appealed to the Commissioner of Internal Revenue. Clinkenbeard v. United States, 21 Wall. 65, 22 L. Ed. 477; United States v. Bank of America (C. C.) 15 Fed. 730; United States v. Nebraska Distilling Co., 30 Fed. 285, 25 C. C. A. 418. But the present case is not of that order.

These considerations lead to a dismissal of the action. But as the plaintiffs have asked leave to amend their complaint, if it should be held that it is insufficient, the court will sustain the motion, but with leave to the plaintiffs to make such amendment as to them may seem proper.

Since the above opinion was written the plaintiffs have amended their complaint, setting out that the defendant was directed by the Commissioner of Internal Revenue of the United States to collect by warrant of distraint the tax in question, unless claim for abatement thereof were made, in which event the collection should be delayed until such claim was rejected; that upon the ruling of the commissioner the plaintiffs filed such claim for abatement, setting forth the facts relative to their case; that after an examination of the evidence submitted to him by the plaintiffs the said Commissioner rejected the same, and ruled that the amounts claimed were legally assessed; that upon such ruling of the Commissioner the plaintiffs were forced to and did pay the sum aforesaid, but under protest. Under this amended complaint it is now insisted that the presentation of the claim for abatement, and the action of the Commissioner of Internal Revenue thereon, rendered it futile to prosecute an appeal to the Commissioner for a

repayment of the tax, he having passed upon the direct question at issue; hence that plaintiffs were excused from a compliance with the provisions of section 3226, Rev. St. (U. S. Comp. St. 1901, p. 2088), requiring that an appeal be taken to the Commissioner of Internal Revenue, according to the provisions of law and the regulations of the Secretary of the Treasury established in pursuance thereof, and that a decision be rendered by him before a suit or action could be instituted to recover the tax.

In support of the contention the plaintiffs' counsel cite the case of San Francisco Savings & Loan Society v. L. Cary, 2 Sawyer, 333, Fed. Cas. No. 12,317. In that case there was an appeal from an assessment of an internal revenue tax before payment of the tax, but no appeal was made to the Commissioner after payment. Sawyer, Circuit Judge, in passing upon the matter, says:

"But an appeal was taken from the assessment before payment, and decided against plaintiff. This I think sufficient. There could be no object in appealing a second time to the same officer in the same cause, and upon precisely the same question. The Commissioner had already decided the identical question, and the object of the law was accomplished in the first appeal."

From the trend of Mr. Justice Miller's opinion in the case of Cheatham v. United States, 92 U. S. 85, 23 L. Ed. 561, cited in the foregoing opinion, it would seem that he was of like opinion as Sawyer, Circuit Judge, and that, had an appeal been taken from the assessment, even prior to the payment, although none should have been taken later, the cause would have been sustained. Although the statute requires that there shall be an appeal taken to the Commissioner of Internal Revenue before any suit can be maintained for a recovery of the tax paid, yet it is believed that the term "appeal" is not used in the technical sense that there must be an appeal from the judgment of a lower tribunal to that of a higher for review or revision, but that the intendment of the statute is that the Commissioner of Internal Revenue shall be appealed or applied to in some regular way, and his decision had, as a condition to the prosecution of such suit or action.

Now, in this case it appears from the amended complaint that the plaintiffs were permitted to make a claim for abatement, and the revenue officer was required to delay collection until the claim was passed upon; that under the ruling of the Commissioner plaintiffs filed such claim, which was in due time brought to the attention of the Commissioner, and by him passed upon and rejected. This I construe to be tantamount to an appeal to the Commissioner of Internal Revenue under the statute, and hence that plaintiffs were entitled to sue at the time of filing their complaint. It is a rule, under the regulations of the revenue system, that no suit can be brought until the tax is paid; but it is not absolutely necessary that an appeal be taken after the payment of the tax. But if an appeal is had in regular course from the assessment, or by request for an abatement, to the Commissioner, and he has acted thereon, then no further step need be taken in the way of perfecting the cause of suit.

I think, therefore, the complaint as amended is sufficient, and the motion to dismiss will be overruled.

## THE EMMA B.

(District Court, D. New Jersey. February 17, 1908.)

1. MARITIME LIENS—STATUTORY LIENS—ENFORCEMENT IN ADMIRALTY.
Persons furnishing supplies to a domestic vessel, for which they are given liens by a state statute, are entitled to enforce them in a court of admiralty against the proceeds of the vessel, when sold in a suit for partition between the owners.

[Ed. Note.—Maritime lines created by state laws, see note to The Electron, 21 C. C. A. 21.]

2. SAME—SUPPLIES—EQUIPMENT OF FISHING VESSELS.
Hooks, lines, bait, ice, and covers required to protect boats from the weather, while on board, are a necessary part of the equipment of a vessel engaged in fishing, and persons furnishing the same to the vessel in a foreign port on order of her master are entitled to maritime liens therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 14.]

3. SAME—ADVANCES MADE IN FOREIGN PORT.
A company engaged in handling fish on commission, which made advances from time to time between trips to the master and managing owner of a fishing schooner, registered in a neighboring port in another state, to enable him to carry on the business, selling the catches made and crediting the proceeds thereon, which advances were made without inquiring as to the credit or standing of the owners, and were not shown to have been needed or used for the necessary equipment of the vessel, is not entitled to a maritime lien for a balance due thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 18.]

4. SAME—REPAIRS—ALTERATIONS IN VESSEL.
Alterations made in a vessel to better fit her for a particular kind of business, but which do not essentially change her character, do not constitute construction, but repairs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, §§ 14, 15.]

5. SAME—PRESUMPTION OF LIEN.
Where repairs are ordered by the master and managing owner of a vessel in a foreign port, a lien is presumed against the vessel unless the contrary is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, §§ 14, 15.]

In Admiralty.
See 140 Fed. 771.

Linsly Rowe, for libelants and certain intervening petitioners.
James Parker, for petitioners.
Cushman & Dewell, for Henry F. Pierce.

CROSS, District Judge. This action was instituted originally by libel filed by Henry F. Pierce, a half owner, against the schooner Emma B and Harry Maddox, the other half owner, for a licitation and an accounting. Subsequently under these proceedings the schooner was sold by the marshal of this district and the proceeds of sale paid into the registry of the court. Prior to the sale, however, A. C. Brown & Sons filed a libel against her for repairs. All of the other demands were presented to the court by certain petitioners, who claim liens

against the proceeds of sale. The schooner was registered at Perth Amboy, N. J., and, as already stated, was owned in equal shares by Pierce and Maddox, both of whom were residents of New Jersey. Differences arose between the owners of the schooner as to her management, which caused the filing of the libel in licitation. At the time the several claims presented for adjudication arose, Maddox had charge of the schooner as captain and managing owner, and used her in summer in taking out excursion parties for the day from Asbury Park, N. J., and in winter for cod and mackerel fishing. The amounts of the several claims are undisputed. The contest is limited as to whether or not they are liens against the boat or the proceeds of sale, as the case may be. The claims of Charles O. Munson and George B. Evans are claimed to be liens under a statute of New Jersey. All of the others are claimed to be liens under the general maritime law. The statute referred to is as follows:

"Whenever a debt shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state for either of the following purposes: On account of any work done, or materials or articles furnished for equipping such ship or vessel; for such supplies, provisions and stores furnished within this state for the use of such ship or vessel at the time when the same were furnished * * *—such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and continue to be a lien on the same until paid, and shall be preferred to all other liens thereon, except mariners' wages."

The claim of Evans is for supplies furnished to the schooner on December 18, 1905, and amounts to $25.22. That of Munson is for work and services and supplies furnished the schooner, to the amount of $174.39. There is no evidence which shows that these claims are not just, or that the various items were not furnished for the purposes set out in the respective petitions. Pierce, one of the half owners, denies that they are liens against the boat, and in support of his contention claims that he gave notice to the petitioners, before the claims were contracted, that they must not run any bills against the Emma B. The notice, if it had any value, was given, however, after the bills were contracted. The petitioners have liens under the statute, and are entitled to maintain them against the proceeds of sale. The Vigilant, 151 Fed. 747, 81 C. C. A. 371; The Iris, 100 Fed. 104, 40 C. C. A. 301; The Rockaway (D. C.) 156 Fed. 692.

The remaining claims will be considered separately, as the facts in respect to them are somewhat variant. That of Augur is for $26.89, for fishing supplies furnished to the vessel in New York upon the order of Maddox, her master and managing owner. The account was charged against the Emma B, and Maddox told the petitioner upon several occasions that the schooner was responsible for it. I think the claim is a valid lien.

The claim of Herman F. Wilckens is for supplies furnished the boat at his place of business in New York City, and the balance due thereon is $238.64. This bill was also ordered by Maddox, who told him that the schooner was responsible for her supplies. No evidence is shown in opposition to this claim. The supplies were ordered by the managing owner on the credit of the boat.

The petition of Winfield S. Pendleton & Co., is for $146.01 for hooks, lines, fishing tackle, and supplies which were furnished the schooner in the city of New York upon the order of Maddox. He was known as the captain, but not as a part owner. The boat, as we have seen, was used in the winter for fishing purposes, and the supplies furnished were a necessary part of her equipment for such use. The petitioners have a maritime lien.

The claim of John J. Burchell is for a cover for a nest of dories carried upon the schooner on her fishing trips. It was made of cotton canvas, and was necessary to protect the boats from the weather and prevent their freezing together. The boats were a necessary part of the fishing equipment. He dealt with Capt. Maddox, without knowledge that he was the owner. The amount of this claim is $15, and his right to a lien is unquestionable.

The next claim for consideration is that of Wilson & Barry, Incorporated. This is mainly for advances made in New York at the instance of Capt. Maddox. The business of the petitioner may be summarized as follows: It dealt with fishermen, who sent it fish on consignment, bought and sold fish, and "handled" fish for smacks. It also financed the vessels, and in further explanation thereof its assistant treasurer, the only witness produced in its behalf, in answer to the question, "What do you do in that line?" said:

"Well, a captain wishing to go out fishing and hasn't the money, why we advance the money for him, and then as he makes the trips, if it is profitable, why he reduces the liability."

And again the same witness says that the company advanced funds to the captains of fishing vessels, sold their catches, and credited the amount of the catches on account of the moneys advanced, although he also said that the moneys in question were advanced to the Emma B for the running of the boat, wages, bait, ice, and such other expenses as might arise; but there is no evidence that they were required or used for such purposes. On the contrary, it appears that the ice and bait bills were not included in the money advancements. The total amount advanced was $2,351.47, and credits appear to the amount of $1,566.94, leaving a balance of $784.53, which is the amount claimed. The dealings were had with Maddox. When complaint was made to Capt. Maddox, after five or six advances had been made, that the trips were not bringing in as much money as he had drawn for the running of the smack, he answered, according to the witness, "to the effect that the smack was worth a great deal more than I am getting, and you need not worry." The advances were made during the months of December, 1905, and January and February, 1906. About $150 of the total amount was applied specifically to the payment of bills for bait and ice. These items, I think, may properly be considered as necessary supplies for the boat in connection with the business in which she was engaged. Such items, however, are more than covered by the admitted credits, and therefore need not be further considered.

All of the other advances were in cash, and with one exception ranged in amount from $250 to $300. The excepted item was for $50. The several credits evidently represented the value of the successive

catches of fish, since each is entered, after giving its date, as "trip," and then follows the amount of the credit. The petitioner knew that the boat was from New Jersey, but did not, so far as appears, know her place of registry. The advances were not, in my opinion, of a character to give a maritime lien. They were rather in the nature of general loans made upon the personal credit of the owner, or upon the security of the fish, and not for the purpose of enabling the boat to complete a voyage, or for repairs, supplies, or other items of necessity. These loans, repeated almost weekly, were apparently made without any regard to the needs of the vessel. They were advances of capital to enable the owner to carry on his business. No attempt was made to find out the needs of the boat, her place of registry, who her owners were, or their credit and financial standing. Perth Amboy may be reached by rail from New York in a little over an hour, and even if the officers of the petitioner did not know that Perth Amboy was the boat's port of registry, they did know she was from New Jersey, and there are so few ports there that within a day or two at the most, upon proper inquiry, they could have put themselves in possession of the facts. Advances which constitute a maritime lien must be made for necessaries. These were not made for any such purpose. This appears clearly, not only from the general business of the petitioners, but also from the character of the successive transactions. The petitioners were financing a private business, and not making advances for the necessities of a vessel, within the meaning of admiralty law. The advances were not made to complete an enterprise, or even for the undertaking of a single enterprise, but for many—indeed, for a whole season's business. As already stated, the security for the advances, it is apparent, was the value of the catches of fish, or the credit of the boat owner, and not the vessel. Furthermore, there is no evidence whatever that the owners were impecunious and without credit. Upon all material matters the petitioners appear to have willfully shut their eyes and acted blindly. Such a course was unjustifiable. In The J. B. Williams (C. C.) 42 Fed. 533, 542, the court said:

"A party lending to a master in a foreign port cannot shut his eyes to existing facts as they appear, or by reasonable inquiry could be made to appear, and deal with the master as a general agent of the vessel and owners, whose representations he may trust and act upon, without any diligence or inquiry on his part as to the extent of and character of the vessel's needs and necessities. Necessity creates the agency, and confers the authority on the master to borrow or secure loans on the credit of the vessel, and that necessity equally defines the limits to which he may rightfully go, and the lender treating with him must make inquiry and judge for himself, and at his own risk, whether the desired advance is a matter of such necessity as to bring it within the master's agency and authority. The cases on this subject, which it is not deemed necessary to review, do not, in my opinion, establish the proposition, contended for by counsel for libelants and announced in the opinion of the district judge, that a lender in a foreign port can act alone upon the master's representation as to the purpose for which the loan is wanted, and, if such expressed purpose is maritime in its character, thereby acquire a maritime lien on the vessel for the full amount of the advances made. When funds are advanced to the master to discharge valid existing maritime liens, and are so used, the lender may properly and equitably stand in the place of the lien holders, whose demands have been discharged with funds furnished by him. It seems to me that the weight of reason and authority supports this

position, especially in the case of a lender who makes no inquiry, but shuts his eyes as to the necessary wants of the vessel."

The burden of proof to show that advances were for necessaries rested upon the petitioner. Bush & Sons v. Fitzpatrick et al. (D. C.) 73 Fed. 501. One who loans money to the master or owner of a vessel who is without funds in a foreign port, to be used in furnishing materials, repairs, or supplies to the vessel, and which is actually used for that purpose, is entitled to a maritime lien on the vessel therefor, and when moneys are advanced in a foreign port to pay maritime liens, and are so used, the lender is subrogated to the rights of the lienors. The City of Camden (D. C.) 147 Fed. 847, and cases cited. See, also, The Alcalde (D. C.) 132 Fed. 576. There is no evidence in this case which shows that the moneys advanced were actually used for necessaries or in the payment of maritime liens, but rather the contrary is shown. The claim of this petitioner against the proceeds of the boat is therefore disallowed.

The only remaining claim is that of the firm of A. C. Brown & Co., who are shipbuilders and have their dock and shipyards at Tottenville, Staten Island, N. Y. The bill of $714.58, for which they filed a libel against the Emma B before she was sold, is for repairs and alterations made to her in the latter part of the year 1904, and extending into the year 1905. The work was ordered by Maddox, the captain and managing owner of the vessel. The boat was originally built for taking out summer excursion parties and for winter fishing, and was used by both owners at different times for those purposes. Such changes as were made by the Browns did not essentially alter her character, although they probably did make her more fit for fishing than for excursion purposes. That such changes, however, do not constitute construction, but repairs, was held by the Circuit Court of Appeals for the First Circuit in The Iris, ubi supra, where the headnote, which is supported by the text, says:

"Work done and materials furnished in fitting a steamer which is then a seagoing vessel for a different trade from that for which she was originally designed are to be taken as having been furnished for repairs, and not for construction, although the expenditures therefor are large as compared with the value of the vessel."

Where repairs are ordered by a captain and managing owner in a foreign port, a lien is presumed against the vessel, unless the contrary is shown. The rule so often stated was well summarized by Judge Gray in The Vigilant, 151 Fed., at page 748, 81 C. C. A., at page 372, where he says:

"The debt due upon a contract, for supplies furnished or repairs done to a foreign vessel, made by the master, agent, or managing owner of said vessel, is, unless the contrary is shown, presumed to have been incurred on the credit of the vessel, and for the security of the debt the general maritime law creates a lien. The reason, as so often stated, for the implication made by the maritime law, that necessaries furnished to a vessel in a foreign port are furnished on the credit of the vessel, is that the exigencies of commerce require that a ship 'should go,' and not be delayed or hindered by the difficulties of ascertaining or making available the credit and responsibility of the owner. In such cases, therefore, the authority of the master, managing owner, or other agent to pledge the ship for debts so incurred is presumed."

Capt. Pierce, one of the owners, testifies that he visited the docks of the libelants during the pendency of the work and ordered them not to make the repairs on the credit of the vessel, although at another place in his testimony he swears that he did not know the work was being done until it was about completed. The libelants, however, say that he notified them merely that he would not be responsible outside of or beyond his interest in the boat, and this statement appears repeatedly. The burden of proof rested upon Pierce to relieve the boat from the presumption of liability to lien, which under the circumstances rested upon her, and the burden has not been sustained. The libelants are entitled to the amount of their claim, with interest.

Upon the whole case then, the claims of Abram C. Brown & Co., and of all the intervening petitioners, except that of Wilson & Barry, Incorporated, are allowed, with interest and costs. In the excepted case, that of Wilson & Barry, the petition will be dismissed, with costs. Separate decrees will be entered in accordance with the above conclusions.

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## In re ROME.

(District Court, D. New Jersey. January 2, 1908.)

1 BANKRUPTCY—REFEREE'S ORDER—REVIEW—OBJECTIONS NOT MADE BEFORE REFEREE.

An objection to the re-examination of a claim because of the trustee's laches in applying therefor, not having been pressed before the referee, would be considered as waived on petition to review.

2. SAME—PETITION FOR REVIEW—LACHES.

Where an order expunging a creditor's claim against a bankrupt was entered July 29, 1907, and the creditor's petition for review was filed on August 26th following, the creditor, having for several weeks prior to and after the filing of the order been traveling in Western Pennsylvania and Ohio, was not guilty of such laches in filing the petition to review as authorized its dismissal on such ground.

3. SAME—CLAIMS—DISALLOWANCE—FINDINGS.

Evidence *held to* sustain a referee's finding that petitioner had no valid claim for money alleged to have been loaned the bankrupt.

4. SAME—ADVANCEMENTS AFTER BANKRUPTCY PROCEEDINGS.

A claim cannot be maintained against a bankrupt's estate for money advanced to the bankrupt after the commencement of bankruptcy proceedings.

5. SAME—COSTS—ATTORNEY'S FEES.

Where, on re-examination of the allowance of certain claims against a bankrupt's estate, it was found on sufficient evidence that the claims were unsustainable, the referee properly required the claimant to pay the costs of the hearing, but he was not authorized to require that the trustee also pay an attorney's fee to the trustee's attorney.

On Petition to Review a Referee's Order Expunging Petitioner's Claim Against the Estate of Harris Rome, Bankrupt.

George H. Peirce, for petitioner.
David H. Bilder, for trustee.

LANNING, District Judge. A petition to have Harris Rome adjudged an involuntary bankrupt was filed on May 31, 1905. An order

adjudging bankruptcy was entered June 19, 1905. On August 1, 1905, the bankrupt filed his schedules. On August 16, 1905, Rayton E. Horton was appointed trustee. On October 21, 1905, Simon Fleischman's claim for $6,900 was allowed and filed by the referee. On June 15, 1906, the trustee filed with the referee a petition praying for a re-examination of Fleischman's claim, on which an order for re-examination was made pursuant to section 6 of the twenty-first general order in bankruptcy (32 C. C. A. xxiii; 89 Fed. xxiii). Depositions were taken under the order, and on July 29, 1907, an order was made by the referee expunging the claim, and also adjudging that Fleischman pay to the trustee his taxed costs in the proceeding, and to the trustee's attorney a counsel fee of $50. On August 26, 1907, Fleischman filed his petition to review the referee's order. The present hearing is upon the last-mentioned petition.

It will be observed that the trustee did not file his petition for a re-examination of Fleischman's claim until nearly eight months after the claim was filed and allowed, and one of the grounds upon which the petition to review is based is that the trustee was in laches in not taking earlier proceedings to secure an order expunging the claim. This point, however, was not pressed before the referee, and therefore must now be considered as having been waived.

The trustee has also moved in this court to dismiss the petition to review on the ground of laches on the part of the petitioner in the filing of his petition. It will be observed that the order of the referee expunging the claim was entered July 29, 1907, and the petition to review filed August 26, 1907. The evidence shows that the petitioner, who resides in Philadelphia, was for several weeks previous to and after the filing of the order expunging the claim traveling on business in Western Pennsylvania and Ohio. I am satisfied that he acted with reasonable diligence in filing his petition to review and that it ought not to be dismissed on the ground of laches.

It becomes necessary therefore to dispose of the petition on its merits. The claim is based on four promissory notes, each admittedly signed by the bankrupt, each payable on demand to the order of Simon Fleischman, the first dated October 22, 1903, for $3,000, the second December 23, 1903, for $1,000, the third February 24, 1904, for $1,500, and the fourth March 21, 1904, for $1,000. There is also an additional item in the claim of $400, stated to be for cash advanced by Fleischman to Rome on June 6, 1905. This last item was properly rejected by the referee on the ground that the money was not advanced until after the commencement of the bankruptcy proceedings.

It appears by the record sent up by the referee that Fleischman was in Paterson in June, 1905. The exact date of his presence there is not disclosed, but it was probably early in June. I reach this conclusion because it appears that he was examined as a witness in the bankruptcy proceedings. This examination must have been under the provisions of section 21(a) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), since the adjudication was made on June 19th and the first meeting of creditors could hardly have been had in June. Isaac L. Miller, who keeps a hotel in Paterson, testifies that Fleischman was at his hotel in June,

and that, Fleischman having introduced himself to Miller as a cousin or second cousin to the bankrupt, Miller said to Fleischman:

"Are you one of the friends he (the bankrupt) stuck the same as in Paterson?"

And that Fleischman answered:

"No, I have been fortunate enough not to be stuck for a cent. He never came near to me before. Now is the first time I heard of his trouble, and when I came to see what was the trouble."

Walter R. Hudson is an attorney and counsellor at law in Paterson. He says that he met a man in Paterson who said he was the bankrupt's cousin, that he asked the man if he was a creditor, and that the man replied that he was in Paterson "simply to help Rome if he could." Mr. Hudson declares that at the time he and others were seeking to effect a settlement with the bankrupt. While Mr. Hudson does not positively identify Fleischman as the man with whom he had the conversation, there is little doubt but it was he. Mr. Harris Westerhoff is also an attorney at law in Paterson. He says he had a conversation with Fleischman in June, and, learning that Fleischman claimed to be a cousin to the bankrupt, he asked Fleischman:

"Whether Rome owed him any money, whether he borrowed from him. And he said 'No.' I asked him what he was here for. He said: 'If I can help him out, I want to.'"

Harris Rosenstein says that in June he had the bankrupt arrested for misappropriating $600 of the money of the Hebrew Relief Society, and that subsequently, after the bankrupt had given bail, he (Rosenstein) and David Fuchs went to Philadelphia with the bankrupt to see Fleischman, and that on that occasion Fleischman arranged to help the bankrupt to the extent of $400, which amount represents the last item in Fleischman's claim above referred to. While in Philadelphia, which must have been on June 6th, since Fleischman's check for $200 of the $400 bears that date, Rosenstein says the following conversation took place:

"I asked him (Fleischman) was he stuck in money. He said: 'No, he did not call on me for money, but now I am willing to back him as far as $10,000.'"

He further says that Mr. Fuchs was present at the time of this conversation. Mr. Fuchs testifies that he went with Rosenstein and the bankrupt to Philadelphia in June, 1905, and met Fleischman. I quote the following excerpt from his testimony:

"Q. At that time did you have any conversation with Mr. Fleischman as to his interest in these proceedings? A. Yes. Q. Tell us the substance of the conversation? A. We went over about a note and check to the Hebrew Relief Society, and had a conversation with him about Rome. We spoke about it. He had stuck everybody in Paterson. Q. You told him he had stuck everybody in Paterson? A. Yes; we asked him if he was a friend of his, and if he got stuck, too, and he said, 'No, he never showed up before. If he would have come, I might have helped him out, but he never showed up.'"

William O. Mickel, an attorney at law in Paterson, says that the bankrupt, claiming to act for Fleischman, authorized him to sign a

consent for Fleischman, as a creditor to the amount of $400, to the making of a certain order by the referee.

The bankrupt filed his schedules of assets and liabilities on August 1, 1905. In the list of unsecured creditors is this one:

"Sam'l Fleischman, Phila. Pa., Loan, etc. (holds notes for $6,500)—$6,900."

The words "Loan, etc. (holds notes for $6,500)," are admittedly in a hand different from that in which the rest of the Fleischman item is written and different from the other 18 items on the same page. The total amount, "6,900," has been written over an erasure; the "6" being evidently written over a "2." The name "Sam'l" is a misnomer for "Simon."

These statements and facts certainly call for satisfactory evidence on the part of Fleischman to support his claim. He has sought to support it by the testimony of himself and his wife and of the bankrupt and his daughter. Notwithstanding the testimony of these four witnesses, the referee has rejected the claim. He has filed an opinion which is a sad commentary on the credibility of these four witnesses. The claim cannot be rejected on any other theory than that they are unworthy of belief. It is a serious matter to reject the claim on such a ground. But their statements bear such marks of inherent improbability, and in some respects are so inconsistent with one another, that I have been forced to a conclusion in accord with that expressed by the referee. I need not undertake to analyze their testimony. It has been well done by the referee. I will only add that I have carefully read and re-read their testimony, and the testimony of the other witnesses, and that I am satisfied with the conclusion reached by the referee.

The only remaining question is as to whether the order that Fleischman pay costs and also a fee of $50 to the trustee's counsel shall stand. Inasmuch as the conclusion reached is that the claim is not one that has been pressed in good faith, the decision that Fleischman shall pay the costs, amounting to $88.75, is right. The order that he pay a fee of $50 to the trustee's counsel, however, I think is erroneous. No such fee is expressly authorized by the statute, and, although in bankruptcy proceedings the court may apply the rules of equity, I know of no rule of equity that authorizes the court to require the defeated party, in a suit to collect on a promissory note, to pay a counsel fee to the attorney of the successful party. The order of referee should therefore be amended by striking out the last clause requiring a fee of $50 to be paid to the trustee's attorney.

As thus amended, the order is affirmed.

## ORO WATER, LIGHT & POWER CO. v. CITY OF OROVILLE et al.

(Circuit Court, N. D. California. April 14, 1908.)

No. 14,459.

1. DISCOVERY—PRACTICE IN EQUITY—FEDERAL COURTS.
   Rev. St. § 724 (U. S. Comp. St. 1901, p. 583), authorizing the federal courts on the trial of actions at law to require parties on motion to produce books or writings, has no application to suits in equity.
2. SAME.
   In suits in equity in the federal courts, the defendant is entitled to require a production of documents by the complainant for inspection only on a cross-bill for discovery which should state with certainty what such documents are, and show their competency and materiality under the issues.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 23.]

In Equity. On motion by defendants for an order allowing an inspection of books and papers.

George W. Lane and Curtis H. Lindley, for complainant.
W. E. Duncan, Jr., for defendants.

FARRINGTON, District Judge. This suit was brought to obtain a decree restraining defendants and all consumers of electric light or current in the city of Oroville, Cal., from enforcing or attempting to enforce an ordinance of said city fixing the maximum rates to be charged for electricity. The defendants have filed their answer, and now move the court for an order allowing them, their agents or attorneys, "the right to inspect or make copies of any part of any and all books, records, vouchers, papers, bills, receipts, deeds, agreements, time books, check books, stubs, day books, cash books, journals, ledgers, blotters or other books or papers," relating to some 23 different subjects which are enumerated in the motion, such as matters of purchasing, constructing, maintaining, and operating complainant's electric plant, the amount of merchandise purchased by complainant to be sold to other persons, amounts received from the sales of electricity, etc.

This being a suit in equity, there is no warrant in section 724 of the Revised Statutes (U. S. Comp. St. 1901, p. 583) of the United States for such an order. That section applies to actions at law, and in no wise changes the procedure in equitable cases. This has been so held repeatedly by the federal courts, and is apparent from the language of the statute itself, which reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." Ryder v. Bateman (C. C.) 93 Fed. 31; West Publishing Co. v. Edward Thompson Co. (C. C.) 151 Fed. 138, 140; 2 Rose's Code of Federal Proc. § 1763.

Although this statute has changed the procedure, it has not increased or diminished the rights of the parties. True, it is no longer

necessary for a litigant at law in the federal courts to file a bill of discovery in equity in order to obtain inspection of documents necessary to the proper presentation of his case. But nevertheless this statute requires him to make just as full a showing of facts and circumstances justifying the order as under the old chancery practice which was superseded by this statute. I call attention to this in order to emphasize the fact that the federal courts have no power to grant, and the litigant in the federal court has no right to expect, an order which will compel his adversary to exhibit for inspection anything and everything in writing under the latter's control which may assist the party who makes the demand. The theory upon which this court and courts of equity have always proceeded is that the party against whom discovery is sought has rights which must be protected. The court cannot lend itself to any scheme to conceal evidence, neither can it compel a party to disclose evidence which, for instance, would subject him to criminal prosecution. Neither party has a legal right to examine all records and documents in his adversary's possession simply for the purpose of discovering whether they contain something which might benefit him, or to see in advance of the trial what evidence will be produced on the other side. Again, a court of equity should make no order blindly. It should command of no man anything which he has a legal right to refuse, and, when issued, its order should be specific and certain, leaving as little as possible to the discretion of the person or persons against whom it is directed. In cases of this kind, there should be no uncertainty as to what documents are in the possession of the party against whom discovery is sought, and just what portion of them he should exhibit. The court should require the production of no evidence which is not competent and material, and within the legitimate issues of the case and in aid of the action or defense of him who seeks it. Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. (C. C.) 98 Fed. 175. Obviously, then, there ought to be a hearing in advance of the order at which each party shall be given adequate opportunity to state and establish his contentions. These reasons indicate somewhat of the nature, character, and purpose of the chancery practice. If the statute, a portion of which is recited above, indicates anything as to the practice, it indicates that courts of equity are to compel the production of documentary evidence by their old methods, and "not upon motion and due notice"; for, as Judge Hammond says in Ryder v. Bateman (C. C.) 93 Fed. 31, 34:

"Congress has not yet chosen to change the method of procedure in the federal courts of equity, and the very fact that Rev. St. § 724, is confined to courts of law, is conclusive that courts of equity must proceed as they did and do without the aid of that statute."

The equity rules prescribed by the Supreme Court of the United States to regulate the practice in Circuit Courts do not formulate any method for compelling the production of documents prior to trial, but they do provide, in rule 90, that:

"In all cases where the rules prescribed by this 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 reasonably

be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

It has been held that by "present practice of the High Court of Chancery in England" is to be understood the practice which prevailed in that court in 1842, when the equity rules were ordained. In Bate v. Bate, 7 Beav. 528, 538, decided in the year 1844, Lord Langdale thus stated the practice which then obtained:

"No doubt you have a right in this court to look at the evidence which the plaintiff states to be in his possession; but that right is only to be obtained upon a cross-bill. Every party has in this court that advantage which is not to be had so effectually in any other jurisdiction. He may discover that which is in the knowledge and breast of the plaintiff before he proceeds to a hearing of the cause, but he must do it in such a way as to give the plaintiff an opportunity of stating all the circumstances connected with the matter. It is undoubtedly extremely important, when the plaintiff is called upon to furnish any discovery, that he should do it in the proper form, and be at liberty to state all the circumstances relating to the matter, and that he should have all the guard and protection which he derives from being able to give a full statement of all the circumstances belonging to the case."

The same rule is thus stated in 2 Daniell's Chancery Pleading and Practice, 1819:

"Where discovery from the plaintiff, either concerning matters of fact or the contents of documents, was necessary to a defendant for the purpose of enabling him to complete his defense to the case sought to be established against him, he could, in general, only obtain such discovery by means of a cross-bill. Upon such a bill being filed, the plaintiff in the original suit, in his character of defendant to the cross-bill, became liable to the application of the same rules concerning the production of documents as a defendant in any other case. An answer to a cross-bill cannot, however, in general be obtained until the original bill has been fully answered; and not only must a full answer in the ordinary sense of the term be placed upon the record before an answer to the cross-bill can be enforced, but the plaintiff in the original suit will be allowed time to answer the cross-bill until after the defendant has complied with an order for production of deeds made in the original suit."

At page 338 in the fourteenth volume of the Cyclopedia of Law and Procedure, the following statement is made:

"The proper and only method for obtaining the inspection or production of books or papers is by bill or cross-bill alone, which bill or cross-bill must describe the books or papers of which an inspection or production is sought with reasonable certainty, and must state the facts which are expected to be proved thereby. The bill must show possession or control of the books or papers sought by the party who is asked to produce them, the pertinency of the facts to be proved by them to the issue, and that the facts pertain to the case of the complainant, and must require answer under oath, admitting or denying the allegations."

In Bogert v. Bogert, 2 Edw. Ch. (N. Y.) 399, 404, decided in 1834, a motion for discovery was made, but not until after the replication had been filed. In passing upon the motion of two of the defendants asking an order for the production of documents, the court used this language:

"Where a defendant seeks the production or discovery of documents in the complainant's possession, the usual course is by filing a cross-bill. * * * and Bigelow and wife must do so in this case, provided they require a dis-

covery of the books and papers of the estate of Jacobus Bogert, deceased This part of the present motion is denied."

Although the practice in the English courts of chancery has been changed by statute, the old procedure is still followed by the federal courts in equitable causes. In Bischoffsheim v. Brown (C. C.) 29 Fed. 341, there was a motion by defendant to compel plaintiff to produce certain books and papers for inspection. The motion seems to have been made upon the theory that in a court of equity a party can be compelled to exhibit everything in the nature of written evidence under his control for the inspection of his opponent. Judge Wallace, in denying the motion, said:

"In courts of equity a bill or a cross-bill alleging that the defendant has in his possession or power documents or papers relating to the matters of the bill which, if produced, will establish their truth, is the foundation of the proceeding. The defendant is required by the bill to admit or deny the truth of these allegations. If he admits having possession or power over any of the documents or papers, he is required by the bill, and is prima facie bound, to describe them either in the body of his answer or in a schedule to it. The plaintiff then moves the court that the defendant may be ordered to produce and leave in the hands of the proper officer the documents and papers, with liberty to the plaintiff to take copies thereof. Upon this application, the defendant may controvert the materiality of the evidence sought for, and he can in any event be required to produce only such documents and papers as are referred to in his answer to the bill. This is the ordinary and the only practice to compel the production of documents except under special circumstances, as where deeds or other papers contested as false or forged are ordered to be brought into court for inspection."

The views which are expressed above will find abundant support in the following authorities: 1 Bates on Federal Equity Procedure, p. 134; 3 Greenleaf on Evidence, §§ 302, 303; Shipman, Eq. Pl. p. 126; 16 Cyc. p. 326; Spragg v. Corner, 2 Cox, Ch. 109; Penfold v. Nunn, 5 Sim. 409; Lupton v. Johnson, 2 Johns. Ch. (N. Y.) 429; Evans v. Staples, 42 N. J. Eq. 584, 8 Atl. 528; Ryder v. Bateman (C. C.) 93 Fed. 31; Indianapolis Gas Co. v. City of Indianapolis (C. C.) 90 Fed. 196; West Publishing Co. v. Edward Thompson Co. (C. C.) 151 Fed. 138, 140.

Probably defendant is entitled to inspect documentary evidence now in possession of complainant, but the method which has been adopted to obtain the production of such evidence cannot be approved; and therefore the motion is denied.

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GRAND TRUNK WESTERN RY. CO. v. CURRY, Secretary of State of California.

(Circuit Court, N. D. California. June 15, 1908.)

No. 14,610.

COURTS — JURISDICTION OF FEDERAL COURTS — SUIT AGAINST STATE — EQUITY JURISDICTION.

The California statute imposing a license tax on corporations (St. 1905, p. 493, c. 386, as amended by St. 1906, p. 22, c. 19, and St. 1907, p. 664, c. 347) provides that every domestic corporation and foreign corporation doing business in the state shall pay an annual license tax based on its

capital stock to the Secretary of State by the 1st day of July each year. It is made the duty of the Secretary on or before September 15th to report those corporations which are delinquent to the Governor, who shall thereupon issue a proclamation declaring that, unless such corporations pay the tax and penalty by November 30th, their charters or right to do business in the state as the case may be shall be forfeited. It is then provided that it shall be unlawful for any such delinquent corporations to do business in the state after that date, and that any violation of such provision shall be a misdemeanor. It is made the further duty of the Secretary of State on December 31st each year to send a list of such delinquent corporations to each county clerk, who shall place it on file. Complainant filed a bill in a federal court against the Secretary of State, as an officer and individually, alleging that it was a foreign railroad corporation, but that it was not doing business in California within the meaning of such statute, although it maintained agents there to solicit business in interstate commerce; that, if the statute be construed to apply to complainant, it was unconstitutional and void; that defendant had reported complainant delinquent thereunder, and claimed and contended that it was subject to such tax, and threatened to enforce the statute against it. The bill prayed for an injunction against defendant and a judicial construction of the statute. *Held*, that it did not state a cause of action for any relief in equity or within the jurisdiction of the court, since defendant was charged with no duty in enforcing the law, and had already performed all acts required of him thereunder, except filing lists with the county clerks, which did not affect complainant's liability or status.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 844, 844½.

Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.]

In Equity. On demurrer to bill.

By its bill herein complainant seeks an injunction to restrain the enforcement as against it of the provisions of an act of the Legislature of the state of California entitled "An act relating to revenue and taxation, providing for a license tax upon corporations," etc., approved March 20, 1905 (St. Cal. 1905, p. 493, c. 386). This act, as amended (St. Cal. 1906, p. 22, c. 19; Id. 1907, p. 664, c. 347), imposes an annual license tax, graduated upon a basis of capital stock, on every corporation, domestic and foreign (other than religious, educational, and scientific, and corporations not organized for profit), "now doing business, or which shall hereafter engage in business in this state." It provides (section 2) that the "license tax or fee shall be due and payable on the first day of July of each and every year, to the Secretary of State, who shall pay the same into the state treasury. If not paid on or before the hour of four o'clock p. m. of the first day of September next thereafter, the same shall become delinquent and there shall be added thereto, as a penalty for such delinquency, the sum of ten dollars." It is made the duty of the Secretary of State (section 3) to report to the Governor on or before the 15th day of September in each year a list of all corporations which have become delinquent in the payment of the tax, and the Governor is thereupon required forthwith to issue his proclamation declaring "that the charters of such delinquent domestic corporations will be forfeited and the right of such foreign corporations to do business in this state will be forfeited," unless payment of the tax with penalty for delinquency be made to the Secretary of State on or before the hour of 4 o'clock p. m. of the 30th day of November following. This proclamation is required (section 4) to be filed immediately in the office of the Secretary of State, and the latter must immediately on its receipt cause a copy thereof to be published as in the act required. It is then provided (section 5) that "at the hour of four o'clock p. m. of the thirtieth day of November each year, the charters of all delinquent domestic corporations which have failed to pay the said license tax, together with the penalty for such delinquency, shall be forfeited to the state of California, and the right of all delinquent foreign corporations to do business in this state, which have failed to pay such license tax, together with the penalty for such delinquency, shall be like-

wise forfeited." The Secretary of State is required (section 8) on or before the 31st day of December of each year, to certify a list of all domestic corporations whose charters have been forfeited, and of all foreign corporations whose rights to do business in the state have been so forfeited, to each county clerk in the state, who must file the same in his office. By section 9 it is provided: "It shall be unlawful for any corporation, delinquent under this act, either domestic or foreign, which has not paid the license tax or fee, together with the penalty for such delinquency, as in this act prescribed, to exercise the powers of such corporation or to transact any business in this state, after the thirtieth day of November next following the delinquency. Each and every person who exercises any of the powers of a corporation so delinquent, either domestic or foreign, which has not paid the license tax, together with the penalty for such delinquency, or who transacts any business for or on behalf of any such corporation, after the thirtieth day of November next following the delinquency, shall be guilty of a misdemeanor, and, upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than five hundred days, or by both such fine and imprisonment." This covers all features of the act in any wise involved in the questions raised by the bill, and all ministerial or executive steps required at the hands of the defendant or any other officer looking to its enforcement.

