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CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

MAY—JUNE, 1909.

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

A TABLE OF STATUTES CONSTRUED IS GIVEN
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FEDERAL REPORTER, VOLUME 168.

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OF THE

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

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¹ Appointed April 26, 1909.

² Promoted to Circuit Judge, May 18, 1909.

³ Appointed May 18, 1909, to succeed William M. Lanning.

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* Appointed April 8, 1909.

* Appointed May 25, 1909.

* Appointed May 13, 1909.

† Resigned.

* Died March 1, 1909.

* Appointed March 16, 1909, to succeed John K. Richards.

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Hon. GEORGE DONWORTH, District Judge, Washington ¹³	Seattle, Wash.

¹⁰ Resigned.

¹¹ Appointed May 18, 1909, to succeed Milton D. Purdy.

¹² Appointed April 28, 1909.

¹³ Appointed May 18, 1909.

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(xxxv)†

CASES

ARGUED AND DETERMINED

IN THE

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

WABASH R. CO. v. UNITED STATES.

ELGIN, J. & E. RY. CO. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. February 3, 1909.)

Nos. 1,461, 1,473.

1. COMMERCE (§ 27*)—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT.

The amendment of March 2, 1903 (32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1907, p. 885]), to the safety appliance act applies to all cars and trains operated by a railroad carrier of interstate commerce over an interstate highway, irrespective of whether they are operated between points situated in the same state, or whether they are empty, or whether the traffic carried is intrastate traffic, and is constitutional.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. RAILROADS (§ 229*)—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT.

A penal statute, or one in derogation of the common law, should not be hedged in to less than the legislative intent, if that is clearly revealed by the act as a whole. From the title, and from every part of the safety appliance acts, it is indisputable that the purpose was to promote the safety of interstate passengers and freight, and to protect the lives and limbs of railroad employes while engaged in the work of interstate transportation.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

3. COMMERCE (§ 27*)—SAFETY APPLIANCE ACTS—CARS SUBJECT TO RESTRICTIONS.

If a car is set apart for carrying intrastate traffic exclusively, but if it is not confined to intrastate trains on an intrastate line, the fact that while it is laden with intrastate traffic it is hauled in connection with interstate cars on an interstate line requires it to be equipped with automatic couplers and grab-irons, in compliance with the federal safety appliance acts.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*]

4. EVIDENCE (§ 514*)—EXPERT EVIDENCE.

An expert trainman may be asked, at the trial of a case under the safety appliance acts, as to the condition of a car coupler in question, and as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to what was necessary in order to operate that coupler, as the mode of operation of automatic coupling mechanism and the effect of various conditions thereof are proper subjects for expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2323; Dec. Dig. § 514.*]

(Syllabus by the Court.)

5. WORDS AND PHRASES—"USED."

The word "used," in Safety Appliance Act March 2, 1893, requiring common carriers to equip any car used in moving interstate traffic with automatic couplers, applies to all cars and trains operated by a railroad carrier of interstate commerce over an interstate highway, irrespective of whether they are operated between points situated in the same state, or whether they are empty, or whether the traffic carried is interstate traffic.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7228-7237; vol. 8, p. 7825.]

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

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

These cases arise under the safety appliance acts. The first, second, and fourth sections of Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), are as follows:

"Section 1. That from and after the first day of January, eighteen hundred and ninety-eight, 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, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

In the first section of Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), it was provided: "That the provisions and requirements of the act" of March 2, 1893, "shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements * * * relating to train brakes, automatic couplers, grab-irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

In the Wabash case the only question is the sufficiency of the petition. The averments in substance were that the Wabash Company was an interstate common carrier, owning and operating an interstate railroad, and engaged in transporting thereover commodities in interstate traffic; that on a day named it hauled on its line of railroad a car that was not equipped with automatic couplers; that the car was one "regularly used in the movement of interstate traffic," but at the time in question was empty. As against the demurrer to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this petition it stands admitted that the defective car was not a part of an interstate train, was not itself being moved on an interstate journey, and was not exclusively devoted to the carriage of commodities in interstate traffic. Contentions are presented that the car was not within section 2 of the act of 1893, and that if, by reason of the declaratory and interpretative act of 1903, this car be held to be included, the legislation would be in excess of the powers of Congress to regulate commerce.

In the Elgin, Joliet & Eastern case, besides the same matter of pleading, the question is presented by the evidence "whether a car, merely in the same train with other cars that are carrying interstate commerce, is by the fact alone of being in such a train, within the provisions of the act." Some minor points are urged, the facts in relation to which are indicated in the opinion.

In Case No. 1,461 :

N. S. Brown and McAnulty & Allen, for plaintiff in error.

William A. Northcott, U. S. Atty., Henry A. Converse, Asst. U. S. Atty., and Philip J. Doherty and Luther M. Walter, Sp. Asst. U. S. Attys.

In Case No. 1,473 :

Kemper K. Knapp, R. W. Campbell, William Duff Haynie, and William Beye, for plaintiff in error.

Edwin W. Sims, U. S. Atty., Henry A. Parkin, Asst. U. S. Atty., and Philip J. Doherty and Luther M. Walter, Sp. Asst. U. S. Attys.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Do the words in the second section of the act of 1893, "any car used in moving interstate traffic," mean that a car is subject to the statute only during the time it is actually employed in moving interstate traffic, or that every car is within the act if it is customarily or repeatedly employed in such movements? Both meanings are within the dictionary definitions of "used," and, if regard were paid only to the rule that a penal statute should be strictly construed, the narrower meaning might be taken. But a penal statute, or one in derogation of the common law, should not be hedged in to less than the legislative intent if that is clearly revealed by the act as a whole. From the title and from every part of the act we think it is indisputable that the purpose was to promote the safety of interstate passengers and freight and to protect the lives and limbs of railroad employes while engaged in the work of interstate transportation. The risks incurred in coupling and uncoupling are more imminent on switching tracks, where trains are made up and distributed, and where empty cars are set out at freight houses or factory platforms to be loaded, than on the main lines. It is not reasonable to suppose that Congress intended to cover only the smaller part of the dangers; and since the language employed is entirely consistent with the larger meaning, section 2 of the act of 1893 should be held to forbid an interstate carrier from hauling or using on its line any car that is customarily or generally employed in moving interstate traffic, and that is not equipped with automatic couplers, even though at the particular time the car be empty or be moving intrastate traffic.

This interpretation follows, we believe, from the decision in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

A dining car that had been in regular service between San Francisco, Cal., and Ogden, Utah, was dropped by an east-bound train at Promontory, Utah, to be attached to the next west-bound train. While the car was standing empty on a siding, a freight brakeman was ordered to couple it to an engine for the purpose of turning it around preparatory to its being picked up by the west-bound train. The car was not equipped with automatic couplers. "Confessedly this dining car," the Supreme Court said, "was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

The Elgin, Joliet & Eastern record involves the further inquiry: If a car is set apart for carrying intrastate traffic exclusively, but if it is not confined to intrastate trains on an intrastate line, does the fact that while it is laden with intrastate traffic it is hauled in connection with interstate cars on an interstate line require it to be equipped with automatic couplers and grab irons? While the usual canons of construction might not lead to holding such a car to be within sections 2 and 4 of the act of 1893, it seems to us beyond doubt that the rule of interpretation prescribed in section 1 of the act of 1903 forecloses the question. The provisions relating to automatic couplers, etc., "shall be held to apply" to all cars used on any railroad engaged in interstate commerce and to all other cars used in connection therewith.

But these interpretations, it is insisted, carry the legislation beyond the powers of Congress. The answer, in outline, is this: When the Declaration of Independence ripened into fact, the several states could have taken their separate places in the family of nations as absolutely sovereign powers, and the commerce among them would have been on the same footing as commerce "with foreign nations" and "with the Indian tribes." On abandoning their "firm league of friendship" and adopting the Constitution, the states divested themselves of the power to regulate interstate commerce as completely as they did of the power to regulate foreign commerce, and transferred to the nation in equal terms the power to regulate both. To the extent that there is a difference between the power of Congress over interstate commerce and over foreign commerce, it comes not from any difference in the grants, but from the fact that other provisions of the Constitution which may limit the exercise of the power over interstate commerce may have no application to foreign commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. But though the power conferred by the commerce clause is absolute, except as limited by other parts of the Constitution, yet, inasmuch as that instrument is one of "enumeration rather than of definition," the questions always remain in a given case: Is the subject-matter interstate commerce? Is the purported regulation in fact a regulation?

And is the regulation obnoxious to any of the restraining clauses of the Constitution?

In response to these questions no generalizations in advance of the long processes of judicial inclusion and exclusion should be attempted, and the particular answers should be understood as limited to the facts of the cases. That transportation is commerce and that those who do the business of carrying passengers and freight across state lines are engaged in interstate commerce are matters settled beyond question. *State Freight Tax Case*, 15 Wall. 232, 21 L. Ed. 146, and authorities *supra*. No restraining clauses are relied on by counsel to limit the face value of the commerce clause as applied to these cases. No doubt is suggested that the requirement of safety appliances on cars that are actually laden with interstate traffic is a regulation of interstate commerce. Now, if the same interstate carrier may haul on the same interstate highway cars that need not be equipped because though regularly used in interstate traffic they are empty at the time (the *Wabash* case) and also cars that need not be equipped because they are laden with intrastate traffic exclusively (the *Elgin* case), the purpose of equipping the cars that are carrying interstate traffic would manifestly be largely impaired or destroyed; for in switching movements, in derailments, and in collisions, disaster would come to the interstate car quite irrespective of the character of the other cars involved. Therefore Congress, under the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" of regulating interstate commerce, had the right to make the laws in question; and they are paramount, of course, to all laws of the states. This result, which we deem sound in reason, is indirectly sustained, we believe, by the *Employer's Liability Cases*, *supra*; for there the statute was overthrown only because an inseparable part of it was found to have no necessary or proper relation to the security of interstate transportation.

In the *Elgin* case it is insisted that, although the car in question was not furnished with equipment by which it could be uncoupled from the adjacent car "without the necessity of men going between the ends of the cars," the act was not violated because the adjacent car was equipped so that it could be uncoupled from the car in question in the prescribed manner. Under the act each car is a unit and must itself be completely equipped so that trainmen may go about their work without changing their memories with differences between cars.

An expert trainman, after describing the broken condition of a coupler, was asked:

"In the condition in which that coupler was on that end of the car at that time, what was necessary in order to operate the coupler?"

He answered:

"It would necessitate a man going between the ends of the cars and taking the part of the chain that was left with the coupler to operate that coupler."

The question was objected to on the ground that it called for a conclusion and invaded the province of the jury. In our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony.

By an oral stipulation in open court the Elgin Company admitted that "it is a common carrier engaged in interstate commerce." Under the assignment that the court erred in refusing to direct a verdict for defendant, contention is now made that there was no evidence to show that defendant was an interstate carrier at the times laid in the petition. That was not disclosed as one of the grounds of the motion. If it had been, defendant would have been compelled to amend the stipulation, or plaintiff would have introduced the evidence, to obviate the taking of which the stipulation had been made. As the point was not presented to and ruled on by the trial court, it is not available here.

The judgment in each case is affirmed.

GROSSCUP, Circuit Judge (concurring). I feel that in view of the far reach that this decision gives to the commerce clause of the Constitution, and the fact that our judgment is not unanimous, I should indicate the line of thought that has led me (overcoming as I went along a good deal of doubt) to the conclusion arrived at.

The declaration alleges that plaintiff in error is a common carrier engaged in interstate commerce; that on the date named, it hauled on its line of railroad a car regularly used in the movement of interstate commerce, but, at the time, empty; that the car was being hauled from a point in the state of Illinois "in an easterly direction" (whether destined to some point in the state of Illinois is not stated); and that the line of railroad over which it was being hauled is a part of a through highway, over which interstate traffic is being continually hauled, from one state in the United States to another state in the United States.

Assuming that every averment of the declaration is true, it appears (the pleading to be taken most strongly against the pleader) that the car involved in this suit may, on this date, and on this trip, have been hauled alone, or one of a train made up to start, run, and stop, wholly within the state of Illinois; actually starting, running, and stopping wholly within the state of Illinois; and carrying traffic wholly originating in the state of Illinois, and whose destination was at points wholly in the state of Illinois—neither the car, nor its contents, nor any part of the train of which the car was a part, nor any part of the train's contents being either in purpose, operation, or traffic actually carried, a train in interstate commerce, except as it may be such by reason of the fact that it was moving over rails that were part of a line of railroad that is an interstate highway, and was operated by a carrier that, in addition to the operation of this train, was engaged in operating trains in interstate commerce. That a car or train thus starting, running, and stopping wholly within a single state, and not intended to run beyond the state, and carrying traffic originating wholly within the state, and destined to points wholly within the state, is not, for the time being, actually "engaged" in interstate commerce, is a proposition that does not need argument. That the traffic, thus carried from a point wholly within the state to another point wholly within the state, is not interstate commerce, is a proposition, also, that does not need argument.

But does it follow, that because, considered by itself, a given train or car is not for the time being actually "engaged" in interstate commerce, or that the contents are not interstate commerce, that the "railroad," as an entirety, is not a highway of interstate commerce, or the operation of its trains, as an entirety, including the operation of such trains or cars, is not within the purview of the power given Congress? We are now dealing with subject-matter of government. May not specific trains and cars, and their contents, considered by themselves, fall within a subject-matter of government essentially different from the operation of the railroad as an entirety, in which every locomotive, train, and car are so correlated that the operation of each is but a correlative part of the operation of the whole? And does not the existence of this distinction bring the operation of such car or train, irrespective of their status as mere vehicles of the commerce with which for the time being they are loaded, within the railroad's operations that, as an entirety, are operations in interstate commerce, and, therefore, within the power of Congress to regulate? These are the precise questions that this case presents.

The first, second, and fourth sections of the act of March 2, 1893 (I quote them), are as follows:

"Section 1. That from and after the first day of January, eighteen hundred and ninety-eight, 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, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

In the first section of Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), it was provided:

"That the provisions and requirements of the act (that of March 2, 1893) shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements * * * relating to train brakes, automatic couplers, grab-irons, and the height of draw bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

The act of March 2, 1893, standing by itself, need not be interpreted to include the purely intrastate car or train described. There is nothing in the language of that act that necessarily includes such an intrastate car or train. The words "any car used in moving interstate

traffic" may very reasonably be interpreted to mean any car used, at the time complained of, in the moving of interstate traffic, or in connection with the movement of interstate traffic. So far as the act of March 2, 1893 goes, the constitutional power of Congress to regulate a purely intrastate train, carrying purely intrastate traffic, but moving on rails that are a part of an interstate line, and by a carrier that in addition operates interstate trains, is not necessarily raised.

But coming to the act of March 2, 1903, we find that the provisions of the preceding act relating to train brakes, automatic couplers, and the like, are declared "to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith"—language that leaves no reasonable alternative to holding, that no matter how entirely intrastate the movement of the car, or the train to which the car is attached, may be, and how entirely intrastate the traffic carried may be, the hauling of the car or train thus unequipped is within the act, provided the "railroad" on which the car or train is used is one engaged in interstate commerce. Is such regulation within the constitutional powers of Congress?

The General Government, within its constitutional field of power, is a government that is just as direct, plenary, and domestic as the several governments of the states; and the several governments of the states, outside the field of constitutional power bestowed on the Government of the United States, are just as plenary as the Government of the United States; so that, generally speaking, within its powers to regulate, every person and corporation, including common carriers, are answerable to the regulation of the Government of the United States, and exempt from being answerable to the regulation of the governments of the states; and within their power to regulate, every person and corporation, including common carriers, are answerable to the regulation of the state governments, and equally exempt from being answerable to the regulation of the General Government.

But such is not always the case; for although the division of power between the General Government and the states is the division of subject-matter of government, and the line to be drawn, in any case presenting an inquiry respecting power, is the line between such divisible subject-matter, there are subject-matters of government that at one and the same time directly affect, and are directly connected with, other subject-matter lying on both sides of the line. And it is just here that the difficulty of running the line arises. Just such a case is the one before us.

Interstate commerce, in its broadest sense, is commercial intercourse between the states; the obverse of which would seem to be, that commercial intercourse that is wholly within the state is not interstate commerce. The railway locomotive, train, or car, or the car as a constituent of the train, that goes from state to state carrying wholly, or in part, any interstate commerce, are for the time being instrumentalities of interstate commerce; as also the locomotive, train, or car that, though not going out of the state, carries on its way through the state traffic that is in interstate transit; and the

obverse of that would seem to be that a train traveling wholly between points in the same state, and not going out of the state, and carrying wholly commerce originating in the state, destined to points in the same state, is not for the time being an instrument of interstate commerce. But may not the operation of such a purely intrastate train (an instrumentality solely of intrastate commerce when considered by itself) be so bound up with the operation of interstate trains or instrumentalities of interstate commerce—may not the connection between them be so direct and so inseparable—that in substance their operation is one and the same thing—but a part only of that which constitutes, in its entirety, the operation of the whole railroad, including all its trains, and necessarily, therefore, the subject-matter of one and the same source of regulation. Certainly on railroads over which interstate trains are operated there are some matters (such as what signal lights cars and trains shall carry; what kind of examination respecting eyesight employes dependent on these lights shall be subject to; whether air brakes shall be employed, and to what extent; the character of switches, the character of rails, the character and operation of interlocking devices, at railway crossings) that though local, constitute subject-matter so directly connected with the operation of all trains, irrespective of whether they are intrastate or interstate—are so connected with the operation of the railroad as an entirety—that they may be well held to constitute but a single subject-matter of governmental regulation. And in such cases, where the regulation cannot go to both state and General Government, it goes of course, whenever the General Government acts, to the General Government.

Now it seems to me that in the matter of safety appliances, in the very nature of the case, the operation of trains by a railroad engaged in interstate commerce, irrespective of whether the trains are intrastate or interstate trains (that is to say, the operation of the railroad as an entirety), leads to the same view, and for the same practical reasons. Primarily, these safety-appliance acts are to safeguard railway employes—the car not being the unit, but the train of which the car is a constituent—and in carrying out this primary object, the necessity of regulation extends to every car to be operated, not only those to be operated from state to state, but those to be operated wholly within a given state. Indeed, one of the chief dangers that regulation is intended to safeguard against is that incurred in the making up and the unmaking of trains in the switch yards—the putting together of the constituents into a unit, and their subsequent dissolution—in the process of which all distinction between trains and cars that have been, or are to be, used in interstate commerce or intrastate commerce, is obliterated, thereby subjecting the employes of trains that have come from, or are going into interstate commerce, to all the dangers that lurk in all the cars used on the road, in both interstate and intrastate operation. Besides, trains that are purely intrastate, unregulated in the matter of automatic couplings, may be a menace to persons and property carried by interstate trains—differing in that respect only in degree from the menace of trains

unequipped with air or other power brakes—a view that seems to bring the subject-matter of regulation respecting automatic couplings within the power of the General Government; for power “to regulate” being unquestioned, the boundaries of that power are not determined by the degree of the need of regulation, but by the question whether there be a need that is a substantial one.

This view I think to be right, not only upon the practical considerations stated, but is the only view consistent with the cases already decided. True, the clearest cases relate to the power of Congress to make regulations, both for the safety of the public and of employes, upon the highways by water—regulations that apply not only to vessels navigating between different states, but to vessels navigating between points in the same state, provided the waterway is an interstate highway, including regulations analogous to the regulations here under review. *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23. But as said by Mr. Justice Brewer, in *Re Debs*, 158 U. S. 590, 15 Sup. Ct. 908, 39 L. Ed. 1092, “the basis upon which rests its (the General Government’s) jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce.” And in the regulation both of artificial and of natural highways, the measure of the General Government’s power is the substantial need of interstate commerce; for we can not conceive that on one of the chief considerations that led to the formation of the General Government, the power to regulate was meant to be anything less than the full power that the need of the thing to be regulated might require.

SEAMAN, Circuit Judge (dissenting in No. 1,461; concurring in No. 1,473). The judgment against the Wabash Railroad Company can be upheld only on this proposition: Although the foreign car in question was moved on its line of railroad within the state of Illinois, for a movement commencing and ending in such state, in no sense connected with interstate traffic or with the operation of a train therein, it is nevertheless subject to the penal provisions of the safety appliance acts for moving such car, because (a) the company engages as well in interstate commerce over such line, and (b) the foreign car so moved is one “regularly used in the movement of interstate traffic.” Laying out of view the want of an averment charging notice to the company of such prior service of this car, I am of opinion that the provision so interpreted exceeds the power vested in the general government under the Constitution. It is well and rightly settled, in conformity with one of the fundamental objects sought in the permanent union of states and people as a nation, that the commerce clause granted supreme national power to regulate and control interstate commerce and all instrumentalities engaged therein while so employed. All legislative powers, however, were theretofore inherent in the state; and with the adoption of the Constitution the powers surrendered to the general government were such only as that instrument conferred upon it—either expressly granted or necessarily im-

plied in the terms—while the great residuum of legislative authority remained unimpaired in the state. This grant of national authority over interstate commerce was not exercised by the Congress over the great field of traffic by railroads for many years, and each state was thus left free to legislate for all regulation thereof within its borders. With the extension of railroads and interstate traffic throughout the country, however, national control became needful and congressional enactments have well attained that object. In so far as such legislation deals with that subject-matter, as above stated, it becomes paramount, and I believe state enactments are without force for interference, directly or indirectly, with subject-matter included therein; but regulation of intrastate traffic and movements, not connected with an operation which is of the interstate class, remains entirely within the state power and control. No clash of authority can arise when these jurisdictional boundaries are strictly observed by nation and state.

The Wabash Company, operating its lines for both classes of traffic—in the one instance an interstate movement and the other exclusively intrastate—must be governed by one or the other authority according to the nature of the operation. Its duality of obligation is not conflicting, but separable. For the movement of a car for a purpose of intrastate traffic alone, it must observe the state requirements—which include those at common law—and when the car is moved for a purpose of interstate traffic, the operation becomes subject to congressional regulation. While the carrier and all instrumentalities of commerce are subject to such regulation for all operations involved in interstate traffic, neither the carrier nor the car in question, is subject per se to regulation otherwise by Congress. I cannot concur in the view that a railroad, built and operated exclusively under the authority of the state, becomes a national highway when it crosses the state boundary under like authority, in the sense of complete national control over its operations as well in traffic not passing such boundary.

I am constrained, therefore, to dissent from affirmance of the judgment against the plaintiff in error, Wabash Company.

In reference to the safety appliance acts, I am impressed with no doubt of the validity of these enactments, exclusive of the amendment of 1903, when interpreted in conformity with the foregoing view, as their terms authorize and the opinion of this court concedes to be within their literal definition. I believe the amendment of 1903 furnishes the only ground for the contention of liability, and that so interpreted the amendatory provision is unconstitutional.

The judgment against the Elgin, Joliet & Eastern Railway Company is not within the above-stated objections, and I concur in the conclusion for affirmance thereof.

IBERVILLE PLANTING & MFG. CO., Limited, v. MONONGAHELA COAL CO.

(Circuit Court of Appeals, Fifth Circuit. February 16, 1909. On Rehearing, March 30, 1909.)

No. 1,727.

1. ACTION (§ 22*)—LEGAL OR EQUITABLE—SUIT INVOLVING PRIORITY OF LIENS OR PRIVILEGES.

A suit which involves the recognizing and marshaling of privileges under the laws of Louisiana should be prosecuted on the equity side in a federal court.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 22.*]

2. AGRICULTURE (§ 11*)—LOUISIANA STATUTE—PRIVILEGE FOR SUPPLIES FURNISHED TO PLANTATION.

Although a contract for the sale and purchase of coal was made in another state, where it was delivered in Louisiana, and notes taken for the purchase price were there made, and recite that the coal was purchased and furnished for use on a Louisiana plantation, and was so used in harvesting and manufacturing a crop thereon, the seller is within Rev. Civ. Code La. art. 3217, which gives the furnisher of supplies to any farm or plantation a privilege on the crop of the year.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. § 18; Dec. Dig. § 11.*]

3. AGRICULTURE (§ 11*)—LOUISIANA STATUTES—PRIVILEGE ON CROP.

Act No. 66, p. 114, Laws La. 1874, providing for the making and recording of contracts, giving a lien or privilege on the crop of a farm or plantation for advances or supplies furnished for the planting, cultivating, and harvesting of such crop, covers no further sum than that named in the contract, and for additional advances or supplies furnished the creditor stands on the same footing as other furnishers of supplies, and must look to Rev. Civ. Code La. art. 3217, for a privilege.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. § 18; Dec. Dig. § 11.*]

4. SUBROGATION (§ 23*)—LOUISIANA STATUTES—PRIORITIES BETWEEN PRIVILEGED HOLDERS.

The fact that money advanced by the holder of a factor's contract privilege on a crop under Act No. 66, p. 114, Laws La. 1874, was used by the borrower in paying off superior liens on the crop, does not subrogate the factor to the rights of such superior lienholders as against others having privileges, in the absence of any conventional transfer of such liens; but where such factor, to protect its privilege on a consignment of sugar to it from the crop, directly paid off the claims of laborers having a superior privilege and took possession of the sugar, it was within the protection of Rev. Civ. Code La. art. 2161, which provides that "subrogation takes place of right for the benefit of him who, being himself a creditor, pays another creditor whose claim is preferable to his by reason of his privileges or mortgages," and is subrogated to the laborers' privileges as against other lien claimants.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 60; Dec. Dig. § 23.*]

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

The Monongahela Coal Company brought suit on the law side in the court below for the recovery of the balance due upon two promissory notes made by one A. V. Robertson, for the price of two boat loads of coal sold and delivered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at his Grand Bay Plantation, in the state of Louisiana, and used in the manufacture of sugar and molasses produced from cane grown upon said plantation in the year 1898. The amount sued for was \$4,436.18, with interest from July 14, 1898, at the rate of 6 per cent. per annum until paid. And the plaintiff, alleging that it had a lien and privilege upon the crop of sugar and molasses produced on said plantation that year for the amount of its demand, obtained a writ of sequestration, by virtue whereof certain sugars were seized and held by the marshal to satisfy the plaintiff's claim.

The Iberville Planting & Manufacturing Company, Limited, intervened in the case, claimed a lien and privilege on the sugars seized, denied that the plaintiff had any privilege thereon, and prayed for leave to bond the seizure, which was allowed, and the sugar seized was delivered by the marshal to the intervener, upon the execution of the required bond.

Thereafter the case was litigated between the plaintiff and intervener. Trial by jury was waived by stipulation in writing, a trial had by the court, and judgment rendered in favor of the plaintiff and against the intervener.

The court made a finding of facts as follows:

"Monongahela Coal Company vs. A. V. Robertson, Iberville Planting & Manufacturing Company, Interveners. No. 26.

"From the record and the evidence, oral and documentary, I make the following findings of fact, the basis of my judgment entered in the cause, and upon which facts so found there arises the following questions of law.

"(1) Was the contract entered into between A. V. Robertson, the defendant, and the Monongahela Coal Company, of West Virginia, for the purchase of coal, a Pennsylvania contract, governed by its laws, or was it a Louisiana contract, carrying with it the privileges accorded by the law of Louisiana to the furnishers of supplies for the cultivation of plantations?

"(2) If it should be held in the reviewing tribunal that it was a Louisiana contract, then the further question for review or error would be whether the factor, in paying privileged claims superior to that of the furnisher of supplies, becomes legally subrogated to the claim thus paid, with the privilege of payment out of the proceeds of the crop by priority, where the privilege ranks the furnishers of supplies; or does the payment of said ranking privileged charges by the furnisher of supplies have the effect of reducing the higher character of the privilege to that accorded by law to the furnisher of supplies?

"The history of the transaction between the Monongahela Coal Company and A. V. Robertson, and of the Iberville Planting & Manufacturing Company and Robertson & Eiseman, are sufficiently set forth in the opinion delivered by me, to a correct appreciation and application of the law to the facts hereinafter specifically found.

"1. (a) The Iberville Planting & Manufacturing Company, intervening in this cause, is a corporation created under the laws of the state of Louisiana, with its domicile in the parish of Iberville, in this state, and doing a planting and manufacturing, furnishing and supplying business to plantations in the state of Louisiana; that A. V. Robertson, the defendant in the cause, was at the time of the institution of these proceedings, for some years prior thereto, and presently is a citizen of the state of Louisiana.

"(b) The Monongahela Coal Company, the plaintiff in this action, was, at the time of the business transactions between itself and A. V. Robertson (and out of which business transactions the notes herein sued upon were given), a corporation created under the laws of West Virginia; that as a corporation it did not have established in Louisiana a branch office, nor was it exercising any of its rights or corporate franchises in this state; that L. E. Jung was at the time of the transactions with the Monongahela Coal Company and A. V. Robertson occupying the position of soliciting agent for said Monongahela Coal Company for the sale of its products, without right or authority to close or conclude any transactions for or on behalf of said Monongahela Coal Company; that the agency of said L. E. Jung was limited to soliciting orders, and that all orders secured by him for the purchase of the product of said Monongahela Coal Company, and particularly the order of A. V. Robertson for the purchase of two boat loads of coal of the Monongahela Coal Com-

pany, for which the notes herein sued upon were given in payment, had to be, and were as a matter of fact, submitted to the Monongahela Coal Company and its executive officers for acceptance or rejection; and that said submission of L. E. Jung of the tentative offer of A. V. Robertson for the purchase of two boat loads of coal from the Monongahela Coal Company was as a matter of fact, and as appears by the records and minute entries of the directors of the Monongahela Coal Company, submitted by L. E. Jung to the officers of said Monongahela Coal Company in the state of West Virginia, and was then after corporate action by said Monongahela Coal Company in the state of West Virginia an offer made and accepted between the Monongahela Coal Company and A. V. Robertson; and that when said offer was so made and accepted, and the said A. V. Robertson was notified thereof, and the delivery was made to him of the two boat loads of coal purchased as aforesaid, the said coal having been intrusted to L. E. Jung for delivery to A. V. Robertson, and which boat loads were described as '2 boats of coal O'Neil 329 containing 10,321 barrels, O'Neil 312 containing 10,194, or an aggregate of 20,515 barrels at 26 cents per barrel \$5,436.48,' the said A. V. Robertson, in payment of the purchase price thereof, under the circumstances hereinbefore recited, executed and delivered his obligations payable to the Monongahela Coal Company of West Virginia, and which obligations are described in the petition herein sued upon, and contain the clause, 'being for the price of coal purchased for Grand Bay Plantation, in the parish of Pointe Coupee,' and payable in the city of New Orleans; that upon the two notes herein sued upon \$1,000 was paid, leaving a balance due on said obligations of A. V. Robertson to the Monongahela Coal Company of West Virginia of the sum of \$4,436.48.

"The two boat loads of coal were delivered at Robertson's plantation in the latter part of June, 1898. The acceptance of the Monongahela Coal Company of Robertson's proposition for the purchase of the two boat loads of coal aforesaid was made in Pennsylvania on March 11, 1898, qualified by the condition, 'deliveries to be subject to water.' There is neither indication nor proof that the coal delivered to Robertson was in the state of Louisiana on March 7, 1898, when the proposition to purchase was made, nor on March 11, 1898, when the Monongahela Coal Company accepted Robertson's proposition and sold him the two boat loads of coal hereinbefore referred to. From the condition embodied in the acceptance of the proposition that the delivery of the two boat loads of coal was to be 'subject to water,' I infer that the coal sold and intrusted to L. E. Jung for delivery to A. V. Robertson was not in the state of Louisiana at the time of either the proposition to purchase or the acceptance thereof by the Monongahela Coal Company.

"The record does not disclose where the coal contained in the two boats was measured, and there is no proof in the record that the coal was measured in the state of Louisiana, either upon its arrival in this state, or upon its delivery to A. V. Robertson. It may be well, in the absence of proof to the contrary, the coal was measured at the point of shipment. It was understood, however, that the coal was to be delivered to Robertson by the Monongahela Coal Company in the state of Louisiana, and it was so delivered by L. E. Jung, who was intrusted with it by the Monongahela Coal Company to make delivery.

"The coal, the purchase price of which is represented by the obligations herein sued upon, was used by A. V. Robertson on his plantation to manufacture a crop of sugar for the season of 1898, and upon which crop of sugar so manufactured the said Monongahela Coal Company in these proceedings asserts a privilege under the laws of Louisiana as a furnisher of supplies. It nowhere appears in the record that in the submission of A. V. Robertson's proposition to the Monongahela Coal Company, and the action of the Monongahela Coal Company in accepting said proposition, that they were advised or informed that A. V. Robertson was conducting a sugar plantation in this state, or that they had any information or knowledge that said coal sold to A. V. Robertson was to be used to manufacture sugar upon the plantation of which A. V. Robertson was the proprietor and operator; but Jung knew Robertson was a sugar planter, though it is not shown that he communicated this knowledge to the Monongahela Coal Company.

"(c) That the present suit of the Monongahela Coal Company against A. V.

Robertson was filed in the United States Circuit Court on January 7, 1899. That at the time the notes sued upon were executed, to wit, July 14, 1898, the acts of pledge from Arthur V. Robertson to the Iberville Planting & Manufacturing Company for advances to cultivate the crop on Nina and Grand Bay Plantations for the year 1898, which acts of pledge were given under the factor's act, No. 66, p. 114, of 1874, were of record in the clerk's office of the district court of Pointe Coupee parish. The said two acts, bearing dates respectively of February 15, 1898, and May 11, 1898, are made part of this finding. That on the day the suit was filed, to wit, January 7, 1899, L. E. Jung, describing himself as the representative of the Monongahela Coal Company of West Virginia, caused to be placed of record in the clerk's office of the district court of the parish of Pointe Coupee his affidavit, in which he describes the two notes here sued upon, and asserts on behalf of the Monongahela Coal Company a lien and privilege upon the crops manufactured upon said Nina and Grand Bay Plantations for the seasons of 1898 and 1899.

"(d) That there was no proof made, nor is there any evidence in the record, that L. E. Jung, the soliciting agent of the Monongahela Coal Company, was authorized, empowered, or directed on behalf of said Monongahela Coal Company to assert or claim any right, privilege, or lien for or on behalf of said company, or to assert or claim on its behalf a lien and privilege upon the crop manufactured on said Nina and Grand Bay Plantations, as furnishers of supplies. Nor is there any evidence in the record that the action of L. E. Jung has ever been approved by the Monongahela Coal Company in the assertion by L. E. Jung without prior authority of a lien and privilege on their behalf, and that the affidavit of January 7, 1899, in which the said L. E. Jung asserted on behalf of said Monongahela Coal Company a lien and privilege upon the crops manufactured, was made without the knowledge or subsequent ratification of the Monongahela Coal Company, except that said company and its liquidators have prosecuted this suit after being informed thereof by Mr. Benedict, its counsel.

"2. (a) The planting partnership of Robertson & Eiseman entered into a contract with the Iberville Planting & Manufacturing Company on the 15th day of February, 1898 (which contract was under the factor's act of 1874), by which the Iberville Planting & Manufacturing Company agreed to and did advance them, for the purposes recited in said act, the sum of \$15,000, and they secured to the Iberville Planting & Manufacturing Company, under the act aforesaid, a crop lien. The act referred to is made part of this finding as though set out in extenso. It was promptly recorded in the clerk's office of the district court in the parish of Pointe Coupee, where the plantations operated by Eiseman & Robertson were situated.

"(b) On the 11th of May, 1898, Robertson & Eiseman, finding it necessary to have additional funds for the purpose of cultivating and operating said plantations, obtained additional advances from the Iberville Planting & Manufacturing Company and secured the additional advance, to wit, the sum of \$4,000, by an act which was duly passed and recorded on the 11th day of May, 1898. The funds so advanced were also secured by a crop lien under the factor's act of 1874. This act is made part of the findings herein.

"(c) In both the acts referred to in the foregoing findings, the following declaration is made and was of record from the date of the recordings respectively of both acts:

"It is finally agreed that said Arthur V. Robertson and Cassius M. Eiseman shall enter into no other contract or agreement which would operate a lien or privilege on or pledge and pawn of said crops in favor of any other person or persons on said crops for the year 1898, or the proceeds thereof.'

"There has been no evidence produced, nor has the fact been established, that the condition above recited was at any time waived by the Iberville Planting & Manufacturing Company, or that the said company at any time expressly authorized or consented to the purchase by Robertson & Eiseman, or either of them, of any supplies for the cultivation or operation of said plantations, and which could in any manner affect their privilege as factors, whether under the act of 1874 or the general law in such cases made and provided. I find that said clause applied only to the securing of the sums

advanced under said contracts, which sums are paid in full under the judgment.

"(d) In addition to the \$19,000 advanced by the Iberville Planting & Manufacturing Company to Eiseman & Robertson under the contracts referred to in findings (a) and (b), and this exclusive of interest on said sum of \$19,000, the Iberville Planting & Manufacturing Company advanced from time to time for the cultivation, harvesting, manufacturing, and marketing of the crop raised by Robertson & Eiseman on Nina and Grand Bay Plantations the gross sum of \$38,635.29; that of the sum so advanced and paid out by the Iberville Planting & Manufacturing Company for the cultivation, harvesting, manufacturing, and marketing of the crop, and to protect the same against privileges of a higher order in rank than that of furnisher of supplies or factor's privilege, there was paid by the Iberville Planting & Manufacturing Company to Robertson & Eiseman the following sums of money, and they used the money advanced to them to pay the claims of the persons hereinafter named, and for the amounts which were justly due and owing, to wit:

"(1) F. O. Lieux, the lessor of Grand Bay Plantation, for the year 1898, received from the Iberville Planting & Manufacturing Company, rent of said plantation to Eiseman & Robertson, the sum of \$2,000.

"(2) Taxes paid by the Iberville Planting & Manufacturing Company on said plantation, and insurance premiums paid on the sugar house of said plantation, which under the terms of the contract of lease were to be paid as part of the rental of said plantation, the sum of \$713.83.

"(3) The Iberville Planting & Manufacturing Company paid to the sheriff of the parish of Pointe Coupee the sum of \$277.45, being the tax levied by the state and known as the produce tax, for the year 1898-99, \$277.45.

"(4) The Iberville Planting & Manufacturing Company paid to Gremillion & Co. the sum of \$2,119, being the purchase price of the raw cane which was subsequently manufactured into sugar by Robertson & Eiseman, and for the payment of which purchase price of cane Gremillion & Co. had a privilege superior in rank to that of the factor or furnisher of supplies, \$2,119.

"(5) The sugar sequestered under the writ of the Monongahela Coal Company owed to the laborers on the plantation the sum of \$5,922.95, a claim superior in rank to that of the factor's lien and the furnisher of supplies. The laborers threatened the seizure of the sugars, and were asserting their superior privilege thereon for the payment of the debt which was due them. The Iberville Planting & Manufacturing Company, in order to protect their privilege as factors, directed their agent, F. O. Lieux, to draw upon it for the amount of said claims, so as to relieve said sugars from the threatened seizure, and the claims aggregating the amount aforesaid, to wit, \$5,922.95, were paid by the Iberville Planting & Manufacturing Company as against the consignment of said sugars to it, and the amounts so paid were charged on the books of the Iberville Planting & Manufacturing Company to Robertson & Eiseman on the crop cultivated, manufactured, and shipped for the year 1898, \$5,922.95.

"The aggregate of items 1 to 5, inclusive, represents eleven thousand and thirty-three and $\frac{23}{100}$ dollars (\$11,033.23).

"The privilege accorded by law to each of the above-enumerated items is superior in rank to the factor's privilege or that of the furnisher of supplies.