By the amended bill, which was filed December 21, 1907, it is alleged, in substance, so far as the matter therein is material, that complainant is a consolidated railroad corporation organized and existing under the laws of the states of Michigan and Indiana, having its principal office in the city of Detroit; that continuously since its organization it has been and is now engaged as a common carrier of freight and passengers in the carrying on of interstate commerce over its lines extending from their western terminus at the city of Chicago easterly through various states of the Union and the Dominion of Canada, to Boston, Mass.; that it neither owns nor operates a railroad west of Chicago, but that it receives at the latter point and other points east of there on its system, from other roads, both freight and passengers, which it transports over its lines to various points east, and likewise receives such traffic at eastern points for transportation west over its system. It is alleged that complainant is not engaged in any local or intrastate business in the state of California, but does employ agents throughout the state to solicit traffic therein for routing over its lines on its arrival over other roads at said city of Chicago and other points of receipt; that such agents issue no bills of lading for freight, nor do they receive payments on account of transportation, but simply make contracts securing the routing of such business over complainant's lines, and it is alleged that the solicitation of such business in the state of California, as aforesaid, does not constitute "doing business" therein, within the meaning of the statute in question, but constitutes merely a part of complainant's business of carrying on interstate commerce; and that, if such act is interpreted to preclude the solicitation of such traffic without the payment of such license or tax, it will constitute the imposition by the state of California of a burden upon interstate commerce, which will render the said act "wholly null and void," as repugnant to the Constitution and laws of the United States. It is alleged that the amount of license or tax complainant would be compelled to pay under the act is $250, and that it is "claimed and contended" by the defendant Curry as such Secretary of State; that complainant is liable to pay said tax; that the officers of the state of California having in charge the enforcement of the act have taken all the necessary preliminary steps as required by the act toward enforcing the same, and that the name of complainant has been included by the defendant in the list of delinquents furnished by him to the Governor and by the latter included in his proclamation; and that if complainant "attempts to exercise its constitutional right to solicit, or have its agent or agents solicit interstate commerce in the state of California, in the manner and for the purposes aforesaid, without the payment of said license tax and penalty imposed upon the solicitation or doing of such interstate business, said Curry, acting as the Secretary of State, but so acting under said void law, will proceed to enforce the proclamation of the Governor as aforesaid by interpreting and construing sections

2 and 9 of the California acts heretofore quoted to mean and include your orator, and * * * will attempt to declare that orator has forfeited its rights under said California act and by force of the proclamation of the Governor as aforesaid to solicit through its agents or agent, in the state of California, interstate commerce, and will proceed to impose the said fines, and to otherwise prohibit orator from exercising its federal constitutional right to engage in interstate business in the said state of California by soliciting such interstate business in the manner and for the purpose aforesaid."

Finally it is alleged that complainant's purpose in instituting the suit is "to obtain a judicial determination by a court having competent jurisdiction over the subject-matter and the parties as to whether said California statutes and provisions can be so interpreted and construed by the law enforcing authorities of California so as to include within their provisions, prohibitions, and penalties against orator as an interstate common carrier; * * * that said Curry, assuming to be authorized by said void act to enforce the same, threatens and gives out that he will enforce said law and enforce the imposition of said license fee, tax, and penalty against orator to the uttermost, unless he is restrained and enjoined by some court of competent jurisdiction from so doing." In response to an order to show cause why an injunction should not issue, the Attorney General of the state appeared in behalf of defendant, and interposed a demurrer to the bill upon the grounds (1) that it appears from the bill that complainant is not entitled to the relief prayed; (2) that the court has no jurisdiction in the premises; (3) that the bill is wholly without equity.

Kretzinger, Gallagher & Rooney, for complainant.

U. S. Webb, Atty. Gen. of the state of California, for defendant.

VAN FLEET, District Judge (after stating the facts as above). I am strongly of opinion, as contended by the Attorney General, that upon the facts stated in the bill the suit, while not nominally such, is within the principles announced in Fitts v. McGhee, 172 U. S. 516, 529, 19 Sup. Ct. 269, 43 L. Ed. 535, Morenci Copper Co. v. Freer (C. C.) 127 Fed. 199, 203, and Union Trust Co. v. Stearns (C. C.) 119 Fed. 791, to be regarded as, in its legal effect, one against the state, and so not within the judicial power conferred upon the courts of the United States by the Constitution. Const. art. 11, § 1.

It is not necessary, however, to pass definitely upon that question, since I am fully satisfied that the facts alleged do not make a case for the equitable intervention of this court. While the bill proceeds against the defendant, both in his official capacity as Secretary of State and as an individual, nothing is alleged against him in the latter capacity; nor, having in view the terms of the act, can it readily be perceived what of an actionable character could be so alleged that would not as well apply to any other private citizen. All that is alleged is the taking by defendant of the various steps required of him in his official capacity looking to the carrying out of the provisions of the statute, all of which are preliminary to its enforcement, and the fact that he "claims and contends" that the complainant is liable to the tax, that he "will attempt to declare that orator has forfeited its rights" under the act, and "threatens and gives out that he will enforce said law and the imposition of said license fee, tax, and penalty against orator to the uttermost, unless he is restrained and enjoined by some court of competent jurisdiction from so doing."

As to the steps required by the statute to be taken by defendant, it is obvious that as to those already performed equity can afford no relief, since it is not the province of a court of equity to restrain acts

already accomplished. The single act required at defendant's hands which yet remained unperformed at the filing of the amended bill was that of certifying the list of delinquent corporations to the county clerks of the state; and that it is asked that he be restrained from doing. But, in the first place, that step is required to be taken on or before the 31st day of December of each year, and presumptively, there being no restraining order, that act was taken long before the hearing of this application, so that it is now beyond restraint. In the next place, however, it is clear from the terms of the act that that step was not necessary as a jurisdictional prerequisite to proceedings to enforce the act, nor essential to fix the complainant's liability thereunder; and therefore its performance could work no injury that had not been already inflicted. The bill also prays that defendant be enjoined from "demanding of orator said two hundred and fifty dollars as a license tax, or any part thereof, and from demanding the penalty of ten dollars for the nonpayment thereof." But no duty is cast upon defendant to make such demand. In fact, under the terms of the statute, no express demand is required to be made by any one. The act itself makes the demand and fixes the date of delinquency for nonpayment—a date which had elapsed prior to the filing of the bill. Such a demand, therefore, by the defendant, would not only be a wholly unwarranted and unnecessary thing, but could work no possible wrong to complainant.

We have, then, nothing left but defendant's alleged threats to have the statute "enforced" as against complainant. These threats, regarded in the light of the provisions of the statute, are idle and meaningless things, and can work no possible legal injury to complainant. It is quite true that, where an officer is charged with some specific duty looking to the enforcement of a statute alleged to be unconstitutional, the performance of such duty, if not already accomplished, and if one of a nature to injure the complainant, may be enjoined pending the determination of the question of the validity of the statute; but that is not this case. Here the defendant is not charged with any further duty in the premises. He has no more power under the act than any other ministerial officer of the state to see that its provisions are enforced against complainant. It is very evident, indeed, from the terms of the act, that its eventual enforcement was intended by the Legislature to be left to the law officers of the state usually and generally charged with such functions and to be accomplished through the instrumentality of ordinary and proper judicial proceedings in its courts. In this respect, therefore, the case is clearly within the principles of Fitts v. McGhee, above referred to, where, speaking of the class of cases relied upon here by complainant, it is said:

"Upon examination, it will be found that the defendants in each of those cases were officers of the state, especially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or about to commit some specific wrong or trespass to the injury of plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state to prevent them, under sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in

the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the Legislature could be tested by a suit against the Governor and Attorney General, based upon the theory that the former as the executive of the state was in a general sense charged with the execution of all its laws, and the latter, as the Attorney General, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

Here the statute in question is not even alleged to be positively unconstitutional, but only that it will be "if so construed" as to make complainant liable for the tax imposed thereby under the facts alleged. No presumption can be indulged that it will be so construed by the state tribunals, if such construction would render it obnoxious to the Constitution or laws of the United States. The obligation to sustain and uphold that Constitution and the laws enacted thereunder rests as solemnly and is as obligatory upon the courts of the state as upon those of the United States, and the presumption must always be that this obligation will be observed. There is, therefore, absolutely nothing of substance in the bill tending to show that complainant is threatened with any wrong at the hands of the defendant Curry calling for the interposition of a court of equity. Should the state attempt to enforce the act against it, it will necessarily be by civil action to collect the tax, or by a prosecution under the penal clause, and such proceedings can only be had under the forms of law and by some appropriate judicial process; and, when that is attempted, there will be no difficulty to complainant in invoking and securing the protection of the Constitution and laws of the United States. Thus far it does not appear to be in need of that protection.

The demurrer will be sustained, the application for an injunction denied, and the bill dismissed.

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## In re MURRAY.

(District Court, D. Connecticut. June 8, 1908.)

1. BANKRUPTCY—APPLICATION FOR DISCHARGE—HEARING BEFORE SPECIAL MASTER.

   A referee in bankruptcy acting as a special master in hearing objections to a bankrupt's discharge has no legal right to consider evidence which has been previously taken before him as referee, but must be governed entirely by the admissible evidence produced on the hearing of the application and objections.

2. SAME—DISCHARGE—FAILURE TO KEEP BOOKS.

   Evidence *held* not to sustain objections to a bankrupt's discharge on the grounds that he failed to keep books and destroyed books with intent to conceal his true financial condition.

In Bankruptcy. On report of special master recommending denial of discharge.

The following is the report of referee in bankruptcy John W. Banks upon petition for discharge:

To the Honorable James P. Platt, Judge of the United States District Court for the District of Connecticut:

I, John W. Banks, referee in bankruptcy for Fairfield county, in said district, respectfully report as follows:

(1) Said John A. Murray, of Bridgeport, in said district, was duly adjudged a bankrupt on the 31st day of August, 1907.

(2) Said bankrupt filed in court on the 30th day of October, 1907, a petition for discharge which was by order of the court referred to me as special master for further proceedings.

(3) On the 19th day of November, 1907, I mailed to each known creditor of said bankrupt a notice stating the substance of said petition, and that a hearing on the same would be held before the undersigned at his office, No. 1115 Main street, Bridgeport, Conn., on the 29th day of November, 1907, at 2 p. m., and I caused said notice to be published once on said 19th day of November in the Bridgeport Standard, a copy of which publication is annexed to said petition.

(4) At said hearing John B. Nichols, a creditor, appeared by John J. Phelan, his attorney, in opposition to the discharge of said bankrupt, and filed specifications of objection to the discharge of said bankrupt on December 9, 1907.

(5) The specifications alleged two grounds of objection to the bankrupt's discharge: (1) Failure to keep books of account, and (2) destruction of such books as were kept.

The facts relevant to these specifications are as follows: The bankrupt was engaged in the liquor business in Bridgeport from April, 1901, until February, 1903, in partnership with Nichols, the objecting creditor. In February, 1903, he bought out Nichols' interest for one thousand ($1,000) dollars and then continued in business alone until October 10, 1906, when he sold the business for one thousand ($1,000) dollars. About three hundred ($300) dollars of this amount was used by him in payment of creditors and the balance of seven hundred ($700) dollars the bankrupt testified that he used for living expenses, as he was out of employment for some time after the sale. The petition in bankruptcy was filed August 31, 1907. The bankrupt testified that he kept one book, which was a combination ledger and day book, and which from his description of it was more in the nature of a cash book, containing entries of the amounts received and paid out each day. These entries were made from slips of paper which were copied from the cash register each day. In addition to this book, he kept a whisky book and a beer book, which were similar to a grocer's passbook, showing the amounts of whisky and beer, respectively, received by him from the wholesalers with whom he dealt. The bankrupt testified that during his business career he had used seven or eight of the combination ledger and day books, and, when one was filled with entries, he had filed it away, and opened a new one. He had preserved all these books, and had them in his possession at the time he sold out. Upon his original examination at the first meeting of creditors, he testified that he gave up keeping this book six or eight months before he sold out, but later at the hearing upon the specifications of objection to his discharge he said that he continued to use that book until he sold the business. He also testified upon his original examination that, when he sold out, he dumped these books into a barrel in the cellar, and guessed they were there if they had not been taken away, and that he "threw them in the cellar and considered the thing through with." Later at the hearing, upon the specifications of objection to his discharge, he testified that he kept these books together with his check book and files containing receipts, correspondence, etc., in a desk in his room over the saloon; that, when he was about to move, he had to take the desk apart in order to move it; and that he then took from it these books, rolled them up in a bundle with checks, check stubs, and check books and put them into a barrel in the cellar, not however intending to

throw them away or leave them there, but to take them with him later. He says that he sold the rubbish in another part of the cellar to a junkman but told him not to take this barrel, but that, when he went to look for it later, he found that the junkman had taken it with the other stuff.

While the books which the bankrupt kept while he was in partnership with Nichols and up to within six or eight months of the time he sold out were far from complete, they were such as a man running a small saloon and employing no bookkeeper, and not being himself a bookkeeper, might naturally keep, and from which taking them altogether a fair idea of his financial condition could probably have been obtained. Nichols, who when a partner was not actually engaged in the business, but looked over the books once a month or so, was evidently satisfied with the information which they contained, both when he examined them as a partner and later as a creditor. If the bankrupt had continued to keep his books in that manner and had preserved them and turned them over to his trustee, he would have complied with all the requirements of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), but he himself says that he ceased to make entries in the combination day book and ledger six or eight months before he sold out, and that when he moved he dumped these books into a barrel in the cellar and left them there. These statements made at the first meeting of his creditors, and before any specifications of objection to a discharge had been filed, were I believe truthful. I am not impressed by his attempt at an explanation made after it became known to him that the objection to his discharge was based upon these acts. He preserved and took with him when he moved four letter files filled with bills, receipts, and correspondence, but left behind him these books which he had preserved throughout his whole business career, and which contained the only record of his business, and which, when wrapped up together, were not larger in bulk than one of the letter files which he took with him. If he really intended to preserve them and take them with him, I can see no possible reason why he should take this small package down two flights of stairs and place it in a barrel which he says contained nothing else. His present claim that he intended to save them, and his explanation of his action in putting them in the barrel, is apparently an afterthought, induced by what he deemed to be the exigencies of the case. I find as a fact, therefore, that the bankrupt did cease to keep the book which was the sole record of his business some six or eight months before he sold out, and that when he sold out he threw away this book and similar ones which had preceded it. Ought this action bar his discharge?

The act no longer requires the specifications to charge that the failure to keep books or their destruction by the bankrupt was with fraudulent intent or in contemplation of bankruptcy. A failure to keep books or their concealment or their destruction by the bankrupt with intent to conceal his financial condition is a bar to his discharge. A man is presumed to intend the necessary consequences of his acts, and direct evidence of such intent is not required in a case where one without any apparent reason ceases to make entries in a book which he had kept throughout his business career, and, when he sells out six or eight months later, throws these books in a barrel in the cellar, although preserving a large mass of bills, correspondence, etc., which would not throw any light upon his financial condition. I find that the bankrupt during the last six or eight months that he was in business with intent to conceal his financial condition failed to keep books from which such condition could be ascertained, and that, with like intent, he so disposed of the books which would have disclosed his condition prior to that period as to place them beyond the reach of his creditors, and thereby in effect destroyed and concealed them.

In my opinion, both specifications of objection to the bankrupt's discharge have been sustained, and the discharge should not be granted.

John J. Phelan, for opposing creditor.

Geo. A. Mullen and J. B. Klein, for the bankrupt.

PLATT, District Judge. In this case Mr. Banks has confused his functions as a referee in bankruptcy and his duties as a special mas-

ter. In re Walder (D. C.) 152 Fed. 489, and cases therein cited. From his hearing on the specifications against the discharge alone, he could not have found the essential facts upon which he bases his recommendation that the discharge be not granted. Plainly and specifically he goes back to the bankrupt's original examination to find some of them.

There is before the court, however, a transcript of the testimony taken at the hearing before Mr. Banks as special master. It is impossible to read that testimony without being satisfied that the bankrupt did not intend to conceal his financial condition when he placed certain books in a barrel in the cellar at the time he sold out his business. His idea was that they were of very little account, and his treatment of them was a mere incident of his work in the final closing out. The testimony is also very clear that he did keep such books up to the time that he sold out. Mr. Banks finds the fact that he failed to keep them for several months by going back to the bankrupt's original examination before him as referee.

Upon the facts before the court, it is right that the discharge should be granted. It is so ordered.

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## In re RESTEIN.

(District Court, E. D. Pennsylvania. July 10, 1908.)

No. 2,343.

1. BANKRUPTCY—RECEIVERS—BORROWING MONEY—RECEIVER'S CERTIFICATES.
   A court of bankruptcy has power to authorize a receiver to borrow money and issue certificates therefor and conduct the bankrupt's business for the purpose of preserving the assets.
2. SAME—DISTRIBUTION.
   A decree of a court of bankruptcy authorized the receiver to borrow $10,000 and issue certificates therefor to continue the bankrupt's business. The receiver borrowed $5,000, for which certificates were issued and purchased by the surety company which was the surety on the bankrupt's bond guaranteeing the performance of the contracts which the receiver expected to complete. The receiver also incurred other indebtedness of the same character, for which no certificates were issued, to an amount in excess of the authorized limit, all of which was done with the knowledge of the surety company, to whom the receiver paid $1,000 on the certificates issued to it. *Held*, that the holders of the debts incurred by the receiver for which no certificates were issued to the amount of $6,000 were entitled to participate in the bankrupt's assets in the hands of the receiver on the same footing with the remaining $4,000 for which certificates were issued.

In Bankruptcy. Review of referee's report.

John H. McCrahon and A. L. Morse, for creditors.
John A. McCarthy, for receiver and trustee.

HOLLAND, District Judge. 1. All the authorities sustain the proposition that the court in bankruptcy has power to authorize a receiver to borrow money and issue certificates therefor and conduct the business for the purpose of preserving the assets of the bankrupt's estate. In this case the order was made because it was urged upon the court

that it was necessary to do so to realize on the prospective asset, which all parties concerned agreed could be made out of the contracts which the bankrupt had with the United States government, so that the certificates were properly issued.

2. The decree of court of September 22, 1905, authorized the receiver to borrow $10,000 and issue certificates therefor. He borrowed $5,000, and contracted debts with merchandise creditors for additional property. There is still $4,000 due to the United States Fidelity & Guaranty Company, the holder of the receiver's certificates, and $11,983.43 due to creditors who furnished materials to the trustee to enable him to conduct the business under the order of the court. The fidelity company was surety on the bankrupt's bond guaranteeing faithful performance of the contracts with the United States government, to complete which the receiver's certificates were issued and the debts contracted.

At the time the petition was presented by the receiver to borrow money on certificates and continue the business, it was thought that these contracts could be completed at a profit. The receiver, who was subsequently appointed the trustee, conducted the business for nearly two years, and at a loss. During the time the business was in operation he paid off $1,000 of the certificates, and paid on account to his creditors as he conducted the business, and when he finally wound up the same he found that the assets of the whole concern, including the equity in the plant and the property on hand which had been contributed by his creditors, amounted to only $9,285.05. This amount was distributed as follows:

| | |
|---|---|
| Referee's compensation | $1,008 94 |
| Stenographer's services | 31 13 |
| U. S. Fidelity & Guaranty Co. of Baltimore, principal of receiver's certificates | 4,000 00 |
| Interest as computed to February 6th, 1908 | 466 25 |
| Total | $5,506 32 |

—leaving a balance for distribution of $3,777.73, which was distributed among the 36 creditors with claims amounting to $11,983.43.

The business was conducted by the trustee under the advice of counsel who was counsel for the United States Fidelity & Guaranty Company and who argued its case on the exceptions, so that the holder of the certificates undoubtedly was aware, through its counsel, of whether or not the business was being conducted at a loss or a profit, and also was aware of the fact that the receiver was authorized to borrow to the limit of $10,000, which he did not do, but purchased on credit from the creditors who are now presenting their claims against the fund. There is nothing in the order of court expressly authorizing him to create an indebtedness above the amount named in the order, although he was authorized to continue the business until "the further order of the court." Whether by reason of the general order to "continue the business until the further order of the court" he was authorized to contract an indebtedness beyond the amount authorized by the decree is not necessary to consider now, under the view we take of the case. He was authorized to create an indebtedness of $10,000,

and there are outstanding certificates of only $4,000, leaving a margin of $6,000. He did create an indebtedness of $6,000, and more for the same purpose for which the $4,000 was borrowed, but did not issue certificates therefor. But, under the facts in this case, we see no reason why this $6,000 of indebtedness should not participate on the same footing with the $4,000 for which certificates were issued, as it was authorized by the same decree and should receive equal protection. So that we conclude an equitable distribution of this fund would be as follows:

| | |
|---|---|
| Referee's compensation | $1,008 94 |
| Stenographer's services | 31 13 |
| | $1,040 07 |
| Total for distribution | $9,285 05 |
| Less referee's and stenographer's compensation | 1,040 07 |
| Balance for distribution | $8,244 98 |

The balance of the fund to be distributed to the Fidelity & Guaranty Company and to the 36 creditors in the following proportions, that is to say: The Fidelity & Guaranty Company to receive two-fifths and the 36 creditors to receive three-fifths.

3. For the reasons stated by the referee in his report to the exceptions, his amount claimed as compensation is approved.

This distribution can be made by the referee, and, when filed, the report, including it, will be confirmed, as modified.

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## In re MILLBOURNE MILLS CO.

(District Court, E. D. Pennsylvania. July 9, 1908.)

No. 2,837.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — PLEDGE OF GRAIN CERTIFICATES.

A bankrupt milling company in Pennsylvania had prior to the bankruptcy issued grain and flour certificates each calling for a certain quantity of grain or flour stored in its mill or grain tanks to be delivered to the holder on demand, and had indorsed such certificates as collateral security for loans. The grain and flour were in the possession of the bankrupt at the time of the bankruptcy, and under the law of Pennsylvania might have been levied upon and sold by attachment or execution creditors. *Held* that, the bankrupt having undoubted title to the property, such title was not divested by the pledge of the certificates, but passed to its trustees in bankruptcy under Bankr. Act July 1, 1898, § 70a (4), c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), as to property which might have been levied upon and sold under judicial process against it.

In Bankruptcy. On exceptions to referee's report.

H. Gordon McCouch and Henry S. Drinker, Jr., for Fourth Street National Bank.

J. Wilson Bayard, for trustee and creditors.

HOLLAND, District Judge. On June 20, 1907, receivers were appointed under the federal bankruptcy act of 1898 for the Millbourne

Mills Company. On July 1st it was adjudged a bankrupt, and on July 26th the receivers were elected trustees. At various times prior to 1907 the Millbourne Mills Company had applied to the Fourth Street National Bank and other banks for loans, and, as collateral security therefor, the banks took two classes of security—grain certificates and flour certificates. The facts with reference to each class differ somewhat, and the referee dealt with each in a separate report. It is, however, conceded that the same principles govern the disposition of both, Both the flour and the grain covered by the certificates were in the entire possession and control of the bankrupt at the time it was adjudged a bankrupt and the trustees elected. The flour was stored in the mill, with some attempt at separation from the general stock of flour on hand. The grain, however, was in the grain tanks, which were connected to the mill by an apparatus called a conveyer, running from the bottom of the tanks, and by unlocking a slide the grain would be run into the mill to be manufactured into flour. There was no setting apart of any particular grain to cover any particular certificate, the form of which was as follows:

"Grain Certificate.

"Millbourne Mills Company,
Philadelphia.

"No. 2,700. 1906.

"This is to certify that Millbourne Mills Company has stored in its Fire Proof Grain Storage Tanks, 1,000 bushels, #2 Penna. Winter Wheat, unloaded from cars #———, which will be subject to its order, and only deliverable upon the indorsement and surrender of this certificate.

"Benj. P. Hoopes, Supt. of Elevators.

"Countersigned: R. S. Dewees, President."

These certificates were indorsed to the respective bank as a pledge or collateral for the notes given by the bankrupt for the money borrowed. The trustees took possession of the flour and grain covered by these certificates, and sold the same subject to the right of the holders of the certificates to claim the proceeds amounting to $50,284.79. The banks presented their claims, and the referee decided against them, holding that the trustees under the law took the flour and grain covered by the certificates into the estate for the benefit of the creditors generally. In this we think he is right. To this finding the banks took an exception, together with other questions raised, but it is the only one necessary to be considered by the court.

Prior to the decision of the Supreme Court in the case of York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, wherein it was held that a conditional sale of merchandise is good not only between the parties themselves, but is also good as against all creditors of a bankrupt who have not fastened upon it by some specific lien, it was held in this district that the trustee in bankruptcy took the property in the possession of a bankrupt under a conditional sale whether there had been any levy by a creditor or not prior to the adjudication of bankruptcy, and that he took the property for the benefit of the general creditors upon the theory that under section 70a of the bankruptcy act (Act July 1, 1898, c. 541, subd. 5, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) the trustee of the bankrupt

took title to all property "which might have been levied upon and sold under judicial proceedings against him," because in Pennsylvania the courts have held that, while creditors could not levy and sell personal property in the possession of a creditor under a bailment lease, yet this exemption from levy and sale in favor of creditors was not accorded to property in the possession of a creditor upon a contract of conditional sale. York Mfg. Co. v. Cassell, supra, was followed in this circuit in the case of Davis v. Crompton, by the Circuit Court of Appeals, 158 Fed. 735, and it is now settled that the vendor's title to property in the possession of a bankrupt under a contract of conditional sale which has not been fastened upon by a specific lien by way of a levy or an attachment prior to proceedings in bankruptcy is paramount to that of the trustee in bankruptcy, unless the latter complies with the condition imposed by the contract of sale, and that the vendor is entitled to claim such personal property covered by the contract of conditional sale, and take it out of the possession of a trustee in bankruptcy. As we read the cases of York Mfg. Co. v. Cassell, supra, and Davis v. Crompton, supra, the court in both held that the bankrupt never had title to property covered by a conditional sale and was not included in the property to which a trustee in bankruptcy took title under subdivision 5 of section 70a, because that subdivision not only requires that the property to which the trustee takes title shall be property which would have been liable to be levied upon and sold under judicial proceedings against the bankrupt by the creditors, but that the bankrupt must have had some previous title to it, or the rights of the creditors fixed by a previous lien placed upon it by levy or attachment. But neither of these cases go so far as to say that property upon which a creditor could have levied concededly belonging to the bankrupt, to which it had title and possession before the bankrupt proceedings and of which title it had never been divested, although covered by a certificate or pledge as collateral security for a loan, belongs to the pledgee as against the trustee in bankruptcy. The pledge is no doubt good as between the pledgor and pledgee in Pennsylvania as against creditors who have never levied, but, as the title still remained in the pledgor, who is the bankrupt when it is so adjudged, its title passed to the trustees. It is property the title to which passes to the trustees under subdivision 5, section 70a of the act, as property "which might have been levied upon and sold under judicial proceedings against him."

In the case of Security Warehousing Co. v. Hand, 206 U. S. 425, 27 Sup. Ct. 720, 51 L. Ed. 1117, the Supreme Court reviews all the cases, including York Mfg. Co. v. Cassell, supra, which deal under varying phases with the doctrine that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankrupt act, is subject to all the equities impressed upon it in the hands of the bankrupt, and pointedly emphasizes the binding force of subdivisions 4 and 5 of section 70a in the care with which they show that neither section has any application to vest the title in the trustee in the cases reviewed. The facts in this case are nearly similar to those under consideration by the Supreme Court in the case of Security Warehousing Co. v. Hand,

supra, and there the trustee held the property for the general creditors. In that case it was in effect held that where there was no delivery or change of possession, such certificates as those given did not operate as a delivery of the property mentioned therein. It was also held that the general law of pledge requires possession, and it cannot exist without it.

The certificates did not divest the bankrupt of the title to the flour or the grain; and, while the banks could have demanded possession of the property represented by the certificates prior to the bankruptcy proceedings so long as no creditor had levied or attached, yet, as they had not done so, the title to the property had not passed out of the bankrupt at the time of the proceedings in bankruptcy, and was such property as passed to the trustees under section 70a, subd. 5, which might have been levied upon and sold under judicial proceedings against the bankrupt.

The exceptions to the report of the referee are dismissed, and his report confirmed.

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## VOWINCKEL v. N. CLARK & SONS.

(Circuit Court, N. D. California. June 15, 1908.)

No. 14,616.

1. COURTS—COURTS OF CONCURRENT JURISDICTION—PRIORITY OF JURISDICTION.
It is the settled general rule that, as between two courts having concurrent jurisdiction of the subject of an action, the one which first obtains jurisdiction of the controversy has the right to proceed to its final determination without interference from the other, and such rule is not limited to cases in which the court first obtaining jurisdiction has taken actual or constructive possession of the subject-matter of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1229.]

2. SAME—FEDERAL AND STATE COURTS—STAY OF SUIT.
Where a state court in a suit to abate a nuisance and recover damages for its maintenance has issued an injunction pendente lite, a federal court will on motion of the defendant stay a second suit brought therein by the same complainant against him based on the same facts, and for the identical relief, until the first suit has been disposed of.

On Motion by Defendant for Stay of Proceedings.

Campbell, Metson, Drew, Oatman, & Mackenzie, for complainant.
Mastick & Partridge and Wm. R. Davis, for respondent.

VAN FLEET, District Judge. The bill in this case, filed here on December 6, 1907, asks an injunction to restrain the respondent, a corporation, from operating its factory in Alameda county, alleged to be a nuisance, and damages for injury caused to complainant's property thereby. The respondent has interposed a motion, supported by the facts, for an order staying all proceedings in the suit until the final determination of an action based upon the same facts as set out in the bill here, and for the identical relief, heretofore, on November 15, 1906, commenced by complainant against this respondent in the superior court of the state for Alameda county, which is still pend-

ing therein undetermined, and in which an injunction pendente lite granted by that court still subsists.

The only question presented is as to the propriety of the order asked. The complainant in opposing the motion takes the ground that the order is authorized only where the case is of such a nature that the court first obtaining jurisdiction thereof has taken actual or constructive possession or control of the subject-matter of the controversy, and that the rule does not apply to actions in personam. The respondent, on the other hand, contends that the rule is beset by no such limitation, but is governed solely by the question of the identity of the parties and the controversy, but that, if such limitation exists, it is satisfied by the fact that the state court has potentially at least taken control of the subject-matter by its injunction. The general rule upon the subject is very clearly stated and ably discussed by the late Judge Hawley of this circuit, in Rodgers v. Pitt (C. C.) 96 Fed. 668, 670. In that case, a suit to determine conflicting claims to a water right, the Circuit Court had first obtained jurisdiction of all the parties, and the complainant applied for an injunction restraining the prosecution of an action theretofore commenced in the state court involving the same controversy and subject-matter. In the opinion granting the restraining order, it is said:

"The general rule is well settled that, where different courts have concurrent jurisdiction, the court which first acquires jurisdiction of the parties, the subject-matter, the specific thing, or the property in controversy is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule, the comity of the courts, national and state, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision, between the courts, which might bring about injurious and calamitous results. This rule is elementary law, and a citation of all the authorities in its support would be endless and useless."

And, after citing a large number of authorities in support of the text, it is further said:

"The general rule, as above stated, is clear, plain, and positive. There is no room for any dispute or controversy as to its correctness, but a careful examination of the authorities shows that many of them do not march up to the full-breasted jurisdiction therein enumerated. The truth is that the language of the courts is used with reference to the facts presented in the cases before them, and is properly confined to such facts, and limited to the direct question there presented. To illustrate: Some of the authorities say the court 'which first acquired jurisdiction of the parties'; others the court 'which first acquired jurisdiction of the subject-matter'; others, 'of a cause which presents the same issues and seeks the same relief'; others, the court which 'first takes cognizance of the controversy'; others, the court which 'first obtained possession of the property' in controversy. It is clear that this court first obtained jurisdiction over the person of the complainant. There is no pretense that the state court ever acquired any jurisdiction over him until long after the commencement of the suit and service of process in this court. *Neither court has ever acquired possession of the land or water.* There is no case cited by counsel which can be said to be on 'all fours' with the present, and it is the duty of this court to ascertain, from the facts before it, the germ of the principle that must govern and control the

disposition of the question before the court; for enough appears to make it certain that, notwithstanding the difference in the parties to the respective suits and other matters, *there is need of but one trial, and the parties should not be compelled to be and appear in both courts at the same time and litigate substantially the same questions. The proceedings in one court or the other should be stayed, at least,* until the other has finally disposed of the suit before it, and then, *if any question remains to be disposed of,* the other court might be called upon to decide it. Union Mut. Life Ins. Co. v. University of Chicago (C. C.) 6 Fed. 443, 447; Foley v. Hartley (C. C.) 72 Fed. 570, 574; Zimmerman v. So Relle, 25 C. C. A. 518, 80 Fed. 417, 420; Hughes v. Green, 28 C. C. A. 537, 84 Fed. 833, 835."

This case was afterward reviewed by the Circuit Court of Appeals (Pitt v. Rodgers, 104 Fed. 387, 43 C. C. A. 600), and Judge Hawley's ruling affirmed; the court saying:

"It is the settled rule of law that, as between two courts having concurrent jurisdiction of the subject of an action, the court which first obtains jurisdiction of the controversy has the right to proceed to its final determination without interference from the other."

The same rule is sustained in the celebrated case of Sharon v. Terry (C. C.) 36 Fed. 337, 1 L. R. A. 572, heard before Justice Field and Judges Sawyer and Sabin, in which the opinion was written by the first named.

In Bunker Hill & Sullivan M. & C. Co. v. Shoshone Mining Co., 109 Fed. 504, 47 C. C. A. 200, an action to determine conflicting claims to a mine, the court, while holding that the pendency of a suit in a state court is not the subject of a plea in bar to one in a federal court between the same parties over the same subject-matter, nevertheless say:

"In the light of all the facts herein, it would doubtless be proper for the Circuit Court, as a matter of comity, in pursuance of the principles announced in Ball v. Tompkins (C. C.) 41 Fed. 486, 491; Foley v. Hartley (C. C.) 72 Fed. 570, 571; Zimmerman v. So Relle, 25 C. C. A. 518, 80 Fed. 417; Hughes v. Green, 28 C. C. A. 537, 84 Fed. 833, 835; Ryan v. Railroad Co. (C. C.) 89 Fed. 397, 408; Rodgers v. Pitt (C. C.) 96 Fed. 668, 671—to suspend proceedings, and stay its hand in the present suit until the suit in the state court is in some manner disposed of, and then proceed with the trial in the light of the results that may be reached in the state court, and the issues that may be presented herein."

In Ryan v. Seaboard R. R. Co. (C. C.) 89 Fed. 397, discussing the question of the sufficiency of a plea in bar setting up the pendency of an action between the same parties for the same matter in the state court, it is said:

"But, after all, the question presented to the court on such a plea is one of comity between courts. When a court has assumed jurisdiction of a subject, all other courts should refrain from interference. In no other way can be prevented unseemly conflict between courts."

And in the recent case of Miller & Lux v. Rickey, 146 Fed. 574, 583, the doctrine as stated in Rodgers v. Pitt is reaffirmed.

While the rule is one resting primarily upon considerations of comity, the compelling force of those considerations is such that its application has, in certain classes of cases at least, come to be largely a matter of right, and its refusal an abuse of discretion. As indicated in the case of Rodgers v. Pitt, it is within the sound discretion of the

court to apply it in any case where the interests of justice demand it, without regard to the particular character of the litigation or nature of the questions involved. Its application is certainly not circumscribed within the narrow limitations contended for by the complainant; nor do the cases relied upon by him sustain that view. Those cases would appear to sustain him to the extent of holding that in purely personal actions, where there are no circumstances calculated to work a wrong or hardship by permitting both actions to proceed contemporaneously, the court will not grant a stay; but they in no respect attack the general discretionary power of the court as embraced within the rule as stated in the above cases. In view of the fact that in this case the complainant saw fit to submit himself voluntarily to the jurisdiction of the state court in the first instance, it would seem an unjust and oppressive thing to permit him, without any reason, stated or apparent, to subject his adversary to the expense and harassment of defending a second suit involving precisely the same controversy until the first has been in some way disposed of; and it would, in my judgment, be an abuse of discretion to deny the relief asked.

The motion will, therefore be granted and an order entered staying all further proceedings in this case until the final determination of the action in the state court.

## FISHER v. BOUTELLE TRANSPORTATION & TOWING CO.

(District Court, E. D. Pennsylvania. September 11, 1906. On Reargument, July 14, 1908.)

No. 30.

ADMIRALTY—SUIT FOR DEATH ON HIGH SEAS—APPLICATION OF STATE STATUTE.

A statute of a state may be applied to a suit in admiralty to recover for a death on the high seas arising purely from tort, where the vessel belonged to the state in question; but the burden rests upon the libelant to establish by satisfactory evidence that the vessel was one of such state, where it is denied, which cannot be presumed from the fact that her owner is a corporation of such state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 219.]

In Admiralty. On final hearing.

Willard M. Harris, for libelant.

Francis C. Adler and John F. Lewis, for respondent.

J. B. McPHERSON, District Judge. The decedent was the master of the barge John C. Fitzpatrick, and in that capacity left the port of Philadelphia on March 31, 1903, upon a voyage to New London. The Fitzpatrick and another barge were in tow of a tug, and the three vessels belonged to the respondent, a corporation of the state of Ohio. The Fitzpatrick was built about 1892, and had been used for the carriage of freight upon the Lakes until three or four years before the voyage in question. She was then brought to Philadelphia, and thereafter was employed exclusively upon the Atlantic seaboard, between that city and other ports. Upon the night of April 3d she foundered upon the high sea off the coast of Long Island, and the decedent lost

his life, with all others on board. This action in personam is brought by his administrator, under the Ohio statutes of 1851 and 1880, upon the theory that the barge was unseaworthy and overloaded, and that the defendant's representative at Philadelphia was guilty of negligence in sending her to sea in such a condition. Several defenses are set up, partly of fact and partly of law; but I think it is only necessary to notice one of them, namely, the legal defense that under the proof the action cannot be supported.

The decision in The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, settled the proposition definitely that, in the absence of federal or state legislation giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for death caused by wrongful act or negligence upon the high seas. Whether an action in rem in the admiralty can be maintained upon the statute of a state, unless a lien is distinctly given, and whether such an action will lie, even if a lien be given, are questions about which the courts have differed. They need not be discussed now, since the present suit is in personam, and was begun by process of foreign attachment against other property of the respondent than the Fitzpatrick. The difficulty in the libelant's way, as it seems to me, is that he has not proved that the Fitzpatrick was a vessel of the state of Ohio. In view of the ruling in The Harrisburg, his case must fail, unless he can establish the proposition that the barge, during her voyage upon the high seas, was a part of the territory of Ohio to which the laws of that state continued to apply; and in my opinion his proof is fatally lacking in this essential particular. The answer admits that the respondent is a corporation organized under the laws of the state of Ohio, and that it was the owner of the Fitzpatrick, but expressly denies the libelant's averment that the barge was a vessel of that state and was enrolled at the city of Cleveland. No evidence whatever was offered upon this subject by the libelant, and the only testimony before the court bearing upon the question would indicate that the vessel was governed upon the high seas by the laws of Pennsylvania, rather than by the laws of Ohio. It is true that the vessel was probably built in Ohio, and may have sailed frequently from the port of Cleveland, although there is little except hearsay evidence upon this point; but, so far as appears, she was never enrolled at Cleveland, and for several years before she foundered her home port was in fact the city of Philadelphia, where she was managed and loaded, and whither she always returned. The fact that the respondent was chartered by the state of Ohio is not conclusive of the territorial character of the vessel. Such a corporation might own many vessels, none of which belonged to the state of Ohio; and, even if it be granted that the domicile of the corporation may afford some presumption that its property belongs in the eye of the law to the same jurisdiction, this is certainly no more than a presumption which may be overthrown by sufficient proof. In the case now before the court it was not even proved in what year the respondent was chartered, nor whether it was the owner of the barge while she was in service on the Lakes, so that the libelant's case rests finally upon the facts that the respondent is (or was) a corporation of Ohio, and was the owner of the barge while she was carrying cargo from

the port of Philadelphia. This, I think, requires the court to infer too much, especially as satisfactory evidence of her territorial character could have been readily obtained, if she was indeed a vessel of the state of Ohio.

There is, therefore, no support for the application of the rule, which some of the lower federal courts have sanctioned, that the law of a state will be applied upon the deck of a vessel which belongs to the state, even if she be upon the high seas when the occasion for the application of the law arises. The subject need not be further considered; but I may be permitted to say that, in the present condition of the federal decisions, it is greatly to be desired that the question may soon be put at rest by a ruling of the Supreme Court. I may also add that in reaching this conclusion I have laid aside entirely the deposition of Daniel McCarthy.

A decree may be entered dismissing the libel.

On Reargument.

Since this reargument was had the Supreme Court has decided the case of The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, and has finally put to rest the question whether the statute of a state applies to a claim for death on the high seas arising purely from tort in proceedings in admiralty. It is now settled that such a statute may be applied in the admiralty, where the vessel belonged to the state in question; but the decision does not undertake to discuss or decide the separate question, what amount or kind of proof is required to establish the proposition that the vessel "belongs" to the particular state? This is the point upon which the ruling in the present case was rested, and I see no reason to change the opinion originally expressed. The libelant's case depends upon the applicability of the Ohio statute, and this in turn depends upon the question whether the Fitzpatrick was a vessel of that state. The respondent expressly denied that the barge belonged to Ohio, and the libelant was therefore put upon proof of that essential fact. If the fact were as averred, conclusive evidence could readily have been obtained, and the absence of such evidence naturally gives rise to doubt concerning the truth of the averment.

I must therefore decline to disturb the decree dismissing the libel.

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## INTERNATIONAL COAL MINING CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. July 17, 1908.)

No. 69.

1. NEW TRIAL—GROUNDS—DOCUMENTS—FAILURE TO PRODUCE.

Where, in an action against a carrier for unlawful discrimination, defendant produced all the books necessary to enable plaintiff to prove all the facts alleged in its statement, and admitted the payment of the rebates claimed to plaintiff's competitors, plaintiff was not entitled to a new trial because of defendant's failure to produce other documents called for at the trial; there being no necessity for further evidence under the circumstances.

2. CARRIERS—DISCRIMINATION—REBATES.
In a suit against a carrier for unlawful discrimination by granting rebates to plaintiff's competitors, plaintiff could not recover damages accruing during a period when it received rebates from defendant because they were less than those given to plaintiff's competitors.

Overruling Motions and Reasons for a New Trial.

J. W. M. Newlin, for plaintiff.
Sellers & Rhoads and Francis I. Gowen, for defendant.

HOLLAND, District Judge. This was a suit instituted in the United States court against the defendant for an unlawful discrimination, and the jury rendered a verdict in favor of the plaintiff for the sum of $12,013.51. In due time both plaintiff and defendant filed motions and reasons for a new trial. Neither the plaintiff's nor the defendant's reasons for a new trial will be considered seriatim. The reasons for the particular rulings of the court objected to by the plaintiff and which are now made reasons for a new trial by it appear upon the record, and we think in every case justifies the view taken by the court.

One of the plaintiff's reasons assigned was the defendant's failure to produce certain documents called for at the trial, and the court's refusal to give judgment against the plaintiff for default. The defendant produced all the books necessary to enable the plaintiff to prove all the facts alleged in its statement, and, in fact, admitted the payment of the amounts to the plaintiff's competitors in the coal business which the plaintiff alleged were paid by way of rebates, so that there was no necessity for the further production of books or papers.

The other reasons of the plaintiff for a new trial we do not think need to be discussed, with the exception of the tenth, which is as follows:

"The court erred in charging the jury that the plaintiff could not recover for discriminations against the plaintiff practiced in any year in which the plaintiff had itself received the partial return from the railroad company on its freight paid."

The evidence showed that the plaintiff had been a persistent solicitor for rebates and had received certain repayments with all its competitors up to about April 1, 1899. Subsequent to this date it was as persistent in demanding rebates as any of its competitors, but for some reason received none, and this continued during the balance of the time covered by the plaintiff's statement. The court refused to permit the plaintiff to recover against the railroad company for the period during which it was engaged in the violation of the law to the same extent as its competitors, although at the trial it claimed that, while it was violating the law in inducing the railroad company to give it a rebate, yet its complaint was that it had not succeeded in forcing out of the railroad as much as its competitors were able to get, and asserted the right to recover the difference. The claim of the plaintiff in this regard is, to say the least, so obviously improper that the mere statement of the facts is sufficient, in our judgment to show that the ruling was entirely right in refusing to permit the courts to be used in an effort to make an even division of what may be called commercial graft.

The reasons assigned for a new trial by the defendant are all exceptions either to the charge of the court or to the refusal of the court to instruct the jury, as requested, in certain points submitted. All the important questions raised in the reasons assigned for a new trial were very elaborately argued at the trial and patiently considered by the court. After a re-examination of the position then taken in regard to these questions, we are unable to discover any error in the court's charge or refusal to charge as requested. The charge fully covers all the points now raised, and we still think the law as applied to the facts in this case is therein correctly stated.

The motions and reasons for a new trial filed both by the plaintiff and defendant are overruled, and a new trial refused.

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## CONNILLEAU v. ROGERS, HOLLOWAY & CO.

(Circuit Court, E. D. Pennsylvania. July 30, 1908.)

No. 140, April Sessions, 1908.

PLEADING—AFFIDAVIT OF DEFENSE—SALE—DAMAGE FOR NONDELIVERY.

In an action for breach of a contract for the sale of phosphates to be delivered in France, where the statement of claim alleges nondelivery and generally the market price of phosphate in France, and that complainant was compelled to buy to fill his own contracts, but without giving the dates or amounts of purchases, or the prices paid, an affidavit of defense which denies that there was any market price in France at the time delivery should have been made for phosphate of the kind covered by the contract meets the issue as to damages and is sufficient to prevent a summary judgment on motion.

At Law. On rule for judgment for want of a sufficient affidavit of defense.

N. Dubois Miller, for the rule.

Francis S. Laws, opposed.

ARCHBALD, District Judge.[1] I cannot agree to all the defendants' contentions, but I am prepared to sustain some of them; and, as the plaintiff must show a case clear of doubt in order to be entitled to a summary judgment for want of a sufficient affidavit of defense, the rule must be discharged.

The action is for damages for breach of a contract for the sale of Florida phosphate. Delivery was to be made in France, and the damage claimed is the difference between the contract price and the price at which similar phosphate was able to be bought in that country subsequently. The allegations upon this point, however, are somewhat vague; all that is said in the plaintiff's statement being that he was obliged to go into the market from time to time and buy phosphate to fulfill his own engagements. On what dates he bought, if in fact he bought at all, which seems to be somewhat uncertain; the quantities purchased, and the prices paid, are not given, in place of which there is the general averment that the market price of phosphate

[1] Specially assigned.

of the same character and quality in France, where the plaintiff was doing business, was, as respects the purchases to take the place of the 7,700 tons contracted for, at the rate of 7⅛ pence per unit of lime per ton, an excess of 2 pence over the contract price; and as to that to take the place of the 2,500 tons contracted for was the same, an excess of 1¾ pence; amounting together to £5,695.16 or $27,641.58, the damages claimed. But it is denied that there was any prevailing market price in France in 1906, to which time the complainant's figures apparently relate, for the particular kind of phosphate contracted for, so as to entitle the plaintiff to go into that market and buy, and it is claimed that the defendants cannot be held in consequence for the purchases there made or the prices which were there prevailing. This goes directly to the damages sustained, and raises an issue of fact which cannot be disposed of at this time, in addition to which, as already intimated, the defendants are entitled to the dates, amounts, and prices of the purchases relied on, if such purchases were made, in order to enable them to make a proper defense to them, if they are to be received.

The rule for judgment for want of sufficient affidavit of defense is therefore discharged.

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## ONTARIO LAND CO. v. WILFONG et al.

(Circuit Court, E. D. Washington, S. D. February 3, 1908.)

1. TAXATION—SUIT TO DETERMINE VALIDITY OF TAX DEED—PROOF OF TITLE.
   In a suit to determine adverse claims to real estate between the holder of the patent title and the holder of a tax title, the former must prevail unless the tax proceedings were sufficient to divest his title.

2. SAME—FORECLOSURE OF TAX LIEN—CONDITIONS PRECEDENT.
   Under the statutes of Washington, until property shall have been listed as delinquent for nonpayment of taxes by a description thereof sufficiently accurate to identify it, so that an intelligent owner, acquainted with his property, on having the delinquent list brought to his attention, will be able to recognize the description as being applicable to his property, it does not become delinquent, nor subject to foreclosure and sale for nonpayment of taxes.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1279.]

3. SAME—WASHINGTON STATUTE.
   The statute of Washington (Ballinger's Ann. Codes & St. Supp. § 1751b), provides that "after the expiration of five years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on said property to the county, and shall file said certificates when completed with the clerk of the court, and the treasurer shall thereon, with such legal assistance as the county commissioners shall provide, * * * proceed to foreclose in the name of the county the tax liens embraced in such certificate, and the same proceedings shall be had as when held by an individual." *Held*, that the filing of such certificate of delinquency is an essential prerequisite to the proceedings by the county to foreclose the tax lien, and that further essential steps are the filing of an application to the court and the service of such process or notice as will give the owner of the property an opportunity to be heard before a decree of foreclosure is entered.

4. SAME—JURISDICTION OF COURT.
   A court cannot enter a valid decree foreclosing a tax lien on property, unless it has acquired jurisdiction over the person of the owner by the

service of process or notice in some mode prescribed by law, or by his appearance, or over the property in rem by its seizure under process.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1305.]

5. SAME.

A superior court of Washington entered a decree foreclosing tax liens in favor of the county on a large number of tracts of real estate, and a deed was executed thereon by which it was claimed that certain real estate owned by complainant was conveyed. No certificate of delinquency was filed prior to the proceeding by the county treasurer, as required by Ballinger's Ann. Codes & St. Supp. § 1751b. No process was issued by the clerk, no notice was posted upon the property, and no papers whatever were filed in the court until the day on which the decree was entered. The only notice of the proceeding given was by a summons published by the county attorney, in which complainant's name was not mentioned. *Held*, that such decree was void for want of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1305.]

6. SAME—TAX DEED—VALIDITY—INSUFFICIENCY OF DESCRIPTION.

A decree was entered foreclosing a tax lien on property described as blocks 353 and 373 of Capitol addition to North Yakima, according to the recorded plat of said addition. Such plat showed no blocks so numbered, but showed in the center of the addition a tract sufficient in area to make four blocks, with the intervening streets, of the same size as the blocks in the addition, and which, if subdivided and numbered in accordance with the system of numbering applied to the other blocks, would have contained blocks numbered 353 and 373, respectively. Such tract was, however, marked on the plat "Reserved," and had never been subdivided. *Held*, that deeds made by the county, based on such decree and purporting to convey such blocks, were absolutely void, because the description did not apply to any property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1519, 1520.]

In Equity.

E. B. Preble (Mr. Agatin, of counsel), for complainant.

Ira P. Englehart and B. S. Grosscup, for defendants.

HANFORD, District Judge. This is a suit in equity to determine adverse claims to real estate, founded upon provisions of the Code of this state authorizing suits for such purpose.

The complainant deraigns title by valid mesne conveyances from grantee by patent from the government of the United States, all of which conveyances were recorded in the real estate records of Yakima county, in which the property is situated, prior to the initiation of the tax proceedings upon which the defendant's only claim of title is based. Since all the parties deraign title from a common source, the complainant must prevail, unless its title was divested by deeds to the defendants executed pursuant to the proceedings for the foreclosure of tax liens referred to. McDonald v. Hannah, 59 Fed. 977, 8 C. C. A. 426. The salutary rule which precludes a defendant, claiming title to the property as successor in interest of the complainant, from contesting the complainant's title otherwise than by asserting his own claim, relieves the court from the necessity of considering the effect of transfer of certain lots from the complainant to persons not made parties to this suit.

The tax deeds mentioned purport to convey real estate pursuant to a decree of the superior court of the state of Washington for Yak-

ima county foreclosing liens for delinquent taxes rendered by default on the 2d day of September, 1902, in a suit against numerous persons, named as defendants, and against many tracts and parcels of land and city lots, listed and assessed for taxation as property of unknown owners. The complainant's name does not appear in the record, and there was no service of process to bring any of the parties into court, except by the publication of a summons, which was not issued by the court, but emanated from the county attorney. The defendants contend that an agent of the complainant did have actual notice of the proceedings; but this is not proved by a fair preponderance of the evidence. There was no complaint, petition, or application to the court filed until the day on which the decree was rendered. The court did not take the property into its custody, and no notice of any proceedings in rem was posted thereon. The law of the state authorizing foreclosure of tax liens (Ballinger's Ann. Codes & St. Supp. § 1751b) provides as follows:

"After the expiration of five years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on said property to the county, and shall file said certificates when completed with the clerk of the court, and the treasurer shall thereon, with such legal assistance as the county commissioners shall provide, * * * proceed to foreclose in the name of the county the tax liens embraced in such certificate, and the same proceedings shall be had as when held by an individual. * * *"

There is no pretense that this initial step in lawful procedure was taken. Nothing purporting to be a certificate of delinquency has been filed in the clerk's office. Throughout the record, and in the deeds to the defendants, the property which they claim to have acquired is described as blocks 353 and 373 of Capitol addition to North Yakima according to the recorded plat of said addition; but on the plat there is no block numbered 353 or 373. There is a tract, centrally located on said plat, sufficient in area to make four blocks, with streets corresponding in size and width to the other blocks and streets, if it were subdivided; and if such blocks had been platted and numbered by consecutive numbers, carrying out the system of the plat, two of them would have been numbered 353 and 373, respectively. The tract, however, is not so subdivided, there are no streets crossing it, and within its lines there is the word "Reserved." The property which is the subject of controversy in this suit is within the boundaries of this reserved tract. As the record in the foreclosure proceedings contains no specific reference to this reserved tract, and as the complainant is not mentioned, although holding by an undisputed title shown by the public records of the county, there can be no reasonable theory to support a claim that this property was in any way identified with the foreclosure proceedings. The complainant disputes the validity of the foreclosure proceedings and the defendant's deeds on other grounds; but the foregoing is a sufficient statement upon which to base this decision.

A court of equity will not aid an owner of property in any attempt to evade payment of taxes; but this court is not called upon to do any such thing in this case, as the complainant, in its bill of com-

plaint, offers to comply with any terms which the court may impose and to pay whatever sum the court shall require to be paid on account of taxes. In view of this offer the court will not refuse to exert its power to prevent an unwarranted confiscation. The law makes ample provisions for coercing unwilling and negligent tax debtors. Contributors to the public revenue for the support of the government are entitled to protection of their legal rights. Public officers should be sustained in proceedings for the collection of taxes in the manner prescribed by law, but unlawful and surreptitious attempts to confiscate property are detrimental to the public welfare; and, when appealed to, the courts are bound to exert their authority to prevent such despoiling of individual rights by public officials. When the officers charged with the duty of enforcing the revenue laws have flagrantly neglected to observe the essential requirements of lawful procedure, it is enough to exact full payment of the amount justly due as a condition precedent to the granting of relief, so that the government shall receive from property owners what is justly due and no more.

In behalf of the defendants it is contended that this suit is a collateral attack upon a decree rendered by a court competent to decide every question as to its own jurisdiction in the premises, and which affirmed its jurisdiction by its decree. It is not true, however, that a court which has not jurisdiction of a particular case, conferred by law, can invest itself with jurisdiction by its own initiative. Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897. The jurisprudence of this country does not admit of despotic power in any court to confiscate property by its decree without lawful notice to the owner and a reasonable opportunity to defend his rights. Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914. These principles are fundamental, and unchangeable, so long as the courts shall be steadfast in the enforcement of the provisions of our national Constitution.

On the following grounds I hold that the tax deeds under which the defendants claim the property in controversy are absolutely void, viz.:

First. Until property shall have been listed as delinquent for nonpayment of taxes, by a description thereof sufficiently accurate to identify it, so that an intelligent owner, acquainted with his property, upon having the delinquent list brought to his attention, will be able to recognize the description as being applicable to his property, it does not become delinquent for nonpayment of taxes, nor subject to foreclosure or sale. This property was not so listed.

Second. The filing of a certificate of delinquency is the initial step in lawful proceedings to foreclose a tax lien by a judicial decree. In the proceedings referred to no such certificate was filed.

Third. The filing of an application to the court to foreclose a tax lien is the second step necessary to the exercise of judicial power in such a case, and a fair opportunity to present a legal defense is also essential. Therefore a final decree could not be lawfully rendered on the same day as the day on which the application was filed, as was done in this case.

Fourth. Jurisdiction to proceed in rem against property can only be acquired by an actual seizure of it, or by some equivalent act, as

by a notice to apprise the owner of the proceeding, served or posted, or published according to a mode prescribed by law, or waived. In a suit in rem jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. Seizure of the property, or the levy of a writ upon it, is the one essential requisite to jurisdiction. Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931. The superior court did not acquire jurisdiction by either mode. There was no seizure of the property, no writ against it was issued, no notice was served upon the owner, and the published summons contained no information that the proceeding affected this owner or its property.

Fifth. The tax deeds under which the defendants claim to have acquired this property are void, because the description of the property which they purport to convey is not applicable to any property.

As the nearest approximation to an equitable determination of the rights of the parties, it will be assumed that the defendants have succeeded to the right of Yakima county to collect the taxes chargeable to this property, and the complainant will be required to pay to each of them $76.75 and interest, or deposit the same in the registry of this court, and upon that condition the relief prayed for will be decreed.

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## F. B. VANDEGRIFT & CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. June 3, 1908.)

No. 4 (1,962).

CUSTOMS DUTIES—CLASSIFICATION—MONUMENT—"WORK OF ART."

The term "works of art." in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 703, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1690), *held* not to include a monument on which the only free sculpture is the cornice, a relief bust, and a garland of flowers, all covering only a very slight area of the whole surface.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7524.]

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

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 importers from a decision of the United States General Appraisers, affirming the decision of the collector of customs and classifying a certain marble monument imported into the port of Philadelphia under paragraph 115, of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1636]), as a manufacture of marble, against the contention of the importers that the same should be classified under paragraph 703 (Act July 24, 1897, § 2, c. 11, Free List, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1690]), covering "works of art * * * imported expressly for presentation to * * * in-

corporated religious society." The appraiser in his report to the collector said:

"I beg to state that in the opinion of this office neither in the various details of its construction nor as a whole is the article a work of art within the meaning of said paragraph 703 and department's regulations in T. D. 24,502, but is simply a mortuary design or monument, as would seem to be the most reasonable deduction from the photographic representation herewith. In this view, it was advisorily returned for classification according to material (as a manufacture of marble) under paragraph 115."

The board in its decision affirming the action of the collector said in part:

"The article in controversy is a marble monument which was presented to the church of Our Lady of Good Counsel in Philadelphia by the congregation and erected in the churchyard to the memory of a deceased pastor. It was assessed for duty as a manufacture of marble at 50 per cent. ad valorem, under paragraph 115 of the tariff act of 1897, and is claimed to be free under paragraph 703 as a 'work of art' imported for presentation to a religious society. The only question at issue is its status as a work of art. The monument is a low, four-sided, tapering shaft surmounted by a cross. The shaft is plain, except for a tablet with carved bust in base relief and an inscription, and beveling and paneling upon the body of the shaft designed to give the effect of five blocks of marble laid one above the other. A simple cornice and garland of flowers are carved on the capstone. The base consists of plain blocks of marble beveled. The only free sculpture on the monument is the cornice, the relief bust, and garland of flowers, which cover a very slight area of the whole marble surface. It is not proposed to find that the article in question is not skillfully carved, or is devoid of a symmetry that makes it attractive to the eye. But in the board's judgment it cannot be admitted under paragraph 703, unless every symmetrical object of carved marble is a work of art within the meaning of the law, and that breadth of construction is not warranted by any authority known to the Board. The monument appears to have been properly classified as a manufacture of marble, and the protest is accordingly overruled with an affirmance of the collector's decision."

The decision of the Board of General Appraisers is affirmed for the reasons stated by the board, and the appeal dismissed.

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## NORTHWESTERN CONSOL. MILLING CO. v. MAUSER & CRESSMAN.

(Circuit Court, E. D. Pennsylvania. July 31, 1908.)

No. 63, April Sessions, 1908.

TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—"CERESOTA" AS NAME OF FLOUR.

The word "Ceresota," as the name of a brand of flour, is not descriptive in such sense that it may not be adopted as a valid trade-mark, and such trade-mark is clearly infringed by the use of the name "Cressota" by a different manufacturer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 71.]

In Equity. On motion for preliminary injunction.

Charles Howson and A. C. Paul, for the motion.
Charles N. Butler, opposed.

ARCHBALD, District Judge.[1] The demurrer to the bill has been disposed of by the amendments, leaving nothing in the way of a consideration of the present motion on its merits.

The complainants are engaged in the manufacture of flour, at Minneapolis, Minn., and have adopted and duly registered as a trade-mark the word "Ceresota" for a brand of flour which they put out, by which, by judicious advertising, at large expense, it has come to be extensively and favorably known. The defendants are also in the flour business, at Catasaqua, Pa., and make use of the word "Cressota" on a brand of their flour, thereby infringing, as it is claimed, on the complainants' rights. That "Cressota" is an infringement of "Ceresota" needs no argument. Indeed, the resemblance is so close as to suggest that it is deliberate. Intentional infringement, however, is denied; it being explained that "Cressota" is derived from the name of Mr. Cressman, one of the defendants, who is familiarly known to his friends as "Cress," and the suffix "ota" being a common one in flour trade-marks, taken from, if not indicative of, the great wheat-producing states of the Northwest. But, even if this be accepted as something more than a specious explanation, it does not do away with the fact of infringement, which is clearly made out, and from which the defendants must therefore desist.

It is said, however, that "Ceresota" is a descriptive term, and (except as brought within the recent act of Congress) not capable, therefore, of being adopted as a trade-mark, being derived from "Ceres," the goddess of grain, from which we get the common word "cereal," with "ota" added, the ending, as already noted, of the names of the great grain states of Minnesota and the two Dakotas, with which, as it is said, it has come to be identified. "Ceresota," according to this, would thus be understood to mean, without more, a flour produced from grain grown in that section of the country. But this is altogether strained and fanciful. The first part of the word, no doubt, is derived, somwhat happily, as applied to flour, from the name of the goddess. But that there is any such meaning as is claimed for the termination "ota," or that it is capable of being made out of it, is not to be credited. It is possible that under the lead of the complainants, through the use of the very word here in controversy, this ending may have come to be adopted by others in the flour business as a part of their trade-marks. But that affords no proof of any such inherent or acquired sense as is contended for, so as to make it descriptive, either by itself or in combination. "Ceresota" is plainly a made-up word, and, having been coined and adopted by the complainants as a trade-mark in their business, they are entitled to the exclusive use of it, without being interfered with by others imitating it.

Let a preliminary injunction issue as prayed for.

[1] Specially assigned.

# MEMORANDUM DECISIONS.

THE ALGERIA. THE MAJESTIC. THE ELLEN S. JENNINGS. THE BAILEY. (Circuit Court of Appeals, Third Circuit. June 15, 1908.) No. 28. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. W. M. Harris, for the Majestic. Howard W. Yocum, for the Algeria. John F. Lewis and Francis C. Adler, for the Ellen S. Jennings and the Bailey. Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This cause is before us upon appeals taken by the steamship Algeria and the tug Majestic, respondents below, from the decree of the District Court of the United States for the Eastern District of Pennsylvania, in admiralty, wherein both respondents were found to be at fault for a collision between the steamship and a tow of barges which the tug had in charge, and the damages resulting from which to the barges Ellen S. Jennings and Bailey were ordered to be divided equally between said respondents. After a careful consideration of the voluminous and somewhat conflicting evidence disclosed by the record, and of the elaborate arguments and briefs of the libelants and respondents respectively, we cannot do otherwise than adopt the findings of fact made by the court below in its opinion, and the conclusions founded thereon. See 155 Fed. 902. The decree of the court below is therefore affirmed.

AMERICAN CAN CO. v. McGINNIS et al. (Circuit Court of Appeals, Fourth Circuit. May 18, 1908.) No. 787. Appeal from the Circuit Court of the United States for the District of Maryland. John W. Munday and Edmund Adcock (John P. Poe & Sons and Munday, Evarts, Adcock & Clarke, on the brief), for appellant. Charles Markell, Jr. (Gans & Haman, on the brief), for appellees. Before PRITCHARD, Circuit Judge, and PURNELL and DAYTON, District Judges.

PER CURIAM. The learned judge of the court below, in determining this case, filed a very full and satisfactory opinion, which will be found in 156 Fed. 784. The conclusions reached by him in this opinion, after a careful examination of the record by us, are fully approved. It is therefore ordered that the decree of the court below be in all respects affirmed. Affirmed.

THE JOHN FLEMING. THE SHANNON. THE SUIR. THE BESSIE WHITING. (Circuit Court of Appeals, Second Circuit. May 5, 1908.) Nos. 257, 258. Appeals from the District Court of the United States for the Eastern District of New York. Peter S. Carter, for Brown & Fleming Contracting Co. James J. Macklin and La Roy S. Gove, for the John Fleming. Wing, Putnam & Burlingham, for the Bessie Whiting. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Affirmed on opinion of district judge, reported in 149 Fed. 904.

McGRAW v. MOTT et al. (Circuit Court of Appeals, Fourth Circuit. July 18, 1908.) No. 840. Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Martinsburg. On Motion to Dismiss Appeal. Geo. W. Johnson (William A. Glasgow, Jr., and Jake Fisher, on the brief), for appellant. S. W. Walker (Faulkner, Walker & Woods, on the

brief), for appellees. Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. The order of the court below of June 16, 1908, by which the appellant, McGraw, was dismissed as a party to this suit, should not have been allowed. In reaching this conclusion, we find that the order of May 13, 1898, permitting McGraw to intervene and making him a defendant, was a proper exercise of judicial discretion. The allegations contained in the petition filed by him presented such a case as justified a court of equity in permitting him to intervene, and rendered it unnecessary for him to first apply to the stockholders or board of directors of the defendant corporation for the relief he now seeks by his intervention. It follows that the decree complained of will be set aside, and that this cause will be remanded, with directions that leave be given the Buckhorn Portland Cement Company and Abram C. Mott to answer appellant's petition, that the case be matured for final hearing at the earliest day practical with proper judicial proceedings, and for such further action as under the circumstances may be proper.

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In re MADSON STEELE CO. (Circuit Court of Appeals, Second Circuit. June 15, 1908.) No. 271. Petition to Review Order of the District Court of the United States for the Southern District of New York. Abram I. Elkus, for petitioner. Wm. B. Hornblower, amicus curiæ. Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We have decided to certify the question involved to the Supreme Court. We were informed at the argument that a cause is pending in that court involving the same question. In view of the importance of the question, we think the Supreme Court should have the benefit of the argument of counsel against, as well as in favor of, the contention of the petitioner. As this is an ex parte proceeding, we suggest that application be made to the Supreme Court for a rule setting the case for hearing with the other case above referred to. Counsel may submit statement of proposed question.

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NORTH CHICAGO ST. R. CO. et al. v. CHICAGO UNION TRACTION CO. et al. WEST CHICAGO ST. R. CO. et al. v. SAME. (Circuit Court of Appeals, Seventh Circuit. April 30, 1908.) Nos. 1,413, 1,414. On second appeal. See 150 Fed. 612; 154 Fed. 1005.

PER CURIAM. These causes came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, and on the stipulation of the parties hereto, on consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decrees of the said Circuit Court in these causes be and the same are hereby affirmed, and each party shall pay his or its own costs.

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A federal court *held* to have properly dismissed an action for want of jurisdiction, when on the trial it appeared that neither party was a resident of the district as alleged, which allegation defendant had denied.—Leonard v. Merchants' Coal Co. (C. C. A.) 885.

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**§ 1. Grounds and conditions precedent.**

*The phrase "cause of action" comprises every fact necessary to the right to the relief prayed for.—McAndrews v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 856.

The "subject-matter of the action" in personal injury suits is the circumstances and facts out of which the cause of action arises.—McAndrews v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 856.

**§ 2. Nature and form.**

*An "action" is the means that the law has provided to put a cause of action into effect.—McAndrews v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 856.

**§ 3. Joinder, splitting, consolidation, and severance.**

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**§ 1. Jurisdiction.**

A collision in a navigable river between vessels and the surface part of borings made to locate an aqueduct under the bed of the river for municipal purposes is not in any sense maritime, and a suit to recover damages for injury to such borings is not within the admiralty jurisdiction.—The Poughkeepsie (D. C.) 494; The Homer Ramsdell, Id.

*A statute of a state may be applied to a suit in admiralty to recover for a death on the high seas arising purely from tort where the vessel belonged to the state in question; but the burden rests upon the libelant to establish by satisfactory evidence that the vessel was one of such state, where it is denied.—Fisher v. Boutelle Transportation & Towing Co. (D. C.) 994.

**§ 2. Evidence, and taking and filing proofs.**

While a court of admiralty does not take judicial notice of the rules of the supervising inspectors, yet it may properly consider the same,

although not formally introduced in evidence where they appear in the record, were referred to in the testimony, and are discussed in the briefs of counsel.—The H. B. Rawson (C. C. A.) 312; The Prinz Adalbert, Id.

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**§ 2. Naturalization.**
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**§ 1. Nature and form of remedy.**
*A defendant *held* entitled to review by writ of error a judgment entered on a mandate of the appellate court, where on the prior writ of error obtained by the plaintiff but a single question was raised or could be considered which did not go to the merits.—Alaska-Treadwell Gold Min. Co. v. Cheney (C. C. A.) 593.

An order of the Circuit Court, adjudging a contempt for violation of an injunction against infringement of a patent and imposing a punative fine payable to the United States, is reviewable by the Circuit Court of Appeals on writ of error.—Continental Gin Co. v. Murray Co. (C. C. A.) 873.

**§ 2. Decisions reviewable.**
A judgment entered by a federal court in an action at law which includes costs against the losing party is none the less final because a blank is left for the insertion of the amount of such costs when taxed; such taxation and entry being made as of course under Rev. St. § 983 (U. S. Comp. St. 1901, p. 706), by the judge or clerk and requiring no further judicial action, and the time for suing out a writ of error to review such judgment runs from such entry, and not

from the time when the blank was filled.—Allis-Chalmers Co. v. United States (C. C. A.) 679.

**§ 3. Presentation and reservation in lower court of grounds of review.**

Where appellant, although having notice, did not defend in the District Court, he cannot defend on appeal.—Young & Holland Co. v. Brande Bros. (C. C. A.) 663.

**§ 4. Record and proceedings not in record.**

*An assignment that the court erred in overruling defendant's motion to direct a verdict at the close of all the evidence cannot be reviewed where the bill of exceptions neither recites nor shows that it contains all the evidence.—City of Chicago v. Troy Laundry Machinery Co. (C. C. A.) 678.

*In the absence of a finding of facts, a special verdict, or a request for a ruling on the facts and bill of exceptions, the evidence taken in a Circuit Court is no part of the record, and therefore cannot be considered by the appellate court on a writ of error.—Continental Gin Co. v. Murray Co. (C. C. A.) 873.

**§ 5. Assignment of errors.**

*While errors not assigned will not ordinarily be considered, a plain error may be noticed, when justice requires, though it is not assigned.—New York Life Ins. Co. v. Rankin (C. C. A.) 103.

*Errors not assigned will not be considered on appeal.—Russel v. Huntington Nat. Bank (C. C. A.) 868.

**§ 6. Dismissal, withdrawal, or abandonment.**

When differences arise between judges as to their powers in matters in which the public have an interest, it is their duty to take such steps as will present the issue in such shape that a decision can be obtained in a higher court with the least delay.—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

Where there is a real controversy whether there be two judges of a district, and, if so, as to their respective powers in removing or appointing court officials, a case actually made concerning it *held* not a moot case in an appellate court.—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

**§ 7. Review.**

*Where evidence erroneously admitted is calculated to affect the determination of other questions than the one as to which it is admitted, the error is not cured by the mere elimination of that question, but the court should charge the jury that the evidence is withdrawn from their consideration.—New York Life Ins. Co. v. Rankin (C. C. A.) 103.

*Questions which were once determined by an appellate court or conceded on the hearing therein will not be considered on a second appeal or writ of error in the same case.—Roth v. Mutual Reserve Life Ins. Co. (C. C. A.) 282.

*Where both parties request a directed verdict, the only questions reviewable on a writ of error are: (1) Whether there was any substantial evidence to support the court's finding on the facts; and (2) whether there was any error in the application of the law.—Roth v. Mutual Reserve Life Ins. Co. (C. C. A.) 282.

*Where both parties request a directed verdict, the defeated party is estopped to claim that any question of fact should have been submitted to the jury, and the only questions reviewable on a writ of error are: (1) Whether there was any substantial evidence to support the courts finding on the facts; and (2) whether there was any error in the application of the law.—Rainy Lake River Boom Corp. v. Rainy River Lumber Co. (C. C. A.) 287.

*Evidence *held* incompetent to corroborate the testimony of prior witnesses and its admission prejudicial error where the other evidence was conflicting.—Leedy v. Lehfeldt (C. C. A.) 304.

*The findings of a trial judge sitting in equity ought not to be set aside on appeal if there is legal evidence to sustain them.—Rochester German Ins. Co., of Rochester, N. Y., v. Schmidt (C. C. A.) 447.

*The admission in evidence of drawings used to illustrate the testimony of witnesses, although not claimed to be accurate, *held* not prejudicial error.—Alaska-Treadwell Gold Min. Co. v. Cheney (C. C. A.) 593.

A general finding by a Circuit Court where a jury has been waived is conclusive in the courts of review on all issues of fact if there was any evidence on which it could have been made, and the rule is applicable notwithstanding a motion by the defeated party for judgment raising an assumed question of law as to the sufficiency of the evidence.—Hall v. Western Union Telegraph Co. (C. C. A.) 657.

*The finding of a trial court on the proofs against the truth of a plea affirmed.—Eagle Oil Co. of New York v. Vacuum Oil Co. (C. C. A.) 671.

*An order of a Circuit Court adjudging a contempt for violation of an injunction against infringement of a patent, and imposing a punitive fine payable to the United States, is reviewable by the Circuit Court of Appeals on writ of error, but upon such writ only matters of law appearing on the record can be considered.—Continental Gin Co. v. Murray Co. (C. C. A.) 873.

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## ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial."
Attorneys fees in bankruptcy proceeding, see "Bankruptcy," § 9.
Attorneys in fact, see "Principal and Agent," § 1.

## ATTORNEY GENERAL.

Jurisdiction of federal courts of action against Attorney General as suit against state, see "Courts," § 2.

## AUTHORITY.

Of corporate officers or agents, see "Corporations," §§ 2, 3.

## AVERAGE.

General average, see "Shipping," § 4.

## AVOIDANCE.

Of contract by minor, see "Infants," § 1.

## BAILMENT.

See "Carriers," § 2; "Pledges."

## BANKRUPTCY.

**§ 1. Petition, adjudication, warrant, and custody of property.**

A corporation organized for and carrying on the business of catching and preserving by salt and marketing salt water fish, and which owns and operates a plant for the preparing, preserving, and packing of such fish, is principally engaged in manufacturing, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), and is subject to adjudication as an involuntary bankrupt.—In re Alaska American Fish Co. (D. C.) 498.

A District Court of Washington *held* to have jurisdiction of joint bankruptcy proceedings against a corporation of that state and one of California, where their business conducted in Washington by a joint manager was so intermingled that it could not be separated.—In re Alaska American Fish Co. (D. C.) 498.

Evidence considered, and *held* insufficient to show that a mortgage given by an alleged bankrupt to her son to secure advances to pay existing debts was made with intent to hinder, delay, or defraud creditors or to prefer a creditor so as to constitute an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (1, 2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).—In re McLoon (D. C.) 575.

*To constitute an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (1), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), by conveying property with intent to hinder, delay, or defraud creditors, there must have been an actual fraudulent intention which impeaches the bona fides of the transaction.—In re McLoon (D. C.) 575.

A judge who is a judge of two districts may make an order to be entered in the court of either as to the appointment of a referee in bankruptcy, though not personally present in court, if he be at the time of the making of the order in either district.—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

*Under Bankr. Act July 1, 1898, c. 541, § 1, subd. 16, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419), where there are two judges in a district, either may hold a court of bankruptcy and perform all the duties thereof in the same place or at a different place within the district while the other judge is also holding a court of bankruptcy.—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

A receiver in bankruptcy *held* properly surcharged with a portion of the loss sustained by his improper persistence in carrying on the bankrupt's business, when he knew it was unprofitable from the beginning.—In re Consumers' Coffee Co. (D. C.) 786.

A receiver in bankruptcy *held* properly surcharged with the amount realized from the sale of fixtures of one of the bankrupt's places of business, but not for the value of supplies on hand, nor for the difference between the appraised and sale value of the fixtures in another place of business belonging to the estate.—In re Consumers' Coffee Co. (D. C.) 786.

**§ 2. Assignment, administration, and distribution of bankrupt's estate —Assignment, and title, rights, and remedies of trustee in general.**

The fact that at a meeting of the creditors of a bankrupt to consider an offer of composition one having title to certain property then in possession of the trustee did not mention his right will not estop him to assert the same after the composition has been rejected.—In re Loll (D. C.) 79.

Grain and flour certificates issued by a bankrupt milling company and pledged as collateral security for loans, covering grain and flour of which it was the owner, and which remained in its possession until its bankruptcy, *held* not to have divested its title to the property which passed to its trustees under Bankr. Act July 1, 1898, § 70a (4), c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), as to property which under the law of Pennsylvania might have been levied on and sold under judicial process against it.—In re Millbourne Mills Co. (D. C.) 988.

**§ 3. —— Preferences and transfers by bankrupt, and attachments and other liens.**

The specific lien acquired by a landlord by distraint of goods for rent under the statutory law of Pennsylvania is not one obtained through legal proceedings, within the meaning of Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), and is not devested by the bankruptcy of the tenant within four months thereafter.—In re West Side Paper Co. (C. C. A.) 110.

A creditor who received payment of his debt, amounting to some $4,000, on the day before bankruptcy proceedings were instituted against the debtor, *held* to have had reasonable cause to believe that a preference was intended so as to render it voidable under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), where he admitted that he knew the debtor was hard pressed and without credit and that he had himself been persistently pressing his own claim for several months.—Wright v. William Skinner Mfg. Co. (C. C. A.) 315; Same v. Skinner Id.