"I find as a matter of law that the advance by the Iberville Planting & Manufacturing Company of the amounts aforesaid, did not operate a legal subrogation of the privilege accorded by law to the respective claims. I find as a matter of law that the advance of money which was used to pay said claims by the Iberville Planting & Manufacturing Company had the effect of reducing the privilege securing said claims from its superior rank to that enjoyed by the factor or furnisher of supplies, who advanced the funds to pay the same, and that, there being no conventional transfer of the debt by those whom the money was paid and no conventional subrogation to the privilege, their superior rank in the order of payment was lost, and the Iberville Planting & Manufacturing Company can only claim as against the crop proceeds the reimbursement of the sum so advanced, and for the sum advanced are only entitled to the privilege of factors or furnishers of supplies.

"I find that the entire proceeds realized from the sale of the crop of Nina and Grand Bay Plantations for the years 1898 and 1899 was \$52,863.85.

"From the gross proceeds realized from the sale of the crop there is to be primarily deducted the advances made by the Iberville Planting & Manufacturing Company of the sum of \$19,000, to which is to be added \$1,133.21, the accumulated interest under the contracts referred to in these findings. The sum of \$20,133.21 deducted from \$52,863.85, the gross proceeds of the crop, leaves a balance of \$32,730.64, to be held subject to special and general privileges.

"If the item referred to in finding (d) secures recognition as privileged debts superior in rank to the factor or furnisher of supplies, and that resulting from the payment by the Iberville Planting & Manufacturing Company there was a legal subrogation not only to the debt, but to the privilege, then the net amount realized from the crop for distribution between the Iberville Planting & Manufacturing Company and the Monongahela Coal Company, as factors and furnishers of supplies, would be \$21,697.41.

"If, on the other hand, it should be held that there was no legal subrogation of the privilege, and the debts aforesaid were only entitled to the privilege of factors and furnishers of supplies, then there would be for distribution between the Iberville Planting & Manufacturing Company and the Monongahela Coal Company the sum of \$32,730.64. I find that the moneys advanced by the Iberville Planting & Manufacturing Company were used in the cultivation, harvesting, manufacturing, and marketing of the crop of Nina and Grand Bay Plantations for the year 1898-99.

"I find that the coal purchased by A. V. Robertson from the Monongahela Coal Company on March 11, 1898, was wholly used to manufacture in part the crop of Eiseman & Robertson on Grand Bay Plantation for the year 1898.

"I further find that the respective debit and credit of the Weis and Union Bank transaction is compensated and offset and in no manner affects the factor's account between the Iberville Planting & Manufacturing Company and Robertson & Eiseman, and may be entirely disregarded in ascertaining and determining the moneys advanced by the Iberville Planting & Manufacturing Company for the crop of 1898 and the proceeds realized from the sale of said crop.

"In my written opinion I have fully stated the facts and the legal propositions considered and decided, and I refer to and adopt said opinion as a statement of the facts and legal questions involved in this case. The foregoing statement of facts is also correct in all particulars where not inconsistent with the statements contained in my opinion.

"[Signed]

Eugene D. Saunders, Judge.

"July 24, 1907."

B. F. Jonas and Henry L. Lazarus, for plaintiff in error.

W. S. Benedict, Jessy Benedict Gessner, J. D. Rouse, Wm. Grant, and Wm. B. Grant, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). This is a suit involving the recognition and marshaling of privileges, and should have been prosecuted on the equity side of the court and for review brought here by appeal instead of writ of error; but as the parties made no objection in the court below and make none here, and as procedure in the case was made possible by waiver of the jury, we will pass upon the case as made by the parties in the court below. But see *Gravenberg v. Laws*, 100 Fed. 1, 40 C. C. A. 240.

We have deemed it advisable to give the full finding of facts by the trial judge to show the pertinency of our remarks and conclusions. As the finding seems to be complete and in no wise inconsistent with the written opinion referred to in the last paragraph thereof, and as

no objection is made by either party, the last paragraph may be treated as surplusage.

The first contention of the plaintiff in error is that the Monongahela Coal Company has no privilege as a furnisher of supplies, because the contract of purchase for the coal is a Pennsylvania contract, and the coal itself was sold by the coal company to Robertson without reference to the Louisiana law with regard to privileges, and even without reference to its use on Robertson's plantation. The original contract for the sale of the coal bears many of the earmarks of a Pennsylvania contract, but the subsequent facts in the case show that the written contracts upon which suit is brought, to wit, the notes, were made in Louisiana, and said notes specified that the coal was purchased for Grand Bay Plantation in the parish of Pointe Coupee, and the coal was actually furnished to said plantation and was used thereon for the harvesting of the crop in 1898. Under these circumstances, we think it clear that the furnisher of the coal is within the Revised Civil Code of Louisiana, art. 3217, giving the furnisher of supplies to any farm or plantation a privilege on the crop of the year. See *London Assurance v. Companhia De Moagens*, 167 U. S. 160, 17 Sup. Ct. 785, 42 L. Ed. 113, and *Pullis Bros. Iron Co. v. Parish of Natchitoches*, 51 La. Ann. 1377, 26 South. 402. While the last case cited deals with mechanics' liens, the reasoning and conclusions are applicable to the case in hand. The furnisher's lien under Rev. Civ. Code, art. 3217, is a statutory lien depending on the destination and use of the supply. Where the preliminary contracts looking to such use are made is apparently immaterial.

The next contention is that the Iberville Planting & Manufacturing Company, having contracted with the owners under Act No. 66, p. 114, Laws La. 1874, to furnish supplies for the Nina and Grand Bay Plantations for planting, cultivating, and harvesting crops grown thereon, and covenanted for a privilege and pledge and pawn of said crops to cover all advances, and the same having been recorded according to law, the said Iberville Planting & Manufacturing Company has a superior lien over other furnishers of supplies for the full amount advanced in the planting, cultivating, harvesting, and marketing of crops on said plantations, although the same exceeds the amounts stipulated in their said contracts as the maximum sum to be advanced; and, as against other furnishers of supplies, reliance is had on the clauses:

"The said Iberville Planting and Manufacturing Company, Limited, shall have the exclusive right to apply the net proceeds of the sale of all of the crop shipped, and all payments of money made to it, to the payment of any indebtedness secured or unsecured which may be due now, or which may hereafter become due to it, by the said Robertson and the said Eiseman, upon open account or otherwise, or to the debt secured and intended to be secured by these presents, according to its view of the exigencies of the case; and that such application may be made at such time and in such manner as said company may elect, and that no application of such proceeds of sale or money to the payment of any debt or open account which may at any time be due to the said company by the said Robertson and Eiseman shall impair, lessen or prejudice the debt secured or intended to be secured by these presents or the security herein and hereby provided for."

"Robertson and Eiseman shall enter into no other contract or agreement which would operate a lien or privilege on or pledge and pawn of said crops

in favor of any other person or persons on said crops for the year 1898, or the proceeds thereof."

The contention is not well founded. Under the contracts in question the Iberville Planting & Manufacturing Company was under no obligation to advance beyond the amount stipulated, and the pledge and pawn under act of 1874 covered no further sums than the limits named in the contracts. Other furnishers of supplies were not bound beyond recorded contracts. For supplies furnished the plantations beyond the contracted maximum stipulated in the contracts, the Iberville Planting & Manufacturing Company stands on the same footing as other furnishers of supplies, and must look to article 3217, Rev. Civ. Code, for a privilege. See *Minge & Co. v. Barbre*, 51 La. Ann. 1285, 26 South. 180.

In *National Bank of Commerce v. Sullivan*, 117 La. 181, 41 South. 480, the case relied on by the plaintiff in error, the privilege allowed was under article 3217, Rev. Civ. Code, and, *Minge & Co. v. Barbre* having been cited to defeat a privilege, the court said:

"The case relied on is, however, inapplicable, since, from the face of the act of pledge here presented, it is evident that the parties contemplated other advances to be otherwise secured, the limit of which is not fixed."

The last contention is that, in addition to the superior lien acquired by the Iberville Planting & Manufacturing Company under their contract for the maximum sums stated therein, it is entitled to a subrogation to certain superior liens originally held by other parties and paid by the said company to protect their privilege as factors. According to the finding of facts, the lessor's lien, the insurance premiums, the taxes, and the sums due for cane purchased, all privileged over the factors, were paid by the Iberville Planting & Manufacturing Company to protect their privilege as factors, but paid to Robertson & Eiseman, and they used the money so advanced to them to pay the claims which were justly due and owing. There is no finding as to when the Iberville Planting & Manufacturing Company paid the money to Robertson & Eiseman, nor as to when the latter paid the privilege holders, nor as to whether these amounts formed a part of the \$19,000 for which the company is given a superior lien. The finding of facts is also silent as to whether there was any conventional transfer or subrogation made or attempted. Under these circumstances, and as to these items, the case seems to be within the rule declared in *Shaw & Zuntz v. Knox*, 12 La. Ann. 41, and *Shaw v. Grant*, 13 La. Ann. 52, and the claimed subrogation should be denied.

As to the laborers' privilege on the entire crop, and particularly on the sugars sequestered in this case, the finding is:

"The sugar sequestered under the writ of the Monongahela Coal Company owed to the laborers on the plantation the sum of \$5,922.95, a claim superior in rank to that of the factor's lien and the furnisher of supplies. The laborers threatened the seizure of the sugars, and were asserting their superior privilege thereon for the payment of the debt which was due them. The Iberville Planting & Manufacturing Company, in order to protect their privilege as factors, directed their agent, F. O. Lieux, to draw upon it for the amount of said claims so as to relieve said sugars from the threatened seizure, and the claims aggregating the amount aforesaid, to wit, \$5,922.95,

were paid by the Iberville Planting & Manufacturing Company as against the consignment of said sugars to it, and the amounts so paid were charged on the books of the Iberville Planting & Manufacturing Company to Robertson & Eiseman on the crop cultivated, manufactured, and shipped for the year 1898, \$5,922.95."

These facts bring the payment of the laborers' privilege within the letter and spirit of the Code on legal subrogation (article 2161, Rev. Civ. Code), to wit:

"Subrogation takes place of right for the benefit of him who being himself a creditor pays another creditor whose claim is preferable to his by reason of his privileges or mortgages."

The Iberville Planting & Manufacturing Company was a creditor. To protect its privilege it paid the laborers whose privilege was preferable. It paid direct, and, on payment, took possession of the sugars in question. That the amount paid was charged on the books of the Iberville Company to Robertson & Eiseman on the crop cultivated, manufactured, and shipped for the year 1898 is wholly immaterial as affecting the subrogation, but it may be noticed that such charge was proper, and, in fact, called for, as the Iberville Planting & Manufacturing Company was bound to account for the entire crop of 1898.

The facts do not show a case of payment by a factor of debts due by his principal in the ordinary course of business, and therefore *Shaw & Zuntz v. Knox*, 12 La. Ann. 41, and *Shaw v. Grant*, 13 La. Ann. 52, do not apply. In *Zeigler v. His Creditors*, 49 La. Ann. 187, 21 South. 684, the right of subrogation was recognized for an ordinary creditor, and in the opinion legal subrogation is fully discussed, and the conclusion is:

"We think reason and authority, as well as the text of the Code, sustains our opinion that gives the bank, in this case the creditor of Zeigler, the subrogation to that mortgage, securing the debt the bank discharged."

We are clear that the same may be said as to subrogation of the Iberville Planting & Manufacturing Company to the laborers' privilege, a conceded superior lien. And see *Laloire v. Wiltz*, 31 La. Ann. 436; *Saloy v. Dragon*, 37 La. Ann. 71.

It follows that the court below erred in holding that the sum of \$32,730.64 was in the hands of the Iberville Planting & Manufacturing Company subject to special and general privileges, as that sum should be reduced by the amount of the laborers' privileges, to wit, the sum of \$5,922.95, leaving subject to other privileges the sum of \$26,807.69, and from this that he erred in giving judgment in favor of the Monongahela Coal Company for the sum of \$3,209.56, instead of the sum of \$2,628.75.

The judgment of the Circuit Court is amended by reducing the amount thereof from \$3,209.56 to \$2,628.75, and, as thus amended, is affirmed.

On Rehearing.

PER CURIAM. In an opinion recently handed down we assumed that the judgment of the lower court in favor of the Monongahela Coal Company was correctly based on the findings of fact and con-

clusions of law of the trial judge; but this was a mistake. On the said findings of fact and conclusions of law the Monongahela Coal Company was entitled to a much larger judgment than was given. Under our conclusions of law, we give a correct statement as follows:

According to the "finding of facts" the amount advanced by the Iberville Planting Company are shown as follows:

Fixed in the contracts.....	\$19,000 00	
Interest thereon.....	1,133 21	
Additional	38,635 29	
		<u>\$58,768 50</u>
Total amount to plantations		
From this amount is to be deducted		
Preferential claims under contracts.....	\$19,000 00	
Interest	1,133 21	
Amount of laborers' claims paid.....	5,922 95	<u>26,056 16</u>

Leaving a balance due Iberville Planting Co., secured by nonpreferential lien..... \$32,712 34

The amount due the Monongahela Coal Company is \$4,436.48. The total amount of the proceeds of the crop of the Nina and Grand Bay plantations was \$52,863.35. Deducting from this preferential liens—contracts, \$19,000; interest, \$1,133.21; laborers' liens, \$5,922.95—leaves the sum of \$26,056.16 to be divided pro rata between the Iberville Planting Company on its claim of \$32,712.34 and the Monongahela Coal Company on its claim of \$4,436.48. The per cent. is 72.163.

As the fund is in the hands of the Iberville Planting Company, the amount due the Monongahela Coal Company is \$3,201.49. The erroneous judgment of the Circuit Court in favor of the Monongahela Coal Company was for the sum of \$3,209.59, which happens to be within a few dollars of the amount we find to be actually due the coal company. Error in the amount of the judgment not having been assigned, this small difference should not carry costs.

It is therefore adjudged that our former judgment be vacated, and instead that the judgment of the Circuit Court be amended by reducing the amount thereof in favor of the Monongahela Coal Company from \$3,209.56 to \$3,201.49, and, as thus amended, the judgment of the Circuit Court is affirmed, with costs to be paid by the plaintiff in error.

The petitions for rehearing filed in this case are denied.

NEW YORK CENT. & H. R. R. CO. et al. v. MAIDMENT.

(Circuit Court of Appeals, Third Circuit. March 12, 1909.)

No. 35.

1. RAILROADS (§ 327*)—ACCIDENTS AT CROSSINGS—CARE REQUIRED OF AUTOMOBILE DRIVER—DUTY TO STOP, LOOK, AND LISTEN.

Because of the fact that a collision between a railroad train and an automobile endangers, not only those in the automobile, but also those on board the train, and also because the car is more readily controlled than a horse vehicle, and can be left by the driver, if necessary, the law exacts from him a strict performance of the duty to stop, look, and listen before

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

driving upon a railroad crossing, where the view is obstructed, and to do so at a time and place where stopping and looking and listening will be effective.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 327.*]

2. RAILROADS (§ 328*)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.

An automobile driven by plaintiff, in which he was riding with a friend, was struck by a train at a railroad crossing, and he was injured. There were double tracks, and plaintiff stopped 20 feet from the nearest track to allow a train on such track to pass, and then started ahead and was struck by a train on the other track going in the opposite direction. From the place where he stopped the tracks could be seen for a considerable distance in the direction from which the first train came; but, owing to trees and other obstructions, he could not see more than 175 feet in the other direction. If he had stopped on the first track, he could have seen the approaching train when 700 feet away; but he did not stop. *Held*, that he took chances rather than precaution, and was chargeable with contributory negligence, which precluded a recovery for his injury from the railroad company.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 328.*]

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

James B. Vredenburgh and Albert C. Wall, for plaintiffs in error.
John S. Mackay, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Maidment, hereafter styled plaintiff, sued the railroads, hereafter styled defendants, for damages sustained by him in a collision between an automobile, driven by him, and defendants' passenger train. The plaintiff recovered a verdict, and to review the judgment entered thereon defendants sued out this writ. A number of errors are alleged, but in our view the case turns on the refusal to give binding instructions for the defendants. If the plaintiff was guilty of contributory negligence, the point was well taken. To that question we therefore address ourselves.

At 7:21 on the evening of August 17, 1906, plaintiff drove his steam automobile westwardly on the Ft. Lee road to a point where the highway crossed at right angles the double-track main line of the defendants. A friend, Herrick by name, occupied the seat beside him. He states in his declaration it—

"was an extraordinarily dangerous crossing, for the public using the highway known as the Ft. Lee road, in that the approach of locomotives and cars of the defendants is obscured by a bridge, woods, trees, foliage, buildings, poles, and other obstructions, and the tracks of the defendants, at the time aforesaid, were constructed in a curved line, preventing a clear view of the defendants' locomotives and cars, moving in either direction towards the crossing aforesaid, which bridges, woods, trees, foliage, buildings, poles, and curved track obscured the view of persons crossing or attempting to cross the tracks of the defendants at the place aforesaid, in the borough aforesaid, on the 17th day of August, 1906."

He was familiar with the place, from crossing it that morning and several times before. A watchman was located there, but had left

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

before plaintiff approached. At a point 15 or 20 feet back from the east-bound track, plaintiff stopped his machine to await the passage of a long freight train on the nearest, or east-bound, track. He waited until the freight was 180 feet beyond the crossing, when he started his automobile down the sharp decline to the east-bound track and attempted to dart across the double tracks. At that instant a passenger train coming westward on the other, or west-bound, track, struck and wrecked his automobile and seriously injured the plaintiff. Was he guilty of contributory negligence in making the crossing?

With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens, not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or stop there, without risk of his horse frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized. In the case of trolleys crossing railroads at grade, the practice is general for the conductor to go ahead and from the track signal the halted car to advance. This would, of course, be impracticable as a rule for automobiles; but it illustrates the trend of the law, as the size of crossing vehicles makes collision with them more serious, to enforce greater safety precautions.

Now, in the present case, we are clear the plaintiff, in crossing with his automobile, unfortunately wholly omitted to take those reasonable

precautions which the situation both demanded and permitted. It is true he stopped 15 or 20 feet back from the tracks; but this was not to get a view of approaching trains. As will be seen later, he could not from that point get a sufficient outlook, and his stop there was merely to await the passage of the freight train. He says:

"I was between 15 and 20 feet, about 20 feet, and I couldn't go any further there, because farther on the roadway runs right down to a track on a steep grade like that (illustrating), quite a perceptible grade, and, of course, I did not want to take any chances of having the machine get away from my control and slip into the freight train. So that was the reason I stopped there."

From where he stopped it was impossible to see up the track, in the direction the west-bound trains would come from, further than 180 feet. Trees and bushes on the property adjoining defendants' right of way cut off all sight of the track beyond that short distance. He could see in the other direction a long way, and knew that no train was following the freight. Moreover, by stopping the automobile on the track which the freight had just passed over, he could see the east-bound track for upwards of 700 feet. Thus plaintiff's witness Herrick, who was in the machine, in answer to the question, "If you had looked northerly after your machine had gotten on the easterly track, could you or could you not have seen the approaching passenger train on the westerly track?" answered, "Well, it seems as though we could see it; yes." It will thus be seen that when the plaintiff made his only stop he had no sufficient view of the track on which west-bound trains came, and that he made no stop on the east-bound track from which he could have seen a train coming on the west-bound one. This was negligence, a lack of precaution and reasonable care, which would have prevented the accident. As it was, the plaintiff says that after the train flashed down upon him he brought his machine "to a complete stop and just to the point of reversing; if it would have been half a second later I would have avoided it." Indeed, the whole proof shows the plaintiff took chances, instead of precautions. We have seen he had no sufficient view when he first stopped. His view became worse as he went down the steep declivity to the track; for at that point Mr. Williams, an engineer and surveyor called by plaintiff, testified, "a pole and a sign pole and an automatic signal all came together," and cut off the vision to less than 175 feet.

But the plaintiff was not without means of crossing in safety. A second man was in the automobile. He could have gone ahead to the east-bound track, or Maidment could have safely halted the machine there. Instead of doing this, and without sight of the west-bound track, save for the very short distance a swift train would quickly cover, he took the chance of dashing across. He says:

"I took hold of the throttle to make this crossing as rapidly as I could to get out of the way quickly, and after I had started, and had gone I don't know how far, a train flashed down on me; and instantly I put my foot on the brake, throwing back my throttle at the same time, and making every effort to avoid any possible collision. * * * The machine had come to a complete stop, and just on the point of reversing. If it had been half a second later, I would have avoided it."

The duty of an automobile driver approaching tracks where there is restricted vision to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty, and these safeguarding steps the plaintiff failed to take: He stopped where stopping served no purpose, and failed to stop where stopping would have disclosed danger. He made chance, and not sight, the guarantee of his safety.

We are clear he was guilty of contributory negligence, and the judgment below should be reversed.

HARDESTY et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1909.)

No. 1,802.

1. CRIMINAL LAW (§ 1144*)—APPEAL AND ERROR—REVIEW—PRESUMPTIONS.

On a writ of error, when there is a general verdict and judgment upon an indictment containing several counts, the presumption is that the judgment was rendered on the good counts, if any, unless something to the contrary appears in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3035; Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 1056*)—APPEAL AND ERROR—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW—INSTRUCTIONS.

Where there were no exceptions to the charge of the court in a criminal case, and no error is assigned thereon, the charge will not be considered by the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2668; Dec. Dig. § 1056.*]

3. INDICTMENT AND INFORMATION (§ 202*)—WAIVER OF DEFECTS—AIDER BY VERDICT.

By failure to demur to an indictment, or enter a motion to quash, the defendant waives the right to object after verdict to matters which go merely to the form in which the offense is stated; but if some element of the offense has been omitted, which is necessary to constitute the crime attempted to be charged, advantage may be taken of it, even after verdict.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 640-650; Dec. Dig. § 202.*]

4. INDICTMENT AND INFORMATION (§ 110*)—REQUISITES AND SUFFICIENCY—STATUTORY OFFENSE—LANGUAGE OF STATUTE.

Under Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), which makes it a criminal offense if any person engaged in carrying on the business of manufacturing oleomargarine "defrauds or attempts to defraud the United States of the tax on the oleomargarine produced by him," an indictment which, after averring facts showing defendant to have been a manufacturer of oleomargarine within the statute, charges in the language of the statute that he attempted to defraud the United States of the tax on oleomargarine produced by him, is sufficient, without setting out the particular acts relied on to prove such attempt.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

5. INTERNAL REVENUE (§ 47*)—OLEOMARGARINE ACT—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

An indictment charging defendants with an attempt to defraud the United States of the tax on oleomargarine manufactured by them is sustained by evidence that they were dealers in oleomargarine, that they bought uncolored oleomargarine, colored the same to resemble butter, and repacked it in empty packages before used and stamped as containing the colored product, and that they had previously systematically done the same thing, and sold the article so colored without paying the additional tax required thereon.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 47.*]

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

H. M. Johnson, for plaintiffs in error.

George Randolph, for the United States.

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

LURTON, Circuit Judge. The plaintiffs in error were indicted for a violation of the oleomargarine act (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]). The indictment contained 24 counts. The jury found Voges guilty upon each of the counts, and found Hardesty guilty upon every count except the fifth, sixth, seventh, eighth, ninth, twentieth, and twenty-first. The judgment of the court was that each of the plaintiffs in error pay a fine of \$1,000 and be confined in the penitentiary at Atlanta, Ga., for the period of one year and one day at hard labor and pay the costs of the cause. From this judgment each of the plaintiffs in error have sued out this writ.

Upon consideration, this judgment was by this court affirmed in a per curiam opinion dealing only with a question of evidence. 164 Fed. 421. Upon a seasonable petition a rehearing was ordered, and the cause has again been heard at length upon every question, save the question of evidence referred to as to which no rehearing was asked. It is now urged that a judgment of imprisonment at hard labor for one year and one day in a penitentiary and a fine of \$1,000 can only be supported by a conviction under the fourth and nineteenth counts.

If these counts are good, and the evidence sufficient in law, there is no reason for considering the sufficiency of the other counts. Upon a writ of error, the presumption is, when there is a general verdict and judgment upon an indictment containing several counts, that the judgment was rendered upon the good counts, unless something to the contrary appears upon the record. *Claasen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; *Ballew v. United States*, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388; *Selvester v. United States*, 170 U. S. 262, 18 Sup. Ct. 580, 42 L. Ed. 1029.

There were no exceptions to the charge of the court, and no error has been assigned thereon. Under such circumstances this court will not consider the charge. *Alexander v. United States*, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954; *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. 136, 30 L. Ed. 1011; *St. Clair v. United States*, 154 U.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

S. 135, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Coffey v. United States, 116 U. S. 427, 6 Sup. Ct. 432, 29 L. Ed. 681.

Neither was there any objection taken before verdict in any way to the sufficiency of the indictment. It is assigned as error that the court refused to sustain a motion made in arrest of judgment, because "the pleader drafting the indictment failed to follow the verbiage of the act said to have been infringed," etc. This, by the exercise of much latitude, may be regarded as an objection after verdict to the sufficiency of the indictment. By failure to demur, or enter a motion to quash, the defendant waives the right to object after verdict to matters which go to the mere form in which the offense is stated. By his delay it is properly presumed that he regards the indictment as sufficiently advising him of the offense charged to enable him to present his defense. If, however, some element of the offense has been omitted which is necessary to constitute the crime attempted to be charged, advantage may be taken even after verdict. *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

The fourth and nineteenth counts of the indictment are alike, except that they charge similar offenses committed upon different days. It is only necessary to consider one of these counts. If that does not omit any essential element necessary to make out the offense, and there was substantial evidence upon which the jury might return a verdict of guilty, the judgment must be affirmed. The fourth count is in these words:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Jerome E. Hardesty and the said Ben F. Voges and the said Ella Jentges on the 13th day of March, A. D. 1907, in the city of Memphis aforesaid, and within the Western Division of the District aforesaid, and within the jurisdiction of this court, were engaged in carrying on the business of manufacturing oleomargarine by then and there selling, vending, and furnishing oleomargarine for the use and consumption of persons other than the members of the family tables of the said Jerome E. Hardesty and of the said Ben F. Voges and of the said Ella Jentges, by then and there adding to and mixing with the oleomargarine so sold, vended, and furnished by them an artificial coloration that caused the said oleomargarine to look like butter of the shade of yellow; and the said Jerome E. Hardesty and the said Ben F. Voges and the said Ella Jentges then and there being persons engaged in carrying on the business of manufacturing oleomargarine as aforesaid, did at Memphis, Tennessee, aforesaid, in the district aforesaid, and within the jurisdiction of this court, on the 13th day of March, A. D. 1907, add to and mix with three hundred pounds of oleomargarine an artificial coloration, which caused the same oleomargarine to look like butter of the shade of yellow; and the said Jerome E. Hardesty and the said Ben F. Voges and the said Ella Jentges then and there had not paid on the said three hundred pounds of oleomargarine so colored by them as aforesaid the tax of ten cents on each pound as provided by law; and the said Jerome E. Hardesty and the said Ben F. Voges and the said Ella Jentges did then and there knowingly and unlawfully intend to sell, vend, and furnish the said three hundred pounds of oleomargarine so colored as aforesaid for the use and consumption of persons other than the members of the family tables of the said Jerome E. Hardesty and of the said Ben F. Voges and of the said Ella Jentges, and did then and there attempt to defraud the United States of the tax of ten cents on each pound of said three hundred pounds of oleomargarine so colored by them as aforesaid—contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

This count is founded upon Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), which is in these words:

"Whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him and all oleomargarine and all raw material for the production of oleomargarine found in the factory, and on the factory premises, and shall be fined not less than five hundred nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years."

The plaintiffs urge that this count does not charge an attempt to defraud the United States of the tax upon the colored product so made, but only with an intent to defraud which they say does not constitute an attempt. But this is a mistake. After averring that this oleomargarine was colored with the intent to dispose of the same unlawfully, it adds:

"And did then and there attempt to defraud the United States of the tax of ten cents on each pound of said three hundred pounds of oleomargarine so colored by them as aforesaid, contrary to the form of the statute," etc.

Neither is the count to be construed as charging that the coloration of oleomargarine to resemble butter with intent to dispose of the same without paying the tax constitutes, without more, an attempt to defraud the United States of the product tax on such colored oleomargarine. It was surplusage to aver a specific intent to dispose of such colored oleomargarine for use and consumption of persons other than the members of the family tables of the defendants. It was enough to charge that, being engaged in the business of manufacturing oleomargarine, they had defrauded or attempted to defraud the United States of the tax on the oleomargarine produced by them. Such an averment would have included every element essential to the offense declared by the seventeenth section of the act set out above. The offense was a statutory one, and it is generally enough to charge the defendant with doing acts or attempting to do acts which are forbidden by the statute. The qualification of this general rule, as stated by Mr. Justice Harlan in *United States v. Simmons*, 96 U. S. 360, 362, 24 L. Ed. 819, is that the charge in any event must be specific enough to appraise the accused "by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute." See, also, *Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162.

The act defines who is one carrying on the business of manufacturing oleomargarine, and includes as such any person who "sells or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow." If any such person attempts to defraud the United States of the tax on the oleomargarine so produced by him, he is subject to the penalties of the seventeenth section. The essence of the offense is in defrauding or attempting to defraud the

United States of the tax. The acts by which the United States might be defrauded of the tax or which constitute an attempt to defraud are not defined, and in the nature of things could not be. That this product tax is payable when sold or removed, and not before, is a fact which may throw light upon the conduct which is relied upon as evidence of an attempt to defraud. It is not fatal, especially upon a motion in arrest of judgment or a general request to instruct a verdict for the defendant, that the indictment does not set out the particular acts which are to be relied upon to prove that the government was defrauded out of the tax, or an unsuccessful attempt made to so defraud. It is enough to charge the offense in the words of the statute, as it contains all of the elements of the offense and leaves no room for doubt as to the offense charged and which the defendant is called upon to meet.

In *United States v. Simmons*, 96 U. S. 360, 363-364, 24 L. Ed. 819, one count of the indictment was based upon section 3281, Rev. St. (U. S. Comp. St. 1901, p. 2127), and charged that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller within the intent and meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him," etc. The court said:

"This count seems to us sufficient to authorize judgment thereon. It was not necessary to state in the indictment the particular means by which the United States was to be defrauded of the tax. The defendant is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not such a strictness in averment as might defeat the ends of justice. The intent to defraud the United States is of the very essence of the offense; and its existence in connection with the business of distilling being distinctly charged, must be established by satisfactory evidence. Such intent may, however, be manifested by so many acts on the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts upon which it may be fairly inferred."

In *United States v. Manufacturing Apparatus Co.* (D. C.) 141 Fed. 475, an information for the forfeiture of an oleomargarine plant under section 17 of the act of 1886, which charged in the language of the statute that the claimant was engaged in the business of manufacturing oleomargarine, and had defrauded or attempted to defraud the United States of the tax on the product produced by it, was held good, although the means or acts by which the fraud had been effected or an attempt made were not stated. The sufficiency of this count is also supported by the interpretations of the oleomargarine act found in the opinion of the Circuit Court of Appeals for the Eighth Circuit, reported sub nomine *Morris v. United States*, 161 Fed. 672.

There was ample evidence from which the jury might find the verdict they did upon the count we have set out, as well as upon the nineteenth count, which differs only in the date of the transactions. The defendants were carrying on the business of retailers of colored and uncolored oleomargarine. There was ample evidence that they were systematically buying uncolored oleomargarine, which pays a tax of one-fourth of one cent per pound, and mixing with it a coloring matter which gave it the yellowish color of butter, and selling it without

paying the tax of ten cents per pound charged upon oleomargarine so colored. The attempt to defraud the United States out of that tax upon the 300 pounds referred to in this count was inferable from the evidence, which pointed to a systematic course of business unlawful in character, and from evidence that this lot of butter had been freshly colored and packed in empty packages before used, on which the old stamps, indicating that the tax of ten cents had previously been paid, had not been destroyed, as well as from the general appearance of the place of business and the conduct of the defendants when raided.

There were no exceptions to the evidence tending to establish the general facts stated, no requests for charges, other than one for an instruction to find for the defendants, and no exception to the general charge. A question as to the admissibility of evidence obtained by a raid conducted under a search warrant which was claimed to have been illegally issued, but which was not made part of the record, was considered and overruled in the original opinion of the court, though not properly saved below nor assigned as error.

Upon the allowance of a writ of error a bond in the sum of \$3,000 with security was required, and such bond was executed, with the United States Fidelity & Guaranty Company as security, conditioned that the said Hardesty and Voges should answer "all judgments, damages, and costs that may be awarded against them, or either of them, if they or either of them fail to make their pleas good," etc. Motion has been entered here by the surety to discharge the bond as one executed without any authority of law. In re Claasen, 140 U. S. 200, 208, 11 Sup. Ct. 735, 35 L. Ed. 409. We think the matter is not now within the jurisdiction of this court, but is a matter for the consideration and determination of the Circuit Court.

The motion must be denied.

Judgment affirmed.

HARTMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 9, 1909.)

No. 1,809.

1. INDICTMENT AND INFORMATION (§ 132*)—JOINDER OF COUNTS—FEDERAL STATUTE.

The government cannot be required to elect between counts of an indictment which charge misdemeanors of the same class, although under some of the counts the punishment may be imprisonment in the penitentiary; but under Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720), such counts may be joined and tried together.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-453; Dec. Dig. § 132.*]

2. CRIMINAL LAW (§ 1144*)—APPEAL AND ERROR—REVIEW—PRESUMPTIONS.

On a writ of error, when there is a general verdict and judgment upon an indictment containing several counts, the presumption is that the judgment was rendered on the good counts, if any, unless something to the contrary appears on the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3016-3037; Dec. Dig. § 1144.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CRIMINAL LAW (§ 394*)—EVIDENCE—COMPETENCY—EVIDENCE WRONGFULLY OBTAINED.

It is no objection to the admissibility of evidence in a criminal case that it was obtained by means of a search warrant illegally issued or executed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 875, 876; Dec. Dig. § 394.*]

4. CRIMINAL LAW (§ 1172*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where two defendants, jointly indicted, were both convicted under proper instructions on five separate counts of violations of Oleomargarine Act Aug. 2, 1886, c. 840, § 6, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230), by packing oleomargarine colored yellow by them in old stamp-paid packages, which had been emptied, but the stamps from which had not been removed, for the purpose of selling the same to others, and each was sentenced to pay a fine of \$1,000 and to be imprisoned for six months, which was less than might have been imposed under any one of such counts, they could not be prejudiced by instructions given on the trial relating solely to other counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3154; Dec. Dig. § 1172.*]

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

Edwin Sutherland, for plaintiffs in error.

W. L. Day and T. H. Garry, for the United States.

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

LURTON, Circuit Judge. The plaintiffs in error were jointly indicted and convicted for violation of Act Aug. 2, 1886, c. 840, § 1, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228), as amended by Act May 9, 1902, c. 784, § 1, 32 Stat. 193 (U. S. Comp. St. Supp. 1907, p. 636), known as the "Oleomargarine Act." The indictment contained 18 counts. Count 1 charges a violation of section 3 of the act by carrying on the business of manufacturers of oleomargarine without having paid the special tax required by law. Counts 2, 3, 4, and 5 charge violations of the act by failing to destroy stamps on emptied oleomargarine packages. Counts 6 to 9, inclusive, charge a violation of the thirteenth section of the act by refilling stamped packages which had contained tax-paid oleomargarine. Counts 10 to 14, inclusive, charge a violation of section 6 of the act. Counts 15, 16, and 17 charge violations of section 5 of the act by failing to keep books, give the required bond, and put up sign. Count 18 charges a violation of section 17 by defrauding or attempting to defraud the United States of the tax on colored oleomargarine produced. The defendant Henry Hartman was found guilty on all the counts. The defendant Frank Hartman was found guilty upon counts 6 to 14, inclusive, and not guilty upon the other counts. Each of the defendants was adjudged to pay a fine of \$1,000 and to be imprisoned in the Cleveland workhouse for a period of six months.

A motion that the government be compelled to elect upon which count it would proceed or demand a conviction was overruled. There was no reversible error in this. The offenses joined were merely stat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

utory misdemeanors of the same class, and the fact that various penalties were attached, by which imprisonment in a penitentiary was possible under some of the counts, did not prevent a joinder of counts under Revised Statutes, § 1024. *Morris v. United States* (C. C. A.) 161 Fed. 672. Both defendants were found guilty under counts 10 to 14, inclusive. Those counts rest upon section 6 of the oleomargarine act, and charge the offense of packing oleomargarine in old stamp-paid packages which had been emptied and upon which the stamps had not been destroyed. The judgment awarded was one which might have been imposed under the general verdict upon these counts, irrespective of any other. When there are a number of counts in an indictment, and the verdict is a general one, a judgment which might have been awarded under any one of the counts will be applied, upon a writ of error, upon any count good in law upon which there was evidence to go to the jury. The question was given full consideration in a similar case, in which the opinion of this court has just been filed. *Hardesty et al. v. United States*, 168 Fed. 25. It follows, therefore, that we need consider only those counts upon which both defendants might have been legally convicted, namely, those from 10 to 14, inclusive.

Counts 10 to 14, inclusive, charge violations of section 6 of the law by packing oleomargarine in packages theretofore used for that purpose. Under that section manufacturers are required "to pack in firkins, tubs, or other wooden packages not before used for that purpose," and that such manufacturers and wholesale dealers shall sell "only in original stamped packages." It also provides that retail dealers shall sell "only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages which shall be marked and branded as the Commissioner of Internal Revenue * * * shall prescribe." It concludes as follows:

"Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years."

Section 3 of the act, as amended by the act of May 9, 1902, enlarges the definition of manufacturers by providing:

"That any person that sells, vends or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof."

Under this section, as amended, every person is a manufacturer of oleomargarine who colors oleomargarine, except for his own family table, for the use and consumption of others. On this subject the court correctly charged as follows:

"If the defendants, or either of them, have been shown, by proof that satisfies you of it beyond a reasonable doubt, to be engaged, or were engaged on

the 20th of last January, or thereabouts, in this division and district, in coloring oleomargarine so as to make it look like butter, or any shade of yellow, then they were manufacturers, provided they were also persons who were engaged in selling, vending, or furnishing oleomargarine for the use and consumption of others."

The tenth count charges both defendants with having at a date named an empty stamped oleomargarine package in their possession, "and, being there and then manufacturers of oleomargarine, did unlawfully, knowingly, and willfully pack other oleomargarine there and then manufactured by them in the said tub, which had been, as aforesaid, used for that purpose before, * * * contrary to the form of the statute," etc.

The other counts, 11, 12, 13, and 14, are identical, except in charging other offenses of the same character. The court instructed the jury that they could not find defendant Frank H. Hartman guilty under certain counts of the indictment which applied to and covered the obligations of one engaged in the business of manufacturing oleomargarine, such as the payment of a special tax, cancellation of stamps on empty packages, keeping proper books, filing a bond, putting up and maintaining signs, etc. The court charged the jury that they might find both defendants guilty under counts 10 to 14, inclusive, which charged the violation of section 6 of the act by refilling of packages before used in the packing of oleomargarine with other oleomargarine. The court also instructed the jury that they might find both defendants guilty under counts 6 to 9, inclusive, being counts under the thirteenth section, which applies to any person who neglects to destroy the stamps upon an emptied package, or who "fraudulently gives away or accepts from another, or who sells, buys or uses for packing oleomargarine, any such stamped package," without regard to whether such person is or is not a manufacturer, or wholesale or retail dealer, under the definition of the law. The penalties under the thirteenth section would not justify the sentence imposed in this case. But they might have been properly imposed upon both defendants under the tenth, eleventh, twelfth, thirteenth, and fourteenth counts.