A payment of a debt by an insolvent New York corporation on the day before a petition in bankruptcy was filed against it with intent to prefer the creditor is voidable by its trustee under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3449), and the Stock Corporation Law, New York Laws 1892, p. 1838, c. 688, § 48, which makes void any payment made by a corporation when insolvent or when its insolvency is imminent with intent to prefer a creditor.—Wright v. William Skinner Mfg. Co. (C. C. A.) 315; Same v. Skinner, Id.

*A creditor to whom a transfer was made had reasonable cause to believe that a preference was intended, within the meaning of Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), if he had knowledge of facts which would put a prudent man on inquiry and such inquiry would have shown that the transfer was preferential in its effect.—In re W. W. Mills Co. (D. C.) 42.

A corporation deposited sight drafts on third parties in a bank for collection, under an agreement that they were to be credited to its account and if not paid were to be taken up by it as cash items. *Held*, that the taking up of such unpaid drafts, although when the incorporation was insolvent and within four months' prior to its bankruptcy did not constitute voidable preferences.—In re W. W. Mills Co. (D. C.) 42.

A transfer by way of mortgage or pledge given to secure an antecedent debt within four months prior to the debtor's bankruptcy, and when he is insolvent, is void, although the creditor did not know nor have reasonable cause to believe he was then insolvent.—In re W. W. Mills Co. (D. C.) 42.

*A transfer of property by a corporation as security for a past indebtedness, within four months prior to its bankruptcy, when it was insolvent and the creditor had reason to believe it to be insolvent, is voidable as a preference under Bankr Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), even though such transfer was made in ratification of an unauthorized transfer made by an officer of the corporation before the four months' period.—In re W. W. Mills Co. (D. C.) 42.

The payment to a bank by an insolvent corporation within four months prior to its bankruptcy and at a time when the bank had reasonable cause to believe it to be insolvent of notes in favor of the corporation which it had discounted at the bank and indorsed, or of notes

given by it to third parties and discounted by the bank, constituted voidable preferences given to the bank which it was required to return under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1030]), before it could prove a claim against the bankrupt estate.—In re W. W. Mills Co. (D. C.) 42.

The trustee in bankruptcy and creditors of a bankrupt *held* entitled to attack as fraudulent a chattel mortgage given to secure a past indebtedness which had been withheld from record until a few days before the bankruptcy, both under Rev. St. Idaho 1887, §§ 3386, 3396, and under the bankruptcy law.—In re Hickerson (D. C.) 345.

*A bank which took a chattel mortgage from a debtor to secure a past indebtedness and withheld the same from record for nearly a year and until a few days prior to the bankruptcy of the mortgagor *held* to have had reasonable cause to believe that he was in failing circumstances when it was taken and insolvent when it was recorded, which rendered it a voidable preference under Bankr. Act July 1, 1898, c. 541, § 60ab, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1907 p. 1031).—In re Hickerson (D. C.) 345.

Where a bankrupt had undertaken to make collections on contracts which it had pledged to a bank as collateral to its notes, it acted in making such collections as agent for the bank, and all collections so made, whether accounted for or not, reduced the bank's lien on the collateral pro tanto as against the trustee in bankruptcy.—In re Merrill & Baker (D. C.) 590.

Property transferred by a bankrupt to a creditor, which was exempt under the laws of the state, cannot be recovered by his trustee.—Vitzthum v. Large (D. C.) 685.

*The fact that a transfer of property by a bankrupt to a creditor to be applied on an antecedent debt made within four months prior to the bankruptcy, was pursuant to an agreement made before the four-month period, will not prevent its recovery by his trustee.—Vitzthum v. Large (D. C.) 685.

**§ 4. —— Administration of estate.**

A trustee *held* not to have assumed a lease of a storeroom held by the bankrupt, and to be liable only for the rental value of so much of the demised premises as he occupied in closing up the business after the bankruptcy.—In re J. Frank Stanton Co. (D. C.) 169.

A bankrupt who failed to produce his books before a special commissioner appointed to examine him, under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), *held* guilty of contempt.—In re Alper (D. C.) 207.

Where a court of bankruptcy referred back a case to the referee to distribute funds in his hands derived from a sale of the bankrupt's real estate discharged of liens, such order constituted a final adjudication, so far as the District Court was concerned, that the referee had power to make such sale.—In re Miners' Brewing Co. (D. C.) 327.

Where a mechanic's lien was defective on its face, the claimant was not entitled to priority in the distribution of the proceeds of a sale of the property in bankruptcy, freed from liens.—In re Miners' Brewing Co. (D. C.) 327.

A referee in bankruptcy has authority to order a sale of the bankrupt's real estate discharged of liens and determine the validity, extent, and relative priority of claims against the fund.—In re Miners' Brewing Co. (D. C.) 327.

A purchaser of a leasehold property from a trustee in bankruptcy *held* to have taken the same in respect to a mortgage on the fee given by the lessor in the condition it was at the time of the sale, and not entitled to have rent which was then due from the bankrupt and trustee applied on the mortgage for his protection.—In re Ketterer Mfg. Co. (D. C.) 583.

A court of bankruptcy has power to authorize a receiver to borrow money and issue certificates therefor and conduct the bankrupt's business for the purpose of preserving the assets.—In re Restein (D. C.) 986.

**§ 5. —— Actions by or against trustee.**

A District Court as a court of bankruptcy has jurisdiction of a suit in equity by a trustee in bankruptcy of a corporation against a number of defendants to recover unpaid subscriptions to the stock of the corporation; such suit being one which could not have been maintained by the bankrupt.—Skillin v. Magnus (D. C.) 689.

**§ 6. —— Claims against and distribution of estate.**

While it would be an abuse of discretion for a court of bankruptcy to set aside an order allowing or rejecting a claim and grant a rehearing for the sole purpose of extending the time for an appeal therefrom under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), yet it has a discretion to set aside such an order for good cause shown.—West v. W. A. McLaughlin & Co.'s Trustee (C. C. A.) 124.

Where the bankrupt was a stockbroker, and it was shown without dispute that a claimant paid him a sum of money with which to purchase certain stocks, the burden rested upon the bankrupt as agent, or on his trustee who stood in his place, to account for such money; otherwise claimant was entitled to the allowance of his claim as for money received to his use.—West v. W. A. McLaughlin & Co.'s Trustee (C. C. A.) 124.

The money expended by a father who is solvent for the support and education of his sons or given to them, either before or after their majority, with no agreement or apparent expectation that it will be repaid, is not chargeable against a fund held by him as their guardian in favor of his creditors in bankruptcy, and the sons are entitled to interest on such fund from the time of its receipt by him.—Embry v. Bennett (C. C. A.) 139.

Where the amount of claims filed against the estate of a bankrupt as secured claims was in dispute from the first and so understood by all parties, it was not necessary that written objections should be filed to entitle the trustee or other creditors to contest their allowance for the full amount claimed.—Embry v. Bennett (C. C. A.) 139.

After bankruptcy had intervened, a creditor claiming a lien as a subcontractor should not be permitted to change his claim by amendment so as to claim as a contractor under an agreement direct with the bankrupt's agent.—In re Miners' Brewing Co. (D. C.) 327.

A note given by a bankrupt corporation to a stockholder for money borrowed with which to effect a composition, and which was so used, is not without consideration, and may be proved as a debt in a second bankruptcy proceeding.—In re C. H. Bennett Shoe Co. (D. C.) 691.

A claim cannot be maintained against a bankrupt's estate for money advanced to the bankrupt after the commencement of bankruptcy proceedings.—In re Rome (D. C.) 971.

Evidence *held* to sustain a referee's finding that petitioner had no valid claim for money alleged to have been loaned the bankrupt.—In re Rome (D. C.) 971.

Where a receiver in bankruptcy was authorized to issue certificates of indebtedness to the amount of $10,000, debts incurred by the receiver, for which no certificates were issued, *held* entitled to participate on the same footing with the certificates up to the amount of indebtedness which the receiver was authorized to incur.—In re Restein (D. C.) 986.

**§ 7. Rights, remedies, and discharge of bankrupt.**

It is not ground for refusing a discharge under Bankruptcy Act July 1, 1898, c. 541, § 14b(1) 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), that the bankrupt after the filing of the petition against him furnished the money to buy up the claim of a creditor with intent to defeat the proceedings, where it is not shown that the creditor had knowledge of such fact or participated in such intent so as to be guilty of an offense under section 29b(4), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433).—In re Luftig (D. C.) 322.

*A bankrupt refused a discharge on the ground that he made a false oath in his testimony given in the bankruptcy proceedings.—In re Luftig (D. C.) 322.

The court is not required to grant a discharge to a bankrupt knowing at the time that facts exist which would render such discharge revocable for fraud had they first come to light after it was granted, although no cause for refusing it is shown under Bankruptcy Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427).—In re Luftig (D. C.) 322.

A bankrupt *held* not a bona fide resident of Pennsylvania at the time of filing his schedules so as to be entitled to claim exemptions under its laws.—In re O'Hara (D. C.) 325.

Ordinarily it is sufficient if a bankrupt makes his claim to exemption in his schedules, and an extension of time for filing his schedules also extends the time for making such claim.—In re O'Hara (D. C.) 325.

*The omission by a bankrupt from his schedules, under advice of counsel, of property claimed by another and the ownership of which was at least doubtful, cannot be held to be such a fraudulent concealment as to bar his right to a discharge under Bankr. Act July 1, 1898, § 14b (4), c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended in 1903 by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).—In re Alleman (D. C.) 693.

Under Code Civ. Proc. Neb. § 530, a bankrupt who is a dealer in eggs and poultry is entitled to hold as exempt as tools and instruments of his business a horse, harness, and wagon used in gathering such produce, and the appliances at his office necessary to be used in conducting his business.—In re Conley (D. C.) 806.

Under general orders in bankruptcy No. 32 (89 Fed. xiii, 32 C. C. A. xiii), a creditor is not entitled to enter an appearance for the purpose of filing objections to a bankrupt's discharge after the return day named in the order to show cause, at least without good cause shown for the delay.—In re Young (D. C.) 912.

Evidence *held* not to sustain objections to a bankrupt's discharge on the grounds that he failed to keep books, and destroyed books with intent to conceal his true financial condition.—In re Murray (D. C.) 983.

A referee in bankruptcy acting as a special master in hearing objections to a bankrupt's discharge has no legal right to consider evidence which has been previously taken before him as referee, but must be governed entirely by the admissible evidence produced on the hearing of the application and objections.—In re Murray (D. C.) 983.

**§ 8. Appeal and revision of proceedings.**

A court of bankruptcy *held* to have jurisdiction to proceed with the hearing of a petition in involuntary bankruptcy where the alleged bankrupt failed to comply with orders for the amendment of pleadings, or to appear in response to an order to show cause.—Young & Holland Co. v. Brande Bros. (C. C. A.) 663.

A second appeal in a bankrupty proceeding, raising the same question determined on a former appeal, would be dismissed as frivolous.—In re Kehler (C. C. A.) 674.

*An order of a court of bankruptcy holding chattel mortgages on property, in the hands of a bankrupt's trustee, invalid, is reviewable on appeal.—Knapp v. Milwaukee Trust Co. (C. C. A.) 675.

General Bankruptcy Order 36, § 3 (89 Fed. xxxvi, and 32 C. C. A. xxxvi), does not require the Circuit Court of Appeals of its own motion to determine in advance of its decision, on an appeal in bankruptcy, whether a question is raised on which the party is entitled to the allowance of an appeal to the Supreme Court.—Knapp v. Milwaukee Trust Co. (C. C. A.) 675.

***Point annotated. See syllabus.**

On appeal from a decree of a district court in a controversy arising in bankruptcy, the only want of jurisdiction available, when first raised in the appellate court, is the District Court's jurisdiction to render the decree appealed from. —Knapp v. Milwaukee Trust Co. (C. C. A.) 675.

The capacity of a bankrupt's trustee to sue, not having been challenged in the trial court, cannot be raised on appeal.—Knapp v. Milwaukee Trust Co. (C. C. A.) 675.

In November, 1907, there were two judges of the Northern district of Alabama, and S. was appointed a referee in bankruptcy by one of them with the consent of the other who removed him, whereupon the judge appointing him revoked the order of removal. Afterwards, in 1908, the other judge when he was the sole judge, without interfering with S., appointed another referee, and made an order requiring the bankruptcy business to be equally divided between them, except when one of the judges for special reasons in a case ordered otherwise. Two days afterwards he repeated the order without the consent of the other judge, if he had then qualified. Thereupon his colleague having qualified under a new appointment revoked these orders. *Held*, that the judge whose authority was thus ignored properly recommended his appointee to take steps to review the last order concerning him in the Court of Appeals, under section 24 of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]).—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

Laches of a bankrupt's trustee in applying to re-examine the allowance of a creditor's claim would be regarded as waived on a petition to review the referee's order expunging the claim, where it was not pressed before the referee.—In re Rome (D. C.) 971.

A creditor of a bankrupt *held* not guilty of such laches in filing a petition to review the referee's order expunging his claim as authorized the dismissal of the petition to review.—In re Rome (D. C.) 971.

**§ 9. Costs and fees.**

On disallowance of a claim against a bankrupt on re-examination, the referee *held* to have properly charged costs to the claimant, but to have improperly charged claimant with an attorney's fee for the trustee's attorney.—In re Rome (D. C.) 971.

## BANKS AND BANKING.

Pledges of stock of insolvent bank as fraudulent conveyances, see "Fraudulent Conveyances," § 1.

**§ 1. Banking corporations and associations.**

Pub. Laws N. C. 1903, p. 469, c. 275, giving corporations organized thereunder a lien on their stock to secure indebtedness due them from stockholders, *held* not to apply to a banking corporation organized under a special act so as to entitle it to a lien for other indebtedness on the surplus proceeds of stock held by it as collateral for a stockholder's note.—In re W. W. Mills Co. (D. C.) 42.

**§ 2. National banks.**

Under Rev. St. §§ 5208, 5209 (U. S. Comp. St. 1901, p. 3497), an indictment against a national bank cashier *held* not objectionable for failure to charge that the national banking association of which he was cashier was a national banking association organized under the laws of the United States.—Geiger v. United States (C. C. A.) 844.

An indictment for violation of the national banking act *held* not objectionable for failure to allege that the bank of which defendant was cashier was doing business at the time of the alleged offenses.—Geiger v. United States (C. C. A.) 844.

An indictment against a national bank cashier charging misapplication and conversion of the proceeds of a check delivered to him for the payment of a note held by the bank against the drawer when it matured *held* not defective for failure to allege the payee of the check, or that the bank was still the owner of the note.—Geiger v. United States (C. C. A.) 844.

Acts of a cashier of a national bank in obtaining payment of a check as cashier and converting the proceeds to his own use *held* not a mere breach of trust, but a willful misapplication and abstraction of the bank's funds.—Geiger v. United States (C. C. A.) 844.

Where a receiver of a national bank on taking possession of its assets found no definite and certain agreement as to the particulars of the pledge, it was his duty to ascertain and assert fully the obligations and liabilities of the pledgor to the bank, and the purposes and extent of the pledge.—Wise v. Williams (C. C.) 161.

*An indictment charging officers of a national bank with making a false entry in a report made by them "with intent to deceive an agent appointed to examine the affairs of the association, to wit, the Comptroller of the Currency of the United States," does not charge an offense under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497).—United States v. Corbett (D. C.) 687.

*A general averment in an indictment against officers of a national bank that a false entry charged to have been made by them in a report to the Comptroller of the Currency was made "with intent to injure and defraud the association" is insufficient to state an offense under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), no facts being alleged to show in what manner the bank could have been injured or defrauded thereby.—United States v. Corbett (D. C.) 687.

## BAR.

Of action by former adjudication, see "Judgment," § 1.

## BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance associations, see "Insurance," § 7.

## BILL OF DISCOVERY.

See "Discovery," § 1.

## BILL OF LADING.

See "Carriers," § 2.

## BILL OF REVIEW.

See "Equity," § 6.

## BILLS AND NOTES.

Execution of accommodation paper by corporation, see "Corporations," § 3.
Note as claim against bankrupt, see "Bankruptcy," § 6.
Parol or extrinsic evidence, see "Evidence," § 2.

## BONDS.

Importers' bonds, see "Customs Duties," § 3.
Municipal bonds, see "Municipal Corporations," § 3.
Of government contractor, see "United States," § 1.

## BREACH.

Of conditions, see "Insurance," § 3.
Of contract, see "Sales," § 3; "Vendor and Purchaser," § 1.
Of warranty, see "Insurance," § 3.

## BROKERS.

See "Principal and Agent."

**§ 1. Duties and liabilities to principal.**
The right of a client of a stockbroker to recover from such broker for a failure to sell and account for stocks held for the client when ordered considered.—J. J. Quinlan & Co. v. Holbrook (C. C. A.) 272.

## CANCELLATION OF INSTRUMENTS.

Contracts in general, see "Contracts," § 4.

**§ 1. Right of action and defenses.**
*A court of equity will not entertain a suit for the cancellation of a nonnegotiable contract, alleged to be false and fraudulent, on which the defendant has brought an action at law, since the question of the genuineness of the instrument may be fully and finally adjudicated in such action.—Sunset Telephone & Telegraph Co. v. Williams (C. C. A.) 301.

## CAPITAL.

Of bank, see "Banks and Banking," § 1.

## CARGO.

See "Shipping."

## CARRIERS.

Carriage of goods by vessels, see "Shipping," § 2.
Carriage of passengers by vessels, see "Shipping," § 3.
Jurisdiction of equity to restrain acts of state railway commissioner, see "Injunction," § 1.
Right to jury in action for conspiracy by, see "Jury," § 1.

**§ 1. Control and regulation of common carriers.**
The refunding by a railroad company of elevator charges on grain transported in interstate commerce over its line to a shipper which had paid the published schedule rate *held* the granting of a rebate or concession from such rate, in violation of section 1 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]).—Chicago, St. P., M. & O. Ry. Co. v. United States (C. C. A.) 835.

An indictment against a railroad company for granting rebates or concessions from the published schedule rates on interstate shipments, in violation of section 1 of the Elkins act (Act Feb. 19, 1903, c. 703, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), considered, and *held* sufficient.—Chicago, St. P., M. & O. Ry. Co. v. United States (C. C. A.) 835.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165) as amended by Act Cong. June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1907, p. 902), a shipper is not entitled to maintain a suit for damages against an interstate carrier for charging illegal and excessive rates until after a hearing and an award by the interstate commerce commission.—Howard Supply Co. v. Chesapeake & O. Ry. Co. (C. C.) 188.

That an interstate rate on railroad ties was higher than the rough lumber rate, and that the interstate commerce commission had held in another proceeding that such articles should take the same classification, did not entitle the shippers of ties to recover the difference in the rates without a hearing and award before the interstate commerce commission.—Howard Supply Co. v. Chesapeake & O. Ry. Co. (C. C.) 188.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), no action based on an alleged charge of illegal and excessive rates by interstate carriers can be maintained in the absence of an allegation that the rates have been held illegal by the Interstate Commerce Commission.—Meeker v. Lehigh Valley R. Co. (C. C.) 354.

In an action for damages because of an alleged conspiracy to raise rates on anthracite coal by a combination of interstate carriers, an allegation that the rates charged were "unlawful" was not equivalent to an allegation that they had been so held by the Interstate Com-

merce Commission.—Meeker v. Lehigh Valley R. Co. (C. C.) 354.

A right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates to interstate carriers is given by Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and not by the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).—Meeker v. Lehigh Valley R. Co. (C. C.) 354.

Defendant terminal railroad company *held* not guilty of knowingly and willfully violating the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), and therefore not to be liable for a penalty therefor.—United States v. Sioux City Stock Yards Co. (C. C.) 556.

Under the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]), regulating confinement of animals during transportation, only a single penalty is incurred for confinement beyond the period of 28 or 36 hours, so that the time of confinement beyond that period is not material, unless it be for another like period.—United States v. Sioux City Stock Yards Co. (C. C.) 556.

*A common carrier of personal property is one who undertakes for hire to transport from place to place the goods of others employing him.—United States v. Sioux City Stock Yards Co. (C. C.) 556.

Act 1907, p. 453, is unconstitutional because its requirement to furnish cars is absolute and without reasonable exceptions.—St. Louis, I. M. & S. Ry. Co. v. Hampton (C. C.) 693.

A railroad company engaged in interstate commerce in distributing cars between coal mining companies engaged in such commerce where there is a shortage is required by Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155), to take into consideration private cars used by such a company, although only in intrastate commerce. —Majestic Coal & Coke Co. v. Illinois Cent. R. Co. (C. C.) 810.

*The use of the word "willful" in section 1 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]) to characterize offenses thereunder, conceding it to apply to the granting of rebates from the published schedule rates, does not require that there should have been an evil intent to constitute the offense, but it is sufficient if the act was done knowingly and purposely.—Chicago, St. P., M. & O. Ry. Co. v. United States (C. C. A.) 835.

An interstate carrier having been found guilty of violating Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. 1901, p. 918), in the transportation of live stock, the duty devolves on the court to assess the penalty recoverable.—United States v. Southern Pac. Co. (D. C.) 412.

An action by the United States against an interstate carrier to recover penalties for violation of Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), *held* civil in character, so that the government was only required to establish its case by a preponderance of the evidence.—United States v. Southern Pac. Co. (D. C.) 412.

**§ 2. Carriage of goods.**

A contract for through transportation of flour from Pond Creek, Okl., to New York, made in Oklahoma, is governed by the Oklahoma law so far as the same does not invade the rights of the United States to regulate interstate commerce.—Erie R. Co. v. Pond Creek Mill & Elevator Co. (C. C. A.) 878.

Wilson's Rev. & Ann. St. Okl. 1903, § 707, *held* not to regulate the vehicle only by which an interstate transportation contract may be proved, but is a valid exercise of legislative power regulating interstate transportation contracts made in that state.—Erie R. Co. v. Pond Creek Mill & Elevator Co. (C. C. A.) 878.

Where a connecting carrier permitted flour in transit to remain stored for 49 days, because of the shortage of cars, without notifying the shipper, and the flour was destroyed by the burning of the warehouse, the carrier was liable, notwithstanding a limitation in the bill of lading excepting liability for fire.—Erie R. Co. v. Star & Crescent Milling Co. (C. C. A.) 879.

*In an action against an express company for loss of freight, plaintiff's recovery *held* limited to $150, the amount at which the property was valued in the express receipt.—Taylor v. Weir (C. C.) 585.

A shipper *held* not entitled to recover damages for discrimination during a period for which it received rebates from defendant which were less than those allowed to plaintiff's competitors.—International Coal Min. Co. v. Pennsylvania R. Co. (C. C.) 996.

**§ 3. Carriage of live stock.**

Twenty-eight hour law (Act June 29, 1906, c. 3594, 34 Stat. 608, § 3 [U. S. Comp. St. Supp. 1907, p. 919]) *held* to require a carrier to retain animals transported under an interstate shipment in the cars longer than the prescribed period "knowingly and willfully" in order to incur the penalty specified.—United States v. Sioux City Stock Yards Co. (C. C.) 556.

A stockyards company operating a terminal railroad *held* a railroad company or common carrier other than by water within the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1907, p. 918]).—United States v. Sioux City Stock Yards Co. (C. C.) 556.

**§ 4. Carriage of passengers.**

*An adult person who voluntarily left a railroad car in which he was riding several blocks before reaching a station, and stood upon the open platform, where he was killed in a collision, no one inside the cars being seriously injured, *held* chargeable with contributory negligence which precluded a recovery for his death.—Chicago Great Western Ry. Co. v. Mohaupt (C. C. A.) 665.

***Point annotated. See syllabus.**

Where plaintiff purchased a through ticket by steamboat and trolley, it would be presumed that defendant was responsible for plaintiff's safety during the entire journey.—Clemmens v. Washington Park Steamboat Co. (C. C.) 815.

Whether a trolley railroad was operated by another corporation than defendant from whom plaintiff purchased a ticket for a continuous ride to her destination *held* for the jury.—Clemmens v. Washington Park Steamboat Co. (C. C.) 815.

## CAUSE OF ACTION.

See "Action."

## CERTIFICATE.

Of acknowledgment of written instrument, see "Acknowledgment," § 1.

## CHANCERY.

See "Equity."

## CHARACTER.

Of accused in criminal prosecutions, see "Criminal Law," § 2.

## CHARTER PARTIES.

See "Shipping," § 1.

## CHATTEL MORTGAGES.

See "Pledges."

As preferential conveyance by bankrupt, see "Bankruptcy," § 3.

**§ 1. Rights and remedies of creditors.**

*Under the Wisconsin law a chattel mortgage authorizing the mortgagor to retain possession and dispose of the property under some circumstances, for its own benefit is void.—Knapp v. Milwaukee Trust Co. (C. C. A.) 675.

An agreement between the mortgagor and mortgagee to withhold a chattel mortgage from record is evidence of a fraudulent intent.—In re Hickerson (D. C.) 345.

## CHEAT.

See "Fraud."

## CHILDREN.

See "Infants."

## CIRCUIT COURTS OF APPEALS.

See "Courts," § 2.

## CITIES.

See "Municipal Corporations."

## CITIZENS.

See "Aliens"; "Indians."

Citizenship ground of jurisdiction of United States courts, see "Courts," § 2; "Removal of Causes," § 2.

## CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 6.

Against United States, see "United States," § 2.

Mining claims, see "Mines and Minerals," § 1.

Of patent, see "Patents," § 3.

## COLLATERAL SECURITY.

See "Pledges."

## COLLISION.

Admiralty jurisdiction of action for injuries caused by, see "Admiralty," § 1.

Claim against United States for injuries to vessel in collision with government gunboat, see "United States," § 2.

Loss of or injury to tow, see "Towage."

**§ 1. Rules and precautions for preventing collisions in general.**

The binding force of the articles of the statutory navigation rules cannot be affected by the pilot rules but where there is a conflict the articles are of superior authority.—The John H. Starin (C. C. A.) 146; The Jamaica, Id.

**§ 2. Sail vessels meeting or crossing.**

The finding of a trial court, based on conflicting evidence, that a collision at sea in the night between two meeting schooners was the solely to the fault of the privileged vessel in changing her course just prior to the collision, affirmed.—The Eagle Wing (C. C. A.) 882; The R. & T. Hargraves, Id.; Montgomery v. Chatfield, Id.

**§ 3. Steam vessels and sail vessels.**

Where one of two vessels in collision charges the other with faults which, if the charges are true, would have been obvious, the fact that her own log, written at the time, makes no mention of them, is significant and tends to discredit her claim.—Pennell v. United States (D. C.) 64; The Winooski, Id.

**§ 4. Vessels in tow.**

*Where it is shown that a tug with a tow was in fault for a violation of the statutory rules of navigation, and such fault was sufficient to account for an accident in which a person was injured, she has the burden of proof to show beyond a reasonable doubt that another vessel either caused or contributed to it.—North American Dredging Co. v. Cutler (C. C. A.) 457.

**§ 5. Vessels at rest, at anchor, or at piers.**

*The going adrift of a mud scow lying at a wharf in the night with no one on board in calm weather *held* prima facie due to her being

negligently moored, and sufficient to charge her with fault for a collision with a ferryboat while so adrift without lights.—Eastern Dredging Co. v. Winnisimmet Co. (C. C. A.) 860.

*While an exclusive use of anchorage grounds is not allowed to anchored vessels, it is not intended that they shall be used with the same freedom as unrestricted waters, but that moving vessels shall keep clear of them so far as practicable so as not to collide with vessels properly anchored there or embarrass those properly using such waters for purposes of navigation in connection with anchoring.—The Merrill C. Hart (D. C.) 371; The A. C. Cheney, Id.; The Seminole, Id.

*A yacht and a tug and tow alongside all *held* in fault for a collision on the anchorage grounds in the Hudson River opposite New York City.—The Merrill C. Hart (D. C.) 371; The A. C. Cheney, Id.; The Seminole, Id.

§ 6. **Lights, signals, and lookouts.**

*It is the duty of a tug with a tow to see that such tow carries a light at night, and an overtaking vessel is not required to look to the lights on the tug which she may not be able to see clearly to ascertain the fact that there is a tow.—North American Dredging Co. v. Cutler (C. C. A.) 457.

*Evidence *held* to establish that a brig was carrying proper lights at the time of collision with a steam vessel at night.—Pennell v. United States (D. C.) 64; The Winooski, Id.

*Evidence considered, and *held* not to establish fault on the part of a brig contributing to a collision between her and a gunboat at night in a fog, either for want of a proper lookout, failure to give fog signals, or otherwise, but to show that the collision was due solely to the fault of the steam vessel in going at an excessive speed.—Pennell v. United States (D. C.) 64; The Winooski, Id.

Rule 11 of the pilot rules, relating to the lights to be carried by barges and canal boats when towed alongside, do not apply to sailing vessels, which are governed by article 5 of the statutory rules for rivers and harbors (Act June 7, 1897, c. 4, § 1, 30 Stat. 97 [U. S. Comp. St. 1901, p. 2877]).—The Merrill C. Hart (D. C.) 371; The A. C. Cheney, Id.; The Seminole, Id.

§ 7. **Fog or thick weather.**

*A brig sailing at night in a dense fog at a speed of 3 or 3½ knots an hour, which was barely enough to give her steerageway, *held* not to have been going at excessive speed.—Pennell v. United States (D. C.) 64; The Winooski, Id.

*A gunboat, proceeding at night in a dense fog 35 or 40 miles off the coast of Nova Scotia at a speed of seven knots an hour, *held* to have been going at excessive speed and to have been in fault for a collision with a brig.—Pennell v. United States (D. C.) 64; The Winooski, Id.

§ 8. **Narrow channels, harbors, rivers, and canals.**

*A collision between two crossing steam vessels in East river, resulting in a second collision between one and a barge at a pier, *held* to have been due to the fault of both vessels in violating articles 21 and 22 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]).—The John H. Starin (C. C. A.) 146; The Jamaica, Id.

A collision between one of two scows in tow and a meeting steamship coming in from the sea to her dock at Hoboken in the evening *held* attributable to the fault of all four of the vessels; the steamer and tug being in fault for not keeping proper lookout and inattentive navigation, and the scows for carrying but one light each in violation of rule 11 of the supervising inspectors, which required each to carry two lights.—The H. B. Rawson (C. C. A.) 312; The Prinz Adalbert, Id.

A tug with two mud scows in tow without lights *held* solely in fault for the injury of a person on a launch which on overtaking and attempting to pass the tug ran into the tow line.—North American Dredging Co. v. Cutler (C. C. A.) 457.

*A ferryboat *held* solely in fault for a collision which occurred while she was on her way from her Communipaw slip to Twenty-Third street, New York, in a dense fog, at a speed exceeding five miles an hour, by her getting out of her course and striking and sinking a car float lying at a Hoboken pier inside the pier lines.—The Somerville (C. C. A.) 681.

*Evidence *held* sufficient to sustain a finding that libelant's vessel was injured in a collision due to the fault of respondent's tows, which were spread out so as to occupy the greater part of the channel.—North & East River Steamboat Co. v. New York, N. H. & H. R. Co. (C. C. A.) 682.

*A ferryboat *held* in fault for a collision in the night with a drifting scow without lights in Boston Harbor, on the ground that she had no lookout properly stationed forward near the water.—Eastern Dredging Co. v. Winnisimmet Co. (C. C. A.) 860.

§ 9. **Suits for damages.**

Evidence as to the value of a vessel and her equipment at the time she was sunk in collision considered.—Pennell v. United States (D. C.) 75; The Winooski, Id.

*Unearned freight under a charter cannot be allowed to a vessel sunk in a collision as damages unless facts are shown from which the court can estimate the net freight with reasonable certainty.—Pennell v. United States (D. C.) 75; The Winooski, Id.

## COMITY.

Between courts, see "Courts," § 3.

## COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."
Right to jury in action for conspiracy by interstate carriers, see "Jury," § 1.

**§ 1. Means and methods of regulation.**
Acts Ark. 1907, p. 453, to regulate freight transportation by railroad companies doing business in the state, is unconstitutional as an interference with interstate commerce.—St. Louis, I. M. & S. Ry. Co. v. Hampton (C. C.) 693.

## COMMON CARRIERS.

See "Carriers."

## COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.
Salvage, see "Salvage," § 1.

## COMPETENCY.

Of experts as witnesses, see "Evidence," § 3.
Of witnesses in general, see "Witnesses," § 1.

## COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 2.

## COMPLAINT.

In criminal prosecutions, see "Indictment and Information."

## COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction."
Offers of as evidence, see "Evidence," § 1.

## COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 1.

## CONCEALMENT.

Effect on limitation, see "Limitation of Actions," § 1.

## CONCURRENT JURISDICTION.

Of courts, see "Courts," § 3.

## CONDEMNATION.

Taking properly for public use, see "Eminent Domain."

## CONDITIONS.

In insurance policies, see "Insurance," § 3.
Precedent to action, see "Action," § 1.
Precedent to action to follow trust property, see "Trusts," § 4.

## CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see "Courts," § 3.

## CONNECTING CARRIERS.

See "Carriers," § 2.

## CONSIDERATION.

Of contract in general, see "Contracts," § 1.
Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.

## CONSPIRACY.

By carriers to raise rates, see "Carriers," § 1.
Limitations applicable in prosecution for, see "Criminal Law," § 1.
Right to trial by jury in action for, see "Jury," § 1.

**§ 1. Criminal responsibility.**
*An overt act committed by one or more of several conspirators *held* essential to the commission of a conspiracy to defraud the United States denounced by Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676).—Jones v. United States (C. C. A.) 417.

*A conspiracy to obtain land of the government open to entry under its homestead laws by means of false proof *held* a conspiracy to defraud the United States in violation of Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676).—Jones v. United States (C. C. A.) 417.

*An indictment for conspiracy to defraud the United States in making certain homestead entries on false proof *held* sufficient.—Jones v. United States (C. C. A.) 417.

An indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to conceal property from a trustee in bankruptcy, in violation of Bankr. Act, July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), is insufficient, where it does not use the statutory words "knowingly and fraudulently" in characterizing the offense to which the conspiracy related, or any equivalent therefor.—United States v. Comstock (C. C.) 415.

## CONSTITUTIONAL LAW.

Restraining enforcement of unconstitutional law, see "Injunction," § 1.

*Provisions relating to particular subjects.*
See "Carriers," § 1; "Courts," § 2; "Eminent Domain," § 1; "Jury," § 1.

**§ 1. Construction, operation, and enforcement of constitutional provisions.**
*A federal court of first instance acting upon affidavits which pronounces a state statute unconstitutional assumes a grave responsibility, justified only by most exceptional circumstan-

ces.—Lindsley v. Natural Carbonic Gas Co. (C. C.) 954.

Act N. Y. May 20, 1908, for the protection of the natural mineral springs of the state, and to prevent waste and impairment of its natural mineral waters, is not so clearly unconstitutional or beyond the police powers of the state as to justify the granting of a preliminary injunction by a federal court to restrain its enforcement.—Lindsley v. Natural Carbonic Gas Co. (C. C.) 954.

**§ 2. Obligation of contracts.**

The election by a city, expressed by ordinance duly authorized by statute, to exercise an option reserved in a prior ordinance to purchase the property of a water company, which ordinance was accepted by the company, creates a contract binding on both parties and which cannot be impaired by any subsequent action of the city or of the Legislature of the state taken after the property has been appraised as provided by such contract.—Omaha Water Co. v. City of Omaha (C. C. A.) 225.

## CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

## CONTEMPT.

Disobedience of orders in bankruptcy, see "Bankruptcy," § 4.
Proper mode of review of judgment of, see "Appeal and Error," § 1.
Scope and extent in general of review of judgment for, see "Appeal and Error," § 7.

**§ 1. Acts or conduct constituting contempt of court.**

A grand juror *held* not subject to punishment for contempt under Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), for disclosing proceedings in the grand jury room after the grand jury had been discharged.—Atwell v. United States (C. C. A.) 97.

**§ 2. Power to punish and proceedings therefor.**

The power of the federal courts to punish for contempt is limited by Rev. St. § 725 (U. S. Comp. St. 1901, p. 583).—Atwell v. United States (C. C. A.) 97.

## CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."
Assessment of damages for breach of, see "Damages," § 1.
Cancellation, see "Cancellation of Instruments."
Impairing obligation, see "Constitutional Law," § 2.
Parol or extrinsic evidence, see "Evidence," § 2.
Specific performance, see "Specific Performance."
Subrogation to rights or remedies of creditors, see "Subrogation."

*Contracts of particular classes of persons.*

See "Carriers," § 2; "Corporations," §§ 1, 3; "Infants," § 1; "Master and Servant"; "United States," § 1.

*Contracts relating to particular subjects.*

See "Mines and Minerals," § 2; "Patents," § 4; "Public Lands," § 1; "Trade-Marks and Trade-Names," § 1; "Waters and Water Courses," § 2.
Limitation of liability of vessel owner, see "Shipping," § 2.
Subscription to corporate stock, see "Corporations," § 1.
Transportation of goods, see "Carriers," § 2.
Water supply, see "Waters and Water Courses," § 3.

*Particular classes of express contracts.*

See "Insurance"; "Partnership"; "Sales."
Agency, see "Principal and Agent."
Affreightment, see "Shipping," § 2.
Bills of lading, see "Carriers," § 2.
Charter parties, see "Shipping," § 1.
Employment, see "Master and Servant."
Sales of realty, see "Vendor and Purchaser."
Shipping articles, see "Seamen."

*Particular modes of discharging contracts.*

See "Accord and Satisfaction."

**§ 1. Requisites and validity.**

*Evidence considered, and *held* to establish that services rendered by plaintiff in inducing the sale of a waterworks plant to a city were those of a lobbyist in influencing members of the city council to make the purchase, for which he could not recover payment.—Burke v. Wood (C. C.) 533.

*A "lobbyist" is one who solicits members of a legislative body, in the lobby or elsewhere with the purpose of influencing their votes, and a contract to render such services or services which consist in part of lobbying is void as against public policy and an action cannot be maintained thereon.—Burke v. Wood (C. C.) 533.

**§ 2. Construction and operation.**

Under the terms of a selling agency contract, defendant *held* entitled to suspend the contract on controversies arising without reference to the fact that defendant was in the wrong in such controversies.—Kohler v. Northern Electrical Mfg. Co. (C. C. A.) 876.

**§ 3. Modification and merger.**

*Evidence *held* properly excluded as irrelevant in an action on a written contract to recover the price of machinery sold.—Baltimore Refrigerating & Heating Co. of Baltimore City v. Wetzel (C. C. A.) 117.

**§ 4. Rescission and abandonment.**

Plaintiffs, after notice of the suspension of a contract by defendant, having sued defendant on a claim that the suspension was wrongful, *held* to have acquiesced in the termination of the contract without service of notice of termination provided for.—Kohler v. Northern Electrical Mfg. Co. (C. C. A.) 876.

§ 5. **Actions for breach.**
Where a defendant failed to complete a contract with a state within the time stipulated, and was required to pay liquidated damages for the delay, in consequence, as alleged, of plaintiff's failure to supply machinery contracted for, it was no defense to defendant's claim for special damages for breach of such contract that in case of failure to recover defendant contemplated presenting a claim to the Legislature of the state for payment of the amount withheld.—Iowa Mfg. Co. v. B. F. Sturtevant Co. (C. C. A.) 460.

*In all actions on contract, every person must be made a defendant who is subject to legal liability.—Gawne v. Bicknell (C. C.) 587.

## CONTRIBUTION.

Between vessel owner and owner of cargo, see "Shipping," § 4.

## CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 1.
Of passenger, see "Carriers," § 4.
Of servant, see "Master and Servant," §§ 6, 7.

## CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

*Conveyances by or to particular classes of persons.*

See "Indians."
Bankrupt, see "Bankruptcy," § 1.
Trustee, see "Trusts," § 3.

*Conveyances of particular species of, or estates or interests in, property.*

See "Public Lands," § 1.
Trust property, see "Trusts," § 3.
Water rights, see "Waters and Water Courses," § 2.

*Particular classes of conveyances.*

See "Chattel Mortgages"; "Mortgages."

## CORPORATIONS.

Adjudication of corporation as bankrupt, see "Bankruptcy," § 1.
Admissions by corporate agent as evidence, see "Evidence," § 1.
Adoption by United States courts of state laws as rules of decision as to liability of stockholders, see "Courts," § 2.
Equity jurisdiction of federal court of stockholder's suit, see "Courts," § 2.
Jurisdiction of federal courts of action by foreign corporation, see "Courts," § 2.
Pledge of corporate stock, see "Pledges."
Preferential conveyances by bankrupt corporation, see "Bankruptcy," § 3.
Stock brokers, see "Brokers," § 1.

*Particular classes of corporations.*

See "Municipal Corporations"; "Railroads."
Banks, see "Banks and Banking," § 1.
Insurance companies, see "Insurance."
Telegraph and telephone companies, see "Telegraphs and Telephones."
Water companies, see "Waters and Water Courses," § 3.

§ 1. **Capital, stock, and dividends.**
A contract of subscription to the stock of a corporation construed, and *held* legal and enforceable on its face.—Skillin v. Magnus (D. C.) 689.

§ 2. **Officers and agents.**
Where the officers of a corporation have been joined as defendants with the corporation in a suit for infringement, objection to the sufficiency of the proof to hold them personally liable should be made on the hearing; but where they have been adjudged to infringe, and it appears that such infringement was only as officers and not individually, they should be charged only with nominal damages.—Brennan & Co. v. Dowagiac Mfg. Co. (C. C. A.) 472; Dowagiac Mfg. Co. v. Brennan & Co., Id.

Under Gen. Laws R. I. 1896, c. 180, §§ 15, 21, the remedy to enforce the liability of a director for indebtedness of a corporation in excess of the amount of its capital stock thereby created is by an action on the case exclusively, and a suit in equity to enforce such liability cannot be maintained in a federal court in another state.—Pond v. Newell (C. C.) 579.

§ 3. **Corporate powers and liabilities.**
Receivers appointed for the property of a corporation in a suit to foreclose a mortgage thereon have no standing to file exceptions to the report of the master determining the respective rights of the mortgagees and other creditors.—Metropolitan Trust Co. of City of New York v. North Carolina Lumber Co. (C. C.) 170; American Box Co. v. Same, Id.

*The secretary of a corporation, as such, has no authority to assign securities owned by the corporation as collateral security for a past indebtedness.—In re W. W. Mills Co. (D. C.) 42.

An accommodation note and mortgage given by a corporation to the president of another corporation, which owned practically all of its stock and pledged by him as security for an antecedent indebtedness of the latter corporation, *held* void for want of consideration in the hands of the pledgee which had full knowledge of the facts as against the creditors in bankruptcy of the debtor corporation.—In re W. W. Mills Co. (D. C.) 42.

§ 4. **Insolvency and receivers.**
A chancery receiver of a domestic corporation authorized to sue to enforce a statutory stockholder's liability by Minn. Gen. Laws 1899, p. 315, c. 272, *held* entitled to sue in a foreign jurisdiction in a court having jurisdiction of the parties and subject-matter.—Converse v. Mears (C. C.) 767.

A court of equity has jurisdiction to sequestrate the property of an insolvent corporation in a creditors' suit where the bill charges fraud, as well as insolvency.—Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 794; Scovill v. Same, Id.

## COSTS.

*In particular actions or proceedings.*

In bankruptcy, see "Bankruptcy," § 9.

**§ 1. Nature, grounds, and extent of right in general.**

Where suit was unnecessarily instituted in equity, which augmented the costs, and a judgment for defendant was reversed on appeal, the judgment against complainants for costs at the trial would be affirmed, and the costs on appeal divided equally between complainants and defendant.—Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt (C. C. A.) 447.

**§ 2. On appeal or error, and on new trial or motion therefor.**

Where suit was unnecessarily instituted in equity, which augmented the costs, and a judgment for defendant was reversed on appeal, the judgment against complainants for costs at the trial would be affirmed and the costs on appeal divided equally between complainants and defendant.—Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt (C. C. A.) 447.

## COUNTIES.

See "Municipal Corporations."

## COURTS.

Authority to direct and control receivers, see "Receivers," § 2.
Bankruptcy courts, see "Bankruptcy," § 1.
Contempt of court, see "Contempt."
Judges, see "Judges."
Jurisdiction of action to foreclose tax lien, see "Taxation," § 1.
Jurisdiction of action to restrain foreclosure of mortgage, see "Mortgages," § 1.
Jurisdiction of federal courts to determine constitutionality of law, see "Constitutional Law," § 1.
Objections to jurisdiction as ground for abatement, see "Abatement and Revival," § 1.
Power of federal courts to punish for contempt, see "Contempt," § 2.
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Right to trial by jury, see "Jury," § 1.

**§ 1. Establishment, organization, and procedure in general.**

An appellant is entitled to the independent consideration and judgment of the Circuit Court of Appeals of one circuit, even though the question presented may have been decided adversely by another Circuit Court of Appeals.—Heckendorn v. United States (C. C. A.) 141.

*A prior adjudication by a Circuit Court should, unless erroneous, be followed by a Court of Appeals in another circuit, in suits of the character of customs appeals.—Hill v. Franklyn & Ferguson (C. C. A.) 880.

Where a Circuit Court of Appeals has sustained the validity of a patent after full consideration in a contested case, it is not required to re-examine the question de novo in a second case on the same evidence or additional evidence, which is merely cumulative.—Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York (C. C. A.) 892.

*The federal courts are bound by the decisions of the Supreme Court of the United States.—Mella v. Northern S. S. Co. (C. C.) 499.

**§ 2. United States courts.**

Rule 11 of the Circuit Courts of Appeals (150 Fed. xxvii, 79 C. C. A. xxvii), requiring assignments of error to set out separately and particularly each error asserted and intended to be urged is for the purpose of facilitating the business of the court and must be observed.—Norfolk & W. Ry. Co. v. Gardner (C. C. A.) 114.

*Criminal cases in the federal courts are governed by federal statutes and decisions.—Jones v. United States (C. C. A.) 417.

*A suit by a railroad company relating to right of way acquired over government lands under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), *held* to involve a construction of such statute and Act June 26, 1906, c. 3350, 34 Stat. 482 (U. S. Comp. St. Supp. 1907, p. 553), which gave a federal court jurisdiction.—Columbia Valley R. Co. v. Portland & S. Ry. Co. (C. C. A.) 603.

The United States court in the Indian Territory *held* not invested with jurisdiction to extend, by decretal order, a power of alienation over lands allotted to members of the Quapaw Tribe of Indians, which was denied by Act Cong. March 2, 1895, c. 188, 28 Stat. 907.—Goodrum v. Buffalo (C. C. A.) 817; Evers v. Same (C. C. A.) 828.

In a suit for an accounting by a surviving partner, the amount in controversy is the value of the entire partnership property, and where that exceeds $2,000 it is sufficient to sustain the jurisdiction of a federal court.—Rogers v. Lawton (C. C.) 203.

*The responsibility of a railroad corporation for injuries to or by its servants is one of general law, as to which the federal courts are not bound by state decisions.—Salmons v. Norfolk & W. Ry. Co. (C. C.) 722.

*Under Rev. St. § 721 (U. S. Comp. St. 1901, p. 581), federal courts will be governed by state law with reference to the construction of the state constitutional or statutory provisions by decisions which have become rules of property and by rules of law of local character involving domestic customs or usage.—Converse v. Mears (C. C.) 767.

*Whether the liability of stockholders in Minnesota corporations imposed by Minnesota

Constitution is wholly statutory or partly contractual and therefore transitory is a matter of general law, as to which the federal courts in Wisconsin are not bound by the decisions of the Wisconsin Supreme Court, either as a matter of comity or under Rev. St. § 721 (U. S. Comp. St. 1901, p. 581).—Converse v. Mears (C. C.) 767.

Where an action is brought in a federal court on an arbitrator's award, a suit by the defendant therein to set aside the award for fraud is ancillary, but such fact does not give the court jurisdiction to bring in another party who is a citizen of the same state as the complainant to impeach an award in its favor, made at the same arbitration, but which is separate and distinct from that between the other parties.—Hecht v. Younghiogheny & Lehigh Coal Co. (C. C.) 812.

A stockholders' suit in a federal court is not subject to the requirements of equity rule 94, where it involves a constitutional question which gives the court jurisdiction, regardless of the citizenship of the parties, and complainant and the corporation and its directors are evidently united in interest.—Lindsley v. Natural Carbonic Gas Co. (C. C.) 954.

*A suit in a federal court against the Attorney General of a state to enjoin the enforcement of an unconstitutional state statute by the institution of criminal proceedings for its violation is not within the prohibition of Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), as one to stay proceedings in a state court, nor of the eleventh constitutional amendment as a suit against the state.—Lindsley v. Natural Carbonic Gas Co. (C. C.) 954.

*A bill by a foreign corporation filed in a federal court against the Secretary of State of California to enjoin him from enforcing the state statute imposing license taxes on corporations (St. 1905, p. 493, c. 386, as amended by St. 1906, p. 22, c. 19, and St. 1907, p. 664, c. 347) against complainant *held* not to state a cause of action for relief in equity nor within the jurisdiction of the court.—Grand Trunk Western Ry. Co. v. Curry (C. C.) 978.

A federal court of equity should not permit parties by stipulation to abrogate the established procedure by substituting a state practice at variance therewith.—Vitzthum v. Large (D. C.) 685.

**§ 3. Concurrent and conflicting jurisdiction, and comity.**

A federal court has power to protect a litigant therein from seizure of his person by the authorities of a state while in attendance upon the trial of his case, whether upon process or in the exercise of the police power of the state without process, where necessary for the protection of its own jurisdiction, and where the threatened act must rest for its justification upon a proceeding the validity of which is the very matter it is called upon to determine.—Chanler v. Sherman (C. C. A.) 19.

A plaintiff, in an action in a federal court, whose presence in court was necessary to the trial of the issues joined therein, *held* entitled to a writ of protection to prevent his seizure by the state authorities and return to an insane asylum from which he had escaped while in the state in attendance on the trial.—Chanler v. Sherman (C. C. A.) 19.

A court of admiralty in a proceeding for limitation of liability has power to permit a claimant, who before the institution of the proceedings had prosecuted an action at law against the petitioner in a state court to verdict, to complete the liquidation of her claim therein.—Davenport v. Winnisimmet Co. (C. C. A.) 862.

*It is the law of the federal courts that the court which first takes possession of property cannot be disturbed or interfered with in such possession by any other court.—Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 794; Scovill v. Same, Id.

*A federal court of equity which has acquired jurisdiction to administer the property of an insolvent corporation by taking possession of the same by its receivers in an appropriate suit is not deprived of such jurisdiction by a subsequent dissolution of the judgment of a state court.—Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 794; Scovill v. Same, Id.

*A federal court which by its receivers had taken possession of the property of an insolvent life insurance company in a creditors' suit brought pursuant to Code Civ. Proc. N. Y. § 1784, is not ousted of its jurisdiction by the subsequent institution by the Attorney General of the state of a suit in a state court for dissolution of the corporation under section 1785 in which receivers are also appointed.—Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 794; Scovill v. Same, Id.

*It is the settled general rule that, as between two courts having concurrent jurisdiction of the subject of an action, the one which first obtains jurisdiction of the controversy has the right to proceed to its final determination without interference from the other, and such rule is not limited to cases in which the court first obtaining jurisdiction has taken actual or constructive possession of the subject-matter of the suit.—Vowinckel v. N. Clark & Sons (C. C.) 991.

Where a state court in a suit to abate a nuisance and recover damages for its maintenance has issued an injunction pendente lite, a federal court will, on motion of the defendant, stay a second suit brought therein by the same complainant against him, based on the same facts and for the identical relief, until the first suit has been disposed of.—Vowinckel v. N. Clark & Sons (C. C.) 991.

## CREDIBILITY.

Of witness, see "Witnesses," § 3.

## CREDITORS.

See "Bankruptcy"; "Fraudulent Conveyances." Remedies of creditors as to property in hands of receivers, see "Receivers," § 1.

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 1.
Subrogation to rights of creditor, see "Subrogation."

## CREDITORS' SUIT.

Against corporation, see "Corporations," § 4.
Concurrent and conflicting jurisdiction of state and federal courts, see "Courts," § 3.

## CRIMINAL LAW.

Extradition of persons accused, see "Extradition."
Grand jury, see "Grand Jury."
Indictment, information, or complaint, see "Indictment and Information."
Penalties, see "Penalties."
Restraining criminal acts by injunction, see "Injunction," § 1.

*Offenses by particular classes of persons.*

Bank officers, see "Banks and Banking," § 2.

*Particular offenses.*

See "Conspiracy," § 1; "Contempt"; "Homicide"; "Perjury."
Against internal revenue laws, see "Internal Revenue."

**§ 1. Limitation of prosecutions.**

Where a conspiracy to defraud the United States, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), contemplated various overt acts, a prosecution therefor was not barred until three years after the commission of the last overt act.—Jones v. United States (C. C. A.) 417.

The limitation of one year imposed by Bankr. Act July 1, 1898, § 29d, c. 541, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434), for the finding of an indictment for a violation of such section, does not apply to an indictment under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for a conspiracy to commit an offense thereunder.—United States v. Comstock (C. C.) 416.

**§ 2. Evidence.**

*In a prosecution for conspiracy to defraud the United States of certain homestead land, the government *held* properly permitted to show that various other persons not named in the indictment had made final proof on various other tracts pursuant to an agreement with defendants and for their benefit.—Jones v. United States (C. C. A.) 417.

In a prosecution for perjury in support of W.'s homestead claim, declarations of W. indicating nonresidence during the time defendant testified W. continuously resided on the homestead was admissible as res gestæ.—Barnard v. United States (C. C. A.) 618.

*In a prosecution for perjury in giving false testimony in support of a fraudulent homestead land claim, evidence that defendant falsely testified in favor of another fraudulent homestead claim *held* admissible to show knowledge, design, and system.—Barnard v. United States (C. C. A.) 618.

**§ 3. Trial.**

*If a federal prisoner is not indicted for a capital offense, he is not entitled as of right to a list of witnesses or jurors.—Jones v. United States (C. C. A.) 417.

**§ 4. Appeal and error, and certiorari.**

Where petitioner's conviction was affirmed by the Court of Civil Appeals, the judgment would not be amended so as to authorize the trial court to hear an application for a new trial for newly discovered evidence which was not produced at the trial, though available to petitioner and known to him.—Angle v. United States (C. C. A.) 264.

On affirmance of a conviction by the Circuit Court of Appeals, it is the duty of the trial court on receiving a mandate to see that the judgment is carried into execution.—Angle v. United States (C. C. A.) 264.

Accused *held* not prejudiced by uncontradicted proof made by him in support of his homestead claim in which he testified that he had continuously resided on land other than the place where he actually resided.—Barnard v. United States (C. C. A.) 618.

## CROSS-EXAMINATION.

See "Witnesses," § 2.

## CUSTOMS DUTIES.

**§ 1. Validity, construction, and operation of customs laws in general.**

Where the license fee imposed for cutting on public lands is greater on pulp wood exported unmanufactured than that manufactured before exportation, this amounts to the imposition of an export duty within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 393, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1671).—Heckendorn v. United States (C. C. A.) 141.

In determining whether, under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 393, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1671), an export duty has been imposed by the country of exportation, customs officers are not required to pass upon questions of construction of foreign laws, but are justified if they find correctly that what is in fact an export duty has been imposed.—Heckendorn v. United States (C. C. A.) 141.

Conditions do not allow the establishment of a trade designation of articles which are not kept in stock nor dealt in as general merchandise.—Thomas v. Vandegrift & Co. (C. C. A.) 645.

It is not to be assumed that Congress intended to make duties prohibitive or to impose unjust rates of duty.—Shallus v. United States (C. C. A.) 653.

**§ 2. Goods subject to duty, rate, and amount.**

*The term "similar," in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), means nearly corresponding, resembling in many respects, somewhat like, or having a general resemblance.—United States v. Komada & Co. (C. C. A.) 465.

Sake is dutiable as still wine, under the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), being similar to that article in material because of their common alcoholic strength, and in use because both are drunk for the same purpose and have the same effect.—United States v. Komada & Co. (C. C. A.) 465.

*The similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), applies if only one of the four similarities there specified exists.—United States v. Komada & Co. (C. C. A.) 465.

*The similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), requires a real or substantial similarity.—United States v. Komada & Co. (C. C. A.) 465.

The similitude in "material" specified in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), relates only to conditions at the time of importation. Differences in original materials are immaterial.—United States v. Komada & Co. (C. C. A.) 465.

*So-called arched Purves furnaces, used in the manufacture of furnaces, are not dutiable as "furnaces," but as boiler tubes of flues, under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641).—Thomas v. F. B. Vandegrift & Co. (C. C. A.) 645.

Small disks are not within the provision for "sheets * * * commercially known as tin plates," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 134, 30 Stat. 160 (U. S. Comp. St. 1901, p. 1638).—Shallus v. United States (C. C. A.) 653.

*Small disks, a by-product from tin plate and worth about one-fifth as much as the plate from which cut, are not "manufactured from tin plate," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645).—Shallus v. United States (C. C. A.) 653.

Small disks, a by-product in the manufacture of tin cans, are not articles "wholly or partly manufactured from tin plate," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 140, 30 Stat. 162 (U. S. Comp. St. 1901, p. 1639), nor "waste" under Schedule N, par. 463, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1679), but are dutiable as articles of metal, "whether partly or wholly manufactured," under Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645).—Shallus v. United States (C. C. A.) 653.

Granite monuments in parts imported ready to be put together to form completed monuments are "granite * * * dressed," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, pars. 117, 118, 30 Stat. 59 (U. S. Comp. St. 1901, p. 1636).—Alexander Murphy & Co. v. United States (C. C. A.) 871.

*Hematite iron ore not ready to be used as a pigment is not dutiable as "pigments" under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 58, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630), but as "iron ore" under Schedule C, par. 121, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1636).—Hill v. Francklyn & Ferguson (C. C. A.) 880.

*Small flags are not "toys" within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1674).—Tuska v. United States, (C. C.) 814.

Hemstitched lace-trimmed handkerchiefs are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), as "handkerchiefs * * * in part of lace, * * * not elsewhere specially provided for," rather than under paragraph 345, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), as "handkerchiefs * * * hemstitched."—Glendinning, McLeish & Co. v. United States (C. C.) 910.

*A monument bearing only a slight amount of free sculpture *held* not to be "works of art," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 703, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1690).—F. B. Vandegrift & Co. v. United States (C. C.) 1003.

**§ 3. Entry and appraisal of goods, bonds, and warehouses.**

*Findings by the Board of General Appraisers as to similitude will not be disturbed on appeal unless clearly contrary to the evidence or further material evidence is presented.—United States v. Komada & Co. (C. C. A.) 465.

Where there is conflicting evidence as to the character of an import, much weight should be given the fact that a ruling by the Board of General Appraisers has long been acquiesced in by importers of like goods.—United States v. Komada & Co. (C. C. A.) 465.

The question of similarity under the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), is one of fact.—United States v. Komada & Co. (C. C. A.) 465.

Under section 629, Rev. St. (U. S. Comp. St. 1901, p. 503), giving Circuit Courts jurisdiction over suits "arising under any act providing revenue from imports," an importer may bring an action against a collector of customs for withholding refunds accruing under a decision by the Board of General Appraisers.—Klumpp v. Thomas (C. C. A.) 853.

Though Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933), provides that decisions by the Board of General Appraisers shall be final unless appealed, the Secretary of the Treasury may, despite an unappealed decision by the board, order a reliquidation on a different basis from that decreed by such decision in a case

***Point annotated. See syllabus.**

in which he has jurisdiction under Tariff Act Aug. 27, 1894, c. 349, § 25, 28 Stat. 552 (U. S. Comp. St. 1901, p. 2375), relating to fluctuations in currency values.—Klumpp v. Thomas (C. C. A.) 853.

**§ 4. Recovery of duties paid.**
Under Act June 22, 1874, c. 391, § 21, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986), providing that, in the absence of protest, the settlement of duties shall become final one year after entry, the running of the statute is suspended while a protest is pending.—Klumpp v. Thomas (C. C. A.) 853.

## DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

*Damages for particular injuries.*
See "Collision," § 9; "Trespass," § 2.
Breach by seller of contract for sale of goods, see "Sales," § 6.
Infringement of patent, see "Patents," § 5.
Injury to cargo, see "Shipping," § 2.

**§ 1. Pleading, evidence, and assessment.**
*In an action for injuries, evidence as to plaintiff's expectancy according to life tables and the amount required to make an annuity equal to the difference in his earning capacity because of his injury *held* admissible.—Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

*An issue as to the right to recover special damages for breach of a contract *held*, under the evidence, one for the jury.—Iowa Mfg. Co. v. B. F. Sturtevant Co. (C. C. A.) 460.

## DEATH.

Admiralty jurisdiction of action for death on high seas, see "Admiralty," § 1.
Liability of carrier for death of passenger, see "Carriers," § 4.
Liability of master for death of servant, see "Master and Servant," § 2.

**§ 1. Actions for causing death.**
*Where intestate died as the result of paralysis of the heart due to the unnecessary giving of chloroform by hospital attendants in the reduction of a shoulder dislocation caused by defendant's negligence which would not of itself have caused death, defendant was not liable for death under Code Civ. Proc. N. Y. § 1902.—Mella v. Northern S. S. Co. (C. C.) 499.

*Where intestate, having sustained a nonfatal injury by defendant's negligence, employed a surgeon and died, solely from the unnecessary administration of chloroform by the surgeon, the concurrent negligence of defendant and of the physician which was chargeable to decedent united to cause the death.—Mella v. Northern S. S. Co. (C. C.) 499.

*In order to render a defendant liable for wrongful death, the death must be the natural, reasonable, and probable result of defendant's negligent act which could have been foreseen.—Mella v. Northern S. S. Co. (C. C.) 499.

## DEBTOR AND CREDITOR.

See "Bankruptcy"; "Fraudulent Conveyances."

## DECEIT.

See "Fraud."

## DECREE.

In equity, see "Equity," § 5.

## DEEDS.

Acknowledgment of execution, see "Acknowledgment."
Estoppel by deed, see "Estoppel," § 1.

*Deeds of particular species of, or estates or interest in property.*
See "Public Lands," § 1.

*Particular classes of deeds.*
In trust, see "Trusts," § 2.
Of partition, see "Partition," § 1.
Of trust, see "Mortgages."
Tax deeds, see "Taxation," § 2.

## DELIVERY.

Of goods by vessel, see "Shipping," § 2.
Of goods sold, see "Sales," §§ 2, 3, 6.

## DEMURRER.

In pleading, see "Pleading," § 2.
To evidence, see "Trial," § 2.

## DEPOSITIONS.

See "Witnesses."

## DESCENT AND DISTRIBUTION.

Of Indian lands, see "Indians."

## DESCRIPTION.

Of property in tax deed, see "Taxation," § 2.

## DILIGENCE.

Of party asking relief, see "Specific Performance," § 3.

## DIRECTING VERDICT.

In civil actions, see "Trial," § 2.

## DISCHARGE.

From indebtedness, see "Accord and Satisfaction"; "Bankruptcy," § 7.
Of grand jury, see "Grand Jury."

## DISCOVERY.

Of mineral deposit, see "Mines and Minerals," § 1.

**§ 1. In equity.**

*In suits in equity in the federal courts, the defendant is entitled to require a production of documents by the complainant for inspection only on a cross-bill for discovery which should state with certainty what such documents are, and show their competency and materiality under the issues.—Oro Water, Light & Power Co. v. City of Oroville (C. C.) 975.

**§ 2. Under statutory provisions.**

Rev. St. § 724 (U. S. Comp. St. 1901, p. 583), authorizing the federal courts on the trial of actions at law to require parties on motion to produce books or writings, has no application to suits in equity.—Oro Water, Light & Power Co. v. City of Oroville (C. C.) 975.

## DISCRETION OF COURT.

Direction of verdict, see "Trial," § 2.

## DISCRIMINATION.

By carrier, see "Carriers," § 2.

## DISMISSAL AND NONSUIT.

Dismissal of appeal in bankruptcy proceedings, see "Bankruptcy," § 8.
Dismissal of appeal or writ of error, see "Appeal and Error," § 6.
Judgment of dismissal as bar to other action, see "Judgment," § 1.

## DISSOLUTION.

Of insurance association, see "Insurance," § 7.

## DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 6.

## DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 2; "Removal of Causes," § 2.

## DIVERSION.

Of water course, see "Waters and Water Courses," § 1.

## DOCUMENTS.

Production and inspection of writings, see "Discovery," § 2.

## DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 2.

## DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

## EJECTMENT.

**§ 1. Right of action and defenses.**

*Plaintiffs cannot recover in ejectment without proving a legal title.—Dunkerson v. Goldberg (C. C. A.) 120.

## ELECTION OF REMEDIES.

Where plaintiff, in tort, sues all the defendfendants jointly, he cannot thereafter sue any one separately, and if he sues one separately he cannot thereafter sue the defendants jointly. —Gawne v. Bicknell (C. C.) 587.

## ELECTRICITY.

Expert testimony in action for injuries caused by, see "Evidence," § 3.
Liability of master for injuries to servant by, see "Master and Servant," §§ 1, 2, 7.
Patent electric machine, see "Patents," § 1.

*The fact that plaintiff received a shock from touching a live electric wire maintained in a place where he was directed to go for work was evidence of improper insulation.—Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

## EMINENT DOMAIN.

Jurisdiction of federal courts of suit relating to right of way of railroad as dependent on subject matter of suit, see "Courts."
Public improvements by municipalities, see "Municipal Corporations," § 1.
Removal of action to condemn land to federal courts as separable controversies, see "Removal of Causes," § 2.
Restraining foreclosure of mortgage until determination of rights in land by condemnation proceedings, see "Mortgages," § 1.

**§ 1. Nature, extent, and delegation of power.**

*A proceeding by the United States to condemn land for public use is an adversary proceeding instituted by the United States against the landowners and not a proceeding to collect an account or claim against the United States. —United States v. Sargent (C. C. A.) 81.

**§ 2. Compensation.**
In condemnation proceedings by the United States under Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), and Rev. Laws Minn. 1905, §§ 2534, 2535, interest was properly allowed on an award of damages from the date of the filing of the commissioner's report.—United States v. Sargent (C. C. A.) 81.

*Exercise of right of eminent domain is a prerogative of sovereignty subject to the constitutional condition of paying just compensation.—United States v. Sargent (C. C. A.) 81.

*The diversion of the water of a nonnavigable stream by the United States, so as to deprive a landowner of its natural flow adjacent to and upon his premises, for the purpose of improving the navigation of other navigable waters, is a taking of the property of such landowner, within the meaning of the fifth constitutional amendment, which entitles him to just compensation therefor.—Cohen v. United States (C. C.) 364.

**§ 3. Proceedings to take property and assess compensation.**
On the trial to a jury of a proceeding to condemn improved real estate in a city, testimony as to the cost of the building, or its value aside from the value of the land, by witnesses not qualified to testify as to the value of the land or the property as a whole, is inadmissible.—Devou v. City of Cincinnati (C. C. A.) 633.

Evidence considered, and *held* not to sustain the claim of a landowner that her land received benefit from the water of a stream which flowed only during the rainy season and overflowed her land in times of freshets, so as to entitle her to compensation from the United States for a diversion of such stream in improving the navigation of other waters.—Cohen v. United States (C. C.) 364.

## EMPLOYÉS.

See "Master and Servant."

## ENTRY.

Of imported goods, see "Customs Duties," § 3.
Of public lands, see "Public Lands," § 1.

## ENTRY, WRIT OF.

See "Ejectment."

## EQUITY.

Equity jurisdiction of federal courts, see "Courts," §§ 2, 3.
Nature, grounds and extent of right in general to costs in equity suit, see "Costs," § 1.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See "Cancellation of Instruments"; "Discovery," § 1; "Fraudulent Conveyances"; "Injunction"; "Partition," § 1; "Receivers"; "Specific Performance"; "Trusts."
Suits for infringement of patents, see "Patents," § 5.

**§ 1. Jurisdiction, principles, and maxims.**
A complainant, which delivered coal to a railroad company which the latter received and settled for, under a mutual mistake of fact in supposing that such deliveries were made under a contract, *held* entitled in equity to have the settlements set aside and to recover the difference between the contract price and the market price of the coal.—Sloss Iron & Steel Co. v. South Carolina & G. R. Co. (C. C.) 542.

*The objection to jurisdiction in equity on the ground that complainant has an adequate remedy at law should be taken on the threshold of the case, and where the defendant has answered to the merits, taken a consent order of reference, and the evidence has been taken before the objection is made, the court will retain the case if at all justified in exercising jurisdiction.—Sloss Iron & Steel Co. v. South Carolina & G. R. Co. (C. C.) 542.

**§ 2. Parties and process.**
*Where a large number of persons are separately but similarly interested in a trust fund, a bill in equity for an accounting with respect to such fund and for direction as to its administration may be maintained by a part of such body in behalf of all.—Watson v. National Life & Trust Co. (C. C. A.) 7.

*Policy holders in insurance companies which had transferred their assets to other companies and gone out of business *held* entitled to maintain a suit in equity for an accounting with respect to such assets as a trust fund.—Watson v. National Life & Trust Co. (C. C. A.) 7.

**§ 3. Pleading.**
*The joining of several complainants in a bill in equity, the purpose of which is to secure an accounting of a trust fund in which all of the complainants claim an interest with others, although their interests are several, does not render such bill multifarious.—Watson v. National Life & Trust Co. (C. C. A.) 7.

*An amended bill, unlike an amendment to the original bill, speaks from the time it was filed, and not from the filing of the original bill.—Columbia Valley R. Co. v. Portland & S. Ry. Co. (C. C. A.) 603.

**§ 4. Hearing, submission of issues to jury, and rehearing.**
Where a plea in equity setting up the facts relied on as a defense one part of the bill, and supplemented by an answer as to the remainder, is overruled on the proofs after hearing on issue joined thereon, the defendant is not entitled to answer over.—Eagle Oil Co. of New York v. Vacuum Oil Co. (C. C. A.) 671.

**§ 5. Decree and enforcement thereof.**
*A Circuit Court of the United States is without authority to correct a judicial error in one of its decrees upon simple motion or petition after the term.—Home St. Ry. Co. v. City of Lincoln (C. C. A.) 133.

A complainant, who causes a decree in his favor to be executed according to a possible interpretation of it, accepts the benefits thereof,

and acquiesces therein for six years, disentitles himself to call in question its correctness.—Home St. Ry. Co. v. City of Lincoln (C. C. A.) 133.

**§ 6. Bill of review.**

When no process is issued on a bill of review, and defendants do not waive process, a decree rendered thereon which alters the decree sought to be corrected *held* wholly void.—Home St. Ry. Co. v. City of Lincoln (C. C. A.) 133.

A bill of review is not a continuance of the former appeal, but is in the nature of an original bill, and an appearance thereto is enforced in the same manner as to the original bill.—Home St. Ry. Co. v. City of Lincoln (C. C. A.) 133.

*A bill of review for error of law apparent on the face of the record may be brought after the term at which the decree sought to be corrected was entered but not after the time allowed by statute for an appeal.—Home St. Ry. Co. v. City of Lincoln (C. C. A.) 133.

*A decree of foreclosure regularly entered under which the property has been sold and the sale confirmed, cannot be set aside and the case reopened on petition of one not a party, but who claims some right or interest in the property.—Englehard-Hitchcock Co. v. Southern Banking & Trust Co. (C. C.) 690.

## ERROR, WRIT OF.

See "Appeal and Error."

## ESTABLISHMENT.

Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.

## ESTATES.

See "Life Estates."

Trusts, see "Trusts," § 2.

## ESTOPPEL.

By judgment, see "Judgment," §§ 1, 2.

Of creditor to assert claim against estate of bankrupt, see "Bankruptcy," § 2.

To avoid or forfeit insurance policy, see "Insurance," § 4.

To maintain specific performance see "Specific Performance," § 1.

**§ 1. By deed.**

A release signed by a seaman on leaving the vessel while in the Arctic Ocean before her return to the port of discharge, where there was no settlement with him for his services, did not estop him from maintaining an action therefor or from recovering damages for mistreatment by the master.—Belyea v. Cook (D. C.) 180.

## EVIDENCE.

See "Discovery"; "Witnesses."

Verdict or findings contrary to evidence, see "New Trial," § 1.

*As to particular facts or issues.*

See "Damages," § 1; "Judgment," § 3.

Acts of bankruptcy, see "Bankruptcy," § 1.

Discovery of mineral, see "Mines and Minerals," § 1.

Fault in collision, see "Collision," §§ 2–4, 6.

Negligence of vessel owner, see "Shipping," § 2.

Value of property taken in exercise of power of eminent domain, see "Eminent Domain," § 3.

*In actions by or against particular classes of persons.*

See "Carriers," § 4; "Master and Servant," § 7.

*In particular civil actions or proceedings.*

See "Fraud," § 1; "Specific Performance," § 4.

Admiralty, see "Admiralty," § 2; "Collision," § 9.

Condemnation proceedings, see "Eminent Domain," § 3.

For infringement of patent, see "Patents," § 5.

For injury to tow, see "Towage."

For personal injuries, see "Carriers," § 4; "Master and Servant," § 7.

For price of goods, see "Sales," § 5.

On insurance policy, see "Insurance," § 6.

To determine adverse claims to mining property, see "Mines and Minerals," § 1.

To establish rights to patent, see "Patents," § 2.

To try tax titles, see "Taxation," § 2.

*In criminal prosecutions.*

See "Criminal Law," § 2; "Extradition," § 1.

*Review and procedure thereon in appellate courts.*

Error, see "Appeal and Error," § 7.

Harmless error in rulings, see "Appeal and Error," § 7.

Review of rulings on as dependent on record on appeal or writ of error, see "Appeal and Error," § 4.

**§ 1. Admissions.**

Declarations of a general solicitor of an insurance company in attempts to settle a claim under a policy are inadmissible against the company when merely the expression of his personal opinion or when they relate to features of the business having no necessary connection with his duties.—New York Life Ins. Co. v. Rankin (C. C. A.) 103.

*Unaccepted offers to compromise claims are inadmissible in evidence at the trial of controversies over the claims to which they appertain.—New York Life Ins. Co. v. Rankin (C. C. A.) 103.

In an action for injuries to a servant, a complaint alleging that plaintiff "inadvertently" seized a live wire by which he was injured did not admit that plaintiff was negligent.—Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

**§ 2. Parol or extrinsic evidence affecting writings.**

*Evidence *held* admissible in an action on a promissory note to show that it was delivered under an oral agreement that it should not be-

come operative except on a condition that was not performed.—Beach v. Nevins (C. C. A.) 129.

**§ 3. Opinion evidence.**

*In an action for injuries to a servant by seizing a live electric wire, the court properly permitted expert electricians to testify as to the condition of the wire and premises at the time of and shortly after the accident and concerning the insulation of the wire.—Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

*A machinist who had worked for several years in connection with the making, installing and operation of hoisting machinery, was competent to testify as an expert as to the danger of using a broken sheave wheel in a mine hoist and the proper way to repair such a wheel, although he had never repaired one.—Alaska-Treadwell Gold Min. Co. v. Cheney (C. C. A.) 593.

## EXAMINATION.

Of witnesses in general, see "Witnesses," § 2.

## EXCISE.

Duties, see "Internal Revenue."

## EXCUSABLE HOMICIDE.

See "Homicide," § 2.

## EXECUTION.

In equity, see "Equity," § 5.

**§ 1. Property subject to execution.**

*Under Rev. St. Mo. 1845, c. 61, § 14 (Rev. St. 1855, c. 63, § 17), an equitable vested remainder after the termination of a life estate created by a trust deed was subject to sale on an execution against the remaindermen.—Dunkerson v. Goldberg (C. C. A.) 120.

## EXECUTORS AND ADMINISTRATORS.

Computation of period of limitations in action against administratrix, see "Limitation of Actions," § 1.

## EXEMPTIONS.

Of bankrupt, see "Bankruptcy," § 7.
Of vessel owners from liability for loss of cargo, see "Shipping," § 4.

## EXPERT TESTIMONY.

In civil actions, see "Evidence," § 3.

## EXPRESS COMPANIES.

See "Carriers," § 2.

## EXTRADITION.

**§ 1. International.**

*Hearsay evidence alone connecting him with the crime charged is insufficient to warrant the extradition of a person to Italy under article 1 of the Extradition Treaty of 1868 (Act March 23, 1868, 15 Stat. 629) between that country and the United States.—Ex parte Fudera (C. C.) 591.

For the purposes of extradition one who in his absence has been convicted in contumaciam of a criminal offense in a foreign country is to be regarded only as charged with, and not as convicted of, the offense.—Ex parte Fudera (C. C.) 591.

## FALSE SWEARING.

See "Perjury."

## FEDERAL COURTS.

See "Courts," § 2.
Objection to jurisdiction ground for abatement, see "Abatement and Revival," § 1.
Right to discovery in action in, see "Discovery," §§ 1, 2.

## FEDERAL QUESTIONS.

Ground for jurisdiction, see "Courts," § 2.
Ground for removal of cause, see "Removal of Causes," § 1.

## FEES.

In bankruptcy, see "Bankruptcy," § 9.

## FELLOW SERVANTS.

See "Master and Servant," § 4.

## FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

## FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 7.
Setting aside, see "New Trial," § 1.

## FOG.

Collision of vessels, see "Collision," §§ 6, 7.

## FORECLOSURE.

Of mortgage, see "Mortgages," § 1.
Of tax lien, see "Taxation," § 1.

## FOREIGN CORPORATIONS.

Jurisdiction of federal courts of action by, see "Courts," § 2.

## FORFEITURES.

Of mining claims, see "Mines and Minerals," § 1.

## FORMER ADJUDICATION.

See "Judgment," §§ 1, 2.

## FORMS OF ACTION.

See "Action," § 2; "Ejectment"; "Trespass," § 2.

## FRANCHISES.

Grant by municipality, see "Municipal Corporations," § 2.

## FRAUD.

See "Fraudulent Conveyances."
Effect on limitation, see "Limitation of Actions," § 1.
In contract ground for cancellation, see "Cancellation of Instruments," § 1.
In insurance, see "Insurance," § 3.
Limitation of prosecution for conspiracy to defraud United States, see "Criminal Law," § 1.

§ 1. **Actions.**
Evidence considered, and *held* insufficient in law to support an action of fraud and deceit.—Schagun v. Scott Mfg. Co. (C. C. A.) 209.

*In an action for fraud and deceit, the burden rests on the plaintiff to prove that the representations relied on were of material facts, that they were false, and made by defendant without reasonable ground to believe them to be true and within intent to defraud, and that plaintiff was reasonably entitled to and did in fact rely on the same to his damage.—Schagun v. Scott Mfg. Co. (C. C. A.) 209.

## FRAUDS, STATUTE OF.

§ 1. **Requisites and sufficiency of writing.**
*A written contract for a sale of lands, prepared by the purchaser named therein, signed by the vendors at his request and deposited in escrow with deeds conveying the property to him, and letters and telegrams previously sent and signed by the purchaser, *held* to bear such internal evidence of their connection with each other as to constitute together a memorandum in writing signed by him sufficient to bind him under the statute of frauds.—Lindsey v. Humbrecht (C. C.) 548.

§ 2. **Operation and effect of statute.**
*Acts of vendors under a verbal contract for the sale of lands *held* to constitute such part performance as to take the contract out of the statute of frauds.—Lindsey v. Humbrecht (C. C.) 548.

## FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," §§ 1, 3.

§ 1. **Transfers and transactions invalid.**
A pledge by the president of a bankrupt corporation, while personally insolvent, of stocks owned by him to a creditor of the corporation as security for its past indebtedness, *held* invalid as against his creditors for want of consideration except as to indebtedness of the corporation on which he was individually liable.—In re W. W. Mills Co. (D. C.) 42.

## GARNISHMENT.

See "Execution."

## GENERAL AVERAGE.

See "Shipping," § 4.

## GOLD.

See "Mines and Minerals," § 1.

## GOOD FAITH.

Of party asking equitable relief, see "Specific Performance," § 3.

## GRAND JURY.

See "Indictment and Information."
Misconduct of grand juror as contempt, see "Contempt," § 1.

After a presentment and indictment found, made public, accused apprehended, and the grand jury finally discharged, the grand jurors are no longer bound to keep their proceedings secret.—Atwell v. United States (C. C. A.) 97.

The provisions of grand juror's oath to make diligent inquiry and presentment, not to present for envy, hatred, or malice, and to leave no one unpresented for fear, favor, or affection, are mandatory; but the requirement to keep the United States counsel, his fellows', and his own secret is not so.—Atwell v. United States (C. C. A.) 97.

*A grand jury can be discharged only by order of the court or final adjournment of the term.—Jones v. United States (C. C. A.) 417.

*The improper discharge of a grand juror will not vitiate an indictment if the number necessary to find the indictment remain.—Jones v. United States (C. C. A.) 417.

Absence of one or more federal grand jurors from a meeting at which an indictment was found *held* not to invalidate it; a sufficient

number to find it being present.—Jones v. United States (C. C. A.) 417.

*In the absence of an order of the court, a grand jury may meet and adjourn while in existence whether the court is in session or not.—Jones v. United States (C. C. A.) 417.

## GRANITE.

Duty on, see "Customs Duties," § 2.

## GRANTS.

Of public lands, see "Public Lands."

## GUARANTY.

Breach of, by seller, see "Sales," § 3.

## HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 7.

## HAWAII.

Naturalization of residents of, see "Aliens," § 2.

## HEARING.

In equity, see "Equity," § 4.
In foreclosure, see "Mortgages," § 1.

## HIGHWAYS.

See "Municipal Corporations," § 2.
Rights of telephone company to occupy street, see "Telegraphs and Telephones," § 1.

## HOMESTEAD.

Admissibility of evidence in prosecution for perjury in giving false testimony in support of homestead claim, see "Criminal Law," § 2.
Perjury in proof of homestead claim, see "Perjury," § 1.

## HOMICIDE.

**§ 1. Murder.**

*"Malice," legally speaking, in relation to murder, is a conscious violation of law to the prejudice of another: evil design in general; the dictates of a wicked, depraved, and malignant heart.—United States v. Hart (C. C.) 192.

*If a man shoots at another with the intention of killing him (and such killing if consummated would be murder) and kills a bystander or another, he is guilty of the murder of the person killed, whether the killing of the latter was due to a mistake as to his or her identity or to recklessness in the aim of the one doing the killing.—United States v. Hart (C. C.) 192.

**§ 2. Excusable or justifiable homicide.**

*Facts considered which in a prosecution for murder would exclude the defense of self-defense.—United States v. Hart (C. C.) 192.

## HOSPITALS.

Liability for death of patient in hospital, see "Death," § 1.

## HUSBAND AND WIFE.

Construction of trust for wife with remainder to husband, see "Trusts," § 2.
Making and requisites of certificate of acknowledgment by married woman, see "Acknowledgment," § 1.

## IMMIGRATION.

Regulations, see "Aliens," § 1.

## IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 2.

## IMPEACHMENT.

Of witness, see "Witnesses," § 3.

## IMPORTS.

Duties, see "Customs Duties."

## IMPROVEMENTS.

Public improvements, see "Municipal Corporations," § 1.

## INDIANS.

Construction of statutes relating to, see "Statutes," § 1.
Jurisdiction of federal courts of territory to extend power of alienation over lands allotted to Indians, see "Courts," § 2.
Submission of controversy to court of power of Indian allottee to alienate land, see "Submission of Controversy."

The surviving husband of an Indian allottee of lands in the Umatilla reservation in Oregon, under Act March 3, 1885, c. 319, 23 Stat. 341, *held* entitled to hold such land for life as tenant by the curtesy, under B. & C. Comp. Or. § 5544.—Beam v. United States (C. C. A.) 260.

*Under Act Cong. March 2, 1895, c. 188, 28 Stat. p. 907, and patents issued thereunder, declaring the land issued to allottees of the Quapaw Tribe of Indians inalienable for 25 years thereafter, the disability to convey runs with the land, and disqualifies the heir.—Goodrum v. Buffalo (C. C. A.) 817; Ewers v. Same (C. C. A.) 828.

The general government has the right to attach any condition it sees fit to grants of the reservation lands of a tribe in severalty, notwithstanding the Indian grantee under a patent from the United States may be a citizen of the United States, and notwithstanding the patent may run to the allottee and his heirs.—Goodrum v. Buffalo (C. C. A.) 817; Ewers v. Same (C. C. A.) 828.

The use of the term "descend," in Act Cong. May 27, 1902, c. 888, 32 Stat. 245, and the original and supplemental agreements between the United States and the Creek Nation, where "descent," technically speaking, could not take place, creates an uncertainty and ambiguity calling for construction.—Shulthis v. MacDougal (C. C.) 331.

Under section 7 of the supplemental agreement with the Creek Nation, approved by Act Cong. June 30, 1902, c. 1323, 32 Stat. 501, the heirs of a child of the Creek Nation dying before receiving his allotment *held* to take by purchase, as donees of the nation, and not by descent.—Shulthis v. MacDougal (C. C.) 331.

*An allotment acquired by a Creek citizen is a new acquisition within Mansf. Dig. Ark. § 2531 (Ind. T. Ann. St. 1899, § 1839), providing that where intestate shall die without descendants, if the estate be a new acquisition, it shall descend to the father for his lifetime, with remainder to the collateral kindred of intestate.—Shulthis v. MacDougal (C. C.) 331.

*"Inherited lands," within Act Cong. April 26, 1906, c. 1876, § 22, 34 Stat. 145, *held* to apply to all allotments selected by or for deceased members of the Creek Nation in the hands of their heirs, whether such deceased members died before or after such allotments were made.—Shulthis v. MacDougal (C. C.) 331.

*The term "inherited," as used in Act Cong. April 26, 1906, c. 1876, § 22, 34 Stat. 145, *held* synonymous with the word "descend," as used in the original agreement with the Creek Nation, approved by Act Cong. March 1, 1901, c. 676, 31 Stat. 863, and the supplemental agreement, approved by Act Cong. June 30, 1903, c. 1323, 32 Stat. 500, and to cover those cases where heirs take by purchase as well as by inheritance, technically speaking.—Shulthis v. MacDougal (C. C.) 331.

Whom it was intended to include within the term "heirs," as used in section 7 of the supplemental agreement with the Creek Nation, approved by Congress June 30, 1902 (chapter 1323, 32 Stat. 501), must be gathered from the terms of the agreement itself, if clearly expressed, and, if not, then resort must be had to extraneous aids.—Shulthis v. MacDougal (C. C.) 331.

Original Agreement between the United States and the Creek Nation, § 28, approved by Act Cong. March 1, 1901, c. 676, 31 Stat. 869, and Act Cong. May 27, 1907, c. 888, 32 Stat. 245, and Supplemental Agreement June 30, 1902, c. 1323, § 7, 32 Stat. 501, and Supplemental Agreement, § 6, repealing in part Act Cong. March 1, 1901, considered, and Mansf. Dig. Ark. c. 49, §§ 2522–2545 (Ind. T. Ann. St. 1899, §§ 1820–1843), *held* to nominate the heirs of a deceased child of the Creek Nation and to fix the shares and portions of such heirs in the allotment set apart and patented to them.—Shulthis v. MacDougal (C. C.) 331.

Rule for construction of treaties between the United States and Indians declared.—Shulthis v. MacDougal (C. C.) 331.

## INDICTMENT AND INFORMATION.

See "Grand Jury."

*Against particular classes of persons.*

See "Carriers," § 1.
Bank officers, see "Banks and Banking," § 2.

*For particular offenses.*

See "Conspiracy," § 1; "Perjury," § 1.
Offenses against banking law, see "Banks and Banking," § 2.

**§ 1. Formal requisites of indictment.**

An indictment reciting that it was returned by the "grand inquest" of the United States of America, etc., *held* not objectionable for failure to show that it was found by a "grand jury."—Geiger v. United States (C. C. A.) 844.

**§ 2. Requisites and sufficiency of accusation.**

While vital defects in an indictment may be taken charge of by accused at any time, defects not affecting the merits of the case will be disregarded under Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720).—Jones v. United States (C. C. A.) 417.

## INFANTS.

**§ 1. Contracts.**

*Seamen who were minors when they signed shipping articles may disaffirm the contract and recover the reasonable value of the services rendered regardless of the contract terms.—Balyea v. Cook (D. C.) 180.

**§ 2. Actions.**

A partition decree adjudicating the interests of infant parties *held* conclusive on them, their privies, and aliens on the expiration of six months after they became of age without a direct attack on the decree by appeal or bill of review for error on the face of the record.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

## INFORMATION.

Criminal accusation, see "Indictment and Information."

## INFRINGEMENT.

Of patent, see "Patents," § 5.
Of trade-mark, see "Trade-Marks and Trade-Names," § 2.

# INJUNCTION.

Jurisdiction of federal courts of action to enjoin enforcement of statute, see "Courts," § 2.

*Relief against particular acts or proceedings.*
Foreclosure of mortgage, see "Mortgages," § 1.
Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 2.
Use of public grounds, by private corporation, see "Municipal Corporations," § 2.

*Review of proceedings for injunction.*
See "Appeal and Error," § 1.
Scope and extent of review, in general, see "Appeal and Error," § 7.

**§ 1. Subjects of protection and relief.**

A court of equity is without power to interfere by injunction to control in advance the exercise of the legislative power conferred on the State Railway Commission by the Constitution and statutes of Nebraska to fix reasonable and just rates for the transportation of property between points within the state.—Chicago, B. & Q. R. Co. v. Winnett (C. C. A.) 242.

An injunction will be granted to restrain a city from removing the poles and wires erected in its streets by a telephone company under lawful authority, in the exercise of its police powers and without a judicial determination that they constitute an obstruction which interferes with the safety or convenience of ordinary travel.—Southern Bell Telegraph & Telephone Co. v. City of Mobile (C. C.) 523.

*The jurisdiction of a federal court of equity to enjoin the enforcement of an unconstitutional state statute to protect the property rights of complainant from irreparable injury is not defeated by the fact that the means of enforcement provided by the act are by criminal prosecutions for its violation.—Lindsley v. Natural Carbonic Gas Co. (C. C.) 954.

**§ 2. Preliminary and interlocutory injunctions.**

Objections to affidavits filed with a motion for a preliminary injunction in a federal court, which go to a matter of form only, must be made in advance of the hearing on the motion where there is ample time therefor.—Modox Co. v. Moxie Nerve Food Co. (C. C. A.) 649.

Under the practice of the federal courts, it is not an objection to affidavits filed with a bill and motion for preliminary injunction in support of such motion that they were previously made and signed, and are not entitled in the cause where it reasonably appears that they were made for the purpose of being in a suit between the parties.—Modox Co. v. Moxie Nerve Food Co. (C. C. A.) 649.

# INSANE PERSONS.

Jurisdiction of federal courts to grant writ of protection to person escaped from state asylum, see "Courts," § 3.

# INSOLVENCY.

See "Bankruptcy."
Assets and receivers of national bank in insolvency, see "Banks and Banking," § 2.
Of corporation, see "Corporations," § 4.
Of insurance association, see "Insurance," § 7.
Of insurance company, see "Insurance," § 1.

# INSPECTION.

Of writings, see "Discovery," § 2.

# INSURANCE.

Admissions of insurance agent as evidence, see "Evidence," § 1.
Concurrent and conflicting jurisdiction of state and federal courts of creditors' suit against insolvent insurance company, see "Courts," § 3.
Joinder of causes of action on insurance policy, see "Action," § 3.

**§ 1. Insurance companies.**

*Upon the insolvency of a life insurance company, its policyholders become creditors with the same right as other creditors to maintain a suit for the liquidation of its affairs under a state statute giving such right to judgment creditors, and the objection that they have not reduced their claims to judgment and issued executions thereon may be waived by the corporation.—Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 794; Scovill v. Same, Id.

**§ 2. Cancellation, surrender, abandonment, or rescission of policy.**

Where an insured under a life policy refused to pay an assessment made against him solely on the ground that the amount of the assessments had been increased, but without any claim that the increase was illegal, and formally notified the company that he withdrew therefrom, such action constituted an abandonment of his contract which precluded a recovery on his policy after his death unless some other act supervened to reinstate his claim.—Roth v. Mutual Reserve Life Ins. Co. (C. C. A.) 282.

**§ 3. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.**

*Insured's ownership is sole when no one other than insured has any interest in the property as owner and is unconditional when the quality of the estate is not limited or affected by any condition.—Rochester German Ins. Co., of Rochester, N. Y., v. Schmidt (C. C. A.) 447.

Failure of insured to disclose the real state of title, if not sole ownership, etc., *held* fatal to a recovery on a policy, though unintentional. —Rochester German Ins. Co., of Rochester, N. Y., v. Schmidt (C. C. A.) 447.

Where insured's title to property was other than unconditional and sole ownership required by the policies, they were void, though there was no misrepresentation and the condition of

the title did not increase the risk.—Rochester German Ins. Co., of Rochester, N. Y., v. Schmidt (C. C. A.) 447.

**§ 4. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.**

The furnishing of blanks for making proof of death under a life policy *held*, under the circumstances, not to estop the company to assert that the policy had elapsed.—Roth v. Mutual Reserve Life Ins. Co. (C. C. A.) 282.

*Where the underwriter knows the age and defective condition of a vessel and accepts an unusual risk thereon at nearly a double premium, it is liable notwithstanding an absence of complete seaworthiness and is not permitted to urge the lack thereof as a defense, even though the policy required it.—Farmers' Feed Co. of New York v. Insurance Co. of North America (D. C.) 379.

**§ 5. Extent of loss and liability of insurer.**

*If the taking of an injured vessel to a port of necessity for repairs is for the benefit of both owner and insurer, the expense is a general average charge to which both are bound to contribute, although there is no cargo liable to contribute.—Dollar v. La Fonciere Compagnie (D. C.) 563.

The towage of a vessel rendered unseaworthy by an injury from the port where she lay to the nearest port where repairs could be made *held* a voyage of necessity, and the expense thereof a general average charge to which the insurer was required to contribute.—Dollar v. La Fonciere Compagnie (D. C.) 563.

**§ 6. Actions on policies.**

*In an action on a policy insuring certain cotton, evidence *held* to warrant a finding that the loss happened after 8:55 a. m. on June 8, 1905, and that the cash value of the cotton lost or damaged at the time of such loss or damage was 8.55 cents per pound.—McFadden v. Liverpool & London & Globe Ins. Co. (C. C.) 783.

**§ 7. Mutual benefit insurance.**

*A trust agreement under which a life insurance association deposited a portion of its reserve fund with a trustee construed, and *held* to impose on the trustee no duty to distribute the fund on the dissolution of the association, but to leave the same subject to the orders of a federal court administering its assets in insolvency proceedings.—Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 798; Scovill v. Same, Id.

*Laws N. Y. 1884, p. 429, c. 353, § 2, which permits the voluntary deposit with the Superintendent of the Insurance Department of securities by co-operative insurance companies to be held for the benefit of their members, and subject to the terms of a deed of trust agreed upon, does not impose on the superintendent any duty to distribute the fund in case of the insolvency of the company, but he holds the same subject to the orders of the court administering the assets.—Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 800; Scovill v. Same, Id.

## INTENT.

Of Legislature as aid in construction of statute, see "Statutes," § 1.

## INTEREST.

On claims against the United States, see "United States," § 2.

## INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

## INTERNAL REVENUE.

Removal of action arising under revenue law, see "Removal of Causes," § 1.

*Under the provision of Rev. St. § 3169 (U. S. Comp. St. 1901, p. 2059), making it a misdemeanor for any internal revenue officer to negligently or designedly permit a violation of the law by any other person, a criminal intent is not an essential element of the offense.—Mason v. United States (C. C. A.) 23.

Under the regulations made pursuant to the Oleomargarine Act May 9, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), the book entries required may be made by an agent, and an indictment for failure to make such entries, should aver that the dealer did not make and did not cause to be made such entries.—United States v. Lamson (C. C.) 165.

The regulations of December, 1904, made pursuant to the Oleomargarine Act May 9, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), do not require the entry by wholesale dealers on their books of the number of packages and pounds disposed of to be made at any specified time.—United States v. Lamson (C. C.) 165.

The regulations of December, 1904, made pursuant to the Oleomargarine Act May 9, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), do not require wholesale dealers in their monthly returns to state in detail the number of packages and the number of pounds disposed of to each person, and such regulations, which have the force of law, cannot be added to by the forms furnished for such returns.—United States v. Lamson (C. C.) 165.

The facts that an internal revenue collector is required by Rev. St. § 3210 (U. S. Comp. St. 1901, p. 2082), to pay all taxes collected into the treasury daily, and that provision is made by sections 989 and 3220 (U. S. Comp. St. 1901, pp. 708 and 2086) for paying judgments recovered against a collector out of the treasury do not make a suit against a collector to recover judgment for the amount of a legacy tax illegally exacted and paid under protest one against the United States so as to preclude the recovery of interest, and interest is recoverable in such case from the date of the payment.—Conant v. Kinney (C. C.) 581.

Rev. St. § 3226 (U. S. Comp. St. 1901, p. 2088), requires an appeal to the Commissioner of Internal Revenue and an adverse decision as a condition precedent to a suit to recover internal revenue taxes paid; but, where a claim for abatement was made to the Commissioner before payment which was rejected, it is equivalent to an appeal for the purpose of the statute. —De Bary v. Dunne (C. C.) 961.

Each member of a so-called "Locker Club," illegally licensed by a municipal corporation in Georgia, and which in fact sells or furnishes liquors to its members in violation of the prohibition law of the state, is a retail liquor dealer within the meaning of the internal revenue law, and subject to the penalty for its violation.—In re Charge to Grand Jury (D. C.) 736.

While the cardinal purpose of the provisions of the internal revenue law imposing special taxes on dealers in liquors is the raising of revenue for the United States, the federal courts may properly, in the exercise of the powers vested in them, rigidly enforce the penalties provided for a violation of such law for the secondary purpose of aiding in the enforcement of the laws of a state regulating or prohibiting the sale of liquors.—In re Charge to Grand Jury (D. C.) 736.

## INTERNATIONAL LAW.

See "Aliens"; "Extradition," § 1.

## INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

## INTOXICATING LIQUORS.

Duty on, see "Customs Duties," § 2.
Internal revenue tax on, see "Internal Revenue."

## INVENTION.

See "Patents."

## ISSUES.

Presented for review on appeal, see "Appeal and Error," § 3.
Trial by jury of issues in equity, see "Equity," § 4.

## JOINDER.

Of causes of action, see "Action," § 3.

## JUDGES.

See "Courts."

**§ 1. Appointment, qualification, and tenure.**

Act Feb. 25, 1907, c. 1198, 34 Stat. 931 (U. S. Comp. St. Supp. 1907, p. 187), providing for a United States district judge for the Northern District of Alabama, does not repeal Act Aug. 2, 1886, c. 842, 24 Stat. 213 (U. S. Comp. St. 1901, p. 449), and prior laws, which expressly confirm the jurisdiction of the then present district judge of the several districts and his successors in the Northern and Middle districts.—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

**§ 2. Rights, powers, duties, and liabilities.**

The commission of a judge of the Northern district of Alabama having expired by adjournment of the Senate without action, the judge of the Northern and Middle districts again became the sole judge of the Northern district, and so continued until another appointment and qualification occurred, and an order entered by the direction of the judge of the Northern and Middle districts appointing a referee in that interval is a valid act of the sole judge of that district, and the reappointment of the judge of the Northern district and his qualification thereafter cannot destroy the validity of the appointment, or authorize him without the consent of the other judge to vacate or annul it.—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

Under Act Aug. 2, 1886, c. 842, 24 Stat. 213 (U. S. Comp. St. 1901, p. 449), the judge of the Northern and Middle Districts of Alabama being equally the judge of both districts can, when in either, exercise judicial functions regarding matters in the other district without being personally present therein.—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

Where there are two district judges of the same federal district, the absence of one of them from the district or the fact that one alone holds the court cannot justify that judge in overriding the authority of a colleague, or give legality to his appointment or the removal of court officials without the consent of the absent judge.—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.

## JUDGMENT.

Decisions of courts in general, see "Courts," § 1.
Reducing claims to judgment as condition precedent to maintain action to follow trust fund, see "Trusts," § 4.

*In actions by or against particular classes of persons.*

See "Infants," § 2.

*In particular civil actions or proceedings.*

See "Partition," § 1.
Decree in equity, see "Equity," § 5.
For infringement of patent, see "Patents," § 5.
To foreclose tax lien, see "Taxation," § 1.

*Review.*

See "Appeal and Error."

**§ 1. Merger and bar of causes of action and defenses.**

*In general, an order or judgment dismissing an action without prejudice leaves the party as if no such action had been instituted.—Colu-

sa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

*Under Code Civ. Proc. Mont. 1895, § 1007, an order dismissing an action without prejudice as to defendant mining company *held* no bar to a subsequent action against such defendant on the same cause of action.—Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

**§ 2. Conclusiveness of adjudication.**

That the highest state court conclusively determined that plaintiff could not, by amendment after the expiration of limitations, file additional counts curing fatal omissions in the original declaration, was not conclusive against plaintiff's right to commence a new suit within a year thereafter, under Starr & C. Ann. St. Ill. 1896, c. 83, par. 25.—McAndrews v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 856.

**§ 3. Pleading and evidence of judgment as estoppel or defense.**

Where a court in partition had jurisdiction to determine all claims of title between the parties, it will be presumed that a decree conclusively determined their interests in the property.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

## JURISDICTION.

Amount in controversy, see "Courts," § 2.
Objections to jurisdiction as ground for abatement, see "Abatement and Revival," § 1.

*Jurisdiction of particular actions or proceedings.*

To foreclose tax lien, see "Taxation," § 1.

*Jurisdiction of particular classes of persons.*

Trustee in bankruptcy, see "Bankruptcy," § 5.

*Special jurisdictions and jurisdictions of particular classes of courts.*

See "Admiralty," § 1; "Bankruptcy," § 1; "Equity," § 1.
Particular courts, see "Courts."

## JURY.

See "Grand Jury."
Taking case or question from jury at trial, see "Trial," § 2.

**§ 1. Right to trial by jury.**

An action by a shipper authorized by Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), to recover treble damages for injuries to his property and business by interstate carriers pursuant to a conspiracy to charge excessive and illegal coal rates, *held* an action at law as to which the parties are entitled to a jury trial.—Meeker v. Lehigh Valley R. Co. (C. C.) 354.

## JUSTIFICATION.

Of homicide see "Homicide," § 2.

## KNOWLEDGE.

Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 1.

*Affecting or element of particular acts or transactions.*

Assumption of risk by servant, see "Master and Servant," § 5.
Preference by bankrupt, see "Bankruptcy," § 3.

## LACHES.

*Affecting particular rights, remedies, or proceedings.*

See "Specific Performance," § 3.
For breach of trust, see "Trusts," § 4.
Revision of bankruptcy proceedings, see "Bankruptcy," § 8.

## LANDLORD AND TENANT.

Assumption of lease by trustee in bankruptcy, see "Bankruptcy," § 4.
Lease of water rights, see "Waters and Water Courses," § 2.
Mining leases, see "Mines and Minerals," § 2.

## LANDS.

See "Public Lands."
Of Indians, see "Indians."

## LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 7.

## LETTERS PATENT.

For invention, see "Patents."

## LIBEL AND SLANDER.

Removal of action for libel as dependent on subject of controversy, see "Removal of Causes," § 1.

## LICENSES.

For making, use, or sale of patented articles, see "Patents," § 4.
For mining, see "Mines and Minerals," § 2.
Injuries to licensees, see "Railroads," § 3.
Jurisdiction of federal courts of action to enjoin enforcement of license tax, see "Courts," § 2.

## LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.

*Particular classes of liens.*

See "Maritime Liens"; "Railroads," § 2.
Of bank on stock, see "Banks and Banking," § 1.

Pledge, see "Pledges."
Tax liens, see "Taxation," § 1.

## LIFE ESTATES.

In trust, see "Trusts," § 2.

*A tenant for life of lands containing minerals, oil, or gas cannot open any new mines or wells, or lease the lands to others for that purpose.—Shulthis v. MacDougal (C. C.) 331.

## LIFE INSURANCE.

See "Insurance," §§ 1, 2, 7.

## LIGHTS.

Of vessels, see "Collision," § 6.

## LIMITATION.

Of claim of patent, see "Patents," § 3.

## LIMITATION OF ACTIONS.

*Particular actions or proceedings.*

Bill of review, see "Equity," § 6.
Criminal prosecutions, see "Criminal Law," § 1.
For breach of trust, see "Trusts," § 4.

**§ 1. Computation of period of limitation.**

Statutes of limitation are statutes of repose, and it would be contrary to the principles underlying limitations to hold that such statutes run while litigation is going on.—Klumpp v. Thomas (C. C. A.) 853.

*Where a judgment for plaintiff was reversed on appeal, because the original declaration was insufficient and amendments had been filed too late, plaintiff was entitled to commence a new suit for the same cause of action within a year after the final determination of the former, under Starr & C. Ann. St. Ill. 1896, c. 83, par. 25.—McAndrews v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 856.

*Limitations did not begin to run against an administratrix's liability for breaches of trust by her intestate until the right of action accrued on discovery of the fraud.—Russel v. Huntington Nat. Bank (C. C. A.) 868.

## LIMITATION OF LIABILITY.

Of carrier, see "Carriers," § 2.
Of owner of vessel, see "Shipping," §§ 2, 5.

## LIS PENDENS.

Effect on limitation of pendency of other proceedings, see "Limitation of Actions," § 1.

## LIVE STOCK.

Carriage of, see "Carriers," §§ 1, 3.

## LOBBYING.

Legality of contract for services as lobbyist, see "Contracts," § 1.

## LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

## LOGS AND LOGGING.

Laws Minn. 1889, p. 351, c. 221, § 2, relating to boom companies, as amended by Acts 1905, p. 106, c. 89, *held* not to authorize such a company to construct its works on the Canadian side of the Rainy Lake river within the jurisdiction of the Dominion of Canada.—Rainy Lake River Boom Corp. v. Rainy River Lumber Co. (C. C. A.) 287.

The extension of a boom by a boom company organized under the laws of Minnesota across to the Canadian shore of the Rainy Lake River *held* an unlawful obstruction of the river, under the provisions of the Webster-Ashburton treaty of 1842 between Great Britain and the United States, and to give the company no right to demand toll from a Canadian corporation whose logs were thereby directed into its boom.—Rainy Lake River Boom Corp. v Rainy River Lumber Co. (C. C. A.) 287.

## LOOKOUT.

On vessels, see "Collision," § 6.

## LUMBER.

See "Logs and Logging."

## MACHINERY.

Liability of employer for defects, see "Master and Servant," § 2.
Production and use of electricity, see "Electricity."

## MALICE.

Element of homicide, see "Homicide," § 1.

## MARINE INSURANCE.

See "Insurance," § 5.

## MARITIME LIENS.

**§ 1. Nature, grounds, and subject-matter in general.**

*Hooks, lines, bait, ice, and covers required to protect boats from the weather while on board are a necessary part of the equipment of a vessel engaged in fishing, and persons furnishing the same in a foreign port on order of her master are entitled to maritime liens therefor.—The Emma B (D. C.) 966.

*Alterations made in a vessel to better fit her for a particular kind of business, but which do not essentially change her character, do not constitute construction, but repairs.—The Emma B (D. C.) 966.

*Where repairs are ordered by the master and managing owner of a vessel in a foreign port, a lien is presumed against the vessel, unless the contrary is shown.—The Emma B (D. C.) 966.

*Advances made to the master and managing owner of a fishing schooner in a neighboring port of another state without inquiry as to their necessity, and not shown to have been needed or used for necessary equipment of the vessel, *held* not to give a right to a maritime lien.—The Emma B (D. C.) 966.

**§ 2. Enforcement.**

Persons furnishing supplies to a domestic vessel for which they are given liens by a state statute are entitled to enforce them in a court of admiralty against the proceeds of the vessel when sold in a suit for partition between the owners.—The Emma B (D. C.) 966.

## MARITIME TORTS.

Jurisdiction of admiralty, see "Admiralty," § 1.

## MASTER AND SERVANT.

Admissions in pleading in action for injuries to servant as evidence, see "Evidence," § 1.
Adoption by United States courts of state laws as rules of decision in action for injuries to servant, see "Courts," § 2.
Expert testimony in action for injuries to servant, see "Evidence," § 3.

**§ 1. Master's liability for injuries to servant—Nature and extent in general.**

In an action for injuries to a servant, defendant's negligence in maintaining an insufficiently insulated electric wire over the roof of its ore house *held* the proximate cause of the accident.—Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

**§ 2. —— Tools, machinery, appliances, and places for work.**

Where defendant maintained a heavily charged electric wire over the corrugated iron roof of its ore house, defendant was bound to so insulate the wire that its servants likely to come in contact therewith would not be injured.—Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

*A railroad company is not liable for the injury or death of an employé caused by a defective track resulting from excessive rains or other unusual cause, unless the defect had existed for such length of time as to enable it in the exercise of reasonable diligence to discover and repair the defect or to warn the employé, and it failed to do so.—Jennett v. Louisville & N. R. Co. (C. C.) 392.

Duties of a master to his servants arise by operation of law because of the existing relation and not by virtue of the contract of employment.—Gawne v. Bicknell (C. C.) 587.

*In an action for injuries to a brakeman by an alleged defective drop brake on a flat car, facts *held* to constitute a prima facie case of defendant's negligence.—Reed v. Norfolk & W. Ry. Co. (C. C.) 750.

Performance of the master's unassignable duty of inspection must be reasonably thorough and careful, and made within a reasonable time.—Reed v. Norfolk & W. Ry. Co. (C. C.) 750.

**§ 3. —— Methods of work, rules, and orders.**

*The running of a railroad train at night a distance of 84 miles backward with no headlight to light the track in front of it subjects the trainmen to extra and unusual hazard and requires from the railroad company at whose orders it is done a degree of care and caution commensurate with such extra risk to keep the track free from obstructions.—Norfolk & W. Ry. Co. v. Gardner (C. C. A.) 114.

**§ 4. —— Fellow servants.**

*The crews of two vessels owned by the same employer are not by reason of that fact in a common employment, and a member of one crew is not a fellow servant with members of the other.—Fallon v. Cornell Steamboat Co. (C. C.) 329.

*The master of a vessel is not a fellow servant with any other member of the crew.—Fallon v. Cornell Steamboat Co. (C. C.) 329.

*A telegraph operator in charge of a block signal, and in absolute control of the operation of trains within such block, *held* a vice principal, and not a fellow servant, of a trainman killed in a collision due to the operator's negligence in permitting a train to proceed while the block was occupied.—Salmons v. Norfolk & W. Ry. Co. (C. C.) 722.

**§ 5. —— Risks assumed by servant.**

*Risks due to the negligence of the master are not to be included among the ordinary risks of the employment assumed by the servant.—American Sheet & Tin Plate Co. v. Urbanski (C. C. A.) 91.

*An employé injured while engaged in loading stone on a car by the falling of a stone which he unnecessarily pushed while it was being carried by a derrick by means of tongs *held* barred from recovering from the master for the injury both on the ground of assumption of risk and of contributory negligence.—Solt v. Canney (C. C. A.) 660.

*An engineer of a railroad train has a right to assume that the roadway is in safe condition in the absence of notice to the contrary, and a mere general warning to proceed carefully because of heavy rains, with no notice of a particular defect, does not cause him to assume the risk from such defect of which he has no knowledge.—Jennett v. Louisville & N. R. Co. (C. C.) 392.

A man employed to work on a barge in coaling a ship in port *held* not to be a seaman so as to be exempt from the general rules as to assumption of risk.—Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co. (D. C.) 912.

An inexperienced man hired to pump on a barge which was discharging a cargo of coal, and who was drowned by the capsizing of the barge through unseaworthiness, *held* not to have assumed the risk of which he was not warned and had no means of knowledge, and the owner *held* liable for his death.—Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co. (D. C.) 912.

**§ 6. —— Contributory negligence of servant.**

An employé injured while loading stone on a car held barred from recovery by contributory negligence.—Solt v. Canney (C. C. A.) 660.

*An engineer of a railroad train, killed when his train was wrecked by running into a culvert which had been washed out or rendered unsafe by floods, was charged with the duty of running with care and caution in view of conditions which were apparent or could have been known to him by the use of reasonable care and observation, and if, in view of such conditions, he should have known that the culvert was unsafe, or was running at excessive speed, he was chargeable with contributory negligence which precludes a recovery for his death.—Jennett v. Louisville & N. R. Co. (C. C.) 392.

*A brakeman injured while using a drop brake on a flat car with which he was unfamiliar *held* not negligent.—Reed v. Norfolk & W. Ry. Co. (C. C.) 750.

**§ 7. —— Actions.**

In an action by a servant against the master to recover for a personal injury, the question of the proximate cause of the injury *held*, under the evidence, a question for the jury.—American Sheet and Tin Plate Co. v. Urbanski (C. C. A) 91.

*The question whether a servant assumed the risk of an injury caused by a defect in the floor of a mill in which he worked *held*, under the evidence, one for the jury.—American Sheet & Tin Plate Co. v. Urbanski (C. C. A.) 91.

The charge of a trial court on the question of contributory negligence, taken as a whole, *held* to have stated the correct rule.—Baltimore & O. R. Co. v. Kangas (C. C. A.) 143.

*In an action for injuries to a servant by catching a live electric wire to save himself from falling on a roof over which the wire improperly insulated was strung, plaintiff *held* not negligent as a matter of law.—Colusa Parrot Mining & Smelting Co. v. Monahan (C. C. A.) 276.

*The questions of negligence or contributory negligence *held* properly submitted to the jury in an action by a servant against the master for a personal injury.—Worth Bros. Co. v. Kallas (C. C. A.) 306.

*Evidence *held* sufficient to warrant the submission to the jury of an action for the death of a servant alleged to have been due to the master's negligence.—Alaska-Treadwell Gold Min. Co. v. Cheney (C. C. A.) 593.

The presumption of negligence created by the statute of Florida in relation to the liability of railroad companies does not outweigh evidence.—Jennett v. Louisville & N. R. Co. (C. C.) 392.

*In an action for death of a servant by falling into a hole in a passageway while two workmen of an independent contractor were seated on the edge of the hole, whether defendant was negligent in failing to provide additional guards was properly submitted to the jury.—Mella v. Northern S. S. Co. (C. C.) 499.

In an action for injuries to a servant employed by a firm, plaintiff was not required to join all the members of the firm as defendants, but was entitled to sue one of them separately.—Gawne v. Bicknell (C. C.) 587.

In an action for death of a trainman in a collision, whether the operator of a block signal station was justified in believing that defendant's assistant trainmaster had authority to direct that the colliding train proceed in violation of the rules, and whether he was negligent in giving such instruction, *held* for the jury.—Salmons v. Norfolk & W. Ry. Co. (C. C.) 722.

*Under West Virginia practice, a declaration for the wrongful death of a servant alleging defendant's negligence generally *held* sufficient to authorize a recovery on proof of any negligence proximately causing the act which produced the injury.—Salmons v. Norfolk & W. Ry. Co. (C. C.) 722.

*The rule that the maxim, "Res ipsa loquitur," does not apply to cases between master and servant, does not prevent the establishment of a master's negligence by the circumstances surrounding the accident.—Reed v. Norfolk & W. Ry. Co. (C. C.) 750.

In an action for injuries to a brakeman, an instruction *held* objectionable as misleading the jury to find for defendant if they found that a certain inspection was made without reference to its character.—Reed v. Norfolk & W. Ry. Co. (C. C.) 750.

*In an action for injury to plaintiff by a drop brake on a flat car, the burden was on defendant to show that the car in question had been properly inspected prior to the accident, or that it had been moved or the brake used after inspection by the plaintiff's fellow servants.—Reed v. Norfolk & W. Ry. Co. (C. C.) 750.

Instructions in an action by an employé against the master to recover for a personal injury resulting from the bursting of steam pipes in defendant's boiler house reviewed, and *held* not to contain any material or prejudicial errors which entitled defendant to a new trial.—Firment v. Bermind-White Coal Min. Co. (C. C.) 758.

*An instruction in an action by a servant against the master that it was the "absolute duty" of defendant to exercise reasonable and due care to provide a reasonably safe place to work, and appliances, and to keep them in safe and proper condition, was not erroneous.—Firment v. Bermind-White Coal Min. Co. (C. C.) 758.

*While the burden of proving defendant's negligence in an action by a servant to recover for a personal injury rested on the plaintiff, where he gave credible evidence that certain dangerous defects in the machinery and appliances existed on and prior to the day of the accident, and were known to defendant, the burden was thrown on defendant to show that they had been repaired or did not exist.—Firment v. Bermind-White Coal Min. Co. (C. C.) 758.

## MECHANICS' LIENS.

Right of mechanic's lienor to priority in distribution of proceeds of sale of property in bankruptcy, see "Bankruptcy," § 4.

## MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 1.

## MERCHANTABLE TITLE.

Ability of vendor to furnish as condition precedent to action for specific performance, see "Specific Performance," § 3.
To land sold, see "Vendor and Purchaser," § 1.

## MINES AND MINERALS.

Contracts for sale of coal, see "Sales," §§ 1–3, 5.
Creation of trust in mining property, see "Trusts," § 1.
Life estates in mineral lands, see "Life Estates."
Specific performance of contract to convey mining property, see "Specific Performance," §§ 1, 4.

**§ 1. Public mineral lands.**

Upon an issue as to the sufficiency of a discovery of mineral to support the location of a mining claim, where there was proof that gold was actually discovered within the limits of the claim, the locator was entitled to supplement such proof by evidence showing the character, value, and mineralogical condition of adjacent claims, and by the opinions of experienced miners that the discovery was sufficient to justify a prudent man in expending labor and money in developing the property.—Cascaden v. Bortolis (C. C. A.) 267.

Evidence as to performance of necessary assessment work on a mining claim for the benefit of a co-owner so as to prevent a forfeiture under Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), *held* for the jury.—Knickerbocker v. Halla (C. C. A.) 318.

**§ 2. Title, conveyances, and contracts.**

An oil lease in ordinary form giving the lessee the exclusive right to explore for produce and sell oil from the land on payment of a royalty does not vest him with title to the oil in place.—Backer v. Penn Lubricating Co. (C. C. A.) 627.

**§ 3. Operation of mines, quarries, and wells.**

An oil lessee, having an exclusive right to explore for and remove oil from the leased premises, has a right of action to recover damages against one who without his consent enters upon the premises and removes oil therefrom during his term.—Backer v. Penn Lubricating Co. (C. C. A.) 627.

## MINORS.

See "Infants."

## MISREPRESENTATION.

See "Fraud."
By insured, see "Insurance," § 3.

## MISTAKE.

Remedies, see "Equity," § 1.

## MODIFICATION.

Of contract, see "Contracts," § 3.

## MORTGAGES.

As preferential transfer by bankrupt, see "Bankruptcy," § 3.
Bill of review to set aside foreclosure decree, see "Equity," § 6.
Execution of, by corporations, see "Corporations," § 3.
Of personal property, see "Chattel Mortgages."
Railroads, see "Railroads," § 2.