There was evidence tending to show that the plaintiffs in error were engaged in the business of manufacturing oleomargarine by mixing with the white, tax-paid oleomargarine a coloring material which gave the product the yellow shade of butter, for the purpose of selling, vending, or disposing of the same to persons other than those of their own family tables, and that they had packed this colored product so made by them in tubs, baskets, or packages which had contained tax-paid colored oleomargarine and had been emptied, and that they had done this fraudulently, knowing that the stamps upon the said emptied packages had not been destroyed as required by law when the packages were emptied.

By far the most important of the evidence resulted from a search of the premises occupied by the plaintiffs in error and in which they carried on their business. The evidence thus disclosed was objected to as incompetent upon the theory that the search warrant under which it had been procured was irregular and illegal. We need not stop to determine the regularity of the search warrant; for, conceding it to have

been illegally issued, or illegally executed, the evidence which was thereby discovered was not incompetent under the direct authority of *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; and *Hardesty et al. v. United States* (decided by this court) 164 Fed. 420.

There was no error in the charge of the court of which plaintiffs in error can complain. The opinion heretofore filed will be withdrawn, and this substituted.

The application to rehear is denied, and the judgment affirmed.

LA COMPAGNIE GENERALE TRANSATLANTIQUE v. MAGUIRE.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 195.

1. SHIPPING (§ 84*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE WAYS.

A hatch cover on the second deck of a vessel which when in place constituted part of the gangway over which employes were required to move cargo in loading the vessel constituted a "way," within the meaning of the New York employer's liability act (Laws N. Y. 1902, p. 1748, c. 600), which makes employers liable under certain conditions for injuries resulting from defects in the condition of "ways, works and machinery."

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 350; Dec. Dig. § 84.*

For other definitions, see Words and Phrases, vol. 8, pp. 7417, 7418 and 7834.]

2. SHIPPING (§ 86*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

Where the hatch cover on a vessel was made of boards eight feet long, supported only at the ends, with no strong-back across the middle, although the remainder of the deck was supported every four feet, and such cover, which was used as a part of the deck over which cargo was moved, gave way under the weight of a truck and its load, by which an employe was injured, the question whether such construction was negligent and rendered the owner liable for the injury was one for the jury.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 86.*]

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

This cause comes here upon appeal from a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error in an action to recover damages for negligence.

The plaintiff was a longshoreman working on board *La Gascogne*. He was engaged at the time of the accident in receiving and distributing cargo on one of the between-decks; he called it the "orlop deck." The process was as follows: A draft consisting of several sheets of copper was lowered in the sling through the hatch of the deck above. This would bring it to the hatch of the deck below. The hatch cover for that deck had been put in place in the usual way by the plaintiff and his fellow workmen, and upon it there was a truck waiting to receive the descending draft. As it neared the truck the workman caught it and swayed it so that it would come into proper position on the truck. Thereupon the sling was removed, one of them took hold of the handles of the truck, and wheeled it over to the wings of the ship, inshore and outshore, where the copper was being stowed. Cargo had not yet been stowed in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hold under this hatch. The first draft of copper sheets that came was received by the gang working on the offshore side, was placed on a truck, and wheeled off to the wings. The second draft was received by plaintiff and one Brady who were working with the inshore gang; they had a truck in position on the hatch cover, caught the draft, and brought it down on the truck. As soon as its whole weight was on the truck, two of the planks composing the hatch cover broke; Brady narrowly escaped, but plaintiff fell with the broken plank to the bottom of the hold.

The hatch was eight feet fore and aft between coamings. The planks which were used as a hatch cover were eight feet long; they rested on the projecting under edges or shoulder of the hatch, and apparently fitted securely when in place, and had been properly placed by the men before they began work. The transverse deck beams were four feet apart, so that all deck planking rested on a secure support every four feet. The planks composing the hatch cover, however, were supported only at their ends, so that for a distance of nearly eight feet they had no support at all. There was no "strong-back," so called, which is a removable transverse support placed midway in the hatch so that the planks may rest in part upon it, and thus be as well supported as the deck planks are—with four feet only between beams.

Joseph P. Nolan (John M. Nolan, of counsel), for plaintiff in error.
F. A. Acer (F. F. Davis and M. L. Malevinsky, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). This action is brought under the employers' liability act of the state of New York, chapter 600, p. 1748, Laws 1902. The first section provides that the employer shall, under certain conditions, be liable when personal injury results—

"by reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition."

The first contention of defendant is that the injury did not result "by reason of any defect in the condition of the ways, works or machinery." Many cases are cited in which such structures as a scaffolding for workmen to work upon have been held to be "appliances" rather than "places to work." None of these are applicable, because they were concerned solely with the common-law relations of master and servant, and not at all with the construction of this statute. The hatch cover was a portion of the gangway over which the truck was to be wheeled back and forth between the place where the sling descended and the wings; it would be difficult to find anything which was more emphatically a "way" to be kept in proper condition.

It is next assigned as error that the court refused to direct a verdict in favor of the defendant on the ground that no negligence on the part of defendant was shown. We are satisfied that it was a proper question for the jury to determine whether defendant was reasonably prudent in providing a hatch cover of this length, which when in place would become a part of the deck and would necessarily be required to support heavy weights, without giving it the measure of support which was secured to the other parts of the same deck. The

trial judge did not improperly apply the doctrine of *res ipsa loquitur* to an unexplained catastrophe, which upon the proofs no one could account for, or which might be accounted for on several different theories under one or more of which the master would not be in fault. The proof shows that the planks used for the hatch cover were put in place properly in the usual way, and that they gave way under the combined weight of the two workmen, the truck, and the 20 sheets of copper, manifestly because no strong-back had been provided by the master, thus leaving those planks unsupported for eight feet when no other planks on the same deck were left unsupported for more than four feet. The defendant called no witnesses, so we have no evidence that the structure had for months or years proved itself to be sufficient to meet all strains which it might reasonably be expected to bear. For aught that appears, this style of hatch cover for the orlop deck, having no strong-back support, might have been put to use for the first time during the single discharge and loading with which the plaintiff was concerned.

Defendant has argued at some length on assumption of risk and contributory negligence points which were not presented either by motion to direct, nor by exceptions to the charge. In fact no exception to the charge—a very full and careful one—was reserved.

Finally, error is assigned to the "admission of testimony of a custom of other shipowners to use strong-backs." In response to a question as to what was the usual and ordinary way of constructing a hatch, Brady, who had been working as a stevedore all over New York Harbor for 25 years, replied that there was always a strong-back to support the center of the hatch. Objection was made and exception was reserved to the allowance of this question. But if there were error in allowing it—as to which we express no opinion—it was harmless, because the same witness had some time before stated without objection or exception:

"The beams are four feet apart, and this hatch is eight feet apart. In other vessels there is a strong-back in the center of that before you put on the plank for security."

No motion was made to strike out this testimony, nor was the court asked to instruct the jury to disregard it.

The points raised as to excessive damages and as to motion for new trial cannot be considered in this court.

Judgment affirmed.

UNITED STATES v. MOORE.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 33.

POST OFFICE (§ 7*)—POSTMASTERS—LIABILITY ON BONDS.

A postmaster who, by direction of the Post Office Department, appointed a clerk in his office and mailed the checks in payment of her salary to her in Washington, taking credit therefor in his accounts, which he certified under oath were just and true as he verily believed, although such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

clerk rendered no service in his office, is liable on his bond for the amount of the salary so allowed and paid him, notwithstanding the fact that he acted in good faith and in the supposition that such clerk was employed in the department in connection with the establishment of a free delivery at his office; it being provided by Act March 15, 1898, c. 68, § 9, 30 Stat. 317 (U. S. Comp. St. 1901, p. 2630), that it shall not be lawful to detail clerks from any branch of the postal service to any of the offices or bureaus of the Post Office Department at Washington, of which provision he was charged with knowledge.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 7.*]

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

Lyman M. Bass, U. S. Atty.

Wade & Stevenson, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The action is brought against defendant, who was postmaster at Fredonia (a second-class office), upon a bond conditioned that "if the said Arthur R. Moore shall faithfully discharge all the duties and trusts imposed on him, either by law or the rules and regulations of the Post Office Department of the United States," the obligation should be void.

On or prior to January 17, 1899, defendant received a letter from Perry S. Heath, who was First Assistant Postmaster General, instructing him "to appoint [four other named persons and] Minerva Jeffrey as clerks in [his] office at the rate of \$600 per annum to take effect January 15, 1899." With the procuring such letter to be written or these instructions to be given, he had nothing to do. On January 17th he advised the Post Office Department of the appointment of Minerva Jeffrey, general utility clerk, salary \$600. On January 24, 1899, Heath wrote him that the appointment of Minerva Jeffrey as general utility clerk in the Fredonia office at a salary of \$600 per annum was approved. On May 8, 1899, the acting First Assistant Postmaster General wrote defendant, directing him to cancel certain appointments, but directing that Minerva Jeffrey "be continued on his rolls for the present at the rate of \$600 per annum." Prior to June 16, 1899, Heath addressed a letter to defendant, which he duly received, directing him to cancel the appointment of Minerva Jeffrey as of the date of June 15, 1899. He replied on the 16th stating that on June 15th she was "separated from the position of general utility clerk, salary \$600, in this office by transfer, and such position abolished from that date." To this Heath replied on June 22, 1899, approving thereof.

Minerva Jeffrey was not at the Fredonia post office, and did not perform any service at that office, from January 15, 1899, to June 15, 1899. The defendant was instructed by the Post Office Department to send checks for Minerva Jeffrey's salary during that period to her at Washington, D. C., which he did, drawing his checks to her order on the Fredonia National Bank. Her salary for the entire period was thus paid by him, she signed the clerk hire pay rolls for the respective amounts, and defendant certified that the credits claimed by him in his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

accounts by reason of payments to her were "just and true as [he] verily believed." Upon such certified accounts he received credit for these amounts at the Post Office Department in the city of Washington, and has availed of such credit in the final adjustment of his accounts.

The statutes expressly provided that "it shall not be lawful" to detail clerks or other employes paid from general appropriations for the postal service from any branch of said postal service to any of the offices or bureaus of the Post Office Department at Washington." Section 9, Act March 15, 1898, c. 68, 30 Stat. 317 (U. S. Comp. St. 1901, p. 2630). Since defendant is charged with knowledge of this statute, whether he was aware of it or not, he must have known when he certified the various sums paid to Minerva Jeffrey that she had performed no service at Fredonia, and could not by performing service at Washington entitle herself to any payment, since transfer thereto was illegal.

The defendant acted in entire good faith, without any purpose or intent of defrauding the government. He supposed that his superior officers were more familiar than he was with the voluminous and complicated statutes and regulations of the department, and followed their instructions with no suspicion that his doing so was any breach of duty. He had heard before January, 1899, that the installing of a free delivery system in the Fredonia post office was in contemplation, and believed the new appointments were made to carry out the proposed plan, and that Minerva Jeffrey was at work in Washington in respect to matters that related to that addition to the Fredonia office. He had no purpose or intent of having placed on the pay roll persons not needed in said office and not performing service therein. Nevertheless, by certifying to her services on the Fredonia pay roll, he made it possible to draw from the appropriation \$251.66 for services which had never been performed, and to that extent the government has been made to pay out money which it did not owe. Section 3861, Rev. St. (U. S. Comp. St. 1901, p. 2632), provides that the salary of a postmaster and such other expenses of the postal service authorized by law as may be incurred by him, and for which appropriations have been made, may be deducted out of the receipts of his office, under the direction of the Postmaster General. Section 3844 (page 2614) requires a sworn statement to accompany each quarterly account that the credits he claims are just and right. Had he carefully conformed to the statutes and regulations, this money could not have been withdrawn from the treasury in the way it was, and for an improper payment which no act of his had facilitated he would not of course be responsible.

Unfortunately for him, entire good faith and the most honest intentions are no defense. The law is well settled, and it is necessary to refer only to the recent case of *Smythe v. U. S.*, 188 U. S. 156, 23 Sup. Ct. 279, 47 L. Ed. 425. There the official bond was in same form as the one we have here, namely, that Superintendent of the Mint should "faithfully and diligently perform, execute and discharge all the duties of said office according to the laws of the United States." Treasury notes to the amount of \$25,000 were placed by the Superin-

tendent in a tin box in the steel vault provided by the government for the safe-keeping of public funds in his custody. While in that box they were charred, burnt, and destroyed by fire that occurred in the vault, without any negligence on the part of the Superintendent, or his agents or employes. The court said, "He may make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception;" and a judgment against principal and sureties on the bond, for the full amount, was affirmed.

This may seem very harsh, but it is the law for government officers. Applying it to the facts in this case, we must hold that the trial court erred in dismissing the complaint upon the merits.

Judgment reversed.

In re ROSE SHOE MFG. CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 168.

1. BANKRUPTCY (§ 440*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

An order of a court of bankruptcy directing the turning over of money or property by a third person to a trustee cannot be reviewed by appeal under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), a petition for revision under section 24b being the only remedy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*

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

2. BANKRUPTCY (§ 116*)—ADMINISTRATION OF ESTATE—POWERS OF COURT.

Where property which has come into the possession of a receiver in bankruptcy as a part of the bankrupt's estate has been taken from his possession, by an adverse claimant, either with or without his consent, the court of bankruptcy has power to protect its possession by summary order requiring the return of the property, or its proceeds if sold, and jurisdiction to adjudicate with respect to all claims thereto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.*]

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

Adler & Adler, for appellant.

Walter S. Hubbell (John A. Barhite, of counsel), for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is an appeal from an order of the District Court reversing a summary order of a referee in bankruptcy directing the Alliance Bank, of Rochester, N. Y., to turn over to the trustee of a bankrupt estate \$1,171.73, being the proceeds of a sale of certain shoes alleged by the trustee to have been a part of such bankrupt estate and to have been unlawfully taken from the receiver of said estate by said bank.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At the outset it is apparent that the case comes to this court in an improper way. An order directing the turning over of property or money by a third person to a trustee is not an order which can be reviewed by appeal under section 25a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]). It is not (1) an adjudication of bankruptcy, (2) a grant or denial of a discharge, or (3) a judgment allowing or disallowing a debt or claim; the latter term applying only to debts presented for proof against estates in bankruptcy. *First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116; *In re Whitener*, 105 Fed. 180, 44 C. C. A. 434. A petition for revision is the only remedy.

As, however, the appellee has made no objection to the present method of procedure, and as the assignments of errors in connection with the findings present the questions of law to be considered as adequately as would a petition for revision, we have concluded to treat the case as if brought here by petition. *In re Russell & Birkett*, 101 Fed. 248, 41 C. C. A. 323; *In re Abraham*, 93 Fed. 767, 35 C. C. A. 592. But we shall not consider our action a precedent in any case where objection is made.

The following is a summary of the essential facts: In April, 1907, a receiver in bankruptcy was appointed for the Rose Shoe Manufacturing Company, who forthwith entered upon the discharge of his duties and took possession of the bankrupt's shoe factory at Rochester and all the merchandise therein. A part of such merchandise consisted of boots and shoes which had been sent out by the bankrupt to fill orders and had been returned. A considerable quantity sent out before the appointment of the receiver was returned afterwards, and was accepted by the receiver and the bankrupt. Some time after the appointment of the receiver the Alliance Bank, without his consent, took the said returned merchandise, sold it for \$1,171.73, and retained the proceeds. This action of the bank was in pursuance of a claim of ownership. Accounts for boots and shoes sold had been assigned by the bankrupt to the bank as collateral security for indebtedness, and the bank claimed that the returned merchandise which had been included in such accounts belonged to it. The assignment from the bankrupt to the bank in terms embraced only the accounts, and no other assignment was executed.

Upon these facts the referee found that the proceeds of the sale of the shoes should be returned by the bank to the trustee in bankruptcy. The District Court, however, held that the action of the referee was erroneous, upon the ground that the bank had an adverse claim to the returned shoes, that the bankrupt had possession of them only as agent of the bank; that the bank was the lawful owner of the shoes, and that the referee had no jurisdiction to make the order in question.

It is clear that the returned merchandise came into the actual possession of the receiver as a part of the bankrupt's property. Whether or not it was separated from other merchandise is not material, and it is not found by the referee that it was separated. It was in the factory of the bankrupt, and no legal action was necessary upon the part

of the receiver to retain possession. On the other hand, legal action would have been necessary on the part of the bank to obtain possession if it had not been surrendered by the receiver's employé. And, being in the custody of the receiver, the merchandise was in the possession of the bankruptcy court, which had the right, when such possession was disturbed, to regain it by summary proceedings and to adjudicate with respect to all claims concerning the property.

In *Whitney v. Wenman*, 198 U. S. 539, 552, 25 Sup. Ct. 778, 781, 49 L. Ed. 1157, the Supreme Court said:

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankrupt court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

See, also, *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183.

Of these two cases, the Supreme Court said in *Murphy v. Hofman* (decided January 4, 1909) 29 Sup. Ct. 157, 53 L. Ed. —:

"The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of a res as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court."

Although the referee has found that the bank took the merchandise from the possession of the receiver without his knowledge or consent, yet if it be assumed that the receiver voluntarily turned it over, still the bankruptcy court was not deprived of jurisdiction. The receiver had no authority to turn over the property. As also said in *Whitney v. Wenman*, page 553 of 198 U. S., page 781 of 25 Sup. Ct. (49 L. Ed. 1157):

"The court had possession of the property, and jurisdiction to hear and determine the interests of those claiming a lien thereon or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property by the receiver, without authority of the court."

Nor does the fact that the bank sold the shoes change the situation. The proceeds stood in their place. The court had power to direct the turning over of such proceeds to the trustee. In *First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, the Supreme Court said:

"The sale in the circumstances did not change the situation. The proceeds stood in the place of the property, and the order returning the proceeds was equivalent to an order returning the property."

The petition merely prayed for, and the referee only entered, an order for the surrender of the proceeds of the sale of the merchandise to the trustee. No questions of title, rights, or equities have been

litigated. These questions can be determined in proper proceedings in the bankruptcy court after the present order has been complied with.

The decision of the District Court is reversed.

PENNSYLVANIA R. CO. v. KIRK.

(Circuit Court of Appeals, Third Circuit. February 15, 1909.)

No. 45.

MASTER AND SERVANT (§ 286*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—
DEFECTIVE RAILROAD CAR—FAILURE TO INSPECT.

The question whether the failure of a brake to work on a car being moved in railroad yards, by reason of which an employé was killed without negligence on his part, was chargeable to negligence of the railroad company in failing to inspect the same, *held* properly submitted to the jury under the evidence in an action to recover for the employé's death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. § 286.*

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

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

Joseph H. Gaskill and Thomas L. Gaskill, for plaintiff in error.

John W. Wescott and Francis D. Weaver, for defendant in error.

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

BUFFINGTON, Circuit Judge. In the court below, John W. Kirk, administrator of Estell N. Kirk, recovered a judgment against the Pennsylvania Railroad Company, to review which the latter sued out this writ. The suit was brought, under a statute of New Jersey, to recover damages for decedent's death through the negligence of the railroad. The decedent, while working as an air-brake repairer for the railroad, was caught between the bumpers of two cars standing on a yard switch. He sustained fatal injuries. The accident was caused by a shifted car backing violently against two standing cars decedent was working between. Kirk had protected himself by a blue flag, which was the proper notice to show he was under or about the cars. The brakeman on the colliding car saw the flag, and had no intention to run as far as the protected cars, but the brake failed to work and stop the car in time. The alleged negligence was a defective brake and failure to inspect. The case turns on whether there was sufficient evidence to go to the jury.

After an examination of the testimony, we are of opinion it would have been error for the court to give binding instructions for the defendant. The striking car was one of another line, which was being shifted in a drilling yard where trains were made up. There was no

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

evidence to show any inspection of this car by the defendant after it came on its lines, and, while there was evidence it was inspected and found in perfect condition after the accident, there was evidence by the brakeman that he had tried the brake twelve times; that he put all his strength upon it, and it would not work. Now, while it is true there was testimony that a brake apparently perfect would at times fail to work, there was also evidence that the failure to work was often due to a slackness of the brake chain, which a proper inspection would have detected and corrected. In view of the absence of any prior inspection whatever by the defendant company, and of the slackness which such an inspection would remove, we cannot say, as matter of law, there was no proof before the jury from which defendant's lack of care could be found. That the decedent was without fault, and that he was killed by reason of the failure of the brake to work, are unquestioned facts, and whether the failure of the brake to work resulted from defendant's noninspection was, we think, an inference to be determined by the jury, and not stated by the court as a conclusion of law.

The judgment will be affirmed.

WEAVER v. SCHUMPERT. †

(Circuit Court of Appeals, Fifth Circuit. February 23, 1909.)

No. 1,789.

EXCEPTIONS, BILL OF (§ 15*)—INSERTION OF DOCUMENTS—IDENTIFICATION OF DOCUMENTS ATTACHED.

Where a bill of exceptions recites that a transcript of a judgment or other paper introduced in evidence is attached to and made a part thereof, such paper must be identified by some mark or number referred to in the bill.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 15, 16; Dec. Dig. § 15.*]

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

E. B. Herndon, for plaintiff in error.

J. D. Wilkinson, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This action was brought on a judgment alleged to have been obtained in the district court of Fannin county, Tex., against the defendant, who is a citizen of the Western district of Louisiana. The case having been put at issue, a jury was impaneled and evidence taken, whereupon the court, on motion of the defendant, directed a verdict. The direction of the verdict is the substantial error assigned in this court.

The bill of exceptions does not contain the evidence introduced on the trial of the case, but recites as follows:

"There had been offered and introduced, and submitted to the jury, all of the testimony and evidence, to wit: The transcript in the suit of T. F. Weaver

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 30, 1909.

v. T. E. Schumpert from the Sixth district court for the state of Texas, held in and for Fannin county, in said state, and the sections of the Revised Statutes of the state of Texas as copied into the record of this suit; the said transcript and sections of the Revised Statutes of the state of Texas being all the evidence offered in evidence by both plaintiff and defendant, and being duly taken down by R. B. Cook, stenographer, and which is hereto annexed and made part hereof as fully as if copied herein."

The bill of exceptions is insufficient, as the trial judge does not by marks or numbers or paraps identify the papers not incorporated in, but intended to be made part of, the bill. Besides this, we notice that the "note of evidence," signed "R. B. Cook, Stenographer," shows that the transcript in the suit of Weaver v. Schumpert, in the district court of Fannin county, in the state of Texas, which is the basis of the suit, is referred to as offered in evidence, but is not incorporated in the notes. See Foster's Federal Practice (3d Ed.) p. 891, § 377; Leftwitch v. Lecanu, 4 Wall. 188, 18 L. Ed. 388; Reed v. Gardner, 17 Wall. 411, 21 L. Ed. 665.

The judgment of the Circuit Court is affirmed.

SESSLER et al. v. PADUCAH DISTILLERIES CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1909.)

No. 1,835.

1. BANKRUPTCY (§ 363*)—LIENS—WAIVER BY PROVING DEBT AS UNSECURED.

A creditor of a bankrupt for the price of goods sold, by proving his debt as one without security, does not waive his right to assert a vendor's privilege against the goods, under Rev. Civ. Code La. art. 3227.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 363.*]

2. BANKRUPTCY (§ 308*)—PAYMENT OF DEBT BY SURETY—RIGHT OF SUBROGATION.

A surety for a bankrupt, who pays the debt after it has been proved in bankruptcy, is legally subrogated, under Rev. Civ. Code La. art. 2162, to the rights of the original creditor, and may in the latter's name assert his claim to a privilege under the state statutes.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 308.*]

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

Henry L. Lazarus and Eldon S. Lazarus, for appellants.

Bernard Titche, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In November and December, 1907, the Paducah Distilleries Company sold whiskies to David Brunner in the amount of \$1,170, no part of which had been paid when, January 2, 1908, David Brunner was adjudicated a bankrupt. The contract of sale was a Louisiana contract, and at the time of adjudication the Paducah Distilleries Company had an option either to sue for the dissolution of the sale, under articles 2046 and 2561 of the Revised Civil Code of Louisiana, or assert a vendor's privilege, under article 3227 of the same Code.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Paducah Distilleries Company proved its debt as one without security on the 27th of January, 1908, and on February 17, 1908, filed a rule against David Sessler, receiver, praying for a rescission of the contract of sale, or, in the alternative, for a separate appraisal and sale. The referee of hearing made the rule absolute and ordered the restoration of the goods, notwithstanding the proof showed that subsequent to the proof of debt the claim had been paid by Menard Bros., as sureties or guarantors. On appeal the order of the referee was affirmed.

On this appeal it is urged that the Paducah Distilleries Company waived or lost its right to a rescission by the unqualified proof of debt as an ordinary creditor. In our opinion it is not necessary to decide this precise question, because the proof of the debt certainly did not waive the vendor's privilege granted by the Louisiana Code; and whether the sale be rescinded or the vendor's lien granted is immaterial, as a considerable portion of the goods are shown to have been consumed.

The contention is also made that as, subsequent to the proof of debt, Menard Bros., as sureties, paid the debt, the interest of the Paducah Distilleries Company was extinguished, and the case should have been dismissed; and it is also contended that, as Menard Bros. took no express subrogation at the time of payment, they acquired no rights of the original creditor to rescind the sale. There may be some doubt as to whether any subrogation took place by contract; but as Menard Bros. were sureties of David Brunner, and paid the debt, we think they are legally subrogated under the Louisiana Code. See Rev. Civ. Code, art. 2162. We have no doubt about the right of a surety to prosecute his claim in bankruptcy in the name of the principal creditor, when subrogation takes place after proof of debt.

The decree in the court below does substantial right in the premises, and it is affirmed.

CASEIN CO. OF AMERICA v. VAN DAM.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 170.

SALES (§ 77*) — CONSTRUCTION OF CONTRACT — PRICE — ASCERTAINMENT UNDER PROVISIONS OF CONTRACT.

Plaintiff entered into a contract to sell to a company all of his product of dried curd for five years at a price to be fixed on the 1st of January of each year, to be not less than four cents per pound, and equal to the highest price which should be paid by the purchaser to any other party for like product. The purchaser, which did a local business only, sold its business and assigned its contracts, about 40 in number, to defendant, which was a large concern doing business in several states. *Held*, that the contract entitled plaintiff only to the highest price paid under the contracts so assigned and assumed, although defendant may have paid a higher price at other points and under different conditions.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 208; Dec. Dig. § 77.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

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

This cause comes here on writ of error to review a judgment of the Circuit Court, Eastern District of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. He sued as assignee of Ayer & McKinney, manufacturers of butter and other products of milk in Delaware county, N. Y. Since no point is raised as to the assignment, both assignors and assignee will be hereinafter referred to as the plaintiff.

George J. Gillespie (William F. Delaney, of counsel), for plaintiff in error.

Howard R. Bayne, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The action is founded on a contract, dated January 24, 1899, between Ayer & McKinney and "M. R. Isaacs and F. L. Schwerin, trading as the Quaker City Chemical Company of Philadelphia." By its terms Ayer & McKinney were to sell and deliver to the Quaker City Company all their products of skim milk, to be converted into dried cheese, for a period of five years from date, "at the price of four cents per pound f. o. b. cars for the first year, with the understanding that the price for each subsequent year shall be adjusted on the first of January of that year, that it be not less than four cents, as herein stated, for any year and shall be equal to the highest price which the Quaker City Chemical Company are paying to any other party for a like product." The parties further agreed that "all the conditions and terms of this contract shall be binding and extend to their heirs, executors, administrators and assigns, unless altered by mutual consent."

On June 7, 1901, Ayer & McKinney were notified by the Quaker City Company that they had assigned all their contracts to the Casein Company of America (the defendant), and were requested to continue shipping the dried curd and to bill the same to the Casein Company. The Casein Company had bought a controlling interest in the stock of the Quaker City. Plaintiff continued the shipments, and the defendant paid for all so delivered on the basis of five cents a pound, which was the price paid to plaintiffs by the Quaker City Company prior to the assignment of the contract to the Casein Company. Plaintiff sued and recovered on the theory that the Casein Company had, during the later years of the contract, paid $5\frac{3}{4}$ cents for some of the casein which it purchased from other producers, plaintiff contending that under the contract he was entitled to be paid at that rate.

The fundamental question in the case is, what meaning shall be given to the clause "equal to the highest price which the Quaker City Chemical Company are paying to any other party"? Shall it be construed literally, or shall it be broadened so as to cover the highest price paid anywhere by the Casein Company? The Quaker City Company was a local concern doing a small business under about 40 contracts; the Casein Company did a large business in several different

states, where presumably conditions vary, and had about 400 outstanding contracts.

It should be noted that upon buying out the Quaker City Company the Casein Company did not terminate or abrogate its contracts for the purchase of curd; it took them all over and carried them out. As the witness expressed it:

"There were about 40 contracts. The Casein Company continued to receive the curds shipped under those contracts; the Casein Company and the persons with whom the contracts were made proceeded to buy and sell the product."

Upon this state of facts we are of the opinion that the contract should be construed so as to carry out the evident intent of the parties, and to secure to the seller only the highest price paid under Quaker City contracts. The evidence shows that this did not exceed five cents.

The motion to dismiss at the close of the whole case expressly raised the point that the purchases made by the Casein Company under other contracts were not to be considered in fixing the price. Exception was duly reserved.

The judgment is reversed.

TIFFANY & CO. v. DRUMMOND.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 179.

1. MUNICIPAL CORPORATIONS (§ 706*)—NEGLIGENCE IN USE OF STREETS—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action to recover for an injury to a person struck by an automobile while walking across a street, the question of plaintiff's contributory negligence *held* properly submitted to the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706; * Highways, Cent. Dig. §§ 473, 473½.]

2. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—DUTY TO AVOID DANGER—CROSSING STREETS.

The rule that a person before crossing a steam railroad track is bound, as matter of law, to stop, look, and listen, does not apply to one passing over an ordinary street crossing in a city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515–1517; Dec. Dig. § 705; * Highways, Cent. Dig. § 460.]

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

E. Sidney Berry (I. R. Oeland, of counsel), for plaintiff in error.

W. H. Van Steenberg (W. L. Morse, of counsel), for defendant in error.

Before LACOMBE and NOYES, Circuit Judges.

PER CURIAM. Two assignments of error are relied upon:

1. That the court should have directed a verdict in favor of defendant on the theory that plaintiff was himself negligent. He did not continue on the crosswalk, but angled north so as to reach the opposite side of the street about 70 feet above the corner. He looked both

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ways for approaching vehicles just as he started, but upon his own testimony it is not quite clear how often he looked south after he started and became engrossed in the enterprise of crossing the torn-up roadbed of the north-bound track; certainly he did not so look within a few seconds before the accident, or he would have seen the automobile which struck him. But the question of his negligence under all the circumstances was clearly one for the jury to pass upon under proper instructions as to his rights and obligations.

2. Exception was reserved to the charge, on plaintiff's request, that "there is no duty, as a matter of law, upon a person crossing the street, either at a crosswalk or elsewhere, to look up and down to avoid an approaching wagon." No authority is cited holding that the rule, frequently applied at steam railroad crossings, that as a matter of law a person must "stop, look, and listen," prevails to an ordinary street crossing in a city; and we are not prepared so to extend it. Moreover, the question is academic here, for the plaintiff concededly looked both ways before he started.

3. Exception was also reserved to this part of the charge:

"If a man starts—although he has a right so to do—to cross a street without looking for vehicles passing across his path or likely to cross his path as he goes across the street, that man may be found negligent because he has neglected a duty which both the law and common sense casts upon him, namely, to take reasonable precaution to avoid dangers reasonably to be anticipated."

We find no error in it.

The judgment is affirmed.

In re PECK.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 157.

BANKRUPTCY (§ 328*)—TIME FOR PROVING CLAIMS—POWER TO EXTEND.

Under Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), which expressly provides that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication" unless they are liquidated by litigation, the court has no power to extend the time merely because creditors were misled as to the value of assets by statements in the schedules and neglected to prove their claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.*]

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

This cause comes here upon petition to revise an order of the District Court, Northern District of New York, denying an application by certain creditors of the bankrupt to be allowed to come in and file and prove their claims after the expiration of one year from adjudication. The opinion of the District Court is reported in 161 Fed. 762.

Edgar F. Brown, for bankrupt.

H. M. Mott, for petitioners.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM: We think the language of section 57n, Bankr. Act July 1, 1898, c. 541, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), is conclusive of this appeal. It reads:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment."

The latter clause of this paragraph is somewhat ambiguous, and has been construed in cases which are relied upon by the petitioner. Such are *In re Noel*, 150 Fed. 89, 80 C. C. A. 43; *In re Baird* (D. C.) 154 Fed. 215; *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790. But the first clause of paragraph is unobscure and specific; it prescribes a period of limitations, and there is nothing in the act which relieves any creditor from its operation, except in the case where claims are being liquidated by litigation. Whether or not there may be exceptional cases which would not fall within the statute is a question on which we now express no opinion; but to hold that this clear and imperative provision is to be disregarded whenever a creditor may assert that he was misled because the bankrupt's schedules stated that some particular asset was of little or no value seems to us to be legislation, not construction.

The order of the District Court is affirmed.

MORSE v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 12, 1909.)

CRIMINAL LAW (§ 1132*)—APPEAL AND ERROR—PROCEDURE.

The hearing on a writ of error in a criminal case expedited by dispensing with the printing of the record and briefs, where serious objection was made to the enlargement of the defendant on bail.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1132.*]

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

On Motion of Defendant to be Admitted to Bail

See, also, 161 Fed. 429.

Martin W. Littleton, for the motion.

Henry L. Stimson, U. S. Atty., opposed.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We have considered the defendant's application for bail in all its aspects, not overlooking the petitions which have been signed by many prominent citizens on his behalf.

The question presented is a perplexing one. On the one side it is urged that the defendant's affairs are in a condition which demands his personal attention at various places in this city, and, on the other, the District Attorney strenuously urges that if admitted to bail the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant will not be present should the judgment of conviction be affirmed. In support of this view, our attention has been called to several instances in this and other circuits where under similar conditions the defendants, enlarged on bail, have fled the jurisdiction of the court. In these circumstances our sole anxiety is so to act that the rights of neither party may be jeopardized. We think this may be done by providing for a speedy hearing of the appeal, even though other litigants and the court may be inconvenienced thereby.

At the argument both counsel stated that they would be ready to argue the cause as soon as the record and briefs were printed. In order to prevent any delay on this score, we will consent to hear the cause on the typewritten record now on file, and, if necessary, on typewritten briefs, or on oral arguments alone. We will assign the cause for argument at the present session, giving it preference over all other cases, on any day upon which counsel may agree. If, however, counsel prefer, we will set the argument for the first day of the March session. By this arrangement, if counsel so desire, the case may be presented to the court within two weeks.

In the meantime every facility should, as in the past, be extended to the defendant to consult with those having business with him, and, upon proof that it is necessary for him to be present at meetings at other places in the city, arrangement can be made for his attending there in the custody of the marshal.

ELDER DEMPSTER S. S. CO. v. EARN LINE S. S. CO.
(Circuit Court of Appeals, Second Circuit. February 16, 1909.)
No. 167.

SHIPPING (§ 49*) — CONSTRUCTION OF CHARTER — DISPATCH MONEY — LAY DAYS FOR DISCHARGING.

Where a charter party which expressly provided, "Lay days at port of discharge to commence 24 hours after steamer's entry at custom house," and "Steamer to pay charterers * * * dispatch * * * for each lay day not used at discharging port," the lay days, for the purpose of computing dispatch money earned, do not commence until the expiration of 24 hours from the vessel's entry, although she may commence discharging at once.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 49.*

Deductions and offsets from charter hire of vessel, see note to Tweedie Trading Co. v. George D. Emery Co., 84 C. C. A. 254.]

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 adjudging the amount of dispatch money to be paid by ship-owners to charterers upon discharge in the port of Havana. The opinion of the District Court is reported in 163 Fed. 868.

Horace L. Cheyney, for appellant.

Ralph James M. Bullowa, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. The charter party contains the following clauses:

"Consignees to receive cargo at port of discharge at the rate of not less than 400 tons of coal per running day, Sundays and legal holidays excepted. Lay days at port of discharge to commence 24 hours after steamer's entry at custom house, and steamer to work at night, if required."

"Steamer to pay charterers or their agents dispatch at the rate of * * * for each lay day not used at discharging port."

The steamship arrived at Havana on December 27th at 8:30 a. m., was entered at the custom house at 10 a. m. of the same day, and discharge commenced at once. The only question in the case is whether the lay days began when the charterers commenced to discharge, December 27th, or on December 28th at 10 a. m., 24 hours after entry at the custom house.

The parties to the contract have explicitly, and without any reservation or proviso, provided that they shall begin 24 hours after entry. We find no force in the suggestion that the words "if required" refer to any other clause than that providing that the vessel shall work at night. It would seem that the express written agreement of the parties should control. The District Judge did not discuss the point, merely stating that:

"The libellant's view seems to be correct and sustained by the authorities. The *Cyprus* (C. C.) 20 Fed. 144; The *Katy*, L. R. Prob. Div. 1895, 56; and *Leary v. Talbot*, 160 Fed. 914, 88 C. C. A. 96."

In none of these cases was there an express stipulation of the character we have here. In *Leary v. Talbot*, which was an opinion of this court, there was a provision for "customary dispatch at port of discharge" which made applicable a rule of the Maritime Exchange. This rule was quoted in part and briefly discussed; but there was no controversy as to the beginning of the lay days, and no consideration of the effect of an express stipulation specifically providing for their beginning irrespective of any custom of the port.

In the case at bar we think the written agreement controls, and that the calculation should have been made in conformity with that provision of the contract.

The decree is reversed, with costs, and instructions to decree in conformity with this opinion.

J. B. & J. M. CORNELL CO., Limited, et al. v. WARD.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 191.

DEATH (§ 31*)—ACTION FOR CAUSING DEATH—PERSONS ENTITLED TO SUE—FOREIGN ADMINISTRATOR.

An administrator appointed in another state cannot maintain an action in New York to recover damages for the wrongful death of his intestate without taking out ancillary letters in that state, there being no statute of the state authorizing foreign administrators as such to sue therein.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 39; Dec. Dig. § 31.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

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

This cause comes here upon writ of error by defendants to review a judgment of the Circuit Court in favor of plaintiff, who sued to recover damages for the alleged negligence of defendants resulting in the death of George H. Ward, plaintiff's son.

Lemuel Skidmore, for plaintiff in error J. B. & J. M. Cornell Co.

Rose & Putzel (Benj. G. Paskus and Sydney Bernheim, of counsel), for plaintiffs in error Boehm and Coon.

I. Henry Harris, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The accident occurred in the state of New York, the statutes of which state provide that 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 death was caused. The damages recovered do not constitute any part of the decedent's estate. They are exclusively for the benefit of such husband or wife or next of kin. Code Civ. Proc. N. Y. §§ 1902, 1903. There is a similar statute in New Jersey. The deceased was a resident of Newark, N. J., and plaintiff was appointed administrator by the surrogate's court in that state. At the time of bringing suit he had not taken out ancillary letters in New York, and no statute of that state gives a foreign administrator, who has not received such an appointment, any right to sue in its courts. It is well settled that an administrator appointed in one state cannot as such maintain an action in another state, which has not either by the issue of ancillary letters or by some special provision of statute given him authority so to sue. Noonan v. Bradley, 9 Wall. 394, 19 L. Ed. 757; Dennick v. Central Railway Co., 103 U. S. 11, 26 L. Ed. 439. The objection was duly raised on the trial, and exception was reserved. The objection is fatal, and the judgment must be reversed. Fortunately this error will not deprive the plaintiff of any substantial right. It appears that subsequent to the trial he has taken out ancillary letters, and the Circuit Court has power to allow amendment which will enable him to prosecute the suit as such administrator. Van Doren v. Pennsylvania R. R., 93 Fed. 260, 35 C. C. A. 282; Hodges v. Kimball, 91 Fed. 845, 34 C. C. A. 103.