**§ 1. Foreclosure by action.**

A federal court, which directed its receivers in a railway foreclosure suit to institute proceedings to condemn the interest of certain mortgagees in right of way of defendant pending which proceedings the property was sold, *held* to have retained jurisdiction to enjoin the prosecution of a foreclosure suit by such mortgagees in a state court until their interest should be determined in the condemnation proceedings.—Taylor v. Norfolk & O. V. Ry. Co. (C. C. A.) 452.

In a foreclosure suit, the court cannot undertake to determine the right of a party who sets up a legal title which is adverse, and, if valid paramount, to the title of both mortgagor and mortgagee.—Grosscup v. German Savings & Loan Soc. (C. C.) 947.

## MOTIONS.

Direction of verdict in civil actions, see "Trial," § 2.

## MUNICIPAL CORPORATIONS.

Injunctions affecting, see "Injunction," § 1.
Laws impairing obligation of contract with city, see "Constitutional Law," § 2.

Legality of contract for services in securing sale of waterworks to city, see "Contracts," § 1.
Right of telephone company to occupy streets in cities, see "Telegraphs and Telephones."
Water supply, see "Waters and Water Courses," § 3.

**§ 1. Public improvements.**

The city of Omaha *held* to have power under Laws Neb. 1879, p. 99, § 27 (Comp. St. 1901, § 762), and Laws 1903, p. 66, c. 12, to contract for the purchase of a waterworks system in part outside of the city limits, and the exercise of an option reserved by ordinance to purchase the plant of a water company *held* to create a contract for the purchase of its entire system of distribution including such part as extended into adjoining municipalities.—Omaha Water Co. v. City of Omaha (C. C. A.) 225.

**§ 2. Use and regulation of public places, property, and works.**

Under the various acts of the Legislature of Pennsylvania, relating thereto, as construed by the Supreme Court of the state, the city of Allegheny has authority to grant to a railroad company the right to use for the purpose of erecting a railroad passenger station in part thereon a portion of the ground set apart as commons by Act Sept. 11, 1787 (2 Smith's Laws, p. 414), providing for laying out the town, and afterward granted to the city to be used for public purposes.—Larkin v. City of Allegheny (C. C. A.) 611.

A taxpayer *held* not entitled to an injunction to restrain the execution of a contract authorized by Laws Pa. March 7, 1901, p. 29, by the councils of a city, granting a right to use public grounds because of formal defects of the contract proposed.—Larkin v. City of Allegheny (C. C. A.) 611.

A city given by its charter power to establish and regulate sidewalks, streets, and avenues, and appurtenances or appendants thereto, has implied authority to grant the right to a telephone company to use its streets at least to such extent that an ordinance granting such right, accepted and acted on by the company, creates a contract which is binding on the city itself whatever may be its effect on the rights of others.—Southern Bell Telegraph & Telephone Co. v. City of Mobile (C. C.) 523.

**§ 3. Fiscal management, public debt, securities, and taxation.**

A bill to charge a municipality as a voluntary trustee with the duty of collecting taxes to pay bonds, which showed that defendant had ceased and refused to perform such duty 25 years before, since which time no interest had been paid, and that the bonds matured eight years before suit, *held* demurrable on the ground of complainant's laches.—Eddy v. City and County of San Francisco (C. C. A.) 441.

## MURDER.

See "Homicide," § 1.

## MUTUAL BENEFIT INSURANCE.

See "Insurance," § 7.

## NAMES.

See "Trade-Marks and Trade-Names."

## NATIONAL BANKS.

See "Banks and Banking," § 2.

## NATURALIZATION.

See "Aliens," § 2.

## NAVIGABLE WATERS.

See "Waters and Water Courses."

## NAVIGATION.

Rules for preventing collisions, see "Collision," § 1.

## NEGLIGENCE.

Causing death, see "Death," § 1.

*By particular classes of persons.*

See "Carriers," §§ 2, 4; "Railroads," § 3.
Employers, see "Master and Servant."
Operators of vessel, see "Shipping," § 2.
Operators of vessel in collision, see "Collision."
Owners or operators of tug, see "Towage."

*Condition or use of particular species of property, works, machinery, or other instrumentalities.*

See "Electricity"; "Railroads," § 3.

*Injuries to particular species of property.*

Cargo of vessel, see "Shipping," § 4.
Loss of or injury to tow, see "Towage."

*Contributory negligence.*

Of passenger, see "Carriers," § 4.
Of servant, see "Master and Servant," §§ 6, 7.

**§ 1. Actions.**

*Where from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence or contributory negligence such questions are properly for the jury.—Worth Bros. Co. v. Kallas (C. C. A.) 306.

## NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

## NEW TRIAL.

**§ 1. Grounds.**

*Where the evidence offered for the party for whom a verdict is rendered conceding to it the

greatest probative force to which it is fairly entitled under the laws of evidence is insufficient to support or to justify the verdict, it is the duty of the court to set aside such verdict and grant a new trial.—Burke v. Wood (C. C.) 533.

Where defendant produced all the books necessary to enable plaintiff to make out its cause of action, plaintiff was not entitled to a new trial because of defendant's failure to produce other books called for.—International Coal Min. Co. v. Pennsylvania R. Co. (C. C.) 996.

## NUISANCE.

Concurrent and conflicting jurisdiction of state and federal courts of action to abate nuisance, see "Courts," § 3.

## OATH.

Of grand juror, see "Grand Jury."

## OBJECTIONS.

To jurisdiction as ground for abatement, see "Abatement and Revival," § 1.

## OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 2.

## OFFICERS.

Criminal responsibility of officers of bank, see "Banks and Banking," § 2.
Injunctions affecting, see "Injunction," § 1.
Offenses by or against internal revenue officers, see "Internal Revenue."
Removal of action against federal officer, see "Removal of Causes," § 1.

*Particular classes of officers.*

See "Judges"; "Receivers."
Corporate officers, see "Corporations," §§ 2, 3.

## OILS.

Duty on, see "Customs Duties," § 2.
Oil leases, see "Mines and Minerals," §§ 2, 3.

## OLEOMARGARINE.

See "Internal Revenue."

## OPINION EVIDENCE.

In civil actions, see "Evidence," § 3.

## OPINIONS.

Of courts, see "Courts," § 1.

## ORDERS.

Review of appealable orders, see "Appeal and Error."

## PARENT AND CHILD.

See "Infants."

## PARKS.

See "Municipal Corporations," § 2.

## PAROL EVIDENCE.

In civil actions, see "Evidence," § 2.
To vary terms of shipping articles, see "Seamen."

## PARTIES.

Character ground of jurisdiction, see "Courts," § 2.
Persons who may be adjudged bankrupt, see "Bankruptcy," § 1.

*In actions by or against particular classes of persons.*

See "Master and Servant," § 7.

*In particular actions or proceedings.*

See "Equity," § 2.
For breach of trust, see "Trusts," § 4.
For infringement of patent, see "Patents," § 5.
For loss of or injury to cargo, see "Shipping," § 2.
For personal injuries, see "Master and Servant," § 7.
On contract, see "Contracts," § 5.
To set aside decree of foreclosure, see "Equity," § 6.

## PARTITION.

Evidence of judgment in partition suit as estoppel or defense, see "Judgment," § 3.

**§ 1. Actions for partition.**

Under Code W. Va. 1899, c. 79, § 1 (Code 1906, § 3180), the court in a suit for partition may pass on all claims of title except those by a stranger.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

Decree for partition *held* to pass a fee to certain distributees, though it did not so state in terms.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

A deed purporting to partition certain land *held* to have awarded one-eighth interest therein to defendant's grantors in fee.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

## PARTNERSHIP.

Jurisdiction of federal courts of action for accounting by partner, as dependent on amount in controversy, see "Courts," § 2.

**§ 1. The relation.**
*A contract for the operation of a farm for a term of years construed, and *held* not one of partnership, but of lease, under which the parties were to share the gross returns, and not the profits.—Rogers v. Lawton (C. C.) 203.

## PART PERFORMANCE.

Within statute of frauds, see "Frauds, Statute of," § 2.

## PASSENGERS.

See "Carriers," § 4.
On vessel, see "Shipping," § 3.

## PATENTS.

Liability of corporation for infringement of patent, see "Corporations," § 2.
Previous decisions as controlling in suit to determine validity of patent, see "Courts," § 1.
Right to use inventor's name in connection with patent, see "Trade-Marks and Trade-Names," § 1.
Specific performance of contract to convey patent to land, see "Specific Performance," §§ 1, 2.

**§ 1. Patentability.**
The Morrow patent, No. 504,401, for an armature for dynamo electric machines, claim 2, *held* void for lack of invention in view of the prior art.—Bullock Electric Mfg. Co. v. General Electric Co. (C. C. A.) 28.

*Devices and publications leading up to, but not fully accomplishing, a desired end, do not anticipate an invention which for the first time effectively meets all requirements and successfully accomplishes such end.—Truax v. George F. Childs Adjustable Parlor Chair Co. (C. C.) 907.

**§ 2. Applications and proceedings thereon.**
A suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), is for the purpose of establishing complainant's right to a patent which has been refused by the Patent Office, and where such patent was granted to the defendant after interference proceedings, complainant is not entitled in such suit to introduce evidence to prove that such patent is void for anticipation, an issue which was not, and could not have been, tendered by the bill.—Richards v. Meissner (C. C.) 485.

**§ 3. Construction and operation of letters patent.**
*Where the claims of a patent specify the elements of a combination, but do not specify the means whereby those elements perform their functions, but call for "means" generally, and close with the words "substantially as and for the purpose" described, or specified or set forth, such words import into the claims the specific means described in the specification, and the claims are limited accordingly.—Union Match Co. v. Diamond Match Co. (C. C. A.) 148.

When the invention of a patent is along the lines of past efforts which have met with more or less success, and the inventor has made only an improvement in an art already well advanced, the range of equivalents should be reduced accordingly.—Union Match Co. v. Diamond Match Co. (C. C. A.) 148.

A patent for a described means or mechanism to accomplish a desired end must be limited to the particular means described in the specification or their clear mechanical equivalents and does not cover any other mechanical structure which is substantially different in its construction or in its operation.—Union Match Co. v. Diamond Match Co. (C. C. A.) 148.

**§ 4. Title, conveyances, and contracts.**
Assignments of patents on cushion insoles in shoes did not pass the right to use the patentee's name in connection with shoes manufactured under such assignments.—Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. A.) 887.

An inventor who disposes of his patents does not thereby lose the right to describe himself in connection with claimed improvements as the inventor of the original device.—Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. A.) 887.

**§ 5. Infringement.**
Only under exceptional circumstances will a court, in its decree finding infringement of a patent, provide that the infringing machines shall be delivered up to the complainant to be destroyed.—American Caramel Co. v. Thomas Mills & Bro. (C. C. A.) 147.

Where put in issue, the complainant, in a suit for infringement of a patent for a machine, is required to prove affirmatively that machines made thereunder were marked as required by Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), or that notice of infringement was given to the defendant, to entitle complainant to recover damages for infringement prior to the filing of the bill.—American Caramel Co. v. Thomas Mills & Bro. (C. C. A.) 147.

No device can be held to infringe a combination claim of a patent unless it employs all the elements of it.—Union Match Co. v. Diamond Match Co. (C. C. A.) 148.

Where no other invention inheres in a patented combination, and it is not merely for an improvement but for a new structure, an infringer who has deliberately copied such structure cannot avoid liability for the entire profits made thereon by adding improvements of its own which do not materially add to its sale value and by so conducting its business as to make it impossible to separate the profits due to each.—Brennan & Co. v. Dowagiac Mfg. Co. (C. C. A.) 472; Dowagiac Mfg. Co. v. Brennan & Co., Id.

*On an accounting for profits by an infringer, the measure of recovery is the amount of profits actually made by the defendant by the sale of the patented device, and it is immaterial that such sales would probably not have been made by complainant.—Brennan & Co. v. Dowagiac Mfg. Co. (C. C. A.) 472; Dowagiac Mfg. Co. v. Brennan & Co., Id.

Where no other patented structure is shown to have contributed to the profits of an infringer of a patent, and the infringement was deliberate and intentional, the defendant cannot avoid liability for the entire profits made on the structure by so confusing those made on the patented and unpatented parts that the proportions due to each cannot be separated or ascertained.—Dowagiac Mfg. Co. v. Superior Drill Co. (C. C. A.) 479.

A decree enjoining infringement of a patent may properly provide that it shall not apply to a sale by defendant of articles made by the defendant in another suit brought by complainant in another circuit in which the patent was adjudged void; but the proviso will not be extended to cover other articles made in the latter circuit, when the question of such right is not directly involved under the evidence.—Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York (C. C. A.) 892.

A bill for infringement of a patent which makes profert of the patent is not demurrable because it gives only a general description of the patented device.—Hildreth v. Bee Candy Mfg. Co. (C. C.) 40.

In a suit in equity by a patentee for infringement, where the bill discloses that complainant contracted to convey to another an interest in the patent by way of assignment or license, the court will regard such contract as having been carried out for the purpose of determining whether or not the assignee or licensee is a necessary party, either as sole or joint complainant.—Bowers v. Atlantic Gulf & Pacific Co. (C. C.) 895.

A conveyance by a patentee *held* a license, and not an assignment, and the grantee not a necessary party to a suit by the patentee for infringement, although a proper party whose joinder might be ordered by the court in its discretion.—Bowers v. Atlantic Gulf & Pacific Co. (C. C.) 895.

Joint owners of one patent, one of whom is also sole owner of another patent, cannot join in a suit in equity for the infringement of both, although it is alleged that the devices of the two are capable of conjoint use, and are so used by complainants, and that defendants jointly infringe both patents, where it is not alleged that they make, vend, or use any single device which infringes both.—Kaiser v. Bortel (C. C.) 902.

### § 6. Decisions on the validity, construction, and infringement of particular patents.

The Allen patent, No. 424,944, for a surgical pump, *held* not anticipated, valid, and infringed.—Truax v. George F. Childs Adjustable Parlor Chair Co. (C. C.) 907.

The Leach patent, No. 433,686, for a locomotive track sander, *held* valid and infringed.—Economy Locomotive Sander Co. v. American Locomotive Sander Co. (C. C. A.) 683.

An infringer of the Hoyt patent No. 446,230, for a grain drill, *held* liable for the entire profits made on the infringing drills.—Brennan & Co. v. Dowagiac Mfg. Co. (C. C. A.) 472; Dowagiac Mfg. Co. v. Brennan & Co., Id.

The Norton patent, No. 470,591, for a feed mechanism for screw-cutting lathes, construed, and *held* not infringed.—Hendey Mach. Co. v. Prentice Bros. Co. (C. C. A.) 481.

The Palmer, Denmead & Baughman patent, No. 538,535, for a machine for boxing matches, claims 1, 2, 3, and 4, and 23, 24, 26, and 30, construed and *held* not void as for functions merely but, in view of the prior art, entitled only to a narrow construction.—Union Match Co. v. Diamond Match Co. (C. C. A.) 148.

The Palmer, Denmead & Baughman patent, No. 538,535, for a machine for boxing matches, *held* not infringed by the machine of the Wyman patent, No. 736,668.—Union Match Co. v. Diamond Match Co. (C. C. A.) 148.

The Grant patent, No. 554,675, for a rubber tired wheel, was not anticipated, and discloses invention; also, *held* infringed.—Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York (C. C. A.) 892.

The Campbell patent, No. 594,457, for a machine for forming nipples, *held* valid and infringed.—E. J. Manville Mach. Co. v. Excelsior Needle Co. (C. C.) 486.

The Leach patent, No. 656,553, for improvement in pneumatic track sanders for locomotives, *held* void for lack of patentable novelty.—American Locomotive Sander Co. v. Economy Locomotive Sander Co. (C. C. A.) 684.

The Finch patent, No. 666,928, for eyeglasses, construed, and *held* not infringed.—Jones v. F. A. Hardy & Co. (C. C.) 320.

The Hobart patent, No. 755,240, for a tune sheet attachment for piano players, *held* not anticipated valid and infringed.—Roth v. Harris (C. C.) 160.

The Whitmore patent, No. 791,967, for an attachment for a piano player, is void for lack of novelty and patentable invention.—Roth v. Harris (C. C.) 160.

### § 7. Patents enumerated.

ENGLISH.

18,130. Machine for boxing matches, cited 154

GERMAN.

66,557. Machine for boxing matches, cited 154

UNITED STATES.

ORIGINAL.

36,611. Grain separator, cited..... 154
83,774. Lathe gearing, cited..... 483
205,012. Grain driver, cited..... 154
247,764. Screw cutting lathe, cited..... 483
314,680. Machine for straightening match splints, cited..... 155
322,145. Match splint straightener, cited.. 155
341,809. Match making machine, cited.... 155
365,327. Surgical pump, cited..... 907
377,943. Machine for boxing matches, cited .....154, 155

***Point annotated. See syllabus.**

386,264. Match making machine, cited.... 155
409,481. Machine for boxing matches, cited 154
418,887. Machine for boxing matches, cited 154
424,944. Surgical pump, held not anticipated, valid and infringed 907, 908, 910
425,015. Surgical pump, cited..... 907
433,686. Locomotive track sander, held valid and infringed, 683; cited... 684
446,230. Grain drill construed and rule for measure of damages stated 472, 473
448,445. Machine for boxing matches, cited 154
449,275. Package making and filling machine, cited..... 154
450,405. Match making machine, cited.... 154
470,591. Feed machine for screw-cutting lathes, held limited and not infringed by patent No. 787,537 481, 482
472,607. Feeder for cotton gin, cited..... 874
490,963. Match splint bundling machine, cited ..... 154
493,337. Armature, cited.....28, 32
504,401. Armature claim 2 held void for lack of patentable invention 28, 36
505,888. Package making and filling machine, cited..... 154
538,535. Machine for boxing matches, claims 1, 2, 3 and 4 and claims 23, 24, 26 and 30 held not void but limited by prior art; also held not infringed by patent No. 736,668 .....148, 149
546,059. Electric railway, cited..... 37
554,675. Rubber tired wheel, held not anticipated, valid and infringed... 892
557,868. Disc grain drill, cited..... 480
559,910. Armature, cited..... 28
560,895. Pince nez, cited..... 321
594,457. Machine for forming nipples, held valid and infringed..... 486
598,808. Eyeglass, cited..... 321
622,779. Eyeglass, cited..... 321
656,553. Locomotive track sander, held void for lack of patentable novelty.. 684
666,928. Eyeglass, construed and held not infringed ..... 320
736,668. Machine for boxing matches held not to infringe claims 1, 2, 3, 4, 23, 24, 26 and 30 of patent No. 538,535 .....149, 156
765,240. Tune sheet attachment for piano players, held not anticipated, valid and infringed..... 160
770,024. Horn for phonographs, cited..903, 904
784,385. Trumpet for talking machine, cited ..... 903
787,537. Feed machine for screw-cutting lathes, held not to infringe patent No. 470,591..... 481
791,967. Attachment for piano players held void for lack of novelty and patentable invention..... 160
832,384. Candy pulling machine, cited..... 40

## PAYMENT.

See "Accord and Satisfaction."
Of claims by bankrupt, see "Bankruptcy," § 3.
Subrogation on payment, see "Subrogation."

## PENALTIES.

*For particular acts or omissions.*

Offense against internal revenue laws, see "Internal Revenue."
Offenses against immigration laws, see "Aliens," § 1.
Offenses against laws regulating operation of railroads, see "Railroads," § 3.
Violation of regulations for carriers, see "Carriers," § 1.

**§ 1. Actions and other proceedings.**

*An action of debt to recover a penalty given by statute is a civil action.—United States v. Southern Pac. Co. (D. C.) 412.

## PENDENCY OF ACTION.

Effect on limitation of other action, see "Limitation of Actions," § 1.

## PERJURY.

Admissibility of evidence in prosecution for as res gestæ, see "Criminal Law," § 2.
Conviction of perjury affecting competency of witnesses, see "Witnesses," § 1.

**§ 1. Prosecution and punishment.**

*An indictment for perjury in the taking of homestead claim proof before a United States commissioner under Rev. St. § 2294, as amended by Act Cong. March 4, 1904, c. 394, 33 Stat. 59 (U. S. Comp. St. Supp. 1907, p. 467), *held* to sufficiently show that the commissioner had authority to administer the oath to defendant in the particular proceeding, so that the same could be made the basis of a prosecution for perjury under section 5392 (U. S. Comp. St. 1901, p. 3653).—Barnard v. United States (C. C. A.) 618.

*In a prosecution for perjury in the proof of a homestead claim before a United States commissioner, an indictment *held* to sufficiently charge that defendant's testimony so given was material.—Barnard v. United States (C. C. A.) 618.

## PERSONAL INJURIES.

*Particular causes or means of injury.*

See "Negligence."
Operation of railroads, see "Railroads," § 3.

*Particular classes of persons injured.*

See "Seamen."
Employé, see "Master and Servant."
Passenger, see "Carriers," § 4.
Passengers on vessel, see "Shipping," § 3.

*Remedies.*

Admissibility of evidence as to measure of damages, see "Damages," § 1.
Admissions in pleadings as evidence, see "Evidence," § 1.
Adoption by United States courts of state laws as rules of decision, see "Courts," § 2.
Expert testimony, see "Evidence," § 3.

## PETITION.

For removal of cause, see "Removal of Causes," § 3.
In bankruptcy, see "Bankruptcy," § 1.

## PHYSICIANS AND SURGEONS.

Liability for death of patient, see "Death," § 1.

## PLACE.

Of delivery of goods sold, see "Sales," § 2.

## PLEA.

In civil actions, see "Pleading," § 1.

## PLEADING.

Admissions in pleadings as evidence, see "Evidence," § 1.

*In actions by or against particular classes of persons.*

See "Master and Servant," § 7; "Municipal Corporations," § 3.

*In particular actions or proceedings.*

See "Equity," § 3; "Specific Performance," § 4; "Trespass," § 2.
For death of servant, see "Master and Servant," § 7.
For infringement of patent, see "Patents," § 5.
For loss of or injury to cargo, see "Shipping," § 2.
Indictment or criminal information or complaint, see "Indictment and Information."
On city bonds, see "Municipal Corporations," § 3.

**§ 1. Plea or answer, cross-complaint, and affidavit of defense.**

An affidavit of defense in an action by the buyer for breach of a contract of sale *held* sufficient on motion for judgment.—Connilleau v. Rogers, Holloway & Co. (C. C.) 998.

**§ 2. Demurrer or exception.**

An answer in an action to recover damages for an alleged trespass *held* to allege matter of defense, either in whole or in part, and not subject to general demurrer.—Backer v. Penn Lubricating Co. (C. C. A.) 627.

Under Ky. Code Civ. Proc. §§ 92, 93, a petition alleging facts which entitle the plaintiff to some form of relief, and containing a prayer for general relief, is not subject to general demurrer because based on a mistaken theory as to the legal basis of defendant's liability.—Backer v. Penn Lubricating Co. (C. C. A.) 627.

*An allegation that plaintiffs had been obliged to pay excessive and unlawful rates without facts to support it *held* a mere conclusion of law not admitted by demurrer.—Meeker v. Lehigh Valley R. Co. (C. C.) 354.

## PLEDGES.

Of stock of bank as fraudulent conveyances, see "Fraudulent Conveyances," § 1.

Where corporate stock was pledged to a bank as security for a note, the stock was not relieved from the debt because the note was thereafter displaced by a renewal note which was forgery.—Wise v. Williams (C. C.) 161.

## POLICY.

Of insurance, see "Insurance."

## POST OFFICE.

Removal of action against post office official, see "Removal of Causes," § 1.

## PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 2.
In patent office, see "Patents," § 2.
Procedure of particular courts, see "Courts."

*In particular civil actions or proceedings.*

See "Contempt," § 2; "Ejectment."
Condemnation proceedings, see "Eminent Domain," § 3.

*Particular proceedings in actions.*

See "Abatement and Revival"; "Costs"; "Damages," § 1; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Pleading"; "Removal of Causes"; "Trial."

*Particular remedies in or incident to actions.*

See "Discovery"; "Injunction"; "Receivers."

*Procedure in criminal prosecutions.*

See "Criminal Law"; "Extradition."

*Procedure in exercise of special or limited jurisdiction.*

In admiralty, see "Admiralty"; "Collision," § 9; "Maritime Liens," § 2; "Shipping," § 5.
In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."

*Procedure on review.*

See "Appeal and Error"; "New Trial."

## PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," §§ 1, 3.

## PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 7.

***Point annotated. See syllabus.**

## PRINCIPAL AND AGENT.

See "Brokers."
Admissions by agent, see "Evidence," § 1.
Construction of agency contract, see "Contracts," § 2.
Corporate agents, see "Corporations," §§ 2, 3.

**§ 1. Rights and liabilities as to third persons.**

Evidence *held* to warrant the submission to the jury of the question whether a so-called correspondent of a stockbrokerage company was in fact an agent as to third parties.—J. J. Quinlan & Co. v. Holbrook (C. C. A.) 272.

## PRIORITIES.

Between liens and mortgages on railroad, see "Railroads," § 2.
Of claims against bankrupt, see "Bankruptcy," § 6.

## PROCESS.

In action to foreclose tax lien, see "Taxation," § 1.
In equity, see "Equity," § 2.
In injunction suit, see "Injunction."
On bill of review, see "Equity," § 6.
On execution, see "Execution."

## PROFITS.

Accounting for in suit for infringement of patent, see "Patents," § 5.

## PROOF.

Taking and filing proofs in admiralty, see "Admiralty," § 2.

## PROPERTY.

*Of particular classes of persons.*

Bankrupt, see "Bankruptcy," § 2.

*Particular species of property.*

See "Logs and Logging"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."
Remedies involving or affecting, see "Execution," § 1.
Taking for public use, see "Eminent Domain."

## PROXIMATE CAUSE.

Of injury to servant, see "Master and Servant," § 1.

## PUBLIC DEBT.

See "Municipal Corporations," § 3.

## PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 1.

## PUBLIC LANDS.

Conspiracy to defraud government of land, see "Conspiracy," § 1.
Mineral lands, see "Mines and Minerals," § 1.

**§ 1. Survey and disposal of lands of United States.**

Plaintiff, who staked out a lot on public land in Alaska, built a cabin thereon in which he resided for three months, and then went away and remained for three years, leaving no one in actual possession, *held* to have abandoned his possession and ceased to be an occupant whose rights might ripen into a title under the townsite law, or could be asserted against grantees in good faith of a subsequent locator who had made valuable improvements on the property.—Gordon v. Ross-Higgins Co. (C. C. A.) 637.

A deed executed by an alien occupant of public land, which was also at the time reserved under a railroad grant, purporting to convey a right of way over such land to a railroad company, *held* void, and not validated by relation by a patent subsequently acquired by him under the homestead law after he had become a citizen, and the land had been restored to entry.—Call v. Los Angeles-Pacific Co. (C. C.) 926.

## PUBLIC SERVICE CORPORATIONS.

See "Carriers"; "Railroads"; "Telegraphs and Telephones."
Water companies, see "Waters and Water Courses," § 3.

## PUBLIC USE.

Taking property for public use, see "Eminent Domain."

## PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 3.

## PUNISHMENT.

See "Penalties."
For contempt, see "Contempt," § 2.

## QUANTUM MERUIT.

Right of seamen to recover for services on quantum meruit, see "Seamen."

## QUIETING TITLE.

Removal of action for as dependent on citizenship of parties, see "Removal of Causes," § 2.

## QUI TAM ACTIONS.

See "Penalties," § 1.

# RAILROADS.

As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."
Jurisdiction of federal court of action by railroad as dependent on nature of subject-matter of action, see "Courts," § 2.
Right of city to grant to railroad use of public lands, see "Municipal Corporations," § 2.

## § 1. Right of way and other interests in land.

The fact that a railroad company had a suit pending to determine rights in its right of way over public lands as against a third party at the time of the passage of a general act forfeiting such rights to the government could not change the effect of the act on the lands involved of which the court was bound to take judicial cognizance.—Columbia Valley R. Co. v. Portland & S. Ry. Co. (C. C. A.) 603.

Act June 26, 1906, c. 3550, 34 Stat. 482 (U. S. Comp. St. Supp. 1907, p. 553), operated as an immediate and effective forfeiture of all rights of way of railroad companies in public lands acquired under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), where construction had not been completed as required by such act.—Columbia Valley R. Co. v. Portland & S. Ry. Co. (C. C. A.) 603.

## § 2. Indebtedness, securities, liens, and mortgages.

Debts incurred by a committee of bondholders for operating expenses of a railroad while under their management for the benefit of the bondholders *held* entitled to priority of payment over the mortgage debt from the proceeds of the corpus of the property when sold at foreclosure sale.—Scott v. Queen Anne's R. Co. (C. C. A.) 828.

Debts for advertising contracted by a committee of bondholders while operating a railroad *held* legitimate operating expenses, and entitled to priority over the mortgage debt from the proceeds of the property sold under foreclosure.—Scott v. Queen Anne's R. Co. (C. C. A.) 828.

## § 3. Operation.

*Plaintiff, who was injured while sitting on a defective railroad platform by a collapse thereof, *held* not a mere licensee, but a person entitled to the exercise of due care on the part of the railroad company.—Chicago, M. & St. P. Ry. Co. v. Hauber (C. C. A.) 668.

In an action for injuries to plaintiff, by the collapse of railroad platform, evidence *held* to warrant a finding that the stringers were rotten, and that reasonable inspection would have disclosed the defect.—Chicago, M. & St. P. Ry. Co. v. Hauber (C. C. A.) 668.

In an action to recover a penalty under the safety appliance act (Act March 2, 1893, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) it is sufficient if the government furnishes clear and distinct evidence of all necessary facts.—United States v. Louisville & N. R. Co. (D. C.) 185.

An action to recover the penalty provided for in the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) is not a criminal case.—United States v. Louisville & N. R. Co. (D. C.) 185.

The safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) requires cars to be equipped with automatic couplers which can be uncoupled without the necessity of a person going between the ends of the cars on that side which said person might be.—United States v. Louisville & N. R. Co. (D. C.) 185.

The safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) applies to an empty car which is a part of a train moving interstate traffic as well as a car which is itself moving such traffic.—United States v. Louisville & N. R. Co. (D. C.) 185.

In an action against a railroad company to recover the penalty provided for violation of the Safety Appliance Act March 2, 1893, c. 196, § 5, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3175), by using cars in interstate traffic not equipped with proper couplers, it is no defense that defendant used due diligence to keep the equipment up to the standard.—United States v. Philadelphia & R. Ry. Co. (D. C.) 403.

Where a railroad company has had an opportunity to inspect cars used on its line in interstate traffic, its duty to see that they conform to the requirements of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), is absolute, and it is no defense to an action to enforce the penalty provided for a violation of the act that it exercised due diligence.—United States v. Philadelphia & R. Ry. Co. (D. C.) 405.

Where a train or cars used in moving interstate traffic become defective while being moved so as not to meet the requirements of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 886), it is the duty of the company to use reasonable diligence to discover the defects and to repair the same at once or at the nearest point where it can be done.—United States v. Chicago Great Western Ry. Co. (D. C.) 775.

A freight train scheduled to run regularly between points in different states is a single train throughout such run, and at all times subject to the provisions of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), although changes may be made in the cars which compose it or in the engine, caboose, and crew, if at any one or more points on the run it is insufficiently equipped with train brakes to comply with the act, the company is subject to the penalty provided, but to one penalty only.—United States v. Chicago Great Western Ry. Co. (D. C.) 775.

Under Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p.

317r), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), a railroad company is bound to know at its peril that cars used by it in interstate traffic are equipped as by such act required, and is subject for the penalty imposed for each car not so equipped.—United States v. Chicago Great Western Ry. Co. (D. C.) 775.

An action by the United States to recover the penalty provided for a violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885) is a suit of a civil nature, and a preponderance of the evidence only is required to establish the cause of action.—United States v. Chicago Great Western Ry. Co. (D. C.) 775.

## RATE.

Of carriers, see "Carriers," § 1.

## REAL ACTIONS.

See "Ejectment."

## REBATES.

By carriers, see "Carriers," §§ 1, 2.

## RECEIVERS.

Appointment and authority of in bankruptcy proceedings, see "Bankruptcy," § 1.
Of corporations in general, see "Corporations," § 4.
Of national bank, see "Banks and Banking," § 2.

**§ 1. Title to and possession of property.**

While mortgaged property is in the hands of a receiver appointed in a foreclosure suit with authority to enter into possession, to care for the property, keep the building insured, pay the taxes, and collect the rents and profits, it cannot be sold under an execution issued out of another court, and such an attempted sale is ineffectual to effect a transfer of title to the equity of redemption from the original holder to the purchaser.—Grosscup v. German Savings & Loan Soc. (C. C.) 947.

**§ 2. Management and disposition of property.**

Receivers are instrumentalities of the court and are required to be impartial as between the parties litigant and should have authority from the court either express or implied for all of their acts.—Metropolitan Trust Co. of City of New York v. North Carolina Lumber Co. (C. C.) 170; American Box Co. v. Same, Id.

## RECORDS.

Of chattel mortgage, see "Chattel Mortgages," § 1.
Transcript on appeal or writ of error, see "Appeal and Error," § 4.

## REFEREES.

In bankruptcy, see "Bankruptcy," § 1.

## REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

## REGULATIONS.

Of interstate commerce, see "Commerce," § 1.

## REHEARING.

See "New Trial."

## RELEASE.

See "Accord and Satisfaction."
Operating as estoppel, see "Estoppel," § 1.

## RELEVANCY.

Of evidence in criminal prosecutions, see "Criminal Law," § 2.

## REMAINDERS.

See "Life Estates."
In trust estate, see "Trusts," § 2.
Sale on execution, see "Execution," § 1.

## REMEDY AT LAW.

Effect on jurisdiction of equity, see "Cancellation of Instruments," § 1; "Equity," § 1.

## REMOVAL OF CAUSES.

**§ 1. Origin, nature, and subject of controversy.**

An action of libel in a state court against the Assistant Attorney General of the United States for the Post-Office Department and the chief inspector of such department based on the promulgation by them of a fraud order against the plaintiff is not removable under Rev. St. § 643 (U. S. Comp. St. 1901, p. 521), as one against revenue officers or arising under a revenue law.—People's United States Bank v. Goodwin (C. C.) 937.

**§ 2. Citizenship or alienage of parties.**

An action in a state court to condemn right of way over a tract of land the fee of which is owned by a defendant, who is a citizen of the same state as plaintiff, does not involve a separable controversy as between plaintiff and a nonresident defendant joined as having a leasehold interest in all or a part of the tract which entitles the latter to remove the cause into a federal court.—Oroville & N. R. Co. v. Leggett (C. C.) 571.

*The question whether there is a separable controversy warranting a removal of a cause, must be determined by the state of the pleadings and the record of the case at the time of the application for removal, and not by the allegations of the petition therefor or the subsequent proceedings which may be had in the Circuit Court.—Oroville & N. R. Co. v. Leggett (C. C.) 571.

After a case had been properly removed to the United States Circuit Court for diversity of citizenship, the record *held* not amended at plaintiff's instance so as to substitute another as defendant for the sole purpose of defeating federal jurisdiction.—Taylor v. Weir (C. C.) 585.

*Where neither plaintiff nor defendant was a resident of the state in which a suit was brought, it was not removable to the federal courts solely because of such diversity of citizenship.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

A suit in a circuit court to remove a cloud on title between parties neither of whom were residents of the state *held* removable to the federal circuit court where the land was situated within the district.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

**§ 3. Proceedings to procure and effect of removal.**

*Where a petition for removal does not fully disclose jurisdiction on removal, the record may be examined in aid thereof.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

*A petition to remove a cause to the federal Circuit Court should contain all essential averments to show jurisdiction on removal.—Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 742.

## REPAIRS.

Maritime lien for, see "Maritime Liens," § 1.
Right of seamen to lease vessel on return for repairs, see "Seamen."

## RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."
Of contract, see "Contracts," § 4.
Of insurance policy, see "Insurance," § 2.

## RES GESTÆ.

In criminal prosecutions, see "Criminal Law," § 2.

## RES IPSA LOQUITUR.

Application of doctrine to action for injuries to servant, see "Master and Servant," § 7.

## RES JUDICATA.

See "Judgment," §§ 1, 2.

## REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

## REVIEW.

See "Appeal and Error"; "Criminal Law," § 4.
Bill in equity, see "Equity," § 6.

## RIGHT OF WAY.

Of railroads, see "Railroads," § 1.

## RIPARIAN RIGHTS.

See "Waters and Water Courses," § 1.

## RISKS.

Assumed by employé, see "Master and Servant," §§ 5, 7.

## ROADS.

Streets in cities, see "Municipal Corporations," § 2.

## ROYALTIES.

On mining property, see "Mines and Minerals," § 2.

## RULES OF NAVIGATION.

See "Collision," § 1.

## SALES.

Accord and satisfaction of claim for damages from fraud and deceit in sale, see "Accord and Satisfaction."
Affidavits of defense in action for breach of contract of sale, see "Pleading," § 1.

*Sales by or to particular classes of persons.*

Trustee, see "Trusts," § 3.
Trustee in bankruptcy, see "Bankruptcy," § 4.

*Sales of particular species of, or estates or interests in, property.*

See "Public Lands," § 1.
Realty, see "Vendor and Purchaser."
Trust property, see "Trusts," § 3.

*Sales on judicial or other proceedings.*

Tax sales, see "Taxation," § 1.

**§ 1. Requisites and validity of contract.**

An instrument construed, and *held* to constitute an enforceable bilateral contract for the sale of coal.—Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. (C. C. A.) 848.

**§ 2. Construction of contract.**

*A contract for the sale and delivery of coal *held* to bind plaintiff to deliver the coal at de-

fendant's yard, and was not performed by a delivery of a sufficient supply in Philadelphia.—Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. (C. C. A.) 848.

**§ 3. Performance of contract.**
That defendant contracted with another to freight and deliver coal to be furnished by plaintiff *held* not a waiver of plaintiff's guaranty to keep a sufficient supply of coal on hand in defendant's yard.—Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. (C. C. A.) 848.

*Defendant's acceptance of coal under a contract of sale *held* not a waiver or an extinguishment of its cause of action already accrued for plaintiff's failure to furnish coal as agreed.—Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. (C. C. A.) 848.

**§ 4. Operation and effect.**
*The title to certain locomotives delivered under a contract of sale *held* to have passed to the purchaser under the law of Pennsylvania, although it failed to settle for the same on delivery as required by the contract, where the seller permitted it to retain and use the property for five months before settlement, and a lease then executed therefor by the seller *held* to have given it no right in the property by way of ownership or lien.—E. I. Dupont Co. v. John Shields Const. Co. (C. C.) 198.

**§ 5. Remedies of seller.**
A written contract cannot be changed after its execution by a parol agreement, unless in exceptional cases and upon a valuable consideration.—Baltimore Refrigerating & Heating Co. of Baltimore City v. Wetzel (C. C. A.) 117.

Even if defendant was not bound to consume coal under a contract by which plaintiff agreed to furnish defendant's supply, that fact did not deprive defendant of the right to recoup from the price of coal furnished damages for failure to furnish a sufficient supply.—Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. (C. C. A.) 848.

**§ 6. Remedies of buyer.**
Special damages may be recovered for breach of a contract for a sale of machinery by a failure to deliver it within the time required by the contract where they are the natural and direct result of the breach, owing to special circumstances known to the parties when the contract was made, although such circumstances may not have been stated in the formal contract, and where the amount can be ascertained with reasonable certainty.—Iowa Mfg. Co. v. B. F. Sturtevant Co. (C. C. A.) 460.

## SALVAGE.

Recovery of general average from cargo owners because of salvage paid, see "Shipping," § 4.

**§ 1. Right to compensation.**
A salvage award for the rescue of a naphtha launch stranded on a jetty in the Delaware river, and apparently abandoned, *held* sustained by the evidence.—The White Seal (C. C. A.) 642; The Lizzie Crawford, Id.

## SATISFACTION.

See "Accord and Satisfaction."