The judgment is reversed.

GENERAL ELECTRIC CO. v. MORGAN-GARDNER ELECTRIC CO.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1908. Rehearing Denied November 24, 1908.)

No. 1,462.

1. JUDGMENT (§ 675*) — CONCLUSIVENESS OF ADJUDICATION—PERSONS PARTICIPATING IN DEFENSE.

The fact that a manufacturing company paid the attorney who defended a suit against a customer for infringement of a patent, and part or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all of the costs, did not make it a party, so as to be concluded by the decree, where it did not appear that the attorney was not under the exclusive direction and control of the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1191; Dec. Dig. § 675.*]

2. PATENTS (§ 102*)—APPLICATIONS AND PROCEEDINGS THEREON—AMENDMENT OF APPLICATION.

An applicant for a patent may properly file new claims in the Patent Office without verification, where they are within the invention as disclosed in the specification and drawings, and narrower than the original claims.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 102.*]

Amendment of application, see note to *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, 68 C. C. A. 239.]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRICAL CONTROLLERS.

The Knight and Potter patents, Nos. 587,441 and 587,442, for a means and method of regulating the power and speed of mechanism driven by two electric motors, *held* valid and infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

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

For opinion below, see 159 Fed. 951.

Appellant failed in its suit to enjoin alleged infringement of claims 1 and 2 of patent No. 587,441 and claims 3, 4, and 9 of patent No. 587,442, both issued on August 3, 1897, to Knight and Potter, one for a "regulating apparatus for electrically driven mechanism," and the other for a "method of regulating electrically driven mechanism." 159 Fed. 951.

The claims are as follows:

"1. In an apparatus for regulating the power and speed of mechanism driven by two electric motors, the combination of two electric motors and a switch connecting them in series with each other and with a resistance, the switch provided with contacts and connections arranged to shunt one motor, leaving the other in series with a resistance, to disconnect one motor, and to connect the two motors in multiple, all by successive steps."

"2. In an apparatus for regulating the power and speed of mechanism driven by two electric motors, the combination of two motors and a switch for placing them in series with each other and with a resistance, the switch provided with contacts and connections adapted to cut out the resistance for one rate of speed, to again cut in the resistance, to shunt one motor, to disconnect one motor and cut out the resistance, and to connect the two motors in multiple."

"3. The method of regulating a car or vehicle driven by a pair of electric motors, which consists in connecting the motors in series, shunting one motor while maintaining a circuit through the remaining motor and through a resistance protecting the same, opening the circuit of the shunted motor and connecting the two motors in multiple."

"4. The method of regulating the power and speed of mechanism driven by a pair of series-wound electric motors receiving current from a constant potential circuit, which consists in first connecting the motors in series and in circuit with a resistance, then reducing the resistance until it is substantially cut out, then shunting one motor and again making use of the resistance to protect the unshunted motor, then disconnecting the shunted motor from circuit, and finally reconnecting the motors in multiple."

"9. The method of regulating the power and speed of mechanism driven by two electric motors, which consists in placing the two motors in series for slow speed, and changing them from series to multiple for higher speed by first cutting one motor out of circuit, replacing it by a resistance in series with the other motor, and finally placing the two motors in multiple with the resistance cut out."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Parts of the original application for patent No. 587,442, as shown by the file wrapper and contents, are as follows:

"This method, known as the 'series-multiple' method of regulation, with its inherent advantages, has been proposed heretofore, and its characteristics have been perfectly understood theoretically; but to our knowledge no one has succeeded in carrying it into practice in a satisfactory manner. The principal difficulty in the way of making a satisfactory application of this method appears to have been that it is impossible to make the change of connection from series to multiple and vice versa while the current was still passing through the motors without forming such arcs at the contact points as would speedily disintegrate them and render the apparatus unreliable and subject to rapid depreciation. For overcoming this difficulty a number of plans have been suggested. For instance, it has been proposed that at the moment of making the change the circuit should be interrupted either entirely or by the interposition of a considerable resistance, so that there should be no current passing while the change was being made, and, in consequence, no arcs at the contact points.

* * * * *

"This method [the method of the patent] in general consists in regulating the power and speed of mechanism driven by two electric motors by placing the two motors in series for slow speed and changing them to multiple connection for higher speed by first short-circuiting one motor while its field magnet is still energized, and then disconnecting one terminal of such motor and reconnecting it to the corresponding terminal of the other motor, whereby the two motors may be in multiple with each other. We accomplish this without the use of external means, such as a circuit breaker or resistance to interrupt or substantially reduce the current while the change is being made.

* * * * *

"Referring to Figs. 1 to 9, it will appear that in the first position, with the motors out of action, there would be two breaks in the circuit, one between the trolley T, and resistance R, and the other between the armatures, Aa, of the motor A, and the field, Bf, of the motor B. In the second step, Fig. 2, the latter break will be closed, there remaining only the break between the trolley and resistance. In the second step the two combinations shown in Figs. 2 and 3 will be produced, the two breaks in the circuit being closed in succession, and the motors being left in series with each other and the resistance. In the third step the resistance is short-circuited and the motors are in series, as shown in Fig. 4. At the fourth step the two combinations shown in Figs. 5 and 6 are produced. At the fifth step the combinations shown in Figs. 7 and 8 are produced; and, lastly, at the sixth step the combination shown in Fig. 9 is effected.

* * * * *

"These different figures show the combinations made at each step in the regulation. Thus, referring again to the figures, in Fig. 18 the circuit is open at two points; in Fig. 19 the circuit is open between 1 and 2, and closed between 9 and 10; in Fig. 20 the circuit is as follows: From trolley T, to plates 1 and 2, to resistance R, to field Af, to armature Aa, to blow-out magnet, to plates 9 and 10, to field Bf, to armature Ba, to ground G, giving the combination indicated in Fig. 3. In Fig. 21 the circuit is from the trolley T, to plates 1 and 2, to plates 4 and 3, to field Af, to armature Aa, to blow-out magnet, to plates 9 and 10, to field Bf, to armature Ba, to ground G, giving the combination indicated in Fig. 4. In Fig. 22 the circuit is from the trolley T, to plates 1 and 2, to resistance R, to the field Af, to the armature Aa, to blow-out magnet, to plates 5 and 6, to field Bf, to armature Ba, to ground G, giving the combination shown in Fig. 6 with the motor, A, short-circuited by a connection through plates 9 and 10 to ground G. In Fig. 23 the circuit is from the trolley T, to plates 1 and 2, to plates 4 and 3, to field Af, to armature Aa, to blow-out magnet, to plates 5 and 6, to ground G, giving the combination shown in Fig. 7. In Fig. 24 the circuit is from trolley T, to plates 1 and 2, where it divides, one branch going by plates 4 and 3 to field Af, to armature Aa, to blow-out magnet, to plates 5 and 6, to ground G, while the other branch goes by plates 8 and 7 to field Bf, to armature Ba, and to ground G, giving the combination shown in Fig. 8. In Fig. 25 the circuit is from trolley T, to plates 1 and 2,

then dividing and one branch going by plates 4 and 3 to field Af, to armature Aa, to blow-out magnet, to plates 5 and 6, to ground G, with a subbranch going from plate 4 to plates 8 and 7, to plates 11 and 12, to armature Aa, and thence to ground as before, establishing thus a shunt around the field magnet Af, containing resistance Y. The other branch goes from plate 4 to plates 8 and 7, to field Bf, to armature Ba, and to ground at G, with a subbranch from plate 7 to plates 11 and 13, and by a resistance Y to armature Ba, to ground G, thus shunting the field Bf. This gives the last combination indicated in Fig. 9.

* * * * *

"It will thus be seen that in the various combinations that we have brought about by the successive connections established by the switch, we have first placed the motors in series for slow speed as in Fig. 4, and then short-circuited one motor as in Fig. 6, then disconnected the inner terminal of the short-circuited motor as shown in Fig. 7, and finally reconnected the said terminal to the corresponding terminal of the other motor, as in Fig. 8, so that the two have gradually been shifted from series to multiple connection. In addition we have modified the action of the two motors while in their respective connections by means of resistance R, when they were in series, and by shunting their field magnets when in multiple and thereby secured additional rates of speed. By this plan we only use a resistance when the current is at a minimum, the motors being in series, but when a greater amount of current is required by the motors in multiple, we do not use a resistance, but rely upon a change in their field magnet strength to attain the last degree of regulation thereby avoiding loss in resistance. It must also be noted that the combinations shown in Figs. 5 and 6 are effected almost simultaneously, the object of reinstating the resistance being to have to take the place for a short period of the short-circuited motor, and preserve the other motor from being injured by a sudden excess of current, and it is not intended and does not in effect act to cause a material decrease of the current, so that the change of connections shall take place while the circuit is substantially opened.

* * * * *

"1. The method of regulating the power and speed of mechanism driven by two electric motors, which consists in placing the two motors in series for slow speed, and changing them in multiple connection for higher speed by first short-circuiting one motor while its field magnet is still energized, and then disconnecting one terminal of that motor and connecting it to the corresponding terminal of the other motor.

* * * * *

"10. The method of regulating the power and speed of mechanism driven by two electric motors which consists in placing the motors in series connection and then changing them to multiple connection while their field magnets are still energized and without interrupting or reducing the current by external means."

L. F. H. Betts, for appellant.
Glenn S. Noble, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). In *General Electric Co. v. Garrett Coal Co.*, 146 Fed. 66, 76 C. C. A. 528, the claims here in suit were held valid and infringed by the device used by the Garrett Coal Company and manufactured by appellee. Some additional prior patents, without explanation or discussion by experts, have been put into the present record. Our examination of them leads us to conclude that the best possible exhibition of the prior art was made in the Garrett Coal Company record, which constitutes the substantial part of the record in this case. On the issues of patentable novelty and infringement, we deem it unnecessary to do more than

express our concurrence in the views of the Circuit Court of Appeals for the Third Circuit.

In a supplemental bill herein, filed after the final decree was entered in the Garrett Coal Co. Case, appellant alleged that appellee "defended that suit on behalf of the Garrett Coal Company, paid the expenses thereof, and was in fact the real defendant therein; the Garrett Coal Company being simply the nominal defendant." Appellee denied the charge. While the proofs show that appellee paid an attorney who appeared for the Garrett Coal Company and defended the suit, and that, at the conclusion of the litigation, appellee paid a part or possibly all of the court costs, there is no proof that the attorney was not under the exclusive direction and control of the Garrett Coal Company, or that appellee had any standing except as an interested and sympathetic nonparticipant.

The question that has been most strenuously contested here has to do with the scope of the original application. The invention, so far as it is covered by the claims in suit, consists in the means and method of changing from series to multiple by shunting one of the motors, while protecting the other by resistance in series with it, and then breaking the circuit of the shunted motor and arranging it in parallel with the other. The claims in suit were not filed with the original application. They were submitted later by the applicants through their attorney. As these claims were not supported by a new verification, appellee insists that the Patent Office had no warrant in law to allow them, because "the invention claimed is substantially different from any indicated, suggested, or described in the original application." The applications were substantially alike. Excerpts, quoted in the statement, include the portions of the application for the method patent on which the respective arguments of the parties are based. The drawings in the original applications (copied in 146 Fed., at page 68, and in 76 C. C. A., at page 530) indicate that, in changing from series to multiple, when one motor is shunted, the other is protected by resistance in series with it. In describing the step by step changes the applicants said: "At the fourth step the two combinations shown in Figs. 5 and 6 are produced." And these figures point to the characteristic feature of the claims in suit. Referring to the circuits at different stages, applicants make it clear that in Fig. 22 one motor is shunted and the other is protected from the full current by means of an external resistance. In the concluding paragraph they said:

"The object of reinstating the resistance" (during the steps shown in Figs. 5 and 6) is to have the resistance "take the place for a short period of the short-circuited (shunted) motor and preserve the other motor from being injured by a sudden excess of current."

Against these statements, relied on by appellant, appellee lays stress on the applicants' declaration,

"We accomplish this (change from series to multiple by our step by step method) without the use of external means such as a circuit breaker or resistance to interrupt or substantially reduce the current while the change is being made."

In the face of the disclosures in the drawings, in the specific account of the successive steps to be taken, in the detailed description of the course of the circuits, and in the stated reason for using resistance

while shunting the one motor, appellee insists that in the above quotation the applicants asserted that they accomplished their new result without the use of resistance. If a period is to be placed after "resistance," appellee could as well claim that the applicants expressly disclaimed the use of a "circuit breaker." To us it seems that the applicants, instead of stultifying themselves by saying at one place that they did not use resistance and in another that they did and why they did, were broadly distinguishing their method from those of the prior art. One of the earlier methods was to employ enough resistance "so that there should be no current passing while the change was being made." Applicants said in effect that in their method they do not employ resistance in order to interrupt or reduce the current while the change is being made, but do employ it only for the purpose of protecting the unshunted motor. The original claims, as appellee points out, did not call for the use of resistance, and original claim 10 covered the change from series to multiple "without interrupting or reducing the current by external means." Original claims 1 and 10 indicate to us that the applicants believed themselves entitled broadly to a monopoly of the method of changing from series to multiple by shunting one of the motors, then breaking the circuit of the shunted motor, and then arranging it in parallel with the other motor, irrespective of whether the unshunted motor was protected by external resistance or not; and, since the drawings and specification pointed out clearly the desirability of external resistance for the unshunted motor while the change was being made, we think it was competent for the applicants through their attorney to file the narrower claims in suit without an accompanying affidavit. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586.

Appellee refers to a record of an interference between the applicants and one Lamme. The issue was with respect to the subject-matter of the applicants' original claim 1. Appellee cites the testimony given by the applicants in that proceeding as indicating that the use of resistance in protecting the unshunted motor was no part of their invention. Original claim 1 by its terms was not restricted to the use of external resistance for the protection of the unshunted motor while the other was in shunt. The testimony was directed to the issue. The applicants did not testify (and we are not referred to any question that was propounded to them on the subject) that their verified original application was untrue. Passing the question of competency, we find nothing in their testimony that conflicts with our construction of their application.

The decree is reversed, with the direction to enter a decree in appellant's favor for an injunction and an accounting.

COLUMBIA CHEMICAL CO. v. DUFF.

(Circuit Court of Appeals, Third Circuit. February 19, 1909.)

No. 50.

PATENTS (§ 218*)—LICENSES—ROYALTIES—RIGHTS AND LIABILITIES OF PARTIES.
Plaintiff contracted to furnish defendant with plans and specifications for building four patented gas producers, with a warranty that in addi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion to the gas they should produce as a by-product 70 pounds of sulphate of ammonia per ton of coal consumed, provided such coal contained not less than 1.3 per cent. of nitrogen. Defendant agreed to build the machines and to pay a license fee for their use if they fulfilled the warranty. Having refused to make such payment, plaintiff sued therefor, alleging fulfillment of the warranty, which defendant denied, and that issue was the only one tried. *Held*, that it was error for the court to instruct the jury that if defendant used coal containing less than the required per cent. of nitrogen it waived the warranty of 70 pounds of sulphate of ammonia per ton, and plaintiff could recover if a proportionate amount was produced, since the requirement as to the percentage of nitrogen was one for plaintiff's benefit, which he alone could waive or could insist on, and that if he consented to the use of inferior coal, as he admittedly did, the waiver was his and not defendant's, and did not relieve him from the warranty.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 330; Dec. Dig. § 218.*]

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

George B. Gordon, William Watson Smith, Ralph Longenecker, and Allen T. C. Gordon, for plaintiff in error.

Alexander Gilfillan, Edwin W. Smith, and Reed, Smith, Shaw & Beal, for defendant in error.

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

BUFFINGTON, Circuit Judge. In the court below, Edward J. Duff, hereafter styled "plaintiff," brought an action of assumpsit against the Columbia Chemical Company, hereafter styled "defendant," to recover \$15,500, license fees alleged to be due him under a contract between them dated November 28, 1903. On the trial, plaintiff recovered that sum with interest, and, judgment having been entered in his favor on the verdict, defendant sued out a writ of error.

In considering the case, we must bear in mind that this action is not brought to recover the purchase price of machinery which a plaintiff has built and which a defendant retains and refuses to pay for, but is brought to recover license fees for use of a patented device which this defendant built at its own cost and on which it agreed to pay license fees in case it fulfilled certain guaranteed requirements. The plaintiff resided in England, and was anxious to demonstrate in America the capacity of a gas-producer device patented by him. The defendant, a chemical company, was a large user of gas, and was desirous of installing a plant which could produce, from bituminous coal, gas and certain quantities of sulphate of ammonia as a by-product. To secure these objects the contract was entered into, which, so far as here applicable, stipulated that plaintiff—

"supply, free of charge, all plans and details necessary for the erection of the plant for the utilization of the said patents and any improvements thereof, and will give full explanation thereof."

On its part the defendant stipulated:

"Fifth. That during the residues of the terms of the said letters patent mentioned, and any extension thereof respectively the licensees will pay to the grantor the following royalties, viz.: A sum of four thousand two hun-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dred and fifty dollars (\$4,250) for each and every gas producer, the subject of the before-mentioned letters patent, which they shall erect at their works as aforesaid.

"Sixth. That the licensees shall and will commence the erection, within six calendar months from the date of these presents, of at least four producers, amounting at the rate of royalty above mentioned to the sum of seventeen thousand dollars (\$17,000.00), which amount shall be payable by said licensees to said grantor as follows, to wit: the sum of one thousand five hundred dollars (\$1,500.00) when said grantor shall deliver to said licensees complete working plans and details in such form and manner as to enable said licensees to begin the construction or erection of said producers. The remainder of said amount, to wit, the sum of fifteen thousand five hundred dollars (\$15,500.00), shall be paid to said grantor by said licensees in full as soon as the said four producers shall be completed and shall operate in the manner and with the results hereby guaranteed by said grantor, as follows, to wit: from each ton of 2,240 pounds of coal treated in said producers, or any of them, there shall be in addition to the gas a yield of seventy (70) pounds of sulphate of ammonia provided that the coal contains not less than one and three-tenths per cent. (1.3%) of nitrogen; and the gas produced shall be free from soot, tar or other residuum, which if present, could or would clog the flues and require them to be burned."

The defendant thereafter erected the four producers at an expense of some \$85,000. It paid the plaintiff the \$1,500 stipulated. Finding, as it alleged, that the producers would not fulfill the guaranty requirements, defendant ceased in 1906 to use them and plaintiff's process, and declined to pay the remaining \$15,500 license fees. In 1907 the plaintiff, alleging performance of the contract on his part, brought suit to recover said sum. His cause of action was thus stated:

"That the said chemical company did begin the construction of the four producers at Barberton, Ohio, and on or about the 26th day of September, 1905, the said producers were operated, and the result was produced as called for by the contract, and from each ton of 2,240 pounds of coal treated in said producers, or any of them, there was a yield of 70 pounds of sulphate of ammonia, and the gas produced was free from soot or other residuum or deposit which would clog the flues or require them to be burned; that the Columbia Chemical Company had, upon the delivery to it of the working plans and details, paid to the plaintiff in this case \$1,500, and, upon the completion of the producers and the operation in a manner as aforesaid under the contract, the amount hereinbefore stated, \$15,500, with interest thereon, from 9th day of February, 1906, thereupon became due; and for this amount this suit is brought as aforesaid. And the said plaintiff avers that he did everything to be done by him provided in said contract, and that he kept and performed all the covenants and conditions to be kept and performed by him as grantor in a contract hereinbefore mentioned."

To this the defendant replied, denying the producers met the guaranteed requirements; alleged it had spent \$85,046.16 in building them, and \$8,432 in remodeling them; that it expended \$12,990.32 in operating them before it became evident they were a failure; and had paid \$1,500 on account as above noted. The \$107,968.48, the aggregate of said sums, it claimed to recover from the plaintiff, and to have a balance for said sum certified in its favor. On this state of pleadings, viz., fulfillment of the guaranty, the case was tried by counsel, argued to the jury, and to it the points of both sides were directed. The contention of the defendant's counsel was that there must be a complete compliance with the terms of the guaranty, viz., that a ton of 2,240 pounds of coal should produce 70 pounds of ammonia. The contention of the plaintiff's counsel was that there could be a proportionate or partial performance of the guaranty, viz., that if the coal used

contained less than 1.3 per cent. of nitrogen, there was a correspondingly proportionate reduction in the 70-pound requirement of sulphate of ammonia. Both sides, it will be observed, conceded there must be a fulfillment of the guaranty, but they differed as to the mode of fulfillment. Neither side in its pleadings, points, or evidence alleged the guaranty had been waived or its terms varied. When the court charged the jury, it submitted the case on the theory of a waiver of the guaranty, saying:

"On the other hand, if you believe from all the evidence that the defendant waived the general requirement of said guaranty and undertook to furnish coal for practical test containing less than 1.3 per cent. of nitrogen, and that said test showed a proportionate yield of 70 pounds or more of nitrogen to such quantity of coal, that is, that in proportion to the actual amount of nitrogen contained in the 2,240 pounds the yield was at the rate of 70 pounds or more if the coal had contained the required per cent. of nitrogen, then you must find for the plaintiff."

The practical effect of this was to deny both the plaintiff's and defendant's contention that the issue was the fulfillment of the guaranty, and to substitute for that issue one of waiver. It is clear, however, the alleged waiver was based on an erroneous assumption by the court that the contract meant that 1.3 per cent. nitrogen in the coal was a requirement the defendant could insist upon, and which, therefore, it waived by using a coal of less nitrogen. Had this assumption been correct, there might have been some ground for holding that there should be, as contended by the plaintiff, a proportionate reduction in the guaranteed 70 pounds of sulphate of ammonia from each ton. But the presence of 1.3 per cent. of nitrogen in the coal was a requirement that plaintiff, not the chemical company, had a right to insist on, and which, therefore, was not a subject of waiver by the company. The aim of the process was to get a yield of 70 pounds of sulphate of ammonia. Now nitrogen is the basis of ammonia, the union of sulphuric acid and nitrogen producing sulphate of ammonia. Duff, therefore, had a right to demand a coal containing the stated percentage of nitrogen. But the testimony was that the machine had not worked with coal containing so much nitrogen, and Duff therefore attempted, with a coal of less nitrogen, to produce the guaranteed 70 pounds of sulphate of ammonia. It was his waiver, not the company's. This is perfectly clear not only from the contract itself, but Duff in his testimony makes it clear that the nitrogen in the coal was his and not the company's right. Thus Duff in his sworn statement of claim and his averment, quoted above, of fulfillment of the guaranteed result of 70 pounds of sulphate of ammonia, makes no reference whatever to nitrogen, and in answer to the question in reference to the trial of the machine, "Well, you didn't have any analysis during the test that came up to 1.3, did you?" he replied, "No; they were not obliged to come up to 1.3." And in answer to the question, "So then, during your stay there, you did not know the coal they were using didn't have 1.3 of nitrogen in it?" he said, "Yes, we found that out on the test." And also, when he was asked, "And did you ask them why they didn't use coal that had 1.3 in it?" he replied, "No, I did not."

It follows, therefore, that in bringing the question of waiver into the case as an act of the chemical company, and in embodying in the

defendant's points the factor of a waiver by defendant, the court fell into an error which did the defendant injustice. Under the contract, the plaintiff was bound to produce 70 pounds of sulphate of ammonia per 2,240 pounds of coal, and to do this he had a right to call upon the plaintiff to use coal containing 1.3 per cent. of nitrogen. If he chose to use coal with a less per cent. of nitrogen, that was his right, but he did not thereby lessen his guaranteed output of 70 pounds of sulphate of ammonia. He chose to make the test with coal of less nitrogen; and the issue was whether he did or did not produce 70 pounds of sulphate of ammonia. He alleged he had; the defendant alleged he had not. That was the issue involved, and, in substituting for that issue an issue of a waiver by the defendant, the court below fell into reversible error.

Lest nonreference to the court's submission to the jury, as an agreed-upon test, of the September efforts to run the plant, might be misleading, we deem it proper to state we find no evidence that the parties agreed that these operations should be a test of the guaranty.

LICHTENSTEIN v. PHIPPS.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 184.

PATENTS (§ 222*)—MARKING PATENTED ARTICLES.

Notice of a design patent for a hatband on women's sailor hats is not sufficiently given under Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), by printing the words "Lichtenstein Pennant Sailor, Pat. Jan. 15th, 1907," upon the lining in the inside of the hats, there being nothing to indicate that such notice refers to the band.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 352; Dec. Dig. § 222.*]

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

For opinion below, see 161 Fed. 578.

This cause comes here upon appeal from a decree of a perpetual injunction against infringement of complainant's design patent (No. 38,412, Jan. 15, 1907), and adjudging recovery against the defendant of \$250, the statutory liability.

John C. Pennie, for appellant.

Joseph L. Levy, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. As presented here, the case involves a single point. Defendant concedes the validity of the patent, and does not question the propriety of the injunction. The complainant concedes that defendant, when he committed the infringement complained of, had no actual notice of the patenting of the design. All there is left to determine is whether the complainant gave the statutory notice provided for in section 4900, Rev. St. (U. S. Comp. St. 1901, p. 3388).

The design was used by complainant in two ways, upon a belt and upon a hatband. To all the belts which he made and sold he affixed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the notice, "Lichtenstein Pennant Belt, Pat. Jan. 15th, 1907." To the hatbands, however, which he made, placed on women's sailor hats and sold with the hats, he affixed no notice; but upon the lining in the inside of the hats he printed the notice, "Lichtenstein Pennant Sailor, Pat. Jan. 15th, 1907." There was nothing to show whether the hat itself, the design of the hat, the lining, or the design of the band was patented. Indeed, the use of the word "sailor" would be calculated to induce the belief that it was the hat or its design which the patent covered. This was not a compliance with the first clause of section 4900, which provides that the notice shall be affixed on the patented article. Probably such notice could not be affixed on the hatband without marring the design. The alternatives provided in the section are:

"When, from the character of the article this [affixing on the article] cannot be done by affixing to it, or to the package wherein one or more of them is enclosed, a label containing a like notice."

We do not think it can be fairly held that the label inside on the lining of the hat was affixed to the band, nor that the hat was a package within which one or more bands was inclosed. Inasmuch as complainant admits that no labels other than these were affixed to anything, he has failed to make sufficient proof of notice to entitle him to recover damages, profits, or statutory penalty.

The decree is reversed, with costs of this appeal, and cause remanded, with instructions to decree for injunction only with costs in Circuit Court.

HALL SIGNAL CO. et al. v. GENERAL RY. SIGNAL CO.

(Circuit Court, W. D. New York. November 4, 1908.)

No. 284.

1. PATENTS (§ 18*)—INVENTION—SUCCESS OF DEVICE.

A simple device or improvement may involve patentable invention, where it converts failure into success or accomplishes what others had tried to accomplish and failed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 18; Dec. Dig. § 18.*]

2. PATENTS (§ 328*)—INVENTION AND INFRINGEMENT—BLOCK SIGNALING APPARATUS.

The Wilson patent No. 470,813, for an electric railway signal apparatus, was not anticipated, and covers a combination which was the last step in making the normal danger system of signaling successful and practicable, and is entitled to rank as a pioneer in the art and to a broad construction. As so construed, also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

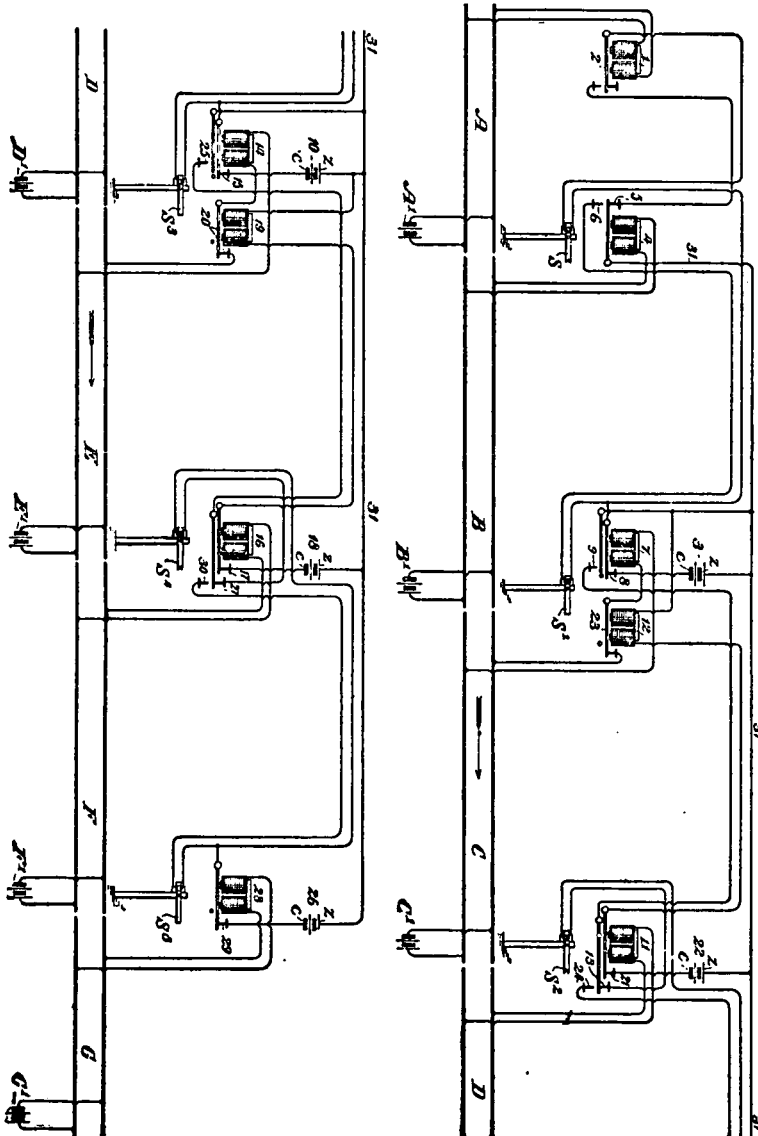
Kenyon & Kenyon (William Houston Kenyon and Henry D. Williams, of counsel), for complainants.

Macomber & Ellis (J. William Ellis, of counsel), for defendant.

HAZEL, District Judge. This action was brought to restrain the infringement of United States letters patent No. 470,813, for improve-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment in electric railway signal apparatus, issued March 15, 1892, to A. J. Wilson, inventor, and by him assigned to the complainant. A diagram representing block sections in series on a line of railway, instrumentalities consisting of batteries, relays, rail and signal circuits showing the arrangement of the apparatus, accompanies and illustrates the patent, and as it is thought indispensable to a complete understanding of the invention it is herewith reproduced.



The specification says:

"The greater number of blocks naturally found on any given installation in practice would be equipped by duplicating indefinitely often the arrangement of the circuits and of instruments shown in connection with the intermediate blocks of the series represented, as, for instance, with blocks marked C, D, E and F. In the installation represented in the drawings the length of the track is divided into separate sections, which are insulated from each other in the well-known way, and are marked in the drawings A, B, C, D, E, F, and G. The trains are supposed to be moving upon the track in the direction indicated by the arrows. Each track section has a battery near the end of the same, marked, respectively, A', B', C', D', E', F', and G', and in the same familiar way the rails of each section form a part of the circuit of the battery pertaining to that section."

Then follows a description of the various operations of the train entering a track section. The claims of the patent, two in number, read:

"(1) In a block signaling apparatus, the combination, with a series of normally-closed rail circuits, of a series of normally open or broken signaling-circuits, each signaling-circuit including a normally-open circuit-closer constructed to be closed by the action of the train upon one of the rail-circuits, and also including a normally-closed circuit-breaker constructed to be opened by the action of the train upon the next succeeding rail-circuit of the line, substantially as and for the purpose set forth.

"(2) In a block signaling apparatus, the combination, with a series of normally-closed rail-circuits, of a series of normally open or broken signaling-circuits, each signaling-circuit including a normally-open circuit-closer constructed to be closed by the action of the train upon one of the rail-circuits, and also including normally-closed circuit-breakers constructed on each alternate signaling-circuit to be opened by the action of the train upon the two next succeeding rail-circuits of the line and on the intermediate signaling-circuits to be opened also by the action of the train on the third succeeding rail-circuit of the line, substantially as and for the purpose set forth."

The first claim, which alone is involved, is broad in its scope and defines invention. The second claim is for the specific method of construction of the signal apparatus in controversy. The defenses are anticipation, noninvention in view of the prior art, and noninfringement.

The practicability of the signal system under consideration depends upon the signaling-circuits which are acted upon in block sections in such a way that the alternate signaling-circuit co-operates with two block sections, and those interposed between co-operate with three block sections. This feature of the apparatus is explained by defendant's expert witness Waterman, who testifies:

"It is characteristic of the system shown that on each block or track section of the indefinitely duplicatable portion a train acts to bring to safety one signal in advance, at the entrance of the next adjacent block or track section, and to set to danger one signal standing at the rear of the train at the entrance to the block in which the train finds itself, and also to hold at danger further to the rear two signals on alternate blocks, and on intermediate blocks one signal in addition to that immediately in its rear."

The first question that requires consideration is whether, in view of the prior art, the combination of the rail and signal circuits, batteries, and relays in series arranged to co-operate so as to protect every block in the series of blocks involved invention. Before discussing the signal apparatuses of the prior art and the improvement in contro-

versy, it is desirable that the objective use of the home and distant signals, which were commonly known in the art, should be thoroughly understood, for both are used in the block-signal systems of complainant and defendant. The distant or cautionary signal consists of a notched blade or arm mounted on an upright post, and is located in the rear of the home signal. It is designed to transmit information to the engineer in charge of an approaching train of the condition of the block section before the home signal is visible to him. The home signal is a narrow blade or arm mounted on a post at the entrance of the block which it guards. At night colored lights are used in place of the pivoted blade. It is also worth noting that railway signals generally, in addition to telegraphic signals, consist of interlocking signals which are used principally in the equipment of a railroad yard to control switches and crossings, while the block signals are operated automatically by electricity to protect a specified distance of track by keeping trains traveling in the same direction a certain distance apart. There were two different methods of automatic signaling known in the art at the date of the invention in suit, namely, the normal clear or safety and the normal danger systems. We are primarily concerned in this case with signaling-circuits and rail-circuits that distinctively operate upon the normal danger plan.

To prevent confusion it probably should be stated that a normal bias danger signal implies a movement of the signal blade through gravitational tendency to a horizontal position. The phrase "normal danger system" more specifically has reference to a signaling device which is supplied with normally-closed rail-circuits, normally-open signal-circuits including a normally-open circuit-closer, so arranged that the current which upsets the signal from a right-angle position to the post upon which it is mounted flows only when a train approaches or occupies the track-circuit section to its rear. In short, if when there is no train present on the section the blade is at right angles to the post, the signal is of the normal danger class, and, when the signal is in an inclined position in the absence of the train, it is of the normal safety class. Thus we find a normal danger bias signal in a normal danger apparatus, the signal blade being firmly held in the danger position when no trains are present, and dropping to safety when the wheels and axles of the train establish a path of low resistance, causing the current to energize the relay to break or close the circuits. The normal danger bias tendency is likewise present in the normal safety system, for when the magnetization is withdrawn by the presence of a train the signal blade recedes from its angular or safety position to a position at right angles to the post upon which it is mounted.

The normal position of the signal while the block was unoccupied by a train was early in the history of the automatic signaling art regarded as a problem of perplexing importance, and it was mooted whether the semaphore arm should point to safety, indicating protection to a train approaching the block, or whether it should normally point to danger, indicating obstruction ahead, thus stopping the movements of the train unless the signal dropped to safety upon its approaching the block section. In the normal clear system of signaling,

energy or force was required to retain the signal in its normal safety hanging or inclined position until the presence of the train in the block actuated it, while in the normal danger system the utilization of energy or force to hold the signal blade in a horizontal position became essential only when its hanging to a safety or oblique position by an approaching train was demanded. This automatic method of signaling was a part of the art as it existed prior to the invention in suit, and by its adaptation signalmen or any manual efforts were not required. It was customary, and still is, to protect separate track sections and switches and railroad crossings by manual application of the horizontal or danger signal, as, for instance, an operator in charge of a track section on the approach of a train, having previously learned by a method of signaling that the track ahead was clear, would lower the danger signal from a horizontal to an oblique position, the commonly accepted position to indicate a clear track. This having been the commonly accepted method of manual signaling, the complainant argues that the normal danger adaptation in suit by which the signal is, in the absence of a train actuating it, in the normal position, was recognized by signaling engineers as a distinct advance over the normal clear system. The defendant, in answering, argues, *inter alia*, that at the date of the Wilson invention both systems were thoroughly understood by the art, and simply were different methods accomplishing identical results; but of this I am not convinced.

Considering more particularly the question of anticipation, four patents are relied upon to negative the validity of the patent in controversy. These patents and publications prove that it was not new at the date of the invention in suit to actuate signaling apparatus by the presence of a train in a block section; that it was a common expedient in automatic signaling to divide a railway track into blocks of different lengths, and place home and distant signals alongside the track section which were operated by the presence of the train; that it was old in the art to control the signal semaphore blade or arm by pressure or counterpressure to enable its dropping to an oblique position, and, indeed, it was old to permit the pivoted arm when released from the current pressure to assume a horizontal position through gravity owing to the presence of the train in the block section; that the magnetization of the relay to overcome the controlling or opposing force holding the signal in position was also understood in the art. The proofs, however, establish that to clear the signal ahead by the action of the train before it reached the entrance to the block, and at the same time protect said train by a rear signal to danger in a normal danger system, was a new achievement. The problem for solution was to seasonably clear the forward signal as the train approached the block without such function retarding or interfering with the signal to danger in the rear of the train as it left the rear block. The prior patents did not protect the block or afford means for adequately clearing the signals ahead and to the rear of the train.

In the Robinson patent, No. 130,661, of August 20, 1872, which was a normal safety system, the current passed through a continuously-closed signal-circuit to maintain the semaphore blade in a hanging position. The flow of the current was diminished and diverted

from the relay when the rail-circuits were connected by the wheels and axles of a train. The relay was demagnetized, but again became magnetized upon the instant the train left the track section. These functional results were in consequence of the attraction of the armature by the magnet as the current passed through the circuit, magnetizing the relay and later demagnetizing it. In the normal safety type of signals, in the absence of the train from the track section, and while the armatures are attracted toward the magnet, the signal circuits are closed, and the blade descends downward to safety from its horizontal or danger position; but when the train on the train-circuit demagnetizes the relay, the armature recedes from it, opening the signal-circuit and sending the signal upward to danger, and upon the train leaving the track section the relay is again magnetized and the signal assumes its normal position. Defendant claims that the essential difference between this feature of the Robinson invention and the later invention of the Gassett patent, No. 251,867 (the normal danger type of signaling), is simply that in the earlier type the relays close the signal circuits when they are magnetized, and in the latter they are closed or demagnetized by a back contact of the armature; that the primal difference between the normal clear and normal danger methods of signaling, as claimed in the patent in suit, consisted in adding to the latter a circuit-closer permitting the train to act upon it before reaching the signaling station. The expert witnesses for the defendant are strongly of the opinion that the addition of a circuit-closer to the normal danger system was plainly obvious in view of the Robinson and Gassett patents. Importance is attached to Robinson's reference in his specification that the signal-circuit may be either open or closed. In his drawing accompanying the patent both normal bias to danger and normal bias to safety signals are indicated. The specification does not show, however, a successfully operating normal danger signal. Indeed, the art was familiar with a signal system of the normal safety type operated with a normally open signaling-circuit. This appears by the testimony of complainant's witnesses, Blodgett and Lane, and I am unable to perceive that Robinson in the then state of the art implied the employment of an open signaling-circuit in connection with a normal danger plan. This view also finds support in a paper read in April, 1886, 14 years after the patent to Robinson was issued, by Mr. Hardy, and published in the Electrician and Electrical Engineer, from which the following may be quoted:

"Most automatic signals are now arranged to stand normally all clear and show red when there is danger in the way. This may be some time improved so as to stand normally at danger, showing red, and open to let an advancing train enter, which would be a more logical system, but its adoption is just now attended by some undesirable complications which hardly warrant such a change."

Accordingly it may be safely decided that the addition of a circuit-closer as used in the patent in suit, and an arrangement of the signaling-circuits as therein described, to enable the trains to operate the signals ahead and to the rear before entering the block section, was not an obvious expedient. On the contrary, the proofs show that the skilled in the art groped in the dark and persistently endeavored to

develop the art to secure a satisfactory normal danger system of signaling.

Eight different normal danger systems are shown in the patents issued to Spang, and in each the clearing sections are shown to be from 60 to 150 to 500 feet in length. In patent No. 164,227, the theretofore unprotected clearing sections for the advance signals were protected, but owing to the magnetization of a magnet, which in this type of signaling was necessary in order to hold the signal in its danger position, insufficient protection was afforded. The evidence of the complainant also indicates that the signaling devices of Spang were impracticable because of the shortness of the clearing sections. The Spang type of signaling is distinguished from that in suit in that it required current to maintain the signal in its danger position, and was based upon an obviously different principle than that by which complainant's signals operate. That an absence of complete protection to the train section made the system an impracticable one is practically conceded by the defendant. Such a system, testifies the witness Dodgson, is not only unsafe, but it tends to produce, instead of prevent, collisions between trains. None of the systems described in the Spang patents have ever been in practical use, and I am satisfied that they taught little to the art. The shortness of the clearing section was a vital defect of construction in the prior art, for in such systems there necessarily would have been a retardation if not a complete stopping of trains at the signal post before entering the block section. The impracticability of the prior signaling devices and the absolute failures of the prior art rightly are attributed by the expert witnesses for the complainant to insufficient clearing space and imperfect signaling facilities in the rear of the train in the clearing section; while in the Wilson patent the clearing space behind the signal is employed for effectuating the successful signaling requirements which result in giving protection from other trains approaching in the rear on the same track.

The Gassett patent, No. 251,867, of 1882, for a normal danger system with an overlapping feature, was the subject of the closest controversy between the expert witnesses on both sides. The specification shows among other things that two signals were controlled by one direct circuit section, and that it was the object of the patent to have such signals safeguard two or more track sections. The defendant claims that these patents indubitably establish that Wilson was not the first to discover means for controlling a danger signal by more than one track section, and that the method of duplicating his unit for a single or double track is so clearly described in such patents that the system of Wilson was obvious to signaling engineers. None of the Gassett systems went into practical use excepting the first, which, however, was soon discontinued. In the Gassett, as in the prior normal danger devices, the clearing sections were left unprotected, and therefore they were impracticable. In his third normal danger system he made provision for safeguarding the entire track, but as the clearing was by a system of track instruments (treadles alongside the track), with the danger signal to be affected by the rail-circuit, it cannot be

considered to anticipate the patent in suit, which concededly was based upon another and different principle.

It is probably undeniable that when the prior art is considered in its entirety the achievement of Wilson was not of an amazing character, but by his conception of the aim, the method, and the arrangement of the instrumentalities he solved what at that time was regarded in the art as a serious and difficult problem. If I am correct in my estimation of the impracticableness of the prior normal danger devices, as shown by the exhibits herein and the oral evidence, and that they were incapable of achieving the same functional result, the differences between them and the invention under consideration are clearly marked and justify applying the principle announced in the following cases: *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *The Barbed Wire Patent*, 143 U. S. 283, 12 Sup. Ct. 443, 36 L. Ed. 154; *Brunswick-Balke-Collender Co. v. Thum*, 111 Fed. 904, 50 C. C. A. 61; *Doig v. Morgan Machine Co.*, 122 Fed. 460, 59 C. C. A. 616; *Brown Bag Filling Machine Co. v. Drohen (C. C.)* 140 Fed. 97. It is to be considered that the adaptation of the normal danger systems by railroads, in some instances to the exclusion of the normal clear system, has materially assisted in recent years in developing such system, and would seem to be ample testimony of the usefulness of the improvement. Old elements found in the prior signaling devices unquestionably were brought together by the patentee. He was not the creator of all the elements of the combination, but I think it is established that by his arrangement or rearrangement of the rail and signal circuits and use of circuit-closers the elements of claim 1 perform a new and different operation, and hence protection of the patent should not be withheld. *Electric Signal Co. v. Hall Signal Co.*, 114 U. S. 87, 5 Sup. Ct. 1069, 29 L. Ed. 96. It is not intended to hold that the prior art was absolutely worthless. It taugt considerable, but the normal danger products were evidently fragments, and of value only as indicating an endeavor to make them practicable on the high plane required by railroads using them. This, then, is a case where the inventor is shown to have taken the last step which accomplished the desired result, and in consequence he became a pioneer in the art of normal danger signaling. He solved the problem in a simple enough way, but where others tried and successively failed he succeeded, and his endeavors, therefore in the field of railway signaling most puissantly point to invention entitling his claim to a broad construction. *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645.

Does the defendant infringe the claim in suit? The specification describing the combination of claim 1 states:

"It will thus be observed that in the broad invention the rail-circuits are normally closed and the signaling-circuits—the circuits directly operating each signal—are normally open or broken, being normally open or broken at a circuit-closer which is constructed to be closed by the action of the train upon one of the rail-circuits—the one at or near the end of which the signal operated by that signal-circuit stands—and that the signaling-circuit is also capable of being broken by one or more normally-closed circuit-breakers which are con-

structed to be opened by the action of a train on one or more of the next succeeding rail-circuits of the line. It will also be observed that in the invention as embodied in its preferred form the rail-circuits are, as before, normally closed, and the signaling-circuits normally open and open as before at a circuit-closer which is constructed to be closed by the action of a train upon one of the rail-circuits, and that the signaling-circuit is also capable of being broken by normally-closed circuit-breakers which are constructed to be opened by the action of a train on either of the next two succeeding rail-circuits of the line, the alternate signaling-circuits having circuit-breakers constructed to be opened by the action of a train on either of the next three succeeding rail-circuits of the line."

And further:

"It is not essential to the main invention, however, that the intermediate signals should be employed as cautionary signals, or be affected by the action of the train on the second or third succeeding rail-circuits, and in such event the connecting circuits and circuit-breakers affecting that end would be omitted."

It will be noted that the structure of the claim, besides having normally-closed rail-circuits and normally-open signal-circuits, embodies a normally-open circuit-closer made by the armature of the magnet and back contact together with a normally-closed circuit-breaker made by the armature and the magnet at its front contact. When a train is on each rail-circuit the signal immediately goes to clear or safety, and correspondingly a signal blade to the rear of the train goes to danger, preventing its clearance for following trains. It will not be necessary to recount the many different instrumentalities by which the successive operations of the signaling are accomplished. In my judgment the defendant's system, though constructed somewhat differently, is nevertheless readable upon the claim.

The defendant contends that the system employed by it is radically different from that of complainant, that the specific claim of the patent is the only conception of the patentee, and that his home and distant signals are entirely dependent upon a unitary structure with signals having separate circuits; that the defendant's signals which are not mounted on the same post are in a series in the same circuit; that its signals are set to safety by the train upon the third or fourth section in advance, while in the patent in suit the blade drops to safety by the train when it is in the block preceding the signal post; that in defendant's system the distant signal sets to safety after the home signal, while in that of complainant the home signals are at safety after the distant. A further distinction insisted upon is that two normally-open circuit-closers in the Wilson device co-operate in the same series, while in defendant's the signals shift to safety by a normally-open circuit-closer in the signal-circuit, and that some of the signals are placed to safety owing to a circuit-closer in the shunt circuit which contracts the primary circuit; that defendant's method of duplicating the signal is different; and, finally, that the patent is devoid of showing a duplicatable system. A complete description of defendant's apparatus based on Wagner diagram No. 41, and taken from complainant's brief, follows:

"The home signal and its distant signal are controlled by a signaling-circuit energized by the battery B, this signaling-circuit being held normally open at the circuit-closer, b. The signals stand normally at danger, and remain in that position at all times except when actuated to give a clear indication to an approaching train. The rail-circuits are all normally closed; and in the part of

defendant's circuits shown in this diagram each block is divided into three interconnected rail-circuits. When the approaching train is on the rail-circuit C2, which extends for 2,800 feet in rear of the distant signal DS3, its wheels and axles shunt the relay, 7c, of that rail-circuit and thereby close the normally-open circuit-closer, b, thereby closing the normally open signaling-circuit, if the track ahead is clear of trains. The first result of the closing of the signaling-circuit is that the home signal HS5 goes to clear, but this movement to clear varies the resistance of the signaling-circuit by the closing of a short branch through the contact, d, so that the distant signal is moved to clear position. Thus the closing of the normally-open circuit-closer, b, causes a clear indication of the home signal, if the conditions of traffic permit a clear indication, and also causes a clear indication of the distant signal if the home signal has cleared. The one normally-open signaling-circuit effects both operations, and the proximate cause of the clear indications of the signals is the closing of the normally-open circuit-closer, b.

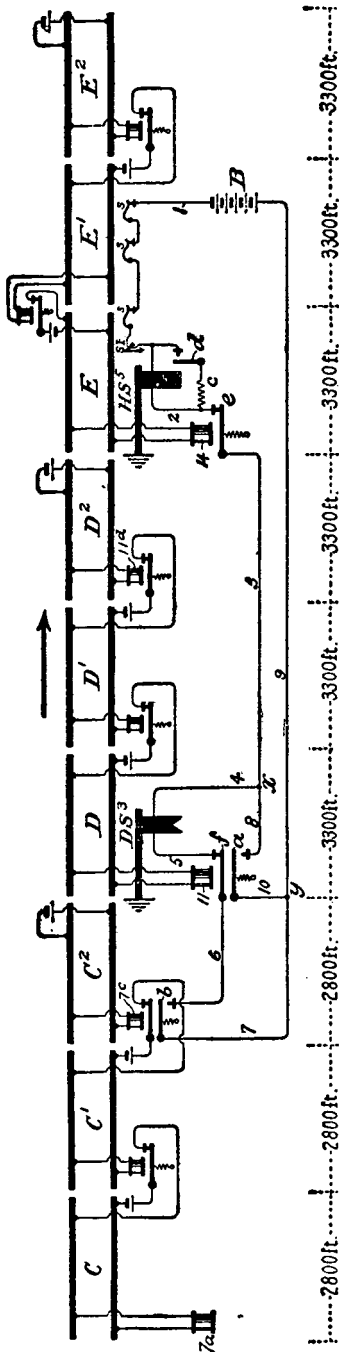
"Considering now the distant signal DS3, we find that when the train is on the rail-circuit D next succeeding the rail-circuit C2, its wheels and axles shunt the relay 11 of the rail-circuit D, and open the normally-closed circuit-breaker, f, with the result that the distant signal is moved to and held at the danger position so that it cannot clear for a following train.

"The home signal is not moved to danger until the train reaches it, and the armature movement which opens the normally-closed circuit-breaker, f, to put the distant signal to danger, also closes a normally-open circuit-closer, a, to continue the clear indications of the home signal. This circuit-closer, a, closes a normally-open branch of the signaling-circuit, excluding the distant signal. As the train proceeds through the block between the distant signal and the home signal, these signaling conditions are maintained, the passage of the train successively over the interconnected rail-circuits of the block continuing the de-energized condition of the relay, 11, of the rail-circuit D through normally-closed circuit-breakers, each located in a rail-circuit in rear and controlled by the relay of the rail-circuit in advance, so that the presence of the train upon the rail-circuit D2, which is immediately in rear of the home signal, shunts the relay of the rail-circuit D2, and thereby maintains the de-energized condition of the relay, 11, with consequent closed condition of the normally-open circuit-closer, a, and consequent clear indication of the home signal HS5. When the train is upon the rail-circuit E, which is immediately in advance of the home signal, and next succeeds the rail-circuit D2, it shunts the relay, 14, of the rail-circuit E, and opens the normally-closed circuit-breaker, e, whereby the home signal is moved to and held at the danger position so that it cannot clear for a following train."

The rail-circuits in the defendant's device likewise operate to protect the rear of the train and to clear the ahead signal, as in the apparatus of complainant:

"When a train is on the rail-circuit C2, it causes the home signal HS5 to give a clear indication and the distant signal DS3 to give a clear indication, and it prevents a clear indication of the home signal HS1 and distant signal DS1. When a train is on the rail-circuit D, it causes the home signal HS5 to give a clear indication, and it prevents a clear indication of the distant signal DS3 and home signal HS3, and also of the distant signal DS1. When the train is on the rail-circuit D1, its effect is exactly the same as when on the rail-circuit D, causing a clear indication of one signal ahead, and preventing a clear indication of three signals in rear. When the train is on rail-circuit D2, it causes the home signal HS7, home signal HS5, and distant signal DS5 to give clear indications, and prevents a clear indication of home signal HS3, distant signal DS3, and distant signal DS1. When the train is on the rail-circuit E, it causes the home signal HS7 to give a clear indication, and prevents a clear indication of the home signal HS5, distant signal DS5, and distant signal DS3."

The diagram in evidence of defendant's structure indicating the combination of circuits and apparatus for operating home and distant signals with numerical references is herewith reproduced.



tem which presumably included protection for a multiplicity of track

The elements of the claim in controversy are at present in defendant's system, and in my judgment they are operated to produce the double function of clearing to safety ahead and to danger in the rear of the train. In the patent to Westinghouse, No. 360,638, of April 5, 1887, for a normal safety home and distant signal system, the same end is not achieved as in the patent in suit. True, it shows normally-closed rail-circuits, but the specification does not indicate that such circuits could be functionally used as normally-open signal-circuits of the normal danger type of signals. Nor do I think, for the reason already dwelt upon, that changes and alterations from the Westinghouse normal safety system to the system in suit was obvious to the skilled in the art. That the home and distant signals of the defendant are mounted on the same post as in the Westinghouse patent is inconsequential, since such variation from the patent in suit nevertheless enables the distant signal to be functionally operated by taking the substance of the Wilson invention.

The next important point is that the claim in terms is limited by the words "substantially as and for the purpose set forth" to the device illustrated in the drawing and specifically described in the specification. Concededly the patent is for a block-signaling system, and it may be supposed, in view of the primary character of the patent, that it includes a stretch of track protected by a successive number of blocks. In fact, the broad claim, as allowed without objection or criticism by the patent office, plainly is for a combination of a series of a specified type of signaling-circuits and rail-circuits in a block-signaling device. It is shown, as has been indicated, that when the different elements were combined as set forth in the specification and claim they co-operated with one another and with the rail and and signal circuits to create a block system

sections. Such co-operation of old elements imparted a new method of operation producing a new and highly meritorious result, and therefore the authorities cited to show that a mere duplication of parts is not invention have no application. The defendant has appropriated the invention owned by the complainant, and the installations complained of in the bill were not infringements of claim 1.

A decree for injunction and accounting may be entered. The defendant in its brief has objected to paying the entire expenses of taking the rebuttal testimony given on behalf of the complainant. Complainant's record contains much repetitious, if not irrelevant, testimony, and the large number of drawings and exhibits were not necessary to a complete presentation or understanding of the questions involved. Therefore, it is thought proper that the complainant should pay a portion of the costs and disbursements, the amount which it shall pay to be determined upon settlement of the decree.

SCHMERTZ WIRE-GLASS CO. et al. v. PITTSBURGH PLATE-GLASS CO.

(Circuit Court, W. D. Pennsylvania. February 5, 1909.)

No. 24.

1. PATENTS (§ 328*)—INVENTION—PROCESS AND MECHANISM FOR MAKING WIRE-GLASS.

The Schmertz patents, No. 791,217 and reissue No. 12,443 (original No. 791,216), each for a process and mechanism for making wire-glass, were not anticipated, and disclose invention and merit of a high order. Each uses two rolls, and produces a double sheet rolled simultaneously and progressively, and having the wire net imbedded between the two parts; the principal difference being that in the former the wire is fed between the two rolls, and in the latter in advance of the leading roll. The resulting product may be polished, and has developed the manufacture of wire plate glass as a commercial product. Both patents also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 114*)—SUIT TO OBTAIN ISSUANCE.

The fact that pending a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), between two applicants for patents, the interests of the two litigants is united, does not deprive the court of jurisdiction to proceed to a decree adjudging the right of the prior inventor to a patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 114.*]

3. PATENTS (§ 114*)—SUIT TO OBTAIN ISSUANCE—ABANDONMENT.

Mere delay in the prosecution of a suit brought under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent, incident to the death of the complainant and which is acquiesced in by the adverse party, will not operate as an abandonment or preclude the court from reviving and proceeding with the suit on application of complainant's administrator.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 114.*]

Abandonment of invention, see note to Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 70 C. C. A. 6.]

In Equity. Suit for infringement of letters patent No. 791,217 and reissue No. 12,443 (original No. 791,216), each for a process and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mechanism for making wire-glass, granted to Edmund C. Schmertz. On final hearing.

Wm. L. Pierce and Pierce & Barber (Drury W. Cooper, Thomas W. Bakewell, and Arthur J. Baldwin, of counsel), for complainants.

Christy & Christy (George H. Christy, Bayard H. Christy, and Frederick P. Fish, of counsel), for defendant.

BUFFINGTON, Circuit Judge. This case concerns a comparatively new article of commerce called "wire-glass," which is a sheet of plate glass having imbedded in its center a fine wire-web. This web strengthens the sheet and prevents its being shattered by fire or a blow. Rough wire-glass is cast in two varieties, one adapted for polishing, the other not. Unpolished wire-glass is used for skylight and area purposes. Polished, or wire-glass plate, is used as ordinary plate glass in large buildings for window lights. In addition to window-light service, however, wire-glass plate, by reason of its imbedded mesh, serves the further purpose of an iron shutter. It is thus a protection against entry and a fire retardant. A just estimate of the radical difference between rough, unground, sheet glass and polished plate glass recognizes the qualities which permit the one and forbid the other to be polished. One is limited to coarser use and smaller price, while the other may be applied to higher and wider uses and commands better prices. An appreciation of these important manufacturing and commercial factors is essential to a just estimate of the patents here involved. It follows, therefore, that the use of the generic term "wire-glass" as alike applicable to the development of both rough, but unpolishable, wire-glass, and rough, but polishable, glass is misleading. All wire-glass is, when it comes from the casting table, rough glass. The rough glass proper ends its development at that point and passes to the uses to which it is limited. The other, while it is of course adapted to like uses, has the higher possibility of being ground and polished and thus reaching the condition of polished plate, with the superadded qualities which flow from the imbedded netting. To displace blown glass in window lighting, the plate-glass manufacturer was forced to produce a very thin sheet of plate. This was imperative to get light-weight windows to raise, and also for economy of space and cost in counterweighting. The extra weight of plate over blown glass virtually forbade the use of cheap iron balances and necessitated more expensive lead ones. These factors of cost and space determined the choice of plate or blown glass in buildings, and, as the height of buildings and window space grew, plate thinness became a greater factor in widening the use of plate. This condition was met by the production of very thin plates, and as a result they have largely superseded blown glass in both private and public buildings where the use of the heavy plate of the old art would have been impossible. But with this use of a light, thin plate in modern tall buildings a greater danger from fire became apparent, for these light sheets were shattered by fire; and pieces, falling from heights, made them very dangerous to firemen. It therefore became apparent, after rough wire-glass was successfully made, that, if the wire mesh could

be so regularly and centrally imbedded in a thin sheet as not to prevent its being ground and polished, a new and valuable factor of utility and safety could be embodied in modern construction. But it was equally clear that, if at any point of the sheet any single part of the wire came near either surface so that its strand would be bared by grinding, the sheet could not be polished.

Now the first thought in connection with this art is that, when the idea of making wire-glass is once suggested, the manufacture must be very simple; in other words, that the inventive thought, if one exists, consists in the conception of wire-glass. Casting tables and rollers for smoothing glass are old. The casting of sheets of rough glass is obviously simple, and grinding and polishing a developed process. What, then, more simple than to cast a sheet, then lay a web of wire netting upon it, and on the two pour and cast a second sheet? And that such should be the first impression is quite natural, for this was the idea and practice for years of the whole glass art, and it found expression in the patent development of three foreign countries and in the name "European process." But experience, as we shall see, proved that this seemingly simple method did not and could not produce wire-glass, and that even rough wire-glass was only a hoped-for product, until, in 1892, Shuman, an experienced American glassman, solved the rough-glass part of the wire-glass problem in a totally different way. And as Shuman's invention was a step in the development of rough, unpolishable wire-glass, which culminated in Schmertz's polishable wire-glass and in the new commercial article of wire plate, it is necessary, in order to understand Schmertz's final development, that Shuman's partial development be clearly grasped. In his device Shuman discarded the theory of sandwiching the wire netting between two sheets cast at different times, or, indeed, of using two sheets at all. He conceived the idea of forcing the web into the body of a single sheet and then closing up the scars caused by this insertion. His machine was a long table mounted on and heated by a furnace and provided with three rollers above it. Molten glass was poured on this hot table and pressed to the desired thickness of the sheet by a front, plain-faced roll. A second or rib roll, engaging the netting delivered in a chute back of the first roll, then pressed such netting, in a waving, uneven line, into the body of the sheet. The third roll, which was plain-faced, followed and covered the openings made by the insertion of the wire. Shuman's patents for machine and process were sustained in the Circuit Court of Appeals, Seventh Circuit, in *Streator Cathedral Glass Co. v. Wire-Glass Co.*, 97 Fed. 950, 38 C. C. A. 573, Mr. Justice Brown, of the Supreme Court, sitting and delivering the opinion. It was there said Shuman's process involved "not merely the function of a mechanical device, but certain elemental action. * * * It is, in fact, a series of acts performed with molten glass and wire-gauze, by which they are transformed into a separate manufacture, within the definition of a process patent in *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139"; and it was held the proper subject of a process patent. The relation of Shuman's

invention to the practical commercial origin of wire-glass was stated by Justice Brown:

"The Shuman patent was evidently the first practicable method of making wire-glass, and appears to have attracted a good deal of attention in this and other countries, and various medals were awarded to the inventor."

Judge Jenkins, in a concurring opinion, says:

"Others * * * had conceived the thought of wire-glass, and provided certain means for the manufacture; but they never achieved success, or pointed out any practical means for its accomplishment. There was no wire-glass in use or upon the market, either in Europe or in this country, when Shuman obtained his patent. Charging him, as we must, with knowledge of the prior art, he was not the first to conceive the idea of wire-glass, but was the first to make it possible."

These judicial findings that the prior wire-glass art was theory and had produced no practical results restate the estimate of the commercial and scientific world. The Franklin Institute of Philadelphia, in awarding a medal to Shuman, in the report of its committee said (volume 187, No. 819):

"In conclusion, they find that the process and machine of Mr. Shuman not only represents a marked advance upon all previous efforts in the class of inventions to which they relate, but also that they meet for the first time, in this branch of the arts, the requirements of a practically operative method and means of manufacture."

The Iron Age, November 24, 1892, says:

"The idea of making a strong combination of wire and glass is said to have had its inception some years ago in England, but it never seems to have gone beyond the region of experiment, although some small panes, not more than one foot square, of an imperfect kind, were made, but the material never obtained recognition as an article of commerce on account of the great cost of production and limitation in the size of the sheets. It remained for an American to carry out the idea to a practical issue. Frank Shuman, after patient and exhaustive experiments, has overcome the initial difficulties, and is now able to make sheets of wire-glass by a process of his own, of any desired size or thickness and of perfect consistency, at a cost which will bring it within the reach of all who now use ordinary glass."

And to the same effect are the Scientific American, November 5, 1892; Paris Revue Industrielle, April 8, 1893; Encyclopedia Britannica, vol. 5, p. 3173.¹

Now the contention of the complainant is that Schmertz, the patentee in suit, was the originator of polishable wire-glass, as Shu-

¹ While it is not in evidence, we find confirmation of this view in a book published in 1900 by Lippincott & Co., entitled "The Wonders of Modern Mechanism," by Charles Henry Cochrane. The author, after discussing in an article entitled "Wire Netting in Glass," and finding English, French, and German patents nonefficient, says: "Mr. Shuman was not the first to think of embedding the wire in glass, but he was the first to concoct a method of imbedding it that was commercially practical. * * * The Shuman patents, for there were two of them, simultaneously issued under date of September 20, 1892, are the only United States patents granted for wire-glass up to that time, and constitute one of those rare instances of a process springing full-fledged and practical in a very short space of time to a most profitable and useful business. For the invention of a practical method of making wire-glass, Mr. Shuman received the John Scott legacy and premium medal from the Franklin Institute in Philadelphia in 1893."

man had been of rough, ribbed, unpolishable wire-glass. On the other hand, it is claimed the Schmertz patents are void by reason of the disclosures of the art prior to Shuman. In support of this contention there are cited 20 British, 4 French, 4 German, and 41 American patents; 3 publications alleged to disclose the art, and 13 prior practices thereof. These have all been examined, and the patents were each discussed in detail as a part of this opinion. In view of the facts that, as stated above, both in judicial opinions in which we concur, and in contemporaneous literature, the wire-glass art had its first practical development in Shuman, we have omitted a discussion of the prior art which we made and but for the length of this opinion had purposed to insert. We content ourselves with saying the number of references and citations prove almost too much. It is simply incredible that if Schmertz's process was disclosed by any or all of these references covering, as they do, a period of almost 50 years, the commercial production of wire-glass would not have followed. Indeed, the very fact that there was so much literature and inventive effort in the art without practical result is persuasive that its ultimate solution was invention of a high order. The truth is that, plausible as prior patent disclosures often seem, and useful as they are to accurately define and justly limit the area of subsequent inventive effort, it may be accepted as a general truth that if they resulted in no practical development they lacked some element which the successful patent they are alleged to anticipate possessed. Accepting, therefore, Shuman's process as the then zenith of the wire-glass art, it was found that, meritorious as it was in producing rough wire-glass, it was open to objections which, when Schmertz disclosed his invention, led to the total abandonment of Shuman's process. The defects of Shuman were that his process was a one-sheet pour and the web was imbedded by fracturing that sheet. As we have seen, the first roll flattened the pour into a single sheet. As this came from the roll, it was exposed to the air and the rapid hardening of a surface unprotected by a second pour. This produced what is known in the glass art as a skin. Now this skin was ruptured both by the ribs of the second roll and by the meshes of the web as it was forced through it. The scars thus made were not effaced by the third roll. A glass skin when once ruptured cannot be restored in clearness, and Shuman's process, therefore, did not produce clear, unmarked glass suitable for polishing. It showed longitudinal lines made by the fracture of the skin by the roll-ribs and also cross-markings made by the wire mesh. These gave to Shuman's product the name "Caramel" glass. The chill to which the single sheet of the Shuman process was subjected in its treatment by three rolls restricted its output to sheets of about eight feet. In longer ones the third roll could not clear out the hardened lumps and roughness made by the mesh and rib-roll.

In this state of the art Schmertz took up the problem of making a wire-glass suitable for polishing, and applied for two patents, each containing process and apparatus claims. In his specifications, which are practically identical, Schmertz cites the Shuman process as the then recognized method of making wire-glass. His language is singu-

larly clear in stating the defects of Shuman's process and the exact object he himself had in view. He says:

"The purposes of my invention, generally stated, are to devise a certain combination of apparatus and such changes in the process of manufacturing wire-glass as will produce a glass with brilliant top surface instead of rough and dull; also, to prevent the glass becoming overchilled in making, so that it will not be excessively hard. Wire-glass as it is now actually manufactured in this country is made in the following manner: The glass is poured upon the usual casting-bed and a roller pulled over the same, developing a sheet of glass of substantially the thickness of the final product. Back of this roller, which is sometimes termed the 'smoothing-roller,' wire-gauze is fed upon the top of the sheet thus formed from a chute or other suitable device. A second corrugated roller now passes over the wire-gauze and the sheet of glass, and by its ribs deeply indents the wire-gauze in the body of the sheet. A third smooth finishing roller now travels over the sheet thus corrugated and gives a finish to the top of the sheet. Some of the objections to this method are these: The action of the three rollers chills the top surface of the glass excessively before it can be transferred to the annealing-kiln. The result is that the glass becomes unduly hard and is difficult to cut. It is a serious task to cut wire-glass when made under the best conditions, and this extra hardening aggravates the situation; but another and more important objection to the method just described lies in the rough top surface produced. The first or leading roll gives a smooth finish to the top of the glass; but this is immediately ruined by the passage of the corrugated roll in the operation of forcing the wire down into the body of the sheet. This smooth finish is never regained, for although the third roller will efficiently smooth down any elevations on the surface of the glass it will not perfectly transfer the surplus glass to the depressions and fill them up with a perfect weld. An examination, therefore, of glass made by this process will disclose fine channels running across the surface which has been uppermost in the process. These channels roughen the surface, making it appear dull and lusterless, and greatly impair its appearance. The unevenness of the surface again adds to the trouble in cutting the article, as the diamond will not traverse it with the same ease as a polished surface. I proceed upon a radically different theory of forming the product, and secure a sheet with brilliant top surface, and also one which is as readily cut as is possible with composite articles of this character."

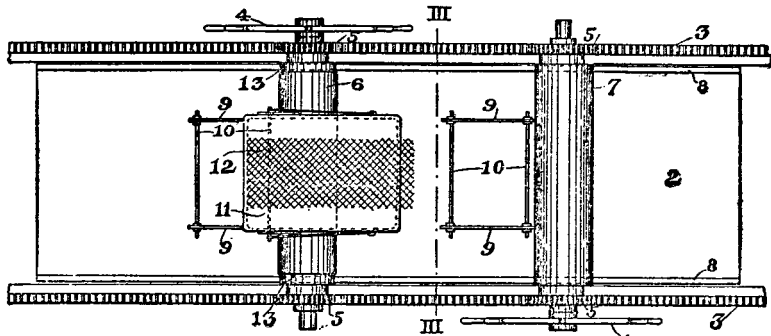


Fig. 2.

His apparatus is shown in the accompanying cut taken from patent No. 791,217, that in reissue No. 12,443 on No. 791,216, being the same, save that the wire netting is fed in advance of the first roll. He describes the cut as follows:

"In the accompanying drawings, which make part of this application, 2 is the ordinary casting table, having the usual racks, 33, on its longitudinal edges.

44 are the hand wheels, which by pinions, 55, advance the leading roll, 6, which may be either smooth or corrugated, and secondary roll, 7. These rolls rest upon trangs, 88, and preferably one-fourth inch in height, and which determine the thickness of the glass, subject to a special provision in the leading roll hereinafter described. 99 are the guides which fix the width of the sheet and are pushed ahead by the rolls. 10, 10, are the rods connecting the right and left hand guides"—

and states that all the above mechanism is old and well known. He then proceeds:

"11 is a chute for wire, 12, located at the rear of the first roll. The leading roll, 6, has its ends, 13, 13, recessed, preferably one-eighth of an inch, so that the body of the roll is left one-eighth of an inch above the bed of the table, while the body of the second roll is one-fourth of an inch above the bed."

The specification then proceeds:

"The operation of the device is as follows: A ladleful or suitable amount of glass is poured upon the table in advance of the leading roll, and the leading roll moved forward. In practice the leading end of the sheet thus formed is discarded as made of chilled glass. Therefore I do not commence to feed the wire down the chute until the first roll has made a sheet of glass sufficiently long to project about 18 inches back of the wire-chute. At this stage the wire is fed down upon the top of the sheet, and finally lies flat upon the same, as shown in Fig. 5. As the forward or dead end of the sheet of glass moves near the rear roll, I make a second casting upon said dead end, that the imperfect ends of the two sheets may coincide, and thus economize material. The rear roll advancing crushes down this second casting and forces the same over and through the wire-gauze, firmly welding the material in the second casting to the wire-gauze and to the first sheet, and firmly uniting the three component parts. A brilliantly polished top surface is imparted to the product by the passage of the second roll, and the wire is left substantially in the center of the finished sheet, whose thickness will be the height of the rear roller above the bed of the table. The top sheet having only one roller traversing it will not become so chilled as where two or more rolls pass over it, and especially where one is a corrugated roll throwing the glass up in ridges. My invention is distinguished from the art as practiced in this country not only by the superior quality of the product, but as well by the following features, either singly or in combination, viz., by the use of two rolls instead of three or more, by the formation of an original sheet a fraction of the desired thickness, feeding the wire upon the top surface of said sheet, and subsequent welding to both wire and original sheet of a top sheet with unbroken surface formed from a second casting while the first sheet is being completed."

These extracts taken from patent No. 791,217 are illustrative as well of his reissue No. 12,443 of patent No. 791,216, the difference being that the latter has a pre-roll, instead of the post-roll, wire feed of No. 791,217.

It is alleged that Schmertz's statement of the art was inadequate and misleading. We cannot agree thereto. He rightly described the Shuman process as the only practical prior process, and his statement in that regard accords with the conclusion subsequently reached by Mr. Justice Brown and Judge Jenkins. Moreover, had Schmertz meant to conceal from the Patent Office knowledge of the unsuccessful European method, it would not have availed him, for the French inventor Appert, patent No. 608,096, with whom he was at once involved in interference, called attention both to it and Shuman's practice, saying:

"The importance and value for various purposes of glass reinforced by a metallic trellis or net work embodied therein are well understood and need not here be set forth. It has therefore been very desirable to discover a process which, while admitting of the production of such article under conditions analogous to those attending the manufacture of ordinary rolled glass, and consequently at a moderate price, would preserve all the essential qualities of limpidity and transparency of the glass without reducing its resistance or increasing its fragility. Attempts in this direction were made in 1886, when it was proposed to place a metallic trellis or network between two glass plates and unite the latter. That attempt, however, was unsuccessful, as the product possessed neither homogeneity nor cohesion. In 1892, it was proposed to obtain the desired result by forcing into the body of molten glass a metallic network or trellis. The chief difficulties attending this process are that a netting of light wires (such as it is very important to use, so as not to impair the essential properties of transparency and limpidity) could not be forced in that manner into the body of the glass, and that it is not easy by this plan to imbed the netting regularly and at the proper uniform distance from the surfaces of the sheet."

We take this occasion, now that Appert has been mentioned, to say that a clear apprehension of his patent becomes necessary to a proper construction of the claims of Schmertz's patents. The statement of the Schmertz reissue, No. 12,443, is:

"Desiring to correct by reissue the accident and mistake whereby claims constituting the issues of a certain interference and covering broadly the invention common to the patents of Schmertz, No. 791,216 and No. 791,217, and the patent of Leon Appert, No. 608,096, were omitted from the specification of said patent No. 791,216, what is claimed is—"

Both Schmertz and Appert, who were working toward the same end at the same time, took the same process path. Like Schmertz, Appert discarded the three-roll, one-sheet process of Shuman and adopted a two-roll, two-sheet process, wherein the two sheets were simultaneously formed with the wire web between them. The principle of simultaneity is clearly brought out by Appert's specification. Appert states that his process—

"is characterized by the continuous and progressive formation of two layers of molten glass and the simultaneous introduction between them of the metallic trellis or net work; and the compression of the whole into a solid, uniform, and homogeneous body or sheet. The simultaneous formation of the two layers, with the fabric inclosed between them, and the progressive formation of the complete product make my invention practical, successful, and economical, and distinguishes it from the processes referred to above."

Later, in speaking of the rolling of the first pour of glass, he says:

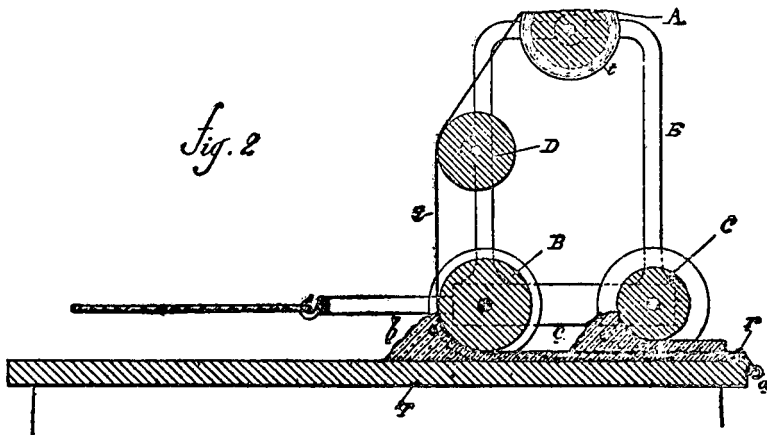
"As soon as the operation has fairly commenced, a fresh quantity of molten glass is poured between rollers, B, C, at 'c.' This batch of glass in its turn is rolled down upon that first poured, becoming perfectly united to it, and forming a homogeneous sheet of glass of the definite dimensions desired. Thus the operation continues progressively."

It will be seen that the process of simultaneously pouring the first pour, rolling it, placing the netting upon it, and progressively following with and rolling the second pour were what was referred to in the reissue as "the invention common to the patents of Schmertz No. 791,216 and No. 791,217, and the patent of Leon Appert No.

608,096." These features were embodied in Appert's process claim as follows:

"(1) The process of making sheets of glass with a metallic trellis imbedded therein, said process consisting in pouring and rolling out a layer of glass, simultaneously applying the trellis to the surface thereof, pouring a second layer of glass upon the trellis and rolling the same, the operation being carried on progressively, substantially as described."

In this regard the two inventions agreed, but in the control of the wire netting they differed radically. Briefly stated, Appert initially and before any glass was poured fixed and stretched his wire in a position in which it ultimately remained after his wire-glass was made. It will thus be seen his was not a feeding operation during the glass making, and instead of the wire-web being fed to the glass the glass was, so to speak, fed to both sides of the wire. This is clearly shown in the accompanying cut, where the wire is held down at one end



and at the proper horizontal plane by the hook, a, and the rule, r, and held up at the other end and at the proper horizontal plane by the spool, A, and the wheel, B, which is mounted on rails to determine the thickness of the lower sheet. In this tense, fixed, and predetermined horizontal position the wire netting has the glass fed to it from beneath by the first and from above by the second pour. So also with respect to the web in Shuman. The horizontal location of the web was rigidly fixed by the depth of the roll rib by which it was carried and imbedded in the sheet. It will thus be seen that in both Shuman and Appert there was no feeding whatever in the sense that the feed affected the possible final horizontal location of the web, but, on the contrary, in both such location was predeterminedly fixed by other than feeding mechanism, and the feed was the mere source of supply. In Schmertz, however, we find the feed itself is the controlling factor in determining the ultimate horizontal location of the web, and in this feature, which was his disclosure, and in the simultaneity and progressiveness which he had in common with Appert, lie the elements

which made his process the signal success it is. Indeed, through this protracted litigation, we have seen no reason to change the view we took of Schmertz's process when it first came before us in *Schmertz v. Appert* (C. C.) 144 Fed. 117, where we said:

"Appert and Schmertz seem to have been working at substantially the same period in developing the wire-glass process; the former in France, the latter in America. It related to casting rough plate glass for skylight and other purposes, having a wire mesh imbedded in its center. This had been done by what was known as the "European method," which consisted of first casting the lower part of the plate, then placing the wire mesh upon it, then casting the upper part thereon. The difficulty with that process was that the plate when finished consisted of two separate strata, the lower of which had so far congealed or solidified before the upper half was cast that the two would not unite and form a homogeneous whole. The result was they separated or split. Schmertz's invention consisted in a process and means to apply the same; whereby the operation which rolled the lower section of the plate to the desired thinness simultaneously deposited thereon the wire mesh. Immediately thereafter the top layer was poured, and a roller followed, which reduced the sheet to the desired thickness. The speed of the operation was such that, instead of two separate plates or layers being pressed together, the two layers united to form a homogeneous whole."