## SEAMEN.

Estoppel of seamen to maintain action for mistreatment, see "Estoppel," § 1.
Right of infant seaman to avoid contract, see "Infants," § 1.

Seamen *held* entitled to recover damages from a shipowner for hardships sustained by reason of a material deviation from the voyage specified in the shipping articles.—Northwestern S. S. Co. v. Turtle (C. C. A.) 256.

Evidence considered, and *held* to sustain the decree of a court of admiralty awarding damages to seamen for injuries suffered by reason of the variance of the ship from the voyage designated in the shipping articles.—Northwestern S. S. Co. v. Turtle (C. C. A.) 256.

Under Rev. St. § 4511 (U. S. Comp. St. 1901, p. 3068), which provides that the shipping articles signed by a crew shall indicate the nature of the intended voyage, the shipowner cannot vary such articles by evidence of a verbal agreement made at the time they were signed that the voyage should be other than that described therein.—Northwestern S. S. Co. v. Turtle (C. C. A.) 256.

The return of a vessel for repairs after starting on a whaling voyage *held* not a termination of the voyage which entitled the seamen to leave the vessel or to recover on a quantum meruit for services subsequently rendered on the voyage.—Belyea v. Cook (D. C.) 180.

Assaults made by a master upon seamen or their confinement by him in unnecessarily cruel positions are violations of their personal rights for which both the master and vessel are liable in damages.—Belyea v. Cook (D. C.) 180.

Where, at the time of the expiration of the contract term of service of seamen on a whaling voyage to the Arctic Ocean, the vessel was icebound without fault of the master or owners, they were not thereby released from the obligation to perform their ordinary duties as seamen until they could be taken or sent to the port of discharge, although they could not be required to resume the business of whaling after the vessel was released, and their confinement in irons because of their refusal to do so entitled them to damages.—Belyea v. Cook (D. C.) 180.

## SELF-DEFENSE.

See "Homicide," § 2.

## SEPARABLE CONTROVERSIES.

Removal from state court, see "Removal of Causes," § 2.

## SET-OFF AND COUNTERCLAIM.

In action for price of goods, see "Sales," § 5.

## SETTLEMENT.

See "Accord and Satisfaction."

## SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Towage."

Vessel owners as employers, see "Master and Servant," §§ 4, 5.

**§ 1. Charters.**

The provisions of a charter party construed, and *held* not to incorporate therein for the benefit of the owners a provision of the bills of lading issued on behalf of the charterer that prepaid freight should be considered earned, ship lost or not lost, so as to impress such prepaid freight with a trust or lien for payment of the charter hire after the vessel was lost by stranding not having delivered her cargo.—Burn Line v. United States & A. S. S. Co. (C. C. A.) 298.

The failure of a vessel to procure a bill of health before entering a Cuban port, as required by the laws of Cuba, *held* the proximate cause of the loss incurred through legal proceedings against her for such violation of the laws, and the liability for such loss as between owner and charterer to rest upon the one whose duty it was under the charter to procure such bill.—The Queen Olga (D. C.) 490.

A charter party construed, and *held* to impose on the owner the duty of procuring a bill of health required by the laws of Cuba to enable the vessel to perform the charter contract.—The Queen Olga (D. C.) 490.

Under the breakdown clause of a charter party, the charterer *held* not entitled to keep the vessel off hire after a stranding until she procured a survey and Lloyd's certificate of seaworthiness where she was in fact in an efficient state when again tendered for service.—The Queen Olga (D. C.) 490.

**§ 2. Carriage of goods.**

*Under Rev. St. § 4463 (U. S. Comp. St. 1901, p. 3045), a steamship carrying passengers is not only required to have a full complement of officers and adequate crew, but they must be competent to act in any emergency that is likely to happen.—Northern Commercial Co. v. Lindblom (C. C. A.) 250.

In an action against a vessel for loss of goods shipped to a point where there was no market therefor and intended for consumption and not sale, the measure of damages was the market value of the goods at destination at the date they should have been delivered, determined by the price at the place of shipment, with freight added and interest at the legal rate.—Northern Commercial Co. v. Lindblom (C. C. A.) 250.

A member of a firm *held* entitled to sue as trustee of an express trust for the loss of goods in transit though a delivery of the goods on board the ship be regarded as a delivery to the firm.—Northern Commercial Co. v. Lindblom (C. C. A.) 250.

In an action to recover for loss of freight, evidence *held* sufficient to go to the jury in support of plaintiff's claim that he made the contract of affreightment, paid the freight, and was the owner and consignor of the merchandise.—Northern Commercial Co. v. Lindblom (C. C. A.) 250.

In an action against the owners of a vessel for loss of freight, an allegation of negligence *held* sufficient to authorize the admission of evidence that the vessel was being operated without a full complement of officers, in violation of Rev. St. § 4463 (U. S. Comp. St. 1901, p. 3045).—Northern Commercial Co. v. Lindblom (C. C. A.) 250.

Plaintiff, prior to delivery at destination of certain mining outfits purchased by him for performance of grub-staking contract, *held* the owner of the outfits, and therefore entitled to recover for their loss in transit.—Northern Commercial Co. v. Lindblom (C. C. A.) 250.

*By the American law freight is due only if the goods are carried to destination, and, even if prepaid, may be recovered back on a failure to make delivery, unless expressly otherwise provided in the contract.—Burn Line v. United States & A. S. S. Co. (C. C. A.) 298.

Evidence *held* insufficient to establish negligence which would render a vessel liable for an injury to cargo which resulted from a cause excepted in the bill of lading.—The St. Quentin (C. C. A.) 883.

Where injury to cargo resulted from a cause excepted in the bill of lading, the carrier cannot be held responsible, unless his negligence is affirmatively shown.—The St. Quentin (C. C. A). 883.

A provision in a bill of lading that the carrier shall have the benefit of any insurance effected by the shipper is not available as a defense to an action by the shipper against the carrier for loss of the goods in transit.—Walter Baker & Co. v. New York, N. H. & H. R. Co. (D. C.) 496.

**§ 3. Carriage of passengers.**

*A corporation which undertook for hire to transport passengers between Nome, Alaska, and points down the coast in the early spring in a gasoline launch, the machinery of which was so defective that the engine froze up and the boat drifted out to sea, *held* liable as a common carrier for injuries suffered by a passenger from exposure and lack of provisions.—North Coast Lighterage Co. v. Greenwood (C. C. A.) 25; Same v. Sullivan (C. C. A.) 28.

**§ 4. General average.**

*The stranding of a vessel *held* to have been due to her negligent navigation, which precluded her recovery in general average from the cargo owners on account of salvage paid.—The Jason (D. C.) 56.

Under the American law and Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 296), the owner of a vessel stranded through negligent navigation *held* entitled to have salvage payments made respectively by the vessel and cargo owners taken into a general average adjustment made at suit of the cargo

owners to enforce contribution on account of cargo jettisoned.—The Jason (D. C.) 56.

Where a portion of a vessel's cargo was jettisoned on account of her stranding solely by reason of her negligent navigation, while Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), exempts the vessel and owners from liability to the cargo owner in tort for his loss, it does not affect his right to maintain a suit against the vessel for a general average contribution in consequence of such loss.—The Jason (D. C.) 56.

**§ 5. Limitation of owner's liability.**

*In a proceeding for limitation of liabilty arising out of an accident which occurred more than two years before the proceeding, in appraising the value of the vessel at the time of the accident deductions from her present value on account of additions made since the accident should also be made at their present value, and not at their cost.—The Captain Jack (D. C.) 808.

*Where at the time of an injury which gave rise to proceedings for limitation of liability the vessel surrendered was employed in raising a sunken vessel under a contract by which the petitioner received a stated sum for the service, such sum may properly be considered as "freight pending."—The Captain Jack (D. C.) 808.

The capsizing of a barge while coaling a steamer *held*, under the evidence, to have been due to unseaworthiness which was within the privity of the owner, which was not entitled to a limitation of liability for the consequent loss.—Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co. (D. C.) 912.

In a suit by a corporation for limitation of liability as owner of a vessel for a loss due to unseaworthiness, the privity of libelant with its condition within the meaning of Rev. St. § 4283 (U. S. Comp. St. 1901, p. 2943), is measured by that of its managing officers.—Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co. (D. C.) 912.

The sinking of a vessel while being properly handled without undue stress of weather or other known external cause was presumptively due to unseaworthiness.—Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co. (D. C.) 912.

## SHIPPING ARTICLES.

See "Seamen."

## SIDEWALKS.

See "Municipal Corporations," § 2.

## SIGNALS.

Of vessels, see "Collision," § 6.

## SPECIFIC PERFORMANCE.

Sufficiency of title of vendor to warrant specific performance of contract to convey land, see "Vendor and Purchaser," § 1.

**§ 1. Nature and grounds of remedy in general.**

The failure to advertise an application by defendant for a patent to mining property did not estop a complainant from maintaining a suit for specific performance of a contract previously made by defendant to convey such property; the claim of complainant not being adverse to the patent but under it to enforce a trust.—Nowell v. McBride (C. C. A.) 432.

**§ 2. Contracts enforceable.**

An instrument conveying a patent to one in trust for himself and others named, without power to sell the same, creates a valid trust under which the trustee cannot sell or convey the legal title to the patent or any part thereof without the consent of all of the equitable owners.—McDuffee v. Hestonville, M. & F. Pass. Ry. Co. (C. C. A.) 36.

**§ 3. Good faith and diligence.**

*Whether equitable relief shall be barred for laches must depend largely upon the circumstances of each case, and in a suit for specific performance of a contract for the purchase of property mere delay in bringing suit is not necessarily conclusive against the right of recovery, where there has been no change in the value of the property, and especially where the defense is based upon records which were fraudulently altered by defendants or those acting in their interest and they stood in a relation of trust and confidence toward complainant, or where the right to bring the suit was vested in a receiver who was personally adversely interested.—Nowell v. McBride (C. C. A.) 432.

*To entitle vendors to enforce specific performance of a contract for the sale of lands they must show their ability to give a merchantable title.—Lindsey v. Humbrecht (C. C.) 548.

**§ 4. Proceedings and relief.**

A bill for specific performance of a contract for conveyance of mining claims *held* to state a cause of action.—Nowell v. McBride (C. C. A.) 432.

Evidence considered in a suit for specific performance, and *held* to sustain the allegations of the bill that the records of a corporation setting forth the terms of a contract between the corporation and defendants were fraudulently altered in the interest of defendants.—Nowell v. McBride (C. C. A.) 432.

## SPEED.

Of vessels in collision, see "Collisions," § 7.

## STARE DECISIS.

See "Courts," § 1.

## STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 3.
Of facts agreed on for submission to court, see "Submission of Controversy."

## STATES.

See "United States."
Breach of contract with state, see "Contracts," § 5.
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Injunction restraining acts of state railway commission, see "Injunction," § 1.
Jurisdiction of federal courts of action against Attorney General as suit against state, see "Courts," § 2.
Jurisdiction of federal courts of action against Secretary of State, see "Courts," § 2.

## STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 2.
Jurisdiction of federal courts of action to enjoin enforcement of statute, see "Courts," § 2.
Laws impairing obligation of contracts, see "Constitutional Law," § 2.
Statutory exemption of vessel owner for liability to cargo owner for loss of cargo, see "Shipping," § 4.

*Provisions relating to particular subjects.*

See "Aliens," §§ 1, 2; "Appeal and Error," § 2; "Bankruptcy," §§ 1–4, 6, 7; "Banks and Banking," §§ 1, 2; "Carriers," §§ 1–3; "Collision," §§ 6, 8; "Commerce," § 1; "Conspiracy," § 1; "Contempt," §§ 1, 2; "Corporations," §§ 2, 4; "Courts," §§ 2, 3; "Criminal Law," § 1; "Customs Duties"; "Death," § 1; "Discovery," § 2; "Eminent Domain," § 2; "Execution," § 1; "Extradition," § 1; "Indians"; "Indictment and Information," § 2; "Insurance," § 7; "Judges," § 1; "Judgment," §§ 1, 2; "Jury," § 1; "Limitation of Actions," § 1; "Logs and Logging"; "Mines and Minerals," § 1; "Municipal Corporations," §§ 1, 2; "Partition," § 1; "Patents," § 2; "Perjury," § 1; "Pleading," § 2; "Railroads," §§ 1, 3; "Seamen"; "Shipping," §§ 2, 4, 5; "Taxation," § 1; "Telegraphs and Telephones," § 1; "United States," §§ 1, 2; "Waters and Water Courses," § 2; "Witnesses," § 1.
Revenue laws, see "Internal Revenue."
Statute of frauds, see "Frauds, Statute of."

**§ 1. Construction and operation.**

Legislative intent should be ascertained only from the language of the act, and not from communications to congressional committees.—Thomas v. F. B. Vandegrift & Co. (C. C. A.) 645.

Congressional debates and records may be consulted to ascertain legislative intent.—Shallus v. United States (C. C. A.) 653.

In construing statutes like the original agreement between the United States and the Creek Nation, approved by Act Cong. March 1, 1901, c. 676, 31 Stat. 863, and Act Cong. May 27, 1902, p. 888, 32 Stat. 245, and the supplemental agreement with the Creek Nation, approved by Act Cong. June 30, 1902, c. 1323, 32 Stat. 500, it is generally safe to reject an interpretation that does not naturally suggest itself to the mind of a casual reader.—Shulthis v. MacDougal (C. C.) 331.

*Acts of Congress enacted before 1873, parts of which were incorporated in the Revised Statutes, and which were thereby repealed, may be referred to in construing the provisions taken therefrom.—People's United States Bank v. Goodwin (C. C.) 937.

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## STOCK.

Bank stock, see "Banks and Banking," § 1.
Corporate stock, see "Corporations," § 1.
Stock brokers, see "Brokers," § 1.

## STREET RAILROADS.

See "Railroads."
Carriage of passengers, see "Carriers."

## STREETS.

See "Municipal Corporations," § 2.

## SUBMISSION OF CONTROVERSY.

A submission to the United States Court in the Indian Territory, under a stipulation between a Quapaw Indian and a white man, of the question as to the power of alienation of allotted lands by the Indian allottee within the limitation period of 25 years, was invalid; the Indian not being a person sui juris.—Goodrum v. Buffalo (C. C. A.) 817; Ewers v. Same (C. C. A.) 828.

A judgment rendered by the United States Court in the Indian Territory, under a stipulation between a Quapaw Indian and a white man submitting, under the local law, the question of the power of such Indian allottee or his heir to convey his allotment within the 25-year period of limitation under the act of Congress adjudging the validity of such a conveyance, is *held* invalid when interposed to defeat an action of ejectment by the Indian heir against the prevailing party.—Goodrum v. Buffalo (C. C. A.) 817; Ewers v. Same (C. C. A.) 828.

A stipulation between a Quapaw Indian and a white man, submitting, under the local law, for decision the question of the power of the Indian allottee or his heir to convey his allotment, is insufficient where it does not describe the land in question.—Goodrum v. Buffalo (C. C. A.) 817; Ewers v. Same (C. C. A.) 828.

## SUBROGATION.

*It is not necessary that a right of subrogation should be expressed. It may be implied from the nature of a transaction.—Walter Baker & Co. v. New York, N. H. & H. R. Co. (D. C.) 496.

## SUBSCRIPTIONS.

To corporate stock, see "Corporations," § 1.

## SUIT.

See "Action."

## SURRENDER.

Of property as accord and satisfaction of claim for damages for fraud and deceit in sale, see "Accord and Satisfaction."
Of written instrument for cancellation, see "Cancellation of Instruments."

## TARIFF.

See "Customs Duties."

## TAXATION.

See "Customs Duties"; "Internal Revenue."
Jurisdiction of federal courts to enjoin enforcement of statute imposing license taxes, see "Courts," § 2.
Right of taxpayer to enjoin use of public lands by private corporation, see "Municipal Corporations," § 2.

### § 1. Sale of land for nonpayment of tax.

*Under the statutes of Washington, until property shall have been listed as delinquent for nonpayment of taxes by a description thereof sufficiently accurate to identify it, so that an intelligent owner acquainted with his property on having the delinquent list brought to his attention will be able to recognize the description as being applicable to his property, it does not become delinquent nor subject to foreclosure and sale for nonpayment of taxes.—Ontario Land Co. v. Wilfong (C. C.) 999.

Under the Washington statute (Ballinger's Ann. Codes & St. Supp. § 1751b) the filing of a delinquent list by the county treasurer with the clerk of the court is an indispensable condition precedent to the maintenance of a suit by the county to foreclose tax liens on property, and further essentials are the filing of an application to the court and the service of such process or notice as will give the owner a fair opportunity to be heard before a decree of foreclosure is entered.—Ontario Land Co. v. Wilfong (C. C.) 999.

*A court cannot enter a valid decree foreclosing a tax lien on property unless it has acquired jurisdiction over the person of the owner by the service of process or notice in some mode prescribed by law or by his appearance, or over the property in rem by its seizure under process.—Ontario Land Co. v. Wilfong (C. C.) 999.

*A decree of a court of Washington purporting to foreclose tax liens in favor of the county, under Ballinger's Ann. Codes & St. Supp. § 1751b, *held* void for want of jurisdiction.—Ontario Land Co. v. Wilfong (C. C.) 999.

### § 2. Tax titles.

*A tax deed *held* void because the description therein did not apply to any property.—Ontario Land Co. v. Wilfong (C. C.) 999.

In a suit to determine adverse claims to real estate between the holder of the patent title and the holder of a tax title, the former must prevail, unless the tax proceedings were sufficient to divest his title.—Ontario Land Co. v. Wilfong (C. C.) 999.

## TELEGRAPHS AND TELEPHONES

Injunction to restrain city from removing poles and wires of telephone company, see "Injunction," § 1.
Right of city to grant franchise to telephone company, see "Municipal Corporations," § 2.

### § 1. Establishment, construction, and maintenance.

A right of way upon a public street granted to a telephone company, whether by a Legislature or city council, is an easement and as such is a property right entitled to all the constitutional protection afforded other property and contracts and of which the company cannot be deprived except by due process of law.—Southern Bell Telegraph & Telephone Co. v. City of Mobile (C. C.) 523.

*A telephone company cannot lawfully occupy the streets of a city with its poles and wires without legislative authority, granted directly by the Legislature or by the municipality in pursuance of express or implied power delegated to it.—Southern Bell Telegraph & Telephone Co. v. City of Mobile (C. C.) 523.

*Code Ala. 1896, § 2490, which provides that "the right of way is granted to any person or corporation having the right to construct telegraph or telephone lines within this state to construct them along the margin of public highways," confers upon a telephone company the right to construct its lines in the streets of a city which are "highways" within the meaning of the statute.—Southern Bell Telegraph & Telephone Co. v. City of Mobile (C. C.) 523.

## TERRITORIES.

Territorial courts, see "Courts," § 2.

## TIMBER.

See "Logs and Logging."

## TITLE.

Determination of on partition, see "Partition," § 1.
Of receiver, see "Receivers," § 1.
Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 1.
Tax titles, see "Taxation," § 2.

*Particular matters affecting title.*

See "Sales," § 4.

*Particular species of property or rights.*

See "Mines and Minerals," § 2; "Patents," § 4; "Trade-Marks and Trade-Names," § 1.
Estate of bankrupt, see "Bankruptcy," § 2.

*Title necessary to maintain particular actions.*

See "Ejectment," § 1; "Specific Performance," § 3.

## TORTS.

Jurisdiction of admiralty of actions for, maritime torts, see "Admiralty," § 1.

*Particular torts.*

See "Fraud"; "Negligence"; "Trespass."
Causing death, see "Death," § 1.
Maritime torts, see "Collision."

*Remedies for torts.*

See "Trespass," § 2.

*In actions of tort the injured party may proceed against all the wrongdoers jointly, or he may sue one or more separately.—Gawne v. Bicknell (C. C.) 587.

## TOWAGE.

Collision of vessel in tow, see "Collision," § 8.
Collisions with tugs and vessels in tow, see "Collision," § 4.

The injury of a coal barge by floating ice after being placed in a tow which was being made up *held* not due to any fault of the tugs, but probably to structural weakness for which the tugs were not responsible.—The Edwin Terry (C. C. A.) 309; The William E. Cleary, Id.; The Edwin Terry (C. C. A.) 311.

While it is the duty of a tug to make up her tow, where there are a number of vessels, by selecting the positions of the different vessels, attending to the leading hawser and prescribing the distance apart of different tiers the details, such as making fast breast lines between the boats in a tier, which are familar to all boatsmen, may properly be left to the tows themselves where they have masters on board.—The Edwin Terry (C. C. A.) 309; The William E. Cleary, Id.; The Edwin Terry (C. C. A.) 311.

Where two tugs are acting jointly in towing a vessel, and an accident happens to the tow through their negligence, both tugs are liable, notwithstanding the fact that one is acting as a helper, under the orders of the master of the other.—The Anthracite (D. C.) 384; The William E. Cleary, Id.

*A tug *held* liable for injury to her tow by collision with an abutment of Kingsbridge in Harlem river, which resulted from her being on the wrong side of the river.—The Three Brothers (D. C.) 388; The Clare, Id.

*A towing tug is not a common carrier nor an insurer, and is bound only to the exercise of reasonable skill and care taking into consideration the fact that it contracts as an expert, and is bound to know the channel and its usual currents and dangers and to avoid obstructions which ought to be known to men experienced in its navigation.—The El Rio (D. C.) 567.

*The liability of a tug for loss of logs from rafts which it undertook to tow, determined.—The El Rio (D. C.) 567.

*The mere occurrence of an accident to a tow raises no presumption of negligence against the tug and the burden is on the complaining party to show a lack of ordinary care.—The El Rio (D. C.) 567.

## TOWNS.

See "Municipal Corporations."

## TRADE-MARKS AND TRADE-NAMES

**§ 1. Title, conveyances, and contracts.**

Where an inventor had the right to use his own name in the manufacture and sale of a patented article, under improved patents, and describe himself as the inventor of the original, a corporation of which he was president, and in which he had a substantial interest, and its licensees to manufacture, had the same right.—Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. A.) 887.

An inventor and a corporation, to which he transferred certain patents for improvements on the article patented, *held* only entitled to use the inventor's name in connection with the manufacture of the improved article when it was used with a statement that it was not the article manufactured under the original patents by complainant.—Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. A.) 887.

*Where the words "Doctor A. Reed's" were printed above a trade-mark, consisting of a cut of a shoe resting on a cushion, in the assignment of the trade-mark, the assignment passed the right to use such name only in connection with the particular representation.—Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. A.) 887.

**§ 2. Infringement and unfair competition.**

An interlocutory order granting a preliminary injunction against the unlawful imitation of a trade-name and unfair competition affirmed.—Modox Co. v. Moxie Nerve Food Co. (C. C. A.) 649.

*Complainant, being entitled to manufacture and sell patented insole shoes under the name of inventor, *held* entitled to enjoin such use by the inventor and others manufacturing similar shoes under subsequent patents covering improvements, so as to mislead the public.—Dr. A. Reed Cushion Shoe Co. v. Frew (C. C. A.) 887.

*The word "Ceresota" as the name of a brand of flour is not descriptive in such sense that it may not be adopted as a valid trade-mark, and such trade-mark is clearly infringed by the use of the name "Ceresota" by a different manufacturer.—Northwestern Consol. Milling Co. v. Mauser & Cressman (C. C.) 1004.

## TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"Ceresota."—Northwestern Consol. Milling Co. v. Mauser & Cressman.....1004
"Dr. A. Reed's."—Dr. A. Reed Cushion Shoe Co. v. Frew..... 887

## TREATIES.

See "Extradition," § 1.
Construction of treaties with Indians, see "Indians."

## TREES.

See "Logs and Logging."

## TRESPASS.

Demurrer to pleading in action for, see "Pleading," § 2.

**§ 1. Acts constituting trespass and liability therefor.**

*The pumping of water through a tunnel constructed by defendant through the land of plaintiff's lessor *held* a continuing trespass, and the proximate cause of the fall of the building on the land leased to plaintiff, for which plaintiff was entitled to recover.—City of Chicago v. Troy Laundry Machinery Co. (C. C. A.) 678.

**§ 2. Actions.**

An answer in an action to recover damages for an alleged trespass *held* to allege matter of defense, either in whole or in part, and not subject to general demurrer.—Backer v. Penn Lubricating Co. (C. C. A.) 627.

## TRESPASS TO TRY TITLE.

See "Ejectment."

## TRIAL.

See "New Trial"; "Witnesses."
Assessment of damages question for jury, see "Damages," § 1.

*Proceedings incident to trials.*

Right to trial by jury, see "Jury," § 1.

*Trial of actions by or against particular classes of persons.*

See "Carriers," § 4; "Master and Servant," § 7; "Principal and Agent," § 1; "Seamen."

*Trial of particular civil actions or proceedings.*

See "Negligence," § 1.
For death of servant, see "Master and Servant," § 7.
Foreclosure suits, see "Mortgages," § 1.
For loss of or injury to cargo, see "Shipping," § 2.
For personal injuries, see "Carriers," § 4; "Master and Servant," § 7; "Railroads," § 3; "Seamen."
Suits in equity, see "Equity," § 4.
Suits to try tax titles, see "Taxation," § 2.

*Trial of criminal prosecutions.*

See "Criminal Law," § 3.

**§ 1. Arguments and conduct of counsel.**

*Improper remarks made by counsel in argument to the jury *held* not ground for reversal of the judgment, where they were withdrawn, and the court took such action as was apparently satisfactory to the adverse party at the time, and to which no exception was taken.—Alaska-Treadwell Gold Min. Co. v. Cheney (C. C. A.) 593.

**§ 2. Taking case or question from jury.**

*The direction of a verdict is discretionary with the trial judge.—Norfolk & W. Ry. Co. v. Gardner (C. C. A.) 114.

Where both parties join in a demurrer to the evidence, plaintiff is entitled to judgment, if, in view of the evidence, the jury would have been legally justified in returning a verdict for plaintiff.—Salmons v. Norfolk & W. Ry. Co. (C. C.) 722.

## TRUST DEEDS.

See "Chattel Mortgages"; "Mortgages."

## TRUSTS.

Effect of trust on limitation, see "Limitation of Actions," § 1.
Sale on execution of remainder estate created by trust deed, see "Execution," § 1.
Specific performance of contract for conveyance of trust property, see "Specific Performance," § 2.

**§ 1. Creation, existence, and validity.**

*Where a surety, which had agreed to advance money in connection with the purchase of certain mining property by the principal, for which it was bound as surety, and in a certain contingency was to receive a conveyance of such property, to operate the same, account for the proceeds, and when reimbursed to reconvey to its principal, by refusing to make agreed payments caused the property to be resold and obtained the title from the court, it took and held the same as a trustee only, and was subject to a suit by the principal for an accounting and to enforce the trust in accord-

ance with the agreement.—Smith v. United States Fidelity & Guaranty Co. (C. C. A.) 15.

**§ 2. Construction and operation.**

A deed by a trustee for a wife, remainder to husband, *held* only to affect the wife's interest, leaving the husband's remainder, which had been sold under execution, as originally created, and therefore did not constitute a constructive trust of the latter interest which could not be executed by the statute of uses.—Dunkerson v. Goldberg (C. C. A.) 120.

*A deed conveying certain property in trust to the use of a wife for life, remainder to her husband, *held* to create an equitable life estate in the wife and an equitable vested remainder in the husband.—Dunkerson v. Goldberg (C. C. A.) 120.

**§ 3. Management and disposal of trust property.**

Acts of trustee *held* to constitute a breach of trust rendering it liable to complainant for the amount of an indebtedness due it from a third person which it was defendant's duty as trustee to protect.—Frank Waterhouse & Co. v. Dodge (C. C. A.) 1.

A contract made by one to whom the legal title of a patent has been conveyed in trust for himself and others named, without power to sell, by which as trustee he agrees to sell and convey the patent, cannot be specifically enforced even as to his own equitable interest by the purchaser who is charged with notice of the trust and its limited character and of the rights of the other joint owners thereunder which would be destroyed by such sale.—McDuffee v. Hestonville, M. & F. Pass. Ry. Co. (C. C. A.) 36.

A quitclaim deed by a trustee to another *held* to vest the property in the grantee subject to all the equities attaching to it in the hands of the grantor including the rights of an execution purchaser of the interest of the remainderman.—Dunkerson v. Goldberg (C. C. A.) 120.

**§ 4. Establishment and enforcement of trust.**

In a suit against a trustee for breach of trust in failing to protect the interest of a creditor in certain property, the debtor *held* not an indispensable party.—Frank Waterhouse & Co. v. Dodge (C. C. A.) 1.

The absence of one who was an indispensable party to the granting of certain relief prayed for in a bill *held* not to render it demurrable, where it alleged grounds for other relief to which such person was not a necessary party.—Watson v. National Life & Trust Co. (C. C. A.) 7.

Reducing claims to judgment *held* not a necessary condition precedent to the maintenance of a suit to follow a trust fund.—Watson v. National Life & Trust Co. (C. C. A.) 7.

*Complainant's right to relief for breaches of trust committed by its president not discovered by complainant until after the president's death *held* not barred by laches.—Russel v. Huntington Nat. Bank (C. C A.) 868.

## TUGS.

See "Towage."

## UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 2.

## UNITED STATES.

See "Customs Duties."
Conspiracy to defraud, see "Conspiracy," § 1.
Courts, see "Courts," §§ 2, 3.
Courts, see "Removal of Causes."
Exercise of power of eminent domain, see "Eminent Domain," §§ 1, 2.
Indians, see "Indians."
Jurisdiction of federal court to enjoin foreclosure suit, see "Mortgages," § 1.
Limitations applicable to prosecution for conspiracy to defraud, see "Criminal Law," § 1.
Objection to jurisdiction of federal court ground for abatement, see "Abatement and Revival," § 1.
Public lands, see "Public Lands," § 1.
Removal of action against United States officer, see "Removal of Causes," § 1.

**§ 1. Property, contracts, and liabilities.**

Under Act. Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), amendatory of Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), creditors for labor or materials furnished to a contractor for government work cannot maintain an action on his bond until the lapse of six months after the work has been completed, whether by the contractor or by the United States on his default, and a settlement to determine the prior rights and claim of the United States on the bond.—United States v. Winkler (C. C.) 397.

**§ 2. Claims against United States.**

*Under the express provisions of Rev. St. § 1091 (U. S. Comp. St. 1901, p. 747), interest is not recoverable against the United States on unpaid accounts or claims in the absence of a stipulation to pay interest, or a statute allowing it.—United States v. Sargent (C. C. A.) 81.

A court of admiralty authorized by special act of Congress to hear and determine a claim for damages for the sinking of a vessel in collision by a gunboat of the United States has no power to allow interest against the government unless expressly authorized by the act.—Pennell v. United States (D. C.) 75; The Winooski, Id.

## VALUE.

Limits of jurisdiction, see "Courts," § 2.

## VENDOR AND PURCHASER.

See "Sales."
Requirements of statute of frauds as to sale of real estate, see "Frauds, Statute of," § 1.

Specific performance of contract, see "Specific Performance."

**§ 1. Performance of contract.**

*Vendors in a contract for a sale of lands *held* not to have a merchantable title which entitled them to a decree for specific performance of the contract.—Lindsey v. Humbrecht (C. C.) 548.

## VERDICT.

Directing verdict in civil actions, see "Trial," § 2.
Review on appeal or writ of error, see "Appeal and Error," § 7.
Setting aside, see "New Trial," § 1.

## VICE PRINCIPALS.

See "Master and Servant," § 4.

## VILLAGES.

See "Municipal Corporations."

## WAGES.

Of seamen, see "Seamen."

## WAIVER.

See "Estoppel."

*Of objections to particular acts, instruments, or proceedings.*

Failure to deliver goods sold, see "Sales," § 3.

*Of rights or remedies.*

See "Insurance," § 4.
Exemption of bankrupt, see "Bankruptcy," § 7.
Revision of bankruptcy proceedings, see "Bankruptcy," § 8.

## WAREHOUSEMEN.

Warehouses for imported goods, see "Customs Duties," § 3.

## WARRANTY.

By insured, see "Insurance," § 3.

## WATERS AND WATER COURSES.

Determination of constitutionality of laws for protection of natural mineral springs, see "Constitutional Law," § 1.
Laws impairing obligation of contract with water company, see "Constitutional Law," § 2.
Legality of contract for services in inducing city to purchase water works, see "Contracts," § 1.
Power of city to purchase water works, see "Municipal Corporations," § 1.
Pumping water through land as trespass, see "Trespass," § 1.

**§ 1. Natural water courses.**

A riparian owner has no vested right in future accretions and cannot maintain an action for damages against one who lawfully obstructs or diverts a stream which has in the past carried and deposited such accretions from the lands of others so that it will no longer do so.—Cohen v. United States (C. C.) 364.

**§ 2. Conveyances and contracts.**

A lease executed under authority of Act Aug. 11, 1888, c. 860, 25 Stat. 417, granting the right to use surplus water from the Muskingum river for the purpose of operating an electric power plant construed and the lessee, *held* not relieved from the payment of rent by the refusal of the government to furnish water not required for such purpose.—United States v. Shryock (C. C.) 790.

**§ 3. Public water supply.**

The procedure of appraisers selected to make a valuation of the property of a water company under a contract for its sale to a city in causing the books of the company to be examined without the presence of counsel for the parties *held* within their discretion and not to invalidate their appraisal.—Omaha Water Co. v. City of Omaha (C. C. A.) 225.

A valuation of property by appraisers selected as experts under a contract for its sale is not an arbitration, and the appraisers do not act judicially, nor are they bound by the rules relating to arbitrations; but, so long as they act honestly and in good faith, they have a wide discretion as to their methods of procedure and sources of information.—Omaha Water Co. v. City of Omaha (C. C. A.) 225.

A provision in a contract for the purchase of waterworks by a city that their value shall be ascertained by appraisers selected by the parties relates to a matter of public concern, and, where the appraisers all qualify and act, the decision of the majority is a valid exercise of the power and is binding on the parties.—Omaha Water Co. v. City of Omaha (C. C. A.) 225.

An appraisal of a large system of waterworks under a contract of purchase will not be invalidated because the title to a small part of the property not vital to the integrity of the system is afterward found to be defective, nor because it may include pieces of property not necessary to the system; a court having power to make an equitable adjustment of such matters between the parties.—Omaha Water Co. v. City of Omaha (C. C. A.) 225.

## WAYS.

Public ways, see "Municipal Corporations," § 2.

## WELLS.

Oil or gas wells, see "Mines and Minerals," §§ 2, 3.

## WITNESSES.

See "Evidence."
Experts, see "Evidence," § 3.
Opinions, see "Evidence," § 3.
Perjury, see "Perjury."

**§ 1. Competency.**

*While a witness convicted of perjury is thereby rendered incompetent to testify in a federal court under Rev. St. § 5392 (U. S. Comp. St. 1901, pp. 3653, 3654), if convicted of any other crime, his competency to testify in the federal court depends on the law of the state, under Act July 6, 1862, c. 189, 12 Stat. 588.—Wise v. Williams (C. C.) 161.

*A witness convicted of making false national bank reports to the Comptroller of the Currency, not being thereby disqualified to testify under the laws of New York, *held* competent to testify in federal courts sitting in that state under Act July 6, 1862, c. 189, 12 Stat. 588.—Wise v. Williams (C. C.) 161.

**§ 2. Examination.**

*In cross-examination it is not permissible to assume as true a damaging state of facts without any reason to believe that there is a foundation of truth for it.—New York Life Ins. Co. v. Rankin (C. C. A.) 103.

**§ 3. Credibility, impeachment, contradiction, and corroboration.**

*Where, on cross-examination, a witness admitted having previously made a sworn statement, the entire statement, and not only such parts thereof as counsel suggested were contained therein, should be admitted for purposes of contradiction.—Jones v. United States (C. C. A.) 417.

## WORDS AND PHRASES.

"Abandonment of contract."—Roth v. Mutual Reserve Life Ins. Co. (C. C. A.) 282.
*"Action."—McAndrews v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 856.
*"Act of bankruptcy."—In re McLoon (D. C.) 575.
"Articles of metal, whether partly or wholly manufactured."—Shallus v. United States (C. C. A.) 653.
*"Cause of action."—McAndrews v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 856.
*"Civil action."—United States v. Southern Pac. Co. (D. C.) 412.
*"Common carrier."—United States v. Sioux City Stock Yards Co. (C. C.) 556; The El Rio (D. C.) 567.
"Complete performance of contract."—United States v. Winkler (C. C.) 397.
*"Descend."—Shulthis v. MacDougal (C. C.) 331.
"F. o. b. Philadelphia."—Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. (C. C. A.) 848.
*"Freight pending."—The Captain Jack (D. C.) 808.
*"Furnace."—Thomas v. F. B. Vandegrift & Co. (C. C. A.) 645.
*"Grand inquest."—Geiger v. United States (C. C. A.) 844.
"Granite dressed."—Alexander Murphy & Co. v. United States (C. C. A.) 871.
"Highway."—Southern Bell Telephone & Telegraph Co. v. City of Mobile (C. C.) 523.
*"Inherited."—Shulthis v. MacDougal (C. C.) 331.
"Inherited lands."—Shulthis v. MacDougal (C. C.) 331.
*"Inquest."—Geiger v. United States (C. C. A.) 844.
*"Iron ore."—Hill v. Francklyn & Ferguson (C. C. A.) 880.
*"Judge."—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.
*"Knowingly and willfully."—United States v. Sioux City Stock Yards Co. (C. C.) 556.
"Lien obtained through legal proceedings."—In re West Side Paper Co. (C. C. A.) 110.
*"Lobbyist."—Burke v. Wood (C. C.) 533.
*"Malice."—United States v. Hart (C. C.) 192.
*"Manufacture."—Shallus v. United States (C. C. A.) 653.
*"Manufactured from tin plate."—Shallus v. United States (C. C. A.) 653.
*"Moot case."—Ex parte Steele (D. C.) 694; Ex parte Birch, Id.
*"Murder."—United States v. Hart (C. C.) 192.
*"New acquisition."—Shulthis v. MacDougal (C. C.) 331.
*"Pigments."—Hill v. Francklyn & Ferguson (C. C. A.) 880.
*"Preference."—In re W. W. Mills Co. (D. C.) 42; In re Hickerson (D. C.) 345.
"Principally engaged in manufacturing."—In re Alaska American Fish Co. (D. C.) 498.
"Sake."—United States v. Komada & Co. (C. C. A.) 465.
"Sheets * * * commercially known as tin plates."—Shallus v. United States (C. C. A.) 653.
*"Similar."—United States v. Komada & Co. (C. C. A.) 465.
*"Similarity."—United States v. Komada & Co. (C. C. A.) 465.
"Single train."—United States v. Chicago Great Western Ry. Co. (D. C.) 775.
*"Sole ownership."—Rochester German Ins. Co. of Rochester, New York, v. Schmidt (C. C. A.) 447.
"Still wine."—United States v. Komada & Co. (C. C. A.) 465.
"Subject-matter of the action."—McAndrews v. Chicago, L. S. & E. Ry. Co. (C. C. A.) 856.
*"Taking of property."—Cohen v. United States (C. C.) 364.
*"Toys."—Tuska v. United States (C. C.) 814.
*"Unconditional ownership."—Rochester German Ins. Co., of Rochester, New York, v. Schmidt (C. C. A.) 447.

"Waste."—Shallus v. United States (C. C. A.) 653.
"Wholly or partly manufactured from tin plate."—Shallus v. United States (C. C. A.) 653.
*"Willful."—Chicago, St. P., M. & O. Ry. Co. v. United States (C. C. A.) 835.
*"Willfully."—United States v. Sioux City Stock Yards Co. (C. C.) 556.
*"Works of art."—F. B. Vandegrift & Co. v. United States (C. C.) 1003.

## WRITS.

*Particular writs.*
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Writ of error, see "Appeal and Error."

## WRONGS.

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***Point annotated. See syllabus.**

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