It will, of course, be noted that the originality of Schmertz with relation to his feed consisted not in its location, viz., pre-roll, as in patent No. 12,443, or post-roll, as in No. 791,217, for Appert's source of wire supply was pre-roll, and Shuman's was post-roll, but in the nature of his feed, which was one where the lower end or tip of the web depends over the lower end of support in a position to be caught between the two forming layers of glass. He for the first time disclosed, in combination with differently recessed two-roll simultaneity and progressive working, a feed which itself and during the casting operation determined the horizontal location of the web. It was rather to seek to describe this supplying feed by a generic name than to restrict the patentee that the Patent Office referred to it as a by-gravity feed to contradistinguish it from Shuman's and Appert's methods of rigid wire fixation. Such being the case, it follows that the presence of this term in the claims of No. 791,217, for they are not found in the reissue of No. 791,216, is not of itself a warrant for restricting the claims of such reissue to the narrow limits of a mere improvement, but rather as a generic term which was intended to effectuate the declared purpose of the Patent Office, viz., to grant claims "covering broadly the invention common to the patents of Schmertz * * * and Appert." The ultimate outcome of the interference between these two resulted in the grant of the Schmertz patents in suit in the proceedings hereafter noted in *Schmertz v. Appert* (C. C.) 144 Fed. 115. On these devices, patent No. 791,217, which showed a device for post-roll feeding, claims as follows were granted:

"(1) In the manufacture of wire-glass, the combination of a table, a leading roll, a second finishing-roll, and means for introducing the wire by gravity between said leading and finishing rolls.

"(2) In the manufacture of wire-glass, the combination of a table, a leading roll with recessed ends, a finishing-roll whose body is higher from the bed of the table than the body of the leading roll; and means for introducing the wire by gravity between said leading and finishing rolls.

"(3) An improvement in the process of manufacturing wire-glass, which consists in rolling a sheet of glass of less thickness than the ultimate product required, simultaneously feeding by gravity wire upon the top of said sheet at the rear of the leading roll, and rolling a second sheet of glass upon said original sheet and the wire, simultaneously imbedding the wire and finishing the sheet.

"(4) An improvement in the process of manufacturing wire-glass, which consists in rolling a sheet of glass of about half the ultimate thickness required, simultaneously feeding by gravity wire upon the top of said sheet at the rear of the leading roll and rolling a second sheet of glass upon said original sheet and the wire, simultaneously imbedding the wire and finishing the sheet."

It will be noted that all of said claims have limitations confining them to post-roll feeding. And on patent No. 791,216 (reissue No. 12,443), which showed apparatus for pre-roll feed, claims (here involved) as follows were granted:

"(1) The process of making glass sheets with wire inclosed therein, consisting in simultaneously forming a layer of glass and introducing wire thereto, and completing the sheet by forming another layer upon the first layer of glass, the process being carried on progressively.

"(2) An apparatus for making sheets of glass with wire inclosed therein, consisting of a table, a leading roll to roll a layer of glass, means to support and introduce wire to the said layer, a second roll, behind the leading roll, to form a layer of glass on the first or underneath layer, the periphery of the second roll being higher above the table than that of the leading roll, and the two rolls being far enough apart to allow the glass for the second or upper layer to be poured between them."

"(6) An improvement in the process of manufacturing wire-glass, which consists in rolling a sheet of glass of less thickness than the ultimate product required, simultaneously forcing wire upon said sheet, and forming a second sheet of glass upon said first sheet.

"(7) An improvement in the process of manufacturing wire-glass which consists in rolling a sheet of glass of about half the ultimate thickness required, simultaneously with the formation of said sheet, forcing wire in said sheet and forming a second sheet upon said first sheet."

It will be noted that process claim 1 contains no limitation as to whether the introduction of the wire-web is pre or post roll.

Under the process of Schmertz, wire-glass has been manufactured in great quantities. Moreover, it has been found that by using the post-roll process a glass fit to grind and polish was produced. In this respect the Schmertz process brought into being—that is, in polished wire-glass—a new commercial article, viz., wire plate. Not only has a new article been produced, but the rapidity and synchronous character of Schmertz's process rendered it possible to make much larger sheets, substantially 160 inches long and 50 inches wide. The complainant company has cast some twenty-six million feet of this glass of which a million and a half feet were afterwards polished. As an outcome of this process, polished wire-glass has also created a new article of commerce, a glass fire retardant. It was found to have remarkable capacity to resist fire, so that no matter how directly the flame impinged on it, or how intense the heat, the glass, though it cracked, did not allow flame or smoke to pass through it. Even when attacked by fire, the glass resisted intact a fire stream of 60 pounds per square inch pressure. The result has been its large use in modern high buildings where window risk is great, since it, in effect,

serves the purpose of a shutter. Its use in elevator-cage service is now a factor in fire protection, since it prevents fire getting in the elevator shaft and making it a draft shaft to aid in the destruction of a building. The length of this opinion precludes a statement in detail of the benefits arising from the introduction of this new article which our reading of this entire record has disclosed. An examination of the prior art in the record has further satisfied us Schmertz first disclosed the process and apparatus by which the remarkable development of wire plate came about. The effective feature of Schmertz's process is the practically synchronous or simultaneous character of his differently-recessed two-roll, two-sheet process, coupled with a successful wire feed. Molten glass responds very quickly to changes in heat conditions, and such changes render impossible results that might have been obtained an instant before. The fragile character of the wire web, the intense heat to which it is subjected, its readiness to kink, if not kept taut enough, and its readiness to stretch out of form, if subjected to tension, make the introduction of the web to the sheets a most delicate operation, and one in which the slightest departure from a perfect feed results in imperfect product. Tension distorts the web, and kinking brings a loop near the surface which prevents the sheet being polished. Schmertz obtained his product by an apparatus adapted to effectuate such a synchronous process and a perfect feed, and a study of the various patents satisfies us that none of the various prior patentees disclosed in the making of wire-glass the necessity of simultaneous treatment, which in connection, be it observed, with suitable mechanism to effectuate both it and a perfect feed, made Schmertz's process successful. These essential features in combination are lacking in the alleged anticipations.

We next come to the question of infringement. This is charged in two different machines of the respondent. In one of these we have a movable table above which are two fixed rolls so mounted that the forward one rolls a sheet of approximately one-half, and the other the whole, thickness desired. A wire web, the length of the desired sheet, is cut and held horizontally suspended between the rolls by four corner magnets. Somewhat in advance of the second roll is a cross-rod, which, with one in a corresponding position at the rear of the forward roll, keeps the wire web from coming in contact with the glass when the web is dropped by the release of the magnets. The forward end of the table being in position near the forward roll, a pour is made and the table advanced. As the table moves, the forward roll presses a sheet of one-half the thickness, which is carried forward toward the second roll. In this passage heat radiation from the sheet and contact with the air is lessened by a horizontal iron jacket which practically covers the whole sheet. As the sheet nears the second roll the magnets which hold the suspended web release and drop the web on the sheet, save where it is kept from contact therewith by the cross-rods. The second pour is then made in advance of the second roll, and on the part of the web in advance of the cross-rod, and as the table advances this stationary cross-rod lifts up the wire as it approaches, and drops or feeds it down on the going sheet in front

of the second pour. In this way the wire web is, without tension, distortion, or kinking, drawn up and dropped, and by such feed is located both vertically and horizontally in the sheet. The jacket meanwhile conserves the heat, and a sheet is produced suitable for polishing. It is clear to us that this process embodies every element of the process claim of the reissue patent. It simultaneously pours a layer of glass and introduces the wire thereto, and it completes the sheet by forming another layer upon the first, the whole being carried on progressively. It will be observed that the claims of reissue No. 12,443 have no limitation as to whether the wire is introduced in advance of the first roll or between both rolls, but in point of fact the method of feeding over the cross-rod in respondent's device is a by-gravity chute feed such as is found in the claims of patent No. 791,217. The accompanying sketch, in connection with Fig. 6 of the reissue patent,

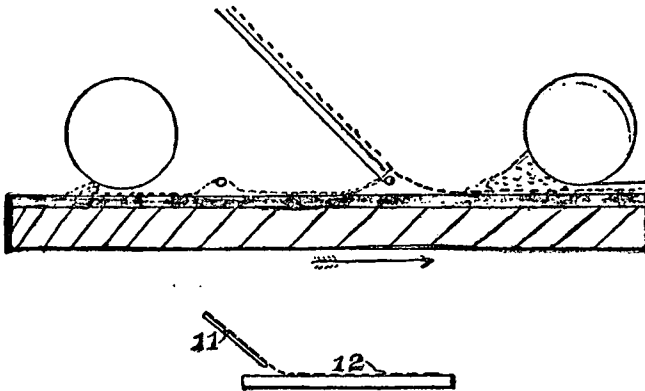
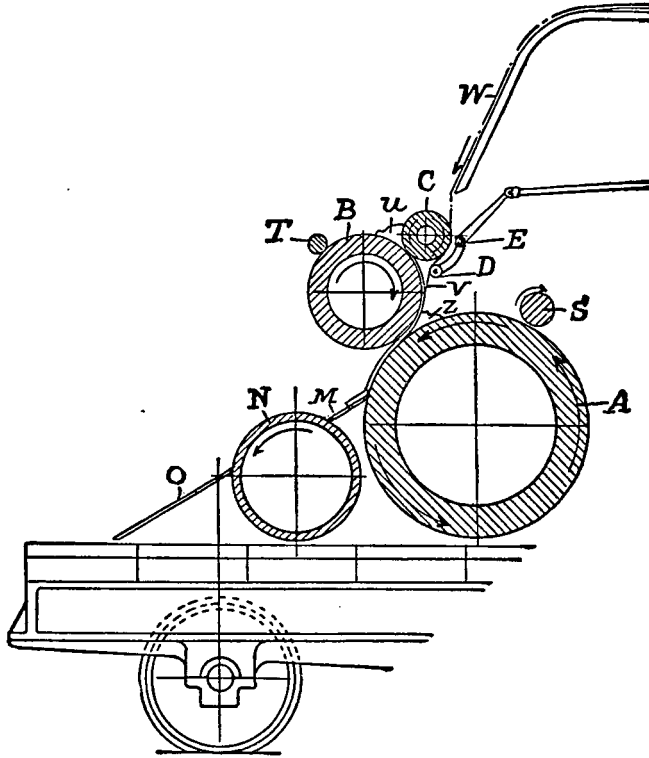


Fig. 6.

shows that the fall of the web from respondent's cross-rod as the table passes along is the same as the fall from the feed point at the foot of Schmertz's chute. The drop from the cross-rod is a feed by gravity at that point, and that is where it is all-important. It will thus be seen the machine embodies all the features of the first claim of No. 791,217, viz., a leading roll, a second finishing roll, and means for introducing the wire by gravity between them. We are therefore of opinion that this machine infringes claims 1, 2, 6, and 7 of the reissue, and claims 1, 2, 3, and 4 of patent No. 791,217.

The other machine is of a different type in form, but, when substance and not mere form is considered, it will be found to appropriate and reproduce the substance of Schmertz's device. This appropriation, to our mind, consists in transposing the flat, forward movement of a flat table surface into the circular surface of a revolving roll. The difference between rolling a sheet of glass with a roller on a flat table and rolling it between two rollers is not as great as the difference in ironing a linen sheet between a hand iron and a table and ironing

it between two rolls of a mangle. In the accompanying cut of respondent's other device there are three rollers, A, B, and C. As we analyze the apparatus, C is the leading roll, A the second roll, and



B the table roll or common base for the action of the other two rolls upon it. The wire-web comes down the chute, W, and is fed by dropping from D to V at a point between the leading roll, C, and the second roll, A. In the process the first pour, U, is made at the bite of the leading roll, C, and the table roll, B. The former is so spaced from the table roll as to roll the sheet of one-half the thickness desired. As this sheet, resting on the table roll, is carried toward the bite of the second roll, A, it meets the wire web which drops down over the tension roll, D, and the second pour, Z, being made, the lower half of the sheet is formed, and the wire is centrally imbedded by the action of the second roll, A, upon the table roll, B. The wire web coming down the chute, W, is deflected by the roll, C, and retarded by the upward movement of that roll as pressure is exerted by the tension roll, D. But from D to the glass the feed, when not unduly restrained above, is clearly one by gravity.

Now to us it is clear that, mutatis mutandis, the plane surface of a moving table being transferred to the periphery of a revolving roll, the apparatus is, in substance, transposed form, and identity of func-

tion and result, but the device of Schmertz. Had such a machine existed before Schmertz, it would have been the work, not of an inventor, but of a clever designer to have laid the periphery of the table roll on a movable table and made the first and second rolls operate on it. If we are right in finding that wire-plate is a new commercial product, and that the Schmertz process produced it, then the fruits of that really great invention should not be frittered away by appropriations of its substance through a transfer of function to a mere differing but alternative mode of application. We are therefore of opinion that this device infringes the first, second, sixth, and seventh claims of the reissue and the first, second, third, and fourth claims of patent No. 791,217.

It is contended, however, that the patents in suit are invalid, that the proceedings in *Appert v. Brownsville Company* (C. C.) 144 Fed. 117, was not an adverse one, and therefore the decree of the court therein directing the Commissioner of Patents to issue these patents to Schmertz was void. We have carefully reconsidered that case, and see no reason to differ from the conclusion there reached. Before the decree was entered the fact was fully and frankly made known to the court that after the suit was brought the ownership of the Appert patent had been acquired by the adverse party. It will be observed the jurisdiction of the Circuit Court as originally invoked was undoubted. Appert filed a bill against Schmertz, charging infringement of his, Appert's, patent No. 608,096. Its jurisdiction was equally clear when it entertained under Rev. St. § 4915, a cross-bill by Schmertz, the defeated party in interference with Appert, to decree the issue of a patent in his favor. *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656; *Butler v. Shaw* (C. C.) 21 Fed. 321; *Wheaton v. Kendall* (C. C.) 85 Fed. 666; *Bernardin v. Northall* (C. C.) 77 Fed. 849. When, therefore, the court made its final decree, it was in a case wherein jurisdiction had been rightly acquired. It is alleged, however, that, when the two contending interests were united, the court should have dismissed the bill. We cannot so hold. The fact that there is no adverse interest of record does not deprive the inventor of the benefit of the statute. Indeed, provision for such a contingency is made in the statute, the only requirement being that when such a proceeding is begun notice shall be given to the Commissioner of Patents. While it is true that after the merger of the two interests some additional testimony was taken, yet this testimony was only corroborative to the main, substantial proofs which were taken when Appert and Schmertz were most hotly contesting the interference, and which testimony had been passed upon by the Commissioner of Patents and on which he held Schmertz was entitled to patents. The court, therefore, having before it the testimony taken adversely, and finding the Commissioner of Patents (who under the statute was to be notified in limine had there been no adverse parties) had already considered such proofs and decided in favor of Schmertz, proceeded to reconsider that proof and the additional corroborative testimony, and made a decree directing the Schmertz patents issue. In effect, the Circuit Court simply ordered the Commissioner to do

what he had already decided to do, and would have done had he not been prevented by the action of the Court of Appeals of the District of Columbia. We saw no reason to differ from the decision of the Commissioner of Patents upon the facts. Nor do we now, and while, as stated, there was additional testimony taken in the Circuit Court after the adverse interests were merged, yet the correctness of that testimony is not now challenged by the respondents by themselves calling these witnesses in the present case or asking that they appear and submit to cross-examination. The Department, pursuant to its holdings as to the dates of foreign patents—*De Farranti v. Westinghouse*, 52 O. G. 457; *Appert v. Parker*, 74 O. G. 1587; *American Bell Telephone Co. v. Cushman* (C. C.) 57 Fed. 842; *Id.*, 65 O. G. 135—holding that January 12, 1894, the date of issue of Appert's French patent, and not October 19, 1893, the date of the application, was the date Schmertz must anticipate, we did not deem it necessary in our opinion to go back of the former date, and we now feel that such date, and not October 19, 1893, is the one we should follow until the Supreme Court shall declare this departmental construction not the true one. To do otherwise would be to unsettle a practice on which patentees and the public have acted. Presumably it is correct, and should not be lightly disturbed. We find no compelling reason to depart from it. In the present case, however, we have critically considered the proofs Schmertz made in the adverse interference proceedings in the way of earlier sketches whose authenticity is not questioned. These show that at their dates, in some cases prior to October 1893, Schmertz had a clear conception of the invention covered by his patents. Schmertz in the fall of 1892 had obtained copies of Shuman's patents, and during the summer shut-down of his own plant from May 1, to July 7, 1893, took up the study of wire-glass, which was then attracting attention through Shuman's development. This is corroborated by Schmertz's copy of Shuman's patent No. 483,020, bearing the stamp of its purchase in October, 1892. On this patent are sketches of apparatus suitable for carrying out Schmertz's process, and which Schmertz says he drew thereon during this shut-down of 1893. These sketches show on the first page a roll recessed to fix the thickness of the sheet, and on the following page a table, two rolls of different recess, a chute for introducing wire in advance of the leading roll, and two pours, one in advance of each roll. Beneath it is written the query, "Will glass made this way weld perfectly?" This shows the device was intended to make glass, and the inquiry shows that Schmertz was keenly alive to the weak point of the European process. Schmertz also placed a sketch of his device at that time on the Shuman patent No. 483,021, which differed from the former sketch in that he there followed Shuman in introducing his wire mesh between the rolls instead of in advance of the leading roll as in the former sketch. At the same time he made a sketch on the Brogan and Mallock patent No. 370,177, which he had also obtained the preceding October. This sketch, made by changing a figure of that patent, clearly discloses an apparatus for the practice of his process. There are a table, two rolls, and a chute marked "wire netting," and beneath are these suggestive descriptive notes:

"Last roll is nearer table than second roll. A ladle of glass is cast before each roll, and wire netting fed to the glass in advance of the first roll. Wire netting will be at top of sheet, and casting will cover it up. Will it make lappy glass?"

This last inquiry is to the same effect as the prior inquiry in reference to welding, and, like it, goes to the very point wherein the European theory was faulty. These conceptions of the inventions were followed by other sketches, explanations of his process to others, and actual reduction to practice within the six months following. Thus on a December stock sheet of his company Schmertz made a sketch between December 2d and 9th, which clearly discloses his device in the alternative form of introducing the web in advance of the leading roll and between the two. And on the January trial balance sheet of his firm he placed a sketch which showed the general form of apparatus disclosed in the preceding sketches, with the modification that in them the rolls were drawn over the glass by hand, while this last sketch showed a modification for use of machinery. It will therefore be seen that on the strength of the testimony alone, which was adversely taken in the Patent Office, the court was warranted in finding priority to Schmertz over Appert, and that the efficacy of that testimony as a basis of relief was not destroyed by the fact that the interests of Appert later ceased to be adverse.

But the further defense is made that the application for the patent in suit and the invention set forth therein were abandoned by their owners, so that no valid patents could be taken. The delay in question was from the date of Schmertz's death in October, 1898, until the fall of 1902, when his administrator began proceedings in revivor. That matter was heard by the late Judge Acheson, and evidently an order of revivor must have been made by him, although none can now be found, since in the opinion of *Schmertz v. Appert*, supra, we recited: "The cross-bill was duly revived in favor of his administrator." We see no reason why this patent should be declared void on the ground of abandonment. The cross-bill in the Circuit Court for a decree for the issue of a patent to Schmertz was a case of original equity jurisdiction. It was brought within two years from the decision of the Court of Appeals of the District of Columbia, and did not involve the fatal delay of *Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. Ed. 1223. The action once begun became subject to the practice and proceedings incident to equity. It will be noted that the jurisdiction of the Circuit Court was originally invoked on Appert's bill charging infringement, and the litigants remained hostile until March 27, 1903. From the death of Schmertz, the Appert interest, the complainant in the original suit, and the respondent in the cross-bill—and they were the only parties in interest, and the judgment in the case could not bind third parties. *Butler v. Shaw* (C. C.) 21 Fed. 321—took no step to dismiss the cross-bill or to prosecute the suit. There was no bad faith in the delay. Moreover, there is no provision in Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), in reference to delay in procedure, and that in Rev. St. § 4894 (U. S. Comp. St. 1901, p. 3384), is a delay "after any action therein, of which notice shall have been given to the applicant." Of such ac-

tion, or of such notice, there was none in this case. When, therefore, in the fall of 1902, the Schmertz interest began its proceeding to revive, Appert was in no position to charge delay to the other side. They were the first to move, and, as between the litigants, the court was certainly justified in reviving the cross-bill in favor of Schmertz's administrator. Delay after suit is begun, which is acquiesced in by both parties, is quite different from delay by one party before suit brought. Moreover, a revivor is not a new suit, but a mere continuation of the original suit, and ordinarily a matter of right. *Fitzpatrick v. Domingo*, 14 Fed. 216; *Hone v. Dillon* (C. C.) 29 Fed. 465; *Clarke v. Matthewson*, 12 Pet. 164, 9 L. Ed. 1041. In addition thereto, the delay can fairly be attributed to other causes than to an intent to abandon. Schmertz left a widow and minor children. The difficulties incident to a prosecution of the claims of Schmertz were such as might well lead to delay. The widow was advised by her relatives and friends not to undertake further prosecution of the proceeding; the opposing interest was a powerful concern, and had enlisted the service of able counsel; and yet, during all that time, she certainly did no positive thing, or did her adversaries put her in a position where she was required to do anything, to evidence her intent. Moreover—and this fact is not without significance—no rights of third parties intervened. As matters stood, Appert had prevailed in the interference, and held his patent with its claims covering Schmertz's process, so that no one could practice it meanwhile. It has not been shown that the rights of any third parties intervened during this period of mutual inaction. We are therefore of opinion this defense cannot prevail.

In conclusion, we may say that careful consideration of this case has impressed us with the novelty and value of Schmertz's invention. It opened up a new and broad field of activity. It brought success out of 50 years of futile effort and recognized failure. We fulfill the intent and spirit of the patent laws in affording patent protection to this, in our judgment, highly meritorious invention.

MISSISSIPPI WIRE-GLASS CO. v. PITTSBURGH PLATE-GLASS CO.
(Circuit Court, W. D. Pennsylvania. February 5, 1909.)

No. 25.

PATENTS (§ 328*)—NOVELTY—MACHINE AND METHOD FOR MAKING WIRE-GLASS.
The Baldwin patents, No. 800,131, for a machine for making wire-glass, and No. 847,637, for a method of making wire-glass, are void for lack of patentable novelty, in view of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity.

Kerr, Page, Cooper & Hayward (Thomas B. Kerr, Thomas W. Bakewell, and Drury W. Cooper, of counsel), for complainant.

Christy & Christy (Bayard H. Christy, George H. Christy, and Frederick P. Fish, of counsel), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BUFFINGTON, Circuit Judge. In this case the complainant charges infringement of letters patent No. 800,131, granted September 26, 1905, to Arthur J. Baldwin, for a machine for making wire-glass, and patent No. 847,637, granted March 19, 1907, for a method of making wire-glass. The machine patent is for a structure so near akin to the respondent's table-roll machine, which we have considered in an opinion filed herewith, in a case between these same parties, that, if we are correct in our estimate of that machine, this patent is void for lack of patentable novelty.

As to the method patent, we are clear that, in view of the patents of Schmertz, Appert, and Shuman, it lacks patentable novelty.

Let a decree be drawn accordingly dismissing the bill.

WESTINGHOUSE ELECTRIC & MFG. CO. v. ALLIS-CHALMERS
CO. et al. *Kerr's*

(Circuit Court, D. New Jersey. February 25, 1909.) *675, 300*

PATENTS (§ 259*) — INFRINGEMENT BY CORPORATION—CONTRIBUTORY INFRINGEMENT.

The fact alone that a majority of the stock of a corporation charged with infringement of a patent is owned by another corporation, which exercises such control only as is incident to such stock ownership by the election of its own officers as directors, etc., does not render the latter corporation chargeable as a contributory infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 400; Dec. Dig. § 259.*

Contributory infringement of patents, see notes to Edison Electric Light Co. v. Peninsular Light, Power & Heat Co., 43 C. C. A. 485; Æolian Co. v. Harry H. Juelg Co., 86 C. C. A. 206.]

In Equity. On final hearing.

Kerr, Page, Cooper & Hayward, for complainant.

Clifton V. Edwards and Thomas F. Sheridan, for defendant Allis-Chalmers Company.

LANNING, District Judge. This is a patent suit for injunction and accounting because of alleged infringement. The complainant owns patent No. 606,015, for an improvement in systems of electrical distribution and regulation, granted to it June 21, 1898, upon the assignment of the inventor, Benjamin G. Lamme. The two defendants named in the bill of complaint are the Allis-Chalmers Company and the Bullock Electric Manufacturing Company. The latter is an Ohio corporation, and has neither been served with process nor appeared in the suit. The case is therefore prosecuted against the Allis-Chalmers Company only.

The bill charges, and the answer of the Allis-Chalmers Company admits, that in March, 1904, that company became the owner of a majority of the capital stock of the Bullock Electric Manufacturing Company. It also charges that some of the directors of the Allis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Chalmers Company are directors of the Bullock Company, that the Allis-Chalmers Company controls the acts of the Bullock Company, and that the Allis-Chalmers Company advertises that its electrical department comprises the plant of, and that it will continue to manufacture the product of, the Bullock Company. The answer of the Allis-Chalmers Company admits that some of its directors are directors of the Bullock Company, that it has advertised that the business of the Bullock Company is operated by the Bullock Company as the electrical department of the Allis-Chalmers Company's business, and that it will continue to manufacture the product of the Bullock Company; but it denies that it controls the Bullock Company "save as it is lawfully entitled thereto as the holder of such majority of stock."

The only infringement referred to in the complainant's briefs or proofs is the one founded on a sale by the Bullock Company to the Merchants' Heat & Light Company of Indianapolis, in April, 1904, of certain machinery said to embody the invention of the complainant's patent.

The ownership of a majority of the capital stock of the Bullock Company by the Allis-Chalmers Company, the fact that some persons—how many does not appear—are members of the two boards of directors, and the fact that the Allis-Chalmers Company advertises that its electrical department is operated by, and that it will continue to manufacture the product of, the Bullock Company, taken with the averment that it does not in any wise control the Bullock Company, except as it lawfully may as a majority stockholder thereof, are not admissions that the Allis-Chalmers Company controls the Bullock Company in any such manner as to justify a conclusion that it is guilty either of direct or contributory infringement. The admissions of the answer are the only proofs on this point. Where individuals, who are officers or stockholders of a corporation, are made codefendants with their corporation in a suit for the infringement of a patent, a decree for injunction and an accounting will not issue against them individually, where the corporation is solvent and they have not as individuals violated, or are not threatening to violate, the complainant's patent rights. *Howard v. St. Paul Plow Works* (C. C.) 35 Fed. 743. In *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. 556, 27 L. Ed. 322, Mr. Chief Justice Waite said:

"If an account of profits is wanted, and an injunction against the further use of the patented inventions under the transfers from Whipple & Dickerson, then the suit should have been against the Missouri corporation in its corporate capacity, and not against a part only of its stockholders and directors individually."

To the same effect are *Mergenthaler Linotype Co. v. Ridder* (C. C.) 65 Fed. 854, and *Bowers v. Atlantic G. & P. Co.* (C. C.) 104 Fed. 888.

In the application of the rule of law on this point, I can see no reason for distinguishing between corporate and individual stockholders. If the admissions of the Allis-Chalmers Company's answer, or the proofs submitted, were sufficient to show that company to be a joint tort-feasor with the Bullock Company, it might be necessary to consider other questions presented by the record. On the present proofs, I think the complainant has failed to show, even on the assumption

that the patent in suit is valid and that it has been infringed, any liability on the part of the Allis-Chalmers Company.

The bill will therefore be dismissed, with costs.

In re ALDRIDGE.

(District Court, N. D. New York. February 26, 1909.)

1. BANKRUPTCY (§ 407*)—DISCHARGE—GROUNDS FOR REFUSAL—DEBTS CREATED BY FALSE STATEMENTS.

To debar a bankrupt from a discharge under Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), on the ground that he "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit," it is not necessary that the property should have been obtained for himself or for his benefit, but if it was obtained on his credit as principal or surety, and such credit was induced by his materially false statement in writing made for the purpose, the case is within the statute.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

2. BANKRUPTCY (§ 407*)—DISCHARGE—GROUNDS FOR REFUSAL—DEBTS CREATED BY FALSE STATEMENTS.

A statement in writing by means of which a bankrupt obtained property on credit, in order to be within Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), which debars him from a discharge if he obtained property on credit by means of a materially false statement "made * * * for the purpose of obtaining such property on credit," need not necessarily have been written nor signed by the bankrupt himself, nor by one who knew it to be false, but if the bankrupt obtained such statement from another with the design of so using it, and, knowing it to be materially false, used it for the purpose and with the effect of obtaining the property on credit, he is within the statute, although the statement may have been made and signed in good faith by one who believed it to be true.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

In Bankruptcy. Application by objecting creditors for an order overruling the exceptions filed by the bankrupt to the report and findings of Wm. P. Badger, Esq., referee in bankruptcy, and which recommends that a discharge be denied, and denying a discharge to the above-named bankrupt, Millard F. Aldridge.

Seth S. Allen, for objecting creditors.

S. L. Wheeler, for bankrupt.

RAY, District Judge. The specifications of objection to a discharge of the bankrupt must be regarded as sufficient. They were neither demurred to as insufficient, nor was any motion made for an order requiring them to be made more definite and certain. Rule 12 of this court requires that the specifications of objection, if deemed insufficient or uncertain, shall be questioned and their sufficiency determined by motion or demurrer, "in default whereof such specifications shall be deemed sufficient to present the questions suggested thereby." This

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rule became necessary to prevent the practice of going to trial on the hearing after the case was referred, and then, when the report came before the court, if adverse to the bankrupt, raising the question of the sufficiency of the specifications of objection. The rule is adhered to; but the specifications were sufficient to give notice of the points presented and relied on by the objecting creditors. The issues were clearly presented before the referee.

The important question is, was the evidence before the referee sufficient to justify the finding and holding that the bankrupt, Millard F. Aldridge, had offended against subdivision 3, § 14b, of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended February 5, 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026]), and which provides that a discharge shall be denied if the bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit"?

This ground for refusing a discharge was introduced into the law by the amendatory act of 1903. What does it mean? Must the written statement be actually made by or signed by the bankrupt in person, or some one authorized to sign his name? Or is it sufficient if the bankrupt induces or procures some other person to make the materially false statement in writing, such other person signing his own name thereto, the bankrupt obtaining and procuring the statement with the design of using it "for the purpose of obtaining such property on credit," and then so actually and successfully using it? Also, is it essential that the person who wrote and signed the statement with his own name at the instigation or request of the bankrupt should have known it was false? Also, if the statement expresses the opinion or state of mind of the writer and signer as to the financial standing and ability of the person so obtaining and using it, and that opinion and state of mind were induced by the acts and words of the person procuring and intending to use the statement, and that person also knows that the opinion expressed in the statement is entirely unfounded and incorrect and the state of mind an entirely mistaken one, but such person having obtained the statement, nevertheless uses it successfully to obtain property of a third person on credit, and thereby misleads and deceives the seller into giving credit, is this obtaining property on credit from a person on a materially false statement in writing made to such person for the purpose of obtaining such property on credit? Again, must the statement be used by the one in whose favor it is written to obtain the property for himself?

In September, 1906, the bankrupt, Millard F. Aldridge, and his brother, Herbert W. Aldridge, were, and for some time had been, more or less connected in business or business transactions. Both were insolvent. Herbert W. Aldridge was substantially worthless and had no credit. Millard F. Aldridge was actually insolvent, and he knew it. He had owned, and then, by most people, was supposed to own, considerable quite valuable real estate and property, but he had disposed of it, quite largely to his wife, and he was doing business for her as her agent. This was not generally known. It is evident

from the evidence and circumstances and conduct of these men that shortly prior to September 26, 1906, these brothers conceived the idea of purchasing a large amount of property on credit, and, probably, without intending to pay for it. Herbert W. Aldridge was to purchase the property, and Millard F. Aldridge was to indorse his notes. On or about September 26, 1906, Millard F. Aldridge, the bankrupt, having in mind the purchase of property by his said brother on credit, and expecting he himself would be the indorser on his paper, went to John M. Wever, the vice president of the Merchants' National Bank of Plattsburgh, N. Y., and requested Wever to write him a recommend. He did not disclose to Wever that he had parted with his property. Pursuant to such request Wever wrote, signed, and delivered or sent to Aldridge a letter of which the following is a copy:

"The Merchants' National Bank, Plattsburgh, N. Y., Sept. 26, '06.

"To Whom It May Concern.

"Dear Sir: We take pleasure in stating that we have done business with Mr. M. F. Aldridge of Chazy, N. Y., for about 20 years and have always found him to be a very satisfactory customer in every particular. We believe him to be good for any contract he will make and have no doubt he is worth \$10,000 and upwards.

"Yours Resp.

John M. Wever, V. P."

He obtained such letter or recommend for the purpose and with the intention of having its contents communicated to persons with whom he and his brother should deal, and for the purpose of using it to procure credit for his brother in purchasing goods, and credit for himself as indorser for his brother on paper to be given in payment for such goods; in short, to enable his brother and himself to obtain goods or property on credit. He knew that Wever did not understand his actual financial condition or situation. He knew that he was not worth \$10,000 or any sum. He knew that Wever wrote under a misapprehension of the facts, and that the letter would give to any one who read it the idea and impression that he, Millard F. Aldridge, was worth \$10,000, and he intended that it should. He knew that, on its face, such letter represented, and in effect stated, that he was worth that sum, and he knew that, considered and construed as a statement of his financial condition, it was a misleading and false statement and representation. On receiving the letter, Millard F. Aldridge delivered it to his brother, Herbert W. Aldridge, for him to use in obtaining property and credit therefor, with Millard F. Aldridge as indorser on his notes to be given in payment. Herbert W. Aldridge knew the financial condition of his brother and the falsity of the representation contained in the letter.

On the 17th day of October, 1906, said Herbert W. Aldridge wrote to Hickstein Piano Company of Auburn, N. Y., a letter of which the following is a copy:

"Chazy, Clinton Co., N. Y., Oct. 17, 1906.

"Hickstein Piano Co., Auburn, N. Y.

"Gents: Yours of Oct. 11th received and noted. I am favorably impressed with description and cuts of your pianos and if we can come together on terms &c. we can do some business.

"I shall want to buy on four mos. time and will furnish bank reference. I have been doing business here for a number of years in a small way and now

have Mr. M. F. Aldridge associated with me financially, whose credit and financial ability is A1 and times are good here and as I have an extended territory I feel that I am justified in extending my business.

"Mr. M. F. Aldridge will endorse my notes at 4 mos.

"Let me hear from you at an early date that I may know what to do in the matter.

"Yours truly,

H. W. Aldridge.

"P. S. The Wegemen piano is sold in this territory by Malone & Burlington Agts. and I would like to have an instrument that I can say is made in the same city and your Union label would be a strong taking point. H. W. A."

Shortly thereafter he forwarded the Wever letter to said company, intending it as a representation to said company of the financial condition and responsibility of his brother. A few days thereafter an agent of said company, one John H. Anderson, went to Chazy, N. Y., where the Aldridges resided, and had interviews with both in regard to selling pianos to Herbert W. Aldridge. Anderson had the Wever letter with him and showed it to Millard F. Aldridge, the brother being present, who read it to Anderson. On the strength of the representations contained in said Wever letter and relying thereon, and at the request of said brothers Aldridge, said Anderson, as agent of and representing said Hickstein Piano Company, then and there sold to said Herbert W. Aldridge 12 pianos on credit, agreeing to take the notes of Herbert W. Aldridge in payment therefor, on the agreement and understanding that said Millard F. Aldridge would indorse same. The pianos were delivered, and the notes, indorsed by said Millard F. Aldridge, were given and accepted in payment. Said Anderson, in making such sale and extending such credit, believed the statements contained in said Wever letter, and that Millard F. Aldridge was worth \$10,000, and relied thereon, and would not have made such sale, or extended such credit, or delivered such property, but for the statements contained in such Wever letter. The notes were not paid; Herbert W. Aldridge was and is worthless, and Millard F. Aldridge was then insolvent, and is now bankrupt seeking a discharge.

The referee has found and reported the facts, and finds that in said transaction said Millard F. Aldridge, the bankrupt, "obtained property on credit from said Hickstein Piano Company upon a materially false statement in writing made to said Hickstein Piano Company for the purpose of obtaining such property on credit." The elements of actual and intentional fraud and deceit were both present. The statement presented and used, and which was the inducing cause that procured the Hickstein Piano Company to sell and part with its property to Herbert W. Aldridge on the credit of Millard F. Aldridge—that is, on credit—was in writing. Millard F. Aldridge took an active part in securing the sale and delivery of the property and extension of credit. He took an active part in obtaining the property on credit, not for himself, however, but for his brother. He obtained the property for his brother, but on his own credit, on a statement in writing, which statement induced the parting with the property and the extension of the credit therefor, made for the purpose of obtaining such property on credit. I think it immaterial that the property was obtained by Millard F. Aldridge for the brother as the vendee. I think it immaterial that the written statement was written and signed

by the vice president of the bank, Wever. In re Goodhile (D. C.) 130 Fed. 782. The statement was made to "whom it may concern," and it was shown and actually delivered to the piano company by these brothers Aldridge for the purpose of obtaining the property on credit. Was this written statement a "materially false statement"? It was material. Was it false? Millard F. Aldridge knew that it conveyed to any one who should read it the impression, and gave such person the understanding, that he, Aldridge, was worth the sum of \$10,000, and he intended that it should. By presenting it to the piano company, he made it his own statement. He, in effect, said, "Here is the opinion and estimate of a banker who knows me as to the value of my property and my pecuniary responsibility, and it is true and correct. I present it for your consideration in extending credit to my brother for pianos on the strength of my indorsement. It tells you my financial condition and responsibility." He knew he had no property, but took no measure to undeceive Anderson or inform him of the truth.

A false statement in writing, like a false pretense, "may be made either expressly or by implication." And "so the form of words in which the pretense is couched is immaterial; if they are intended to create and do create the impression that defendant is making a representation as to a present or past fact, the pretense is within the statute." 19 Cyc. 401; Lesser v. People, 73 N. Y. 78, 81; Maley v. State, 31 Ind. 192; State v. Fooks, 65 Iowa, 196, 452, 21 N. W. 561, 773; Commonwealth v. Hulbert, 12 Metc. (Mass.) 446; State v. Dennis, 80 Mo. 589.

The Wever statement is more than a mere expression of opinion. It is a statement that "we, the bank, have done business with him for 20 years, and have always found him a satisfactory customer"; that is, honest, prompt, and responsible. They believe him to be good; that is, responsible, as the owner of property, for any contract he will make, and "have no doubt he is worth \$10,000 and upwards." This is a direct statement that they have knowledge of his business methods and financial condition and estimate the value of his property at \$10,000. This is what the statement means. This is the idea plainly conveyed. When Millard F. Aldridge delivered this written statement to his brother to deliver to the piano company, and later read it to its agent without qualifying it, except to say he did not think he was worth \$10,000, he adopted and ratified it as his own statement in writing, and upon it obtained the property. Presented and read by Aldridge, it was a material and a totally false statement.

It is, of course, possible to construe subdivision 3 of section 14b of the bankruptcy act, as amended, to mean that the property must have been obtained by the bankrupt for his own use or benefit, to swell or benefit his own estate; and that the written statement used to obtain such property must have been one made by the bankrupt himself or under his direction, so that the written statement itself was in fact his composition, and his expression made to the person of whom the property is obtained and for the purpose of obtaining it. But the section does not so read, and would not, in my judgment, serve the purpose for which intended should we give it such a narrow

and strict construction. The words "from any person" and "made to such person" cannot have been intended to mean that obtaining the property from an agent of the owner by means of a "materially false statement in writing" is not within the act. The words "obtained property," and "obtaining such property on credit," do not mean that the property must have been obtained for the use or benefit of the one obtaining it. I think that if a bankrupt has obtained property from another person for a third person, on his own credit (that of the bankrupt), upon a materially false statement in writing made to that "other person" for that purpose, he is to be denied a discharge. If A., now a bankrupt seeking a discharge, as indorser on a note given by B., as maker, in payment for property obtained from C. for B. by A., is owing C., and C. was induced by A. to part with such property to B. and accept such note relying on A.'s indorsement, and A. at the time of obtaining such property made a materially false statement in writing to C., or the agent who did the business for C., and the property was parted with and the note accepted in reliance on such statement and in the belief that it was true, A. is not entitled to his discharge. The statute quoted was intended to cover such a case, and in my judgment does cover it.

The next question is, how must the false statement have been made, and by whom must it have been made? It must have been made or communicated to the person who parted with the property or his acting agent. The act does not say that the "materially false statement in writing" must have been composed, or written, or signed by the person obtaining the property, or that it must have related to his financial condition. If the materially false statement was innocently composed and written and signed by another, or third person, in the full belief it was in all respects true, at the request of one who, knowing the statement to be in fact false, intended to present and use it to obtain property on credit, and who did present and use it by presenting it to a merchant for the purpose of obtaining property on credit, and such merchant relied on such statement, and, in the belief that it was true, parted with his property on credit, then that person who requested and procured the statement and who used it for the purpose mentioned has, in my judgment, "obtained property on credit from" a "person upon a materially false statement in writing made" by him "to such person for the purpose of obtaining such property on credit." He has used it, communicated it, and in so doing made it his own. The word "made" is not to be so narrowly and strictly construed as to signify that the one who obtains the property must himself have composed, written, and signed the false statement. Such a transaction as I have described is one the Congress intended to reach and cover by the language used. "Made" signifies action; but when a person has "communicated" to another a written statement by reading it to him and delivering it to him, that statement has been "made to" such other person, within the meaning of the law. The words "made to" do not necessarily imply that the one communicating and using the statement also composed it or made it up. "Make known" is a synonym of "communicate." Soule's Dictionary of English Synonyms, 84. The verb "make" has many significations and conveys many

meanings, among which is "to put forth; give out; deliver;" also, "to inform; apprise." Century Dictionary. I think that when a person, seeking credit, hands to a merchant a materially false written statement concerning his financial condition, no matter who composed and signed it, if it be one calculated to deceive, and then reads it to such merchant, and thereby obtains property from him on credit, he has obtained property on credit upon a materially false statement in writing "made to" such person. I do not think such a person can escape the consequences of his act by showing that the materially false statement was written and signed by another person in the full belief that it was true. If it was false in fact, and its falsity was known to the one who obtained the property by its use, that is all-sufficient, and the case is covered by the section referred to.

The bankruptcy law of 1898 shows on its face two leading and controlling purposes, viz.: (1) The surrender by the insolvent debtor of all his property, not exempt, for the benefit of all his creditors; and (2) the discharge of such debtor who has obeyed the orders of the court and complied with the law, and has not been guilty of any of the acts specified in the law as a bar to his discharge. The law gives notice that certain acts done prior to the institution of bankruptcy proceedings will bar a discharge. The law thus encourages honest dealing, and says to all debtors, within its provisions, "If you deal honestly and business misfortune overtakes you, on surrendering all your property for the benefit of all your creditors, with no preferences so far as you are concerned, and you then act honestly and obey the orders of the court, you will be discharged from all your debts and enabled to start business life anew in the open, and unincumbered and unembarrassed by your former debts and business misfortunes."

This law is extremely lenient in putting up bars to a discharge. No honest man can reasonably allege that the law is unwise, or unjust, or strict, in naming grounds for refusing a discharge. The provisions in this regard are in no sense penal. They are not intended as a punishment, but as an incentive and encouragement to honest dealing, and a protection, in a degree, to those who extend credit. The provisions in the law specifying the grounds on which a discharge is to be refused are, therefore, to have a reasonable construction, a construction that will carry out and make effective the intent of the legislative body enacting them, and promote the objects for which they were intended. We are not to adopt either a loose or an unduly strict construction, or one we would give to a private contract, but a reasonable one, having in mind the grounds sought to be covered, and the evils, if any, sought to be remedied, and the objects sought to be attained. Legal Tender Cases (opinion by Mr. Justice Gray) 110 U. S. 421, 439, 4 Sup. Ct. 122, 28 L. Ed. 204, et seq.; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; 8 Cyc. 729, 730, and cases there cited. Can any one doubt that subdivision 3 of section 14b of the bankruptcy act was intended to cover such a case as the one now under consideration? The language of the amendment, giving it its ordinary sense without interpolation, covers the case. Aldridge obtained the property on credit from the piano company, a person in the eye of the law, upon a materially false statement in writing made to such company for the

purpose of obtaining such property on credit. The case is within the letter and the spirit of the law. We may, perhaps, obtain a fair idea of the moderation of Congress when we read such cases as *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822, *Eaton C. & B. Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389, *Morgan v. Skiddy*, 62 N. Y. 319, and *People ex rel. Phelps v. Court of Oyer and Terminer*, 83 N. Y. 436, as well as of the evils sought to be reached.

The report of the referee is confirmed, and there will be an order refusing a discharge.

In re LARKIN.

(District Court, N. D. New York. March 8, 1909.)

1. FRAUDULENT CONVEYANCES (§ 298*)—INTENT TO DELAY OR DEFRAUD CREDITORS—EVIDENCE.

Where a debtor transfers or conveys his property to one or more of his creditors, all the surrounding circumstances and conditions are to be considered in determining whether or not it was done with intent to hinder, delay, or defraud his other creditors, and such an intent may be inferred from the acts done and surrounding circumstances, notwithstanding his denial.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 892-895; Dec. Dig. § 298.*]

2. BANKRUPTCY (§ 57*)—"ACT OF BANKRUPTCY"—FRAUDULENT CONVEYANCES.

A conveyance or transfer of property by a debtor with intent to hinder, delay, or defraud his creditors, or any of them, constitutes an "act of bankruptcy," under Bankr. Act July 1, 1898, c. 541, § 3a (1), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), although he may have been solvent when the conveyance or transfer was made.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 71, 73; Dec. Dig. § 57.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 118; vol. 8, p. 7562.]

In Bankruptcy. Application by petitioning creditors to confirm report of special master and for an adjudication in bankruptcy, and motion on the part of the administrators of the alleged bankrupt, on exceptions filed, to set aside the report, refuse adjudication, and dismiss the petition.

Brown, Carlisle & McCartin, for petitioning creditors.
Purcell & Purcell, for administrators.

RAY, District Judge. This is an involuntary petition by three creditors, praying that Michael B. Larkin be adjudged a bankrupt. An answer was filed, denying the acts of bankruptcy charged, and also denying insolvency at the time the petition was filed. After the matter had been referred, and evidence taken on the issues raised, the alleged bankrupt died, and administrators were appointed. Thereupon an order was made, reviving and continuing the proceeding, and bringing in the administrators, etc. Thereafter the master made a report, and on motion to confirm, and also on motion to set aside, the court sent the matter back for further evidence and a further report. Further

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

evidence was thereupon taken, and a new or supplemental report made.

The special master has found, and this court concurs in the finding, that within four months preceding the filing of the petition the alleged bankrupt, Larkin, conveyed and transferred the greater part of his property without a present consideration to two of his then existing creditors and to secure pre-existing debts, with the intent to hinder, delay, and defraud his other creditors. The evidence is sufficient to sustain the finding, even though based to quite an extent upon the testimony of the alleged bankrupt himself, who vehemently denied that he conveyed and transferred the property referred to with intent to hinder, delay, or defraud, while conceding that he made the transfer and conveyance claimed. Where a person in debt transfers or conveys his property, all the surrounding circumstances and conditions under which it is done are to be considered in determining whether or not it was done with intent to hinder, delay, or defraud his other creditors. The intent may be inferred from the acts done and the circumstances surrounding the transactions.

Section 3 of an act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898 (30 Stat. 546; c. 541 [U. S. Comp. St. 1901, p. 3422]), and amended February 5, 1903, provides that:

"(a) Acts of bankruptcy by a person shall consist of his having (1) 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 section then defines other acts of bankruptcy as:

"(2) Transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors," etc.

Some acts of bankruptcy must be committed while the person is insolvent. The first act of bankruptcy defined may be committed by the person charged when perfectly solvent. If a solvent person conveys or transfers, conceals or removes, or permits to be concealed or removed, any part of his property with the intent to hinder, delay, or defraud his creditors, or any of them, he commits an act of bankruptcy; and if within the ensuing four months he becomes insolvent, and a petition is thereupon filed against him, such petition may allege such acts as the act of bankruptcy, and the person may be adjudicated a bankrupt accordingly. Subdivision "b" of section 3 provides:

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act."

The wisdom of this provision is perfectly apparent. The first act of bankruptcy, so far as it relates to the conveyance or transfer of property, differs from the second act of bankruptcy in this: That in the first there is a conveyance or transfer with intent to hinder, delay, or defraud creditors, while in the second the transfer is made with the intent simply to prefer one creditor or more over the other creditors.

In the second case the transfer must have been made while the person making it was insolvent. The very tendency of the acts mentioned in the first act of bankruptcy is to create insolvency so far as creditors are concerned. The person is not to be permitted to convey, transfer, conceal or remove any part of his property with intent to hinder, delay, or defraud his creditors, and on becoming insolvent within four months thereafter to escape the bankruptcy law by showing that he was solvent when he so conveyed, transferred, concealed, or removed his property. In speaking of this act of bankruptcy, Loveland on Bankruptcy (3d Ed.) p. 192, says:

"Insolvency at the time of the conveyance, transfer, etc., is not essential to constitute an act of bankruptcy under this clause."

This is in effect held in *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

I fully concur in the finding of the special master that the evidence shows that Larkin was insolvent at the time the petition was filed. The evidence of the bankrupt given on the first hearing was to the contrary; but it is very evident that his testimony was not correct, to put it mildly.

The proceeding did not fall with the death of Larkin. The bankruptcy court had taken jurisdiction of the person of Larkin and of the whole subject-matter prior to his death, and this court had power, under subdivision 6 of section 2 to "bring in and substitute additional persons or parties," and section 8 expressly provides that:

"The death or insanity of a bankrupt shall not abate the proceeding, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane; provided that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence."

The word "bankrupt," in this section, refers to the person against whom a petition has been filed, as well as to one who has already been adjudicated a bankrupt.

The adjudication that Larkin was a bankrupt will not bind or conclude the person or persons to whom he conveyed property on the question of fraudulent intent. The trustee, when appointed, will be compelled, if the property is not surrendered, to institute and prosecute proceedings to recover the property and set aside or declare null and void the alleged illegal transfers or conveyances, which, under the provisions of the act, include mortgages.

The report of the special master is confirmed, and there will be an order of adjudication accordingly.

THE BENJAMIN A. VAN BRUNT.

THE ALICIA B. CROSBY.

(District Court, E. D. Virginia. February 13, 1909.)

COLLISION (§ 34*)—SCHOONERS MEETING—CHANGE OF COURSE.

A collision at night off the New Jersey coast between two schooners, one laden and on a northeasterly course and the other light on a south-westerly course, *held*, on conflicting evidence, to have been solely due to the fault of the latter in not keeping out of the way and in changing her course across that of the other very shortly before the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 32; Dec. Dig. § 34.*]

In Admiralty. Suit for collision.

Hughes & Little, for the Van Brunt.

Floyd Hughes, for the Crosby.

WADDILL, District Judge. This libel was filed to recover damages sustained by the Van Brunt in a collision with the schooner Alicia B. Crosby, to which the latter answered and filed a cross-libel against the Van Brunt, seeking to recover for damage sustained by her in the same collision. On the night of the 3d of May, 1907, about 11 o'clock, or shortly thereafter, the Van Brunt and the Crosby came into collision in the Atlantic Ocean, off the Jersey coast, between Cape May and Atlantic City, at a point about three miles northeast of Northeast End Lightship, on Five-Fathom Bank. The Van Brunt was a four-masted schooner, 185 feet long, 42 feet beam, gross tonnage, 1,800, net 1,133, loaded with railroad ties, en route from Savannah to New York; and the Crosby was a four-masted schooner, 204 feet long, 42 feet beam, 1,803 tons gross, 1,103 net, en route light from Portland, Me., to Newport News, Va.

The Van Brunt's contention is that while on the starboard tack, on a course northeast, with all sails set except her top and stay sail, with the wind to the eastward, properly manned and equipped, two men being on the lookout, and her lights properly set and brightly burning, the red light of the Crosby was reported about two points off of the Van Brunt's port bow, the Crosby being about a mile to a mile and a half away; that in a short time the Crosby showed both her side lights, and then shut out her red light, and showed only her green light, while she was still on the Van Brunt's port bow; that the Van Brunt, being on the starboard tack, held her course until the collision was inevitable, when her wheel was put rapidly to port, in order to relieve the blow of the collision, which immediately followed, the bow of the Van Brunt striking the Crosby on the starboard side just aft of the forerigging, the result of which was both vessels were seriously damaged.

The Crosby, on the other hand, contends that on the night in question, when about six miles east-northeast of Northeast End Lightship, with the wind blowing moderately from the southeast, while on the port tack, on a course south-southwest, with all sails set, being proper-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ly manned and equipped, and her lights properly set and brightly burning, some six or seven minutes before the collision which afterwards occurred, her lookout reported a green light about two points on the Crosby's starboard bow, the vessels then being, as stated in the cross-libel, about a mile and a half apart, though in the testimony of the master of the Crosby he places the vessels, at the time of sighting the green light of the Van Brunt, at about five or six miles; that the master of the Crosby observed said light, and, judging it was on a vessel from the south and on a course apparently not converging with his own, continued his own course without apprehending danger; that the vessels continued to approach each other, when suddenly the other vessel, which afterwards proved to be the Van Brunt, about two minutes before the collision, changed her course, opening up her red light, and showed both lights, and then, shutting out her green light, showed only her red light on the starboard bow of the Crosby, making the collision inevitable; that in this condition the Crosby's master put his helm hard up, and his vessel had probably fallen off a point, when the two vessels came together, the Van Brunt striking the Crosby about ten feet forward of the main rigging, cutting into her starboard side and decks about five feet, causing serious injury.

These statements of the parties' contentions, respectively, show that the vessels were practically on a parallel course, each proceeding in opposite directions, and, while it was in effect admitted that the Van Brunt was the vessel having the right of way, it was conceded by both sides that the case turned entirely upon which vessel actually made the change of course which brought about the collision, as there could have been no coming together of the two vessels, had they maintained their respective courses. The correct solution of the issue thus presented necessarily depends upon the version of which vessel's crew the court will accept, as each strongly supports the contention of its respective ship; and there is little difficulty in arriving at the same, in view of the fact that the evidence very strongly preponderates in favor of the Van Brunt. The Van Brunt, at the time of the collision, had two seamen on the lookout, each of whom testified to reporting the red light of the Crosby at about a mile and a half off the port bow of their vessel, of the subsequent movements of the two vessels up to and about the time of the collision, and of the sudden change of course of the Crosby across the Van Brunt's bow, and the bringing about of the collision as contended for by the Van Brunt. The master of the Van Brunt and her wheelsman also strongly corroborate the testimony of the lookouts; and all four concur in the fact that the Van Brunt, at the time of the collision, was being navigated as contended for by her, and that her lights were properly set and brightly burning. Against this we have the testimony of the master of the Crosby and his wheelsman, who alone, until the moment of the collision, with the seaman whom it was claimed was acting as lookout, were on deck and engaged in the act of navigating the ship. The lookout was not examined, though in the employ of the Crosby for some five months after the collision, when it is alleged he disappeared. The master of the Crosby testifies strongly in favor of the contention on the part of his

vessel, as hereinbefore stated, and is supported by his wheelsman; but their account the court should not accept as against that of the navigators of the Van Brunt, including the two seamen on the lookout, especially in view of the fact that the navigators of the Crosby admit that only the master and one seaman were on deck, the latter acting as lookout, and that the lookout was twice within a period of two hours, the first time about 9 o'clock, and then at about half past 10, taken off watch to assist in hauling sails, each time being absent from 10 to 12 minutes, and the last one being made about half an hour before the collision. During these periods, at least, the Crosby was without a lookout, and this may go far to account for the collision, which may have occurred during the last absence of the lookout from his post.

There was some controversy as to the direction of the wind at the time of the collision; the Van Brunt's contention being that at that time it was blowing from east by south, and the Crosby's from south-east. While in the judgment of the court this question does not materially enter into the happening of this accident, still the testimony, including that from the lightships in the vicinity, tends to support the Van Brunt's statement, as against that of the Crosby.

The conclusion reached by the court upon the whole case is that the collision resulted solely because of the fault of the Crosby's navigators in failing to keep out of the way and changing her course across that of the Van Brunt at a time when it was too late for the latter to avoid the consequences of such change; and a decree may therefore be entered so ascertaining.

MOYER v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, W. D. Missouri, W. D. February 18, 1909.)

No. 3,426.

1. REMOVAL OF CAUSES (§ 12*)—RESTRICTIONS AS TO DISTRICT IN WHICH SUIT MIGHT HAVE BEEN BROUGHT.

Where an action is brought against a corporation in a court of a state, whereof it is not a citizen, by a citizen of another state, such action may not be removed into a federal Circuit Court sitting in the state where the action is brought, unless the plaintiff expressly or impliedly assents to such Circuit Court entertaining jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

2. REMOVAL OF CAUSES (§ 12*)—RESTRICTIONS AS TO DISTRICT IN WHICH SUIT MIGHT HAVE BEEN BROUGHT—WAIVER.

The written consent by counsel for a plaintiff to the filing of a general demurrer out of time by the defendant in a federal court after removal of the cause was such a recognition of the jurisdiction of the court over the person of plaintiff as to constitute a waiver of a subsequent plea to the jurisdiction on the ground that neither party was a citizen of the state of suit.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

On Plea to Jurisdiction.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Laughlin & Kenworthy, for plaintiff.
Frank Hagerman, for defendant.

POLLOCK, District Judge. This action was brought in the state court by plaintiff to recover from defendant damages for personal injury sustained through the alleged negligence of the defendant while plaintiff was riding on one of its trains as railway postal clerk in the employ of the government.

In due time after the institution of the action, defendant, a corporate citizen of the state of Wisconsin, filed its petition and bond for removal of the controversy into this court. In the petition for removal it is alleged as a ground of federal jurisdiction that plaintiff is, and was at the date of the commencement of this action, a citizen and resident of this state, and the defendant a citizen of the state of Wisconsin. An order of removal was entered in the state court, and transcript duly lodged in this court. Thereafter, and on the 11th day of November, 1908, plaintiff filed in this court its plea to the jurisdiction of the court, wherein it is alleged that plaintiff was at the date of the commencement of this action a citizen of the state of Kansas, and not a citizen of this state, as alleged in the petition for removal, and that defendant is, and was at the date of the commencement of this action, a citizen of the state of Wisconsin. Wherefore, it is pleaded this court is without jurisdiction. Although no answer or reply was filed to this plea by defendant, a stipulation waiving a jury to try the question of fact raised by the plea was filed, and the evidence taken in open court. At the conclusion of the testimony it was found by the court, and so announced, that the plaintiff at the date this action was commenced was a citizen of the state of Kansas, as alleged in the plea, and not a citizen of this state, as charged in the petition for removal. Thereupon the question of law arising on this state of facts was taken under advisement by the court, with leave to counsel for respective parties to file briefs thereon. None have been filed, and the case comes now on for decision on the record and facts found on the trial of the plea.

As the plaintiff at the date of the commencement of the action was a citizen of the state of Kansas, and the defendant a citizen of the state of Wisconsin, it is quite well settled by many decisions of the Supreme Court this action could not have been brought and maintained, under the terms of the present judiciary act, in this court, without the consent of defendant, actual or implied. *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Galveston*, etc., *Railway v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904. As the case could not have been originally brought in this court by the plaintiff without the consent of defendant, it cannot be removed into this court by defendant without the consent of the plaintiff, for it is quite well settled no case can be removed into a Circuit Court of the United States from a state court unless the case could have been originally brought in such Circuit Court. *Cochran v. Mont-*

gomery County, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182; Ex parte Wisner, supra; In re Moore, supra; Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1136. That is to say, although the requisite diversity of citizenship exists to confer jurisdiction on a Circuit Court of the United States, yet, when a transitory action is originally brought in such Circuit Court against a corporate citizen of this country, it must be brought in the judicial district of which such citizen is a resident or inhabitant, and in the state of which it is a citizen, unless it expressly or impliedly consents to the bringing of an action against it in another district or state.

Again, where an action is brought against it in a court of a state, whereof it is not a citizen, by a citizen of a state other than that in which the action is brought, such action may not be removed into a federal Circuit Court sitting in the state where the action is brought, unless the plaintiff expressly or impliedly assents to such Circuit Court entertaining jurisdiction. Ex parte Wisner, supra; In re Moore, supra; Western Loan Co. v. Butte & Boston Min. Co., supra.

However, in all such cases as the requisite diversity of citizenship of the parties exists, a Circuit Court of the United States has complete, original jurisdiction of the subject-matter of the controversy, when the jurisdictional amount is involved, concurrent with that of the courts of the state. The want of jurisdiction is purely personal, and, being personal, may be waived by the person. This is fully demonstrated by Mr. Justice Brewer, delivering the opinion of the court, in Re Moore, supra, arrived at from a review of many decisions of that court. Viewed in this light, it is apparent the plea to the jurisdiction under consideration must be sustained on the facts found, unless the parties by their acts done are found to have waived their right to object to the jurisdiction of this court over their persons.

The petition and bond for removal filed by defendant on which the controversy was transferred from the state court into this court is in the nature of original process (Kinney v. Columbia Savings, etc., Ass'n, 191 U. S. 87, 24 Sup. Ct. 30, 48 L. Ed. 103), and irrevocably thereafter concluded the defendant from raising any question of the jurisdiction of this court over its person. Therefore the only remaining question for decision is, has plaintiff done any act or taken any step in this court, as shown by the record, after removal taken by defendant to this court, which should be construed as a recognition of the jurisdiction of this court over his person, and a waiver of his right to insist on having the case remanded to the state court on his plea? As has been seen, the plea to the jurisdiction of this court was filed November 11, 1908, and as this plea goes exclusively to the question of the jurisdiction of this court over the person of plaintiff, it is obvious nothing therein contained may be considered as a recognition of the jurisdiction of this court thus called into question by the plea. However, as found from an examination of the record on the 7th day of November, 1908, four days prior to the filing of this plea, defendant filed a general demurrer to the petition of plaintiff. This demurrer was interposed by defendant out of time, and could not have been then filed without leave of court or consent of plaintiff's

counsel. Indorsed on this demurrer, in the handwriting of counsel for plaintiff, is found the following language: "This may be filed as of proper date. Laughlin & Kenworthy, Plff. Attys." It is thus seen counsel for plaintiff consented to the making up of an issue of law for the determination of this court, and in recognition of its jurisdiction and right to proceed to trial of the case. It was held in *Re Moore*, supra, the filing of an amended petition by the plaintiff in the Circuit Court after removal, or stipulating for a continuance of the cause, was such a recognition of the jurisdiction of the federal court by plaintiff, after removal by defendant, as constituted a waiver of the right of plaintiff to object thereto. Therefore I am of the opinion the consent given by counsel for plaintiff to the making up of the issue of law raised in and to be heard by this court on the filing of the demurrer to the petition, in the light of the foregoing case, and the case of *Western Loan Co. v. Butte & Boston Min. Co.*, supra, is such a recognition of the jurisdiction of this court over the controversy removed, and the person of the plaintiff thereto, as will constitute a waiver of the plea thereafter interposed.

For this reason, the plea, although found to be true in point of fact, will be denied as a matter of law. It is so ordered.

YORK MFG. CO. v. MERCHANTS' REFRIGERATING CO. et al.

(Circuit Court, W. D. Missouri, W. D. March 2, 1909.)

No. 3,333.

BANKRUPTCY (§ 387*) — COMPOSITION—REFUSAL OF CREDITOR TO ACCEPT—ELECTION.

A creditor of a bankrupt corporation, claiming a lien for part of his debt, who refused to accept securities of a reorganized corporation, tendered to him pursuant to a composition agreement confirmed by the court, and commenced a suit to establish and enforce his lien, is not entitled to have such securities impounded pending the suit, that he may have them, if unsuccessful, especially when the company issuing the same is not a party to the suit.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 387.*]

In Equity. On demurrers to supplemental bill of complaint herein filed.

Scott, Bancroft & Stephens and Borland, Goodwin & Pew, for complainant.

F. V. Kander, Botsford, Deatherage, Young & Creason, A. F. Evans, Wm. B. Sutton, E. L. Scarritt, and W. C. Scarritt, for defendants.

POLLOCK, District Judge. This suit was brought by complainant for the purpose of procuring a decree foreclosing a mechanic's lien claimed to have been perfected by it against the Merchants' Refrigerating Company, defendant herein, and others, in accordance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with the statute law of this state. The suit was brought under these circumstances:

The Merchants' Refrigerating Company, being insolvent, was duly adjudged a bankrupt on January 6, 1908 (and is hereinafter referred to as the "bankrupt"). On January 22, 1908, the bankrupt made an offer of composition to its creditors under the terms of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), which proposition was accepted by its creditors, and thereafter, on February 21, 1908, the composition thus agreed to was confirmed by order of the bankruptcy court. This composition, as made and confirmed, involved a reorganization of the business and affairs of the bankrupt, by which its property was to be transferred to a corporation to be organized for that purpose, known as the Mid-Continent Refrigerating Company (hereinafter called the "Mid-Continent Company"), and in pursuance of such composition that company was to make, execute, and deliver to the creditors of the bankrupt its mortgage bonds and shares of its capital stock, in equal amounts, to the full face value of the claims proven against the bankrupt. This reorganization transfer was carried out and effected in compliance with the terms of the composition agreement.

On March 2, 1908, by leave of the bankrupt court, this suit was brought. Thereafter, and on March 27, 1908, complainant filed proof of its demand against the bankrupt estate with the referee in bankruptcy, stating there is a portion of said claim which was secured by mechanic's lien and a portion unsecured, and on the same day the claim was allowed by the referee in bankruptcy for the full amount of complainant's demand, \$11,701.58, as a general claim against the bankrupt estate. About August 20, 1908, there was tendered to complainant the bonds and certificate of shares of the capital stock of the Mid-Continent Company in amounts, face value, slightly more than required in full fulfillment of the compromise agreement with the bankrupt, which tender complainant refused to accept.

Thereafter, on December 28, 1908, complainant filed its so-called supplemental bill of complaint herein, in which reference is made to the compromise agreement of the bankrupt with its creditors; the acceptance by the creditors and its confirmation by the court; the transfer of the property of the bankrupt concern to the Mid-Continent Company, organized for the purpose of effecting the reorganization of the business of the bankrupt and carrying into effect the composition made by the bankrupt with its creditors, and a transfer of the property of the bankrupt to that company; the presentation by the complainant of its claim to the bankrupt court, partly as secured and partly unsecured, and its allowance by that court of its entire claim as an unsecured claim; the tender to it of the bonds and certificate of shares of stock of the Mid-Continent Company, in amount something more than required by the composition agreement of the bankrupt with its creditors, and the refusal of complainant to accept the same. The prayer of this so-called supplemental bill reads, as follows:

"Therefore complainant prays that the court order said securities be deposited with the clerk of this court, subject to the final decree in this cause, and for such other relief as the court may see just and proper."

The demurrers of defendants to this supplemental bill have been submitted in argument and briefs, and come now on for decision.

Many questions are presented in the briefs and arguments of solicitors for the respective parties touching the binding force of the composition, accepted by the creditors and confirmed by the court, in pursuance of which the Mid-Continent Company received a transfer of the bankrupt's property, the effect of the presentation by complainant of its claim to the bankrupt court, and its allowance therein as a claim wholly unsecured, and other questions. However, in the view I take of the matter now presented, the determination of such questions is not necessary on the demurrers interposed.

If the adjudication and allowance of the claim in the bankruptcy court is conclusive and binding on complainant, as contended by solicitors for the demurrant, such decision can and will be made on final decree herein. Again, if by reason of the composition agreement between the bankrupt and its creditors, made and confirmed by the court in the bankruptcy proceeding, and the decision of that court in the allowance of the claim of complainant as a wholly unsecured demand, the tender made complainant is a sufficient compliance with the terms of the composition agreement made and accepted, it is clearly the duty of complainant to accept the securities tendered and thus terminate this litigation.

To my mind, the so-called supplemental bill filed herein is no more than an application to this court at this time to require by its order the impounding of the securities tendered complainant in confirmation of the composition agreement enforced in the bankruptcy court, until it may be determined whether complainant is successful in this litigation. If complainant is successful, it will not then accept the securities tendered. However, if it fails in this suit, it will then desire to accept the same. Meanwhile the Mid-Continent Company, which issued these securities in compliance with the proceedings in the bankruptcy court, is not brought before this court. Its rights will, therefore, be left undetermined by any order made in the premises; and, should the complainant herein succeed in its contention made by its bill, the property of the Mid-Continent Company, received as a consideration for the securities tendered complainant, will become charged with a preferred lien to the amount of complainant's claim, if found to be covered by such lien.

The so-called supplemental bill in no wise brings before the court matters occurring since the filing of the bill, which are asserted by complainant to be in aid of its right to the relief prayed in the original bill. Therefore, treating the so-called supplemental bill merely as an application to this court at this time to impound the securities tendered complainant, issued by the Mid-Continent Company in pursuance of the composition agreement, and the demurrers interposed thereto merely as objections to the making of the order applied for, I refuse the order sought for the following reasons:

The Mid-Continent Company, as has been seen, is not before this court, and its rights may be injuriously affected by the order sought by complainant, if made. And, again, I am inclined to the opinion

complainant should determine for itself, as advised by its solicitors, whether to accept the securities tendered in compliance with the composition agreement made in the bankruptcy court in satisfaction of its demand, or rely on its rights asserted in its bill filed herein.

The application made for the impounding of the securities is therefore denied.

BORDEN'S CONDENSED MILK CO. v. BAKER et al.

(Circuit Court, D. New Jersey. March 1, 1909.)

1. INJUNCTION (§ 114*)—ENFORCEMENT OF ORDINANCE—PARTIES.

A local board of health in the state of New Jersey is a public agency created under the authority of the state, from which it directly derives its powers, and is wholly independent of municipal control. Hence a town is not a proper party to a suit to enjoin the enforcement of an ordinance passed by a board of health, although the two exercise authority over the same territory in their different spheres.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 214; Dec. Dig. § 114.*]

2. INJUNCTION (§ 85*)—GROUNDS OF RELIEF—IRREPARABLE INJURY.

Pending a proceeding by certiorari in the Supreme Court of New Jersey to test the validity of an ordinance passed by a local board of health, in which the court made an order staying the enforcement of the ordinance until final decision, the petitioner cannot maintain a suit in equity in a federal court to enjoin such enforcement; there being no threatened irreparable injury to invoke the jurisdiction of that court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

In Equity. On demurrer and plea to bill of complaint.

Charles D. Thompson, Gilbert Collins, R. V. Lindabury, George L. Nichols, and William M. Chadbourne, for complainant.

Robert M. Boyd, for defendant town of Montclair.

Edwin B. Goodell and Edward M. Colie, for defendants Baker and others.

LANNING, District Judge. The complainant seeks, by this suit, an injunction to restrain the defendants from enforcing certain provisions of "An ordinance establishing a Sanitary Code for the town of Montclair," passed by the local board of health of that town on April 7, 1907. The bill refers to the statutory law of the state of New Jersey, that there shall be a local board of health in every town, composed of members appointed in such manner as the governing body of the town may by ordinance provide, and declares, on information and belief, that the members of the local board of health of Montclair were appointed in accordance with that law. The defendants are the local board of health, the individual members of the board, and the town of Montclair. The town of Montclair demurs to the bill, alleging, as one of the grounds of demurrer, that it is improperly made a party defendant.

A local board of health, in the state of New Jersey, is not subordinated to any municipal authority whatever. It is a public agency,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

created under the authority of the state, to protect the public health within a prescribed territory. While the boundaries of its territory are the same as those of the municipality from which it obtains the funds for its work, its powers are derived directly from the state, and it is wholly independent of municipal control. So free, indeed, is it from such control, that the governing body of the municipality is compelled to allow it such annual appropriations as it may demand, up to the sum of five cents per inhabitant of the municipality. Gen. St. N. J. 1895, p. 1641, § 34. No town authority can set aside an ordinance of a local board of health, or enforce obedience thereto. The town of Montclair, as a municipality, has no interest whatever in the administration of the laws of the sanitary district over which the local board of health has jurisdiction. The mere fact that the boundaries of the town and of the sanitary district are identical does not make the local board the agent of the town, or the town responsible for what the local board does. I think the demurrer should be sustained.

The local board of health and its members have filed a joint and several plea, setting forth that shortly before the complainant filed its bill it sued out of the New Jersey Supreme Court a writ of certiorari requiring the local board of health to certify to that court the above-mentioned ordinance, that the enforcement of the provisions of the ordinance requiring the tuberculin test to be applied to cows whose milk product is sold in Montclair was stayed by the court pending decision upon the writ, that the certiorari proceedings are still undetermined, that the objections to the ordinance set forth in the bill are also assigned in the certiorari proceedings as reasons for adjudging the portions of the ordinance complained of to be null and void, and that the certiorari proceedings afford to the complainant a complete and adequate remedy for any wrong or injury set forth in the bill.

The jurisdiction of this court is invoked by the complainant on the ground that the enforcement of the ordinance, in so far as it requires the tuberculin test to be applied to cows whose milk product is sold in Montclair, and in so far as it prescribes a penalty for failure to comply with such requirement, would deprive the complainant of its property without due process of law, would deprive it of the equal protection of the laws, and would be a regulation of, and interference with, interstate commerce, and that the complainant has no adequate remedy at law for the injury it would sustain from such enforcement.

Before the complainant filed its bill in this court, it chose the Supreme Court of the state of New Jersey as the forum in which it would test the validity of the ordinance. The objections to the ordinance there assigned include those assigned here. It obtained from that court an order staying the enforcement of the ordinance as against it up to the time of final decision upon the writ. In other words, it secured from the New Jersey court an injunction against the enforcement of the ordinance until final judgment should be entered by that court. That proceeding is still pending. The injunction in its favor is still operative. What equitable right, then, has it to another injunction from this court? There is no pretense that the local board

of health, or any of its members or agents, intend to do anything, during the pendency of the certiorari proceedings, that will in any wise interfere with the business of the complainant. If this court should be of the opinion that the provisions of the ordinance complained of are void, and that the complainant ought to be protected against the enforcement of those provisions, the practical effect of an injunction issued now would be merely to afford that protection at some time in the future, if the Supreme Court of New Jersey, differing with this court, should conclude that the complainant is not entitled to protection. I have not heard that any court has ever granted any such provisional, conditional, or contingent injunction.

Counsel for the defendants admit, in their brief, that:

“Until final determination the operation of the ordinance is suspended by virtue of the writ of certiorari and by virtue of the special order of the New Jersey Supreme Court.”

The complainant seeks an injunction from this court for the protection of its property rights. Those rights are not now in jeopardy. No suit against the complainant for the enforcement of the ordinance has been commenced. None can now be commenced. None can ever be commenced unless it be ultimately decided in the certiorari proceedings that the ordinance is valid or that the writ of certiorari should be dismissed. Whether, if such a decision be rendered, the complainant will then be entitled to injunctive relief, is a question not now to be decided. The present facts show that the case is not one in which the extraordinary remedy by injunction can now be properly invoked.

Therefore the plea, also, will be sustained.

In re GOUVERNEUR PUB. CO.

(District Court, N. D. New York. February 26, 1909.)

No. 3,042.

1. CORPORATIONS (§ 308*)—OFFICERS—CONTRACTS FOR COMPENSATION.

A binding contract by a corporation to pay a salary to an officer or director for services not incidental to his office may be made without any formal resolution of the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1338; Dec. Dig. § 308.*]

2. CORPORATIONS (§ 309*)—OFFICERS—DEALINGS WITH CORPORATION.

The secretary and treasurer of a corporation who was also its active de facto manager with authority to buy property on credit, to collect and pay out money for the corporation, and to borrow money, from time to time advanced money of his own to pay bills, which he charged up as an indebtedness of the company on its books, and repaid to himself from money collected for the company later. This custom was known to the president and directors, and was not objected to. *Held*, that such advances were not voluntary, but were made under an implied agreement by the company to repay them, and that those unpaid when it became a bankrupt were provable against its estate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1367; Dec. Dig. § 309.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 168 F.—S

In Equity. Review on appeal therefrom of the order of the referee allowing the claim of Martin I. Sackett at \$8,300.52 on an open and unsettled account.

Malby & Lucey, for claimant.

Abbott & Dolan, for objecting creditor and stockholder.

RAY, District Judge. It is unnecessary to go into the facts in detail, as the questions to be decided rest upon three general propositions, and a general statement of the facts is all that is necessary.

The Gouverneur Publishing Company was organized in 1887, and engaged in printing and publishing a newspaper, at times more than one, and job printing. Martin I. Sackett, who had been a school-teacher, and had accumulated a little money, and possessed some executive and considerable literary ability, and who was in accord politically with certain other gentlemen of his political faith who were desirous of controlling a newspaper in that place, was solicited to take stock and engage in the enterprise, which he did. His holdings of stock grew until he became the largest holder of stock, and he was elected secretary and treasurer, and, by common consent and acquiescence, became, and was for about 18 years, the active manager of the corporation, and also the editor of the paper published by it. At the first or about the first meeting of the directors it was proposed that Sackett should receive for his services the sum of \$1,200 per annum, and Sackett assented, no one objecting. The evidence justifies the finding, and I find, that this compensation was not for the performance of his official duties, but for the performance of those outside of his official capacity, and done and to be done in managing the business and editing the paper, etc. By the common consent, approval, and acquiescence of the stockholders, directors, and other officers, and with the above understanding, Sackett assumed and entered upon the performance of all these duties, and did the work satisfactorily, so far as appears, for some 18 years, when, having been appointed United States consul to Prescott, Canada, he severed his connection with the company as manager. During all this time, except signing officially, he conducted the business substantially as if it were his own. He collected subscriptions and bills due, made purchases of machinery and supplies, and payments thereon and therefor, and employed and discharged and paid help and kept the books, etc., and formulated and executed the general policy of the company, all with the general consent and acquiescence of the stockholders and directors and other officers. He drew money from the concern from time to time as he required it for his own use and living expenses, and made such purchases as he saw fit in conducting the business, and whenever the company did not have money on hand for these purposes he advanced it from his own private funds, trusting to subsequent incomes from the business for reimbursement. Other directors were about and in and out of the office, and the books and business and its conduct were open to inquiry and inspection at all times. All that was done was known, or might have been known, except that at one time a rival or competing paper and its business and subscription list were pur-

chased, for the benefit of this company, however, and this, for policy sake, was kept secret for a time. but was subsequently made known and ratified and approved by the board of directors. There is no question that the company availed itself of and had the benefits of the transaction, such as they were. Eventually, probably, it resulted in no benefit, but temporarily it was an advantage. The books were loosely kept, evidently, but not dishonestly so, and Sackett did not charge up his salary except on one occasion. Receipts and also payments aggregating several thousands of dollars for the 18 years did not go on the books at all. The referee, with infinite labor, has gone over the whole time and compelled an exact accounting of all receipts and disbursements, including salary, and on balancing the account has found actually due to Sackett something like \$14,335.74, but he has limited the claim allowed to that first presented, and that to the amount therein claimed, \$8,300.52.

The referee gets at the figures in his summary in this way:

Total cash received in business.....	\$ 84,812 01	
Received for stock subscription.....	6,000 00	
Total book accounts not collected.....	7,437 60	
		<u>\$ 98,249 61</u>
Paid expenses, etc.....	\$90,072 16	
Paid plant and other papers, etc.....	12,987 61	
Interest paid.....	1,400 00	
Drawn by Sackett as salary.....	7,437 60	
Balance due as salary.....	687 98	<u>\$112,585 35</u>
Due Sackett charging him with accounts unpaid.....	\$ 14,335 74	
The total cash receipts were.....	\$ 90,812 01	
Total cash payments, leaving out salary.....	\$104,459 77	

Leaving out salary, except that paid entirely, and accounts not collected, and confining ourselves to cash received and disbursed, we find the company owing Sackett about \$13,647.76. Other figures of the referee give different results; however, I think the figures above given include salary actually drawn. I am unable to ascertain where any injustice has been done the company or its creditors or stockholders.

It is clear that there was a fair understanding with the creditors in the very beginning that Sackett should have \$1,200 per year for his services outside of his official duties as director and secretary and treasurer. A binding contract for compensation for such services to one who is at the time an officer or a director in the corporation may be made without any formal resolution. Whatever may have been said in prior cases, this is now the settled law of the state of New York and of the United States courts. *Bagley v. Carthage, W. & S. H. R. Co.*, 165 N. Y. 179, 182, 58 N. E. 895; *Corinne Mill Canal & Stock Company v. Toponce*, 152 U. S. 405, 407, 409, 14 Sup. Ct. 632, 38 L. Ed. 493; *Bogart v. N. Y. & L. I. R. Co.*, 118 App. Div. 50, 54, 102 N. Y. Supp. 1093; *Jackson v. N. Y. C. R. R. Co.*, 2 *Thomp. & C.* 653, affirmed on opinion below, 58 N. Y. 623. See, also, *Henry v. R. & B. R. Co.*, 27 Vt. 435, and *Bartlett v. M. R. Co.*, 151 Mass. 433, 24 N. E. 780.

In *Bagley v. C., W. & S. H. R. R. Co.*, supra, the plaintiff was a director in and the president of the defendant company, and claimed to recover for services performed for the company outside his official duties. There was no resolution of the board of directors employing the plaintiff or directing him to perform the services. The syllabus of the case is as follows.

"The president and director of a corporation who renders services thereto outside of his official duties, upon an employment of the directors upon a promise of compensation, is entitled to receive the value of such services and the expenses incurred during their rendition, although he is not entitled by the by-laws to any salary for his official services, and there is no express resolution of the board of directors containing an agreement to employ and to compensate him."

The court held, on pages 181, 182, of 165 N. Y., on page 896 of 58 N. E.:

"It is true that he was not entitled by the defendant's by-laws to any salary for his official services, and that there was no express resolution containing an agreement to employ and to compensate him. But those facts are by no means conclusive upon the question. The fact that no salary was attached to the office which he held merely rendered it all the more essential to establish that the services in question were beyond the range of his official duties and their character. The issue upon that head was settled by the verdict and its subsequent affirmance.

"Neither is it essential to the plaintiff's right of recovery that he should have been employed under a formal resolution of the board. It is sufficient if, from the nature of the employment, the importance of the subject-matter, and the action of the directors of the corporation, the inference is authorized of the employment as alleged. *Jackson v. N. Y. C. Railroad Co.*, 2 *Thomp. & C.* 653, affirmed here upon the opinion below, 58 N. Y. 623. The principle of the right of recovery in such cases was recognized in the case cited. See, also, *Outterson v. F. L. Paper Co.*, 66 *Hun*, 629, 20 N. Y. *Supp.* 980; *McDowell v. N. Y. & S. B. R. R. Co.*, 12 N. Y. *St. Rep.* 877; *Corinne Mill C. & S. Co. v. Toponce*, 152 U. S. 405, 14 *Sup. Ct.* 632, 38 *L. Ed.* 493; *Henry v. R. & B. Ry. Co.*, 27 *Vt.* 435.

"It is the general rule that a director, assuming office as such without any agreement as to compensation, is presumed to render his official services gratuitously; for he assumes thereby, in a sense, a trust relation towards the company, and it would be against sound policy to permit him to assert claims for services which were within the line of his duties. But, when he is employed to perform services for the benefit of the corporation which are not within that line, there is not the same reason for denying him the right to be compensated. So far from there being any objection to the employment by a board of directors of one of their number as their agent to do something in the interest and for the benefit of the corporation which, collectively, it would be impossible or inconvenient for them to do, it may often happen, from the nature of the business to be done or in the situation of affairs, that it is essentially preferable and advantageous to do so."

In *Corinne Mill Canal & Stock Co. v. Toponce*, supra, the plaintiff was a director in and the vice president of the company (defendant below). It was conceded that there was no express resolution or contract for the rendition of the services. The court said:

"It is conceded that there was no express contract or authority for compensation, and it is insisted that all that he did in behalf of the company was within the proper scope of his duties as an officer, or, if not, was done upon the understanding that such services were to be gratuitously rendered. * * *

"The court charged in substance that for services rendered in the discharge of his duties as vice president and director he could not recover; that before recovery could be had the jury must find that the services rendered 'were clear-

ly outside of his duties as vice president and director, and that they were rendered under such circumstances as raises an implied promise to pay for the services on the part of the company.' * * *

"Obviously, therefore, under the testimony which we have referred to, from the plaintiff and the foreman of the ranch, the services which the plaintiff performed were not those of a director or vice president, but outside thereof, and similar to those of a general manager. * * *

"It is enough that the jury by their verdict have practically affirmed the truth of plaintiff's story, and that shows an understanding on the part of the parties in interest that he was to receive compensation for his services as manager, and that the two parties who owned substantially all the stock and properties of the corporation attempted to make an arrangement in respect to such compensation, which arrangement proved a failure, and proving a failure, left the corporation under the implied obligation to pay for the services."

In *Bogart v. N. Y. & L. I. R. R. Co.*, supra, the plaintiff was a director in and secretary of the defendant company at the time of his employment.

In the case at bar the evidence is ample to sustain the finding and conclusion of the referee that there was a contract of employment at \$1,200 per year, implied from the conversation with the directors referred to and the subsequent conduct of the claimant and the other directors and officers. The importance of the matter, the nature of the work done, and the conduct of the officers and directors authorize the inference of the employment as alleged. *Bagley v. C., W. & S. H. R. R. Co.*, supra. The facts that the claimant did not charge up his salary, that he did not draw the full amount, and that nothing further was ever said about it, were duly considered by the referee, and also the remark made by claimant when a witness that the question of salary was furthest from his mind. He was not then speaking of the contract made, to which he had explicitly testified, but explaining another matter.

It is contended that the payments made by Mr. Sackett on the debts and liabilities of the company, where he used or advanced his own money for the purpose of making such payments, were voluntary, and that such payments cannot be allowed. If they were voluntary, within the meaning of the law, Sackett cannot sustain his claim, so far as they are concerned, as the law does not permit a man to volunteer and pay the debt of another, which he is not obligated to pay, without request, express or implied, and thus make him his debtor and recover from him. *National Bank, etc., v. Board of Supervisors*, 106 N. Y. 488, 494, 13 N. E. 439; *Flynn v. Hurd*, 118 N. Y. 19, 26, 22 N. E. 1109; *City of Albany v. McNamara*, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212.

But were these payments "voluntary" payments? I think not. There was a request to make the payments fairly implied from the circumstances under which they were made and the relations of Sackett to the company. In *City of Albany v. McNamara*, 117 N. Y. 172, 22 N. E. 932, 6 L. R. A. 212, the court held that:

"To maintain an action to recover moneys paid out and expended, it is essential to prove a request to make the payment on the part of the person benefited, either expressed or fairly to be implied from the circumstances."

Here there was no express request by the board of directors to make the payments with his own money—to advance it. But he was the

secretary and treasurer of the company, and also its active de facto manager. He was authorized to collect all moneys and pay all the debts of the company he could with its money. He was authorized to purchase property on the credit of the company and pay therefor, and for 18 years he purchased on credit, ran the company in debt, and paid such indebtedness with the money of the company or his own money as the case might be, and, when he used his own money for such a purpose, he reimbursed himself, when he could, from the funds of the company. All this was acquiesced in, and seems to have been expected of him. If he had borrowed money to make such payments on the credit of the company, it would have been bound by his act. The company had actual knowledge that Mr. Sackett was advancing his own money to pay the indebtedness of the company, and as to some of these advancements embodied the fact in a resolution formally assuming a note made for the benefit of the company. The advances were charged up to the company as indebtedness on its books open to all the officers and directors, and frequently seen and examined by the president of the company. When Sackett drew money it was credited on the same account in the same books. No objection was made. I think that with full knowledge these acts were ratified and approved by acquiescence, and that a request to continue them was implied. Sackett was acting within the general scope of his authority. He was the secretary and treasurer of the company, and was expected to provide funds, and, when borrowed for the benefit of the company, to repay them from the funds of the corporation. In effect, he, as treasurer, for the benefit of the company, borrowed from himself, individually, with the knowledge and approval of the president of the company and its directors. There was no express promise to repay, but it was implied. And, again, Sackett was a stockholder with others, and was in a sense compelled to pay in order to protect his own interests and the interests intrusted to him, and which he was obligated to protect by paying, when demanded, the debts of the company. Sackett advanced and paid the money for a reasonable cause and not officiously, and can recover of the company. 2 Greenleaf's Evidence, § 114; *Irvine v. Angus*, 93 Fed. 629, 633, 35 C. C. A. 501, reversing (C. C.) 84 Fed. 127; 27 Cyc. 833, 834.

In 2 Greenleaf's Evidence, § 114, it is said:

"Where no express order or request has been given, it will ordinarily be sufficient for the plaintiff to show that he has paid money for the defendant for a reasonable cause, and not officiously."

In Keener, Quasi Contracts, 388, it is said:

"If, however, the payment made, though made without request, is not regarded in law as having been officiously made, the party so paying is entitled to be reimbursed by the debtor to the extent that the debt, as between the debtor and himself, should, in equity and good conscience, have been paid by the debtor."

This is quoted and approved in *Irvine v. Angus*, supra. Clearly, Sackett, in making the payments, was not acting officiously, but, as stated, in the general line of his duty and for the protection of the interests intrusted to him and which he had undertaken to conserve.

In 27 Cyc. 833, 834, citing many cases, it is said:

"(a) In General. An action for money paid is maintainable in every case in which there has been a payment of money by plaintiff to a third party, at the request of defendant, express or implied, with an undertaking, express or implied, to repay the amount, and it is immaterial whether defendant is relieved from a liability by the payment or not. The request to pay and the payment according to it constitute the debt; and whether the request be direct, as where the party is expressly desired by defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference.

"(b) Payment for Self-Protection: (1) In General. Although no assumpsit will be raised by the mere voluntary payment of the debt of another person, yet if one person, in order to protect his own interests, pays a debt for which another is legally and personally liable, the law will imply an assumpsit on the part of the latter to the former. A request will be implied where the consideration consists in plaintiff's having been compelled to do that to which defendant was legally compellable."

So where one person has paid the debt of another without request, express or implied, so that there is no obligation to repay, that other may subsequently ratify the payment, expressly or impliedly, and thereby become obligated to repay. 27 Cyc. 837, 838, and cases there cited.

In *Oliphant v. Patterson*, 56 Pa. 368, it was held that a subsequent recognition of the payment is equivalent to an express request. In 27 Cyc. 837, 838, the rule is thus stated:

"An action for money paid does not lie except upon a previous request or a subsequent ratification on the part of defendant or his authorized agent. But where money or its equivalent has been paid for the use of another, the request or ratification may be either expressed or implied; and the request, as well as the promise, will be implied where the consideration consists in plaintiff's having been compelled to do that to which defendant was legally compellable, or where defendant has adopted and enjoyed the benefit of the payment. A request to one person to pay a sum of money will not authorize another, who advances the money, to recover it in an action for money paid brought in the name of the person to whom the request was made.

"(b) Voluntary Payment: (1) In General. A voluntary payment for the benefit of another gives the payer no right of action against the one for whose benefit the payment was made, unless he subsequently ratifies it."

I am satisfied under the evidence here that there was not only an implied request, but a subsequent ratification and approval, and an implied promise to repay.

As to the purchase of the *Herald Times* and the assumption of the indebtedness growing out of it, it is sufficient to say that there was no fraud or concealment, and the approval and assumption were by express resolution of the board of directors. Sackett had no private interests in any of these matters. In all that he did he was acting as the agent or representative of the stockholders, of which he was one. It was all done in their interest and for the benefit of the company, and not for personal gain or to serve some private interest or purpose. He was not trustee for the others, and they beneficiaries of the trust, where the trustee is forbidden to deal with the trust property, purchase it for his own benefit, or sell his own property to himself as trustee. But even in such cases the beneficiary may ratify and confirm on becoming competent so to do, as in cases of mental incompetency, infancy, etc. I think this case within *Martin as Sheriff et al. v. Webb*

et al., Trustees, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, and Martin v. Niagara Falls P. M. Co. et al., 122 N. Y. 175, 25 N. E. 303. For years Sackett was permitted to carry on and conduct the business in the way he did without objection, and generally with the knowledge of the president, and when transactions were brought to the attention of the directors they were approved. I think the long period during which business was done in this way justifies the inference that Sackett was acting within his actual authority as was held in the cases cited. See Martin v. Niagara Falls, etc., 122 N. Y. 175, 25 N. E. 303.

Holding these views, after an examination of all the authorities cited by the contestants, and on a careful review of the voluminous exhibits and the evidence, I am of the opinion that the decision of the referee allowing the claim was right, and his order is approved and affirmed, and the claim allowed. There will be an order accordingly.

BRITISH & AMERICAN MORTGAGE CO., Limited, v. WORRILL.

(Circuit Court, N. D. Georgia, W. D. February 20, 1909.)

1. DEEDS (§ 211*)—VALIDITY—MENTAL CAPACITY OF GRANTOR.

Evidence held insufficient to impeach a conveyance made in Georgia of land there situated, on the ground of the mental incapacity of the grantor, under the settled rule of the Supreme Court of that state that to constitute such incapacity as will avoid a contract there must be an entire loss of understanding.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 638-640; Dec. Dig. § 211.*]

2. EXECUTORS AND ADMINISTRATORS (§ 181*)—WIDOW'S ALLOWANCE.

Under Civ. Code Ga. 1895, § 2771, which provides that "whenever any person in this state conveys any real property by deed to secure any debt * * * and shall take a bond for titles back * * * upon the payment of such debt * * * such conveyance * * * shall pass the title of said property to the vendee till the debt * * * shall be fully paid, and shall be held by the courts of this state to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt," the fact that the holder of such a conveyance brings suit to foreclose the same as a mortgage in a federal court, as he may do, does not change its character to that of a plain mortgage, which, under Code Ga. 1895, § 2725, is only a security and passes no title, so as to let in the claim of the widow of the grantor to an allowance for support out of the property, but such an allowance made in proceedings to which the grantee was not a party can apply only to the grantor's equity of redemption.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 181.*]

3. WITNESSES (§ 140*) — COMPETENCY—SUITS AGAINST PERSONAL REPRESENTATIVES OF DECEASED PERSONS—PERSONS INTERESTED IN QUESTIONS AT ISSUE.

Neither the provisions of Rev. St. § 858 (U. S. Comp. St. 1901, p. 659), nor of Civ. Code Ga. 1895, § 5269, with respect to the competency of witnesses in suits against executors or guardians, render a witness incompetent merely because he may have an interest in a question at issue, where he is not a party to the suit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598-618; Dec. Dig. § 140.*]

4. WITNESSES (§ 159*) — COMPETENCY — SUITS AGAINST PERSONAL REPRESENTATIVES OF DECEASED PERSON—TRANSACTION WITH DECEASED.

One who acted as agent for a borrower in procuring a loan is not thereby disqualified under the law of Georgia to testify as a witness for the lender as to transactions between himself and the borrower relating to the loan, in a suit to enforce payment against the borrower's executrix.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664, 666-669, 671-682; Dec. Dig. § 159.*]

5. WITNESSES (§ 140*)—COMPETENCY—INTEREST.

Nor is he disqualified for interest because employed as attorney for the borrower in the suit, where it does not appear that his compensation is dependent on the result.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598-618; Dec. Dig. § 140.*]

6. MORTGAGES (§ 581*)—FORECLOSURE BY SUIT—RIGHT TO ATTORNEY'S FEES.

A provision in promissory notes for the payment of attorney fees in case of collection by suit, valid under Laws Ga. 1900, p. 53, is enforceable although the holder brings a suit in equity to foreclose a mortgage securing the notes, instead of suing thereon at law, the attorney's fees being a part of the debt secured.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1670; Dec. Dig. § 581.*]

In Equity.

Wimbish, Watkins & Ellis, for complainant.

Olin J. Wimberley, for defendant.

NEWMAN, District Judge. This bill is brought by the complainant, the British & American Mortgage Company Limited, a foreign corporation, against Mrs. Carrie H. Worrill, guardian, and, by virtue of her office, administratrix on the estate of Bedford H. Worrill, deceased. Some preliminary questions of jurisdiction having been settled in this case, it was referred to Henry R. Goetchius, Esq., standing master at Columbus. There was a hearing before him, and his report filed. Exceptions to the report have now been heard and considered.

The bill was filed to foreclose as a mortgage a paper executed by Bedford H. Worrill in his lifetime. The paper was a deed to a tract of land in Stewart county, Ga., executed in pursuance of Civ. Code Ga. 1895, § 2771, upon the execution of which deed a bond for title was given to B. H. Worrill to reconvey the land upon the payment of a debt of \$6,500, which the deed secured. The date of this transaction was November 30, 1903. In December, 1904, B. H. Worrill was adjudged a lunatic, and his wife, the said Mrs. Carrie H. Worrill, was appointed his guardian. Bedford H. Worrill died November 22, 1905, and, in accordance with the statutes of Georgia, Mrs. Carrie H. Worrill, by virtue of her office as guardian, became administratrix on her husband's estate. After the death of her husband, on February 5, 1906, Mrs. Carrie H. Worrill applied for a year's support, and the same was set apart for her in the lands conveyed to complainant, with the rents and profits thereof, and certain personal property.

Two main defenses are interposed in this case: The first is that, at the time the deed to secure the debt to the British & American Mortgage Company was made, B. H. Worrill was an insane person and incapable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of contracting. The second defense is that Mrs. Carrie H. Worrill's rights are superior to the rights of the British & American Mortgage Company, in view of the fact that all the property covered by the deed to the mortgage company has been set apart to her as a year's support.

On the question as to B. H. Worrill's sanity at the time the contract was made on November 30, 1903, the master heard a large amount of testimony, and discusses it extensively in his report. Some of the testimony heard by the master was professional testimony, but the greater part of it related to the acts and conduct of B. H. Worrill during the year 1903, and some of it for a short period prior to that time. The master says in his report:

"The main issue of fact in this case is whether or not Bedford H. Worrill, at the time this deed and these notes were executed by him, and this transaction as to the loan was consummated, was of sufficient mental capacity to enter into and understand his contract and undertaking. It is not denied that in January, 1905, his wife, the respondent, was appointed guardian, and duly qualified as such, of his person and property, after proper proceedings begun in December, 1904, in the court of ordinary of Stewart county, Ga. this appointment being made on the verdict of a jury that he was a person imbecile from infirmity and incompetent thereby to manage his property. He departed this life November 22, 1905, when about 56 years of age, and his wife, by virtue of her office as guardian, became administratrix of his estate. The evidence shows that he was afflicted with a disease known as 'progressive paresis,' and that this disease is insidious in its character, the symptoms being hardly perceptible in the incipency, but more plainly marked as the disease progresses, the period varying, but averaging from three to five years. The testimony submitted on this issue was voluminous, and there was a very large number of witnesses introduced by both sides, there being 19 for complainant and 18 for respondent."

After discussing the testimony of the various witnesses which dealt with the question in the manner just stated, the master concludes his report on this part of the case as follows:

"Taking the entire and immense volume of evidence, very nearly all of which was submitted pro and con on the question of Worrill's capacity to contract, and reconciling the differences and conflicts as best I could, I have concluded that Bedford H. Worrill, up to the first part of the year 1903, was free from the disease which finally caused his death; that, if it existed prior to that time, its symptoms were not apparent; that possibly during 1903 these symptoms began to be apparent to the extent of accentuating his peculiarities, which had been more or less apparent prior to that time, but that he was fully competent to transact business during the year 1903, and for some time in 1904; that he felt somewhat financially embarrassed as far back as 1898, when he first applied for what was designated as the 'Hancock loan'; that the procurement of this loan and failure to pay the same, the failure of successive crops (he being engaged in farming), the expenditure of money for improvements on his place, the expense of maintaining a son at school and other demands, all coupled with a declining capacity to manage, which doubtless grew upon him in these later years because of the incipient and unknown progress of the disease, made it necessary for him to readjust his finances. This he began to attempt to do as early as the spring of 1903, and finally accomplished it at the date of this completed loan from complainant November 30 to December 19, 1903, the last date being the final balance to him of the money procured. Pending these transactions, and for several months in the year 1904, he managed his business as formerly, and performed the usual public service of a citizen, and for that purpose his mind was practically in a normal state. The paresis, which the evidence shows progresses by slow but by sure stages, did not appear to undermine his mental faculties entirely until the close of 1904. He was without question fully capacitated to make a legal and binding con-

tract from November 30 to December 19, 1903, and was competent to understand and comprehend the purport of his dealings with complainant and the contract into which he entered. I therefore find that on said dates he was mentally capacitated to make this contract and understand the full purport of his acts in executing and delivering this deed and the notes secured thereby, and in receiving the money paid as a loan to him by complainant in consideration of said deed and notes, and that he fully understood and directed the distribution of the proceeds of the loan."

The master in the latter part of his report adopts the rule announced by the Supreme Court of Georgia in *Maddox v. Simmons*, 31 Ga. 512, as to the degree of mental capacity necessary to make a valid and binding contract. In the opinion in that case by Judge Lumpkin, on this question, it is said:

"I assume, in the first place, that, to establish incapacity in a grantor, he must be shown to have been at the time non compos mentis, in the legal acceptance of that term; which means, not a partial, but an entire, loss of understanding. The common law has not drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. Weakness of understanding is not, of itself, any objection to the validity of a contract. If a man be legally compos mentis, he is the disposer of his own property, and his will stands, for the reason of his actions. *Jackson ex dem. Cadwell v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; *Odell v. Buck*, 21 Wend. (N. Y.) 142; *Stewart v. Lispenard*, 26 Wend. (N. Y.) 298 et seq.; *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *Blanchard v. Nestle*, 3 Denio (N. Y.) 37; *Osterhout v. Shoemaker*, Id., note; *Dean's Med. Jur.* 555 et seq.; 2 Mad. Ch. Pr. et seq.

"To establish any other standard of intellect or information beyond the possession of reason, in its lowest degree, as in itself essential to legal capacity, would, as said by Senator Verplanck, in the great case already cited (*Stewart's Ex'rs v. Lispenard*, 26 Wend. [N. Y.] 255), create endless uncertainty, difficulty, and litigation; would shake the security of property, and wrest from the aged and infirm that authority over their earnings and savings which is often their best security against injury and neglect. If you throw aside the old common-law test of capacity, then proofs of wild speculation or of extravagant and peculiar opinions, or the forgetfulness or prejudice of old age, might be sufficient to shake the fairest conveyance, or impeach the most equitable will. The law, therefore, in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, and therefore wise and safe. It holds, in the language of a late English commentator (*Shelford on Lunacy*, p. 39), that weak minds differ from strong ones only in the extent and power of their faculties; but unless they betray a total want of understanding, or idiocy, or delusion, they cannot properly be considered unsound."

The rule thus laid down has been approved in a number of cases by the Supreme Court of the state of Georgia, the last case being *Barlow v. Strange*, 120 Ga. 1015-1018, 48 S. E. 344, 345, in which it is said:

"In *Maddox v. Simmons*, 31 Ga. 512, 527. Judge Lumpkin used this language: 'I assume, in the first place, that, to establish incapacity in a grantor, he must be shown to have been at the time non compos mentis, in the legal acceptance of that term, which means, not a partial, but an entire, loss of understanding.' The rule thus laid down has been approved in two cases. See *Nance v. Stockburger*, 111 Ga. 821, 36 S. E. 100, and cit. There is no conflict between this rule and the one laid down in *Frizzell v. Reed*. Both recognize that, in order to avoid a contract on account of mental incapacity, there must be an entire loss of understanding. The first case recognizes it in terms, and the second in effect. For one who has not strength of mind and reason equal to a clear and full understanding of his act in making a contract is one who is afflicted with an entire loss of understanding."

This being a Georgia contract, and the lands conveyed to secure the debt being Georgia land, the law of the state must, of course, prevail,

and, applying the evidence and the facts found by the master from the evidence to the law as thus stated, there is no reason whatever for differing from the conclusion reached as to Bedford H. Worrill's capacity to contract at the time he executed the deed.

The next principal ground of defense raises this question: It is conceded that under the law of Georgia (Code 1895, § 2771 et seq.), in conformity with which this deed and bond to reconvey were executed, the title to the land vested in the British & American Mortgage Company, consequently the widow, Mrs. Carrie H. Worrill, would not have the right to a year's support out of the land except as to the equity redemption, her rights being subordinated to those of the British & American Mortgage Company holding the title. Section 2771, Code Ga. 1895, is as follows:

"Whenever any person in this state conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money or to secure any other debt, and shall take a bond for titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale, and take an obligation binding the person to whom said property was conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this state to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and not a mortgage."

The contention is that, by electing to institute the foreclosure proceeding in this court, the complainant chose to treat this instrument as a mortgage. Under the law of Georgia, a mortgage is "only a security for debt and passes no title." Code Ga. 1895, § 2723. It was held in this court several years ago that the right to foreclose in this court existed where a deed and bond to reconvey had been executed under the state statute, as in this case (*Tatum v. Ray* [C. C.] 69 Fed. 682), and this was affirmed in the Circuit Court of Appeals in *Ray v. Tatum*, 72 Fed. 112, 18 C. C. A. 464. In a later case in this court, *Merrihew v. Fort*, 98 Fed. 899, the same question arose, and a similar ruling was made.

It is contended that the language used in the last-named case indicates that the court was of the opinion that the complainant, by electing to treat the instrument as a mortgage and to foreclose the equity redemption, yielded and waived his right to assert title, and chose to treat the deed as a mortgage, and, consequently, as a mortgage under the laws of Georgia. There is no question that the widow's right to a year's support would be superior to the rights of a mortgagee; that is, where the instrument is a mortgage, pure and simple, only creating a lien and vesting no title in the mortgagee.

It is equally true that where the transaction conforms to section 2771 et seq., where a deed is made and a bond to reconvey given, the title passing to the vendee, his rights would be superior to that of a widow's claim to a year's support. So that to sustain the contention of the defendant here it would be necessary to hold that by coming into the Circuit Court of the United States to foreclose the equity of

redemption, thereby treating the transaction as a mortgage, the complainant loses the right to claim title as security in it as it unquestionably existed before the foreclosure proceeding was instituted. I do not think so, nor was the language used by the court in *Merrihew v. Fort* intended to have any such effect. What was there stated was with reference to, and should be taken in connection with, the facts of the case then before the court. The right to treat the transaction as a mortgage, not asserting title in terms, was there in question, and the further right to resort to a court of equity, especially to the Circuit Court of the United States, instead of being restricted and confined to the remedy provided by the statutes of the state. Where a deed is made in pursuance of the state statutes to secure a debt, and a bond given to reconvey when the debt is paid, it is in effect a common-law mortgage by which the title vests in the mortgagee, subject only to the mortgagor's equity of redemption. The language used by the court in *Merrihew v. Fort* means no more than this.

Judge Bleckly in *West v. Bennett*, 59 Ga. 507, discussing this deed and bond to reconvey, with reference to homestead rights, says this:

"On what estate did the homestead proceedings take effect? On such estate as the debtor had in the land. That estate was purely equitable, and consisted of the right to redeem the legal title, on payment of the money as security for which he had passed that title to his creditor. When the right to redeem is in question, equitable principles are applied, and a deed, though absolute, will be treated as a mortgage. But thus dealing with it does not involve any concession that the legal title did not pass. It did pass, and for that very reason the necessity arises for invoking principles of equity. This was so before the act of 1871 (Code 1873, §§ 1969, 1971) was passed. That act was not required for the mere purpose of enabling a debtor to pass the legal title as security. It had further objects, one of which, as declared in section 1971 of the Code, was to prevent liens from attaching on the property while title was held by the vendee. Another object may have been to restrict the right of redemption to the time specified in the contract. Compliance with the contract 'according to the terms' thereof seems to have been contemplated. Perhaps, as the act originally stood, time was of the essence. Finally, it is not improbable that by virtue of the act the wife might bear some relation to the transaction under it which she would not bear to a similar transaction before the act was passed. Doubtless, she would be allowed to redeem the same as her husband. But one or the other must redeem, whether an absolute deed be made under the act, or under the law as it stood prior to this new legislation."

The effect of sustaining the contention of the defense in this respect would be to deny to persons taking a deed as security under the Georgia statutes the privilege of resorting to the Circuit Court of the United States without losing the best part of their security; that is, to have title to the property conveyed until the debt is paid. If the other jurisdictional facts exist, it is now clearly established that resort may be had to the Circuit Court of the United States in a case and by a procedure such as this. This being true, certainly the security held by the vendee should not in any way be weakened or lessened by doing so. The language of Judge Bleckly in *West v. Bennett*, *supra*, is particularly applicable. It is contained in what has been hereinbefore quoted, but the particular language to which I refer is to this effect:

"When the right to redeem is in question, equitable principles are applied, and a deed, although absolute, will be treated as a mortgage. But thus deal-

ing with it does not involve any concession that the legal title did not pass. It did pass, and for that very reason the necessity arises for invoking principles of equity."

I do not think this ground of defense can be sustained.

The action of the ordinary's court of Stewart county setting aside a year's support for Mrs. Carrie H. Worrill cannot have any effect on the rights of the parties here. Jurisdiction was taken of the case by the judge of the county court of Stewart county, the ordinary being disqualified by relationship. He appointed appraisers to set apart Mrs. Worrill's year's support, and they set apart for her as year's support, with certain other things, "all the right, title, and interest which B. H. Worrill had at the time of his death in and to" (the property in question here). As to this land, the only "right, title, and interest" which B. H. Worrill had at the time of his death was his equity of redemption, and it was only to this that the action of the ordinary's court could apply. It is true that the British & American Mortgage Company appeared in the ordinary's court and filed a caveat, and that then, by consent of counsel for Mrs. Carrie H. Worrill and the mortgage company, the case was appealed to the superior court of Stewart county. Subsequently, in the superior court, the British & American Mortgage Company, in writing, withdrew its caveat, and the judge of the superior court made the following order:

"The foregoing and dismissal and withdrawal by caveators is hereby allowed without prejudice to the legal or equitable rights of caveators against the lands and rents set forth in said return of appraisers for year's support to Mrs. Carrie H. Worrill as caveators with a deed, and just as if they had not filed said caveat."

This action in the superior court was certified back to the ordinary's court, where the same was recited in an order, and the return of the appraisers approved and made the judgment of the ordinary's court. The British & American Mortgage Company not being a party to the proceeding when the final order approving the appraisal and allowance was made, the result, of course, is that its rights are unaffected by the judgment allowing the year's support to Mrs. Carrie H. Worrill.

The defense contended before the master that certain witnesses introduced by the complainant were incompetent. What the master says on that subject, and the authorities cited by him, are so conclusive of the question raised that I content myself with quoting from his report:

"Was J. M. Stevens a competent witness for complainant? Respondent moved to rule out his evidence because it developed in the testimony that he himself had a suit pending in Stewart county superior court against this same respondent to foreclose a similar security deed on this same land. It was contended that he was interested, and therefore not competent to testify, inasmuch as the issue in this case was the sanity of Worrill when his deed was made. I find that this witness was competent, and I overrule objection to the suit. I do not think the admissibility of this evidence is governed by the state statutes, but rather by Rev. St. U. S. § 858 (U. S. Comp. St. 1901, p. 659). The proviso of the federal statute applies only to parties to the record, and does not exclude parties interested in a suit but not parties to the record. *Berry v. Sawyer* (C. C.) 19 Fed. 286, and especially *Potter v. National Bank*, 102 U. S. 165, 26 L. Ed. 111. Also *De Beaumont v. Webster*, 81 Fed. 535, 26 C. C. A.

494, and *Goodwin v. Fox*, 129 U. S. 601, 9 Sup. Ct. 367, 32 L. Ed. 805. But if the federal statute does not govern, I cannot see how this witness should be excluded under the state rule. He has no pecuniary interest in this suit. Should the complainant prevail or not, the result has no bearing whatever on his case. He is in no wise bound by any judgment here, or liable for cost or interested in the recovery in the case at bar. The pecuniary interest is the test of qualification. Code Ga. § 5269; *Clements v. Western Lodge*, 101 Ga. 62, 28 S. E. 494; *Hawes v. Glover*, 126 Ga. 310, 55 S. E. 62.

"Were Pinkston, James, and Miller competent witnesses for complainant?"

"At the conclusion of the testimony of S. T. Pinkston, counsel for respondent moved to rule out all of his testimony on the ground that this is a suit defended by Worrill's administratrix, and Worrill being dead, and this witness being shown to have been the agent and representative of the complainant, he could not testify as to transactions between himself and Worrill. A similar motion was made as to T. T. James, and as to B. S. Miller. The master let in the testimony at the hearing, reserving his ruling till this report came to be made. James and Miller, it was shown, are counsel of record in this cause. The evidence nowhere discloses that either of these three witnesses at the time of the loan were acting other than as agents for Worrill. It is true that Miller communicated with complainant and indorsed a draft on it drawn by Worrill for the loan, and he secured the money from complainant by means of this draft; but his compensation for these and all other services was paid by Worrill, and so were those of James. The evidence does not disclose that Miller or James are entitled as attorneys to recover the 10 per cent. or any part sued for as attorney's fees, nor is there any evidence of any contract as to their fees in this case. Under an almost identical state of facts the Supreme Court of Georgia have ruled in the case of *Merck v. American Freehold Mortgage Company*, 79 Ga. 230, 7 S. E. 265 (second paragraph, opinion), that witnesses such as these were the agents of the deceased and not of the plaintiff. Witnesses of this character, under the evidence in the case at bar, as to complainant, may be classed as intermediaries, and especially is this true as to Miller.

"In the case above cited, supra, of *Merck v. Mortgage Company*, the court says: 'By using intermediaries as channels of transmission for papers, relying upon their inspection of property and examination of titles, made at the borrower's instance, and forwarding the money through them also at his instance, the lender does not constitute them his agents to make loans.'

"Also in the case of *Jackson, Guardian, v. Bennett*, 98 Ga. 106 (syllabi 1 and 2, 26 S. E. 53):

"(1) An agent who procures for another a loan of money, the agent in this transaction not representing the lender, is not, upon the trial of an action brought by the lender upon a promissory note given for money borrowed, incompetent to testify in behalf of the plaintiff as to transactions between the witness as such agent and the borrower, relating to the procurement of the loan, or before the time when the same was granted, although the latter may have become insane (or died), and although the agent after the maturity of the note was by the lender employed as an attorney for its collection.'

"(2) An attorney at law employed to collect a promissory note, and who has no contract with his client as to what fees will be charged, but expects to look to the client for reasonable compensation, is not interested in the case so as to disqualify him from testifying as a witness for the plaintiff. This is true although the witness may have testified that he had no other fee reserved except the 10 per cent. in the note sued upon. Taken altogether, the facts were not such as to disqualify him, it really appearing that his fee was in no way dependent upon the result of the case.'"

The notes given by B. H. Worrill to the British & American Mortgage Company provided for attorney's fees. It is contended here by the defendant that, because this proceeding for foreclosure was instituted instead of suing on the notes, counsel fees cannot be recovered. On this subject the master says:

"Attorney's fees are recoverable in this cause. They are as much a part of the contract as is any other provision therein, and the failure to pay on part of the obligor or his legal representative, and the resort to the court for collection, places the obligation to pay as a part of the debt. The statute provides how these fees shall be recovered. The notice required by law has been given as a foundation for this recovery, and the fact that this is a bill in equity to foreclose the lien of the debt does not take it out of the requirement of the statute and of the benefit resulting from notice of suit. Laws Ga. 1900, p. 53. See *Harris et al. v. Powers*, 129 Ga. 75 (8), 58 S. E. 1038."

This conclusion of the master is clearly correct. I see no reason whatever why complainant is not as much entitled to attorney's fees in a proceeding like this, as it would have been if it had brought suit on the notes.

All the exceptions to the master's report will be overruled, and the report confirmed. A decree may be taken in accordance with the report.

DELAWARE, L. & W. R. CO. v. MAYOR, ETC., OF JERSEY CITY.

(Circuit Court, D. New Jersey. February 25, 1909.)

1. INJUNCTION (§ 114*)—INDISPENSABLE PARTIES.

A contract was entered into between a water company and a railroad company having a right of way through a city, by which the water company was to supply water to the railroad for 25 years and was given the right to lay a pipe line on the railroad right of way through the city for the delivery of water to the railroad company and to other customers, to maintain the same for the term of the contract, and, if it should not be renewed, for an additional 25 years on such terms as should be agreed upon. *Held* that, as such pipe line was not for railroad purposes alone, but was to be constructed by and for the benefit of the water company, such company was an indispensable party to a suit to enjoin the city from interfering with its construction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 202; Dec. Dig. § 114.*]

2. COURTS (§ 343*)—FEDERAL COURTS—NONJOINDER OF INDISPENSABLE PARTIES—AMENDMENT.

Leave cannot be granted by a federal court to amend a bill by bringing in a new party, which, whether nominally made a complainant or defendant, must be aligned for jurisdictional purposes in opposition to a citizen of the same state, and whose joinder would defeat the jurisdiction of the court, which rests alone on diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 919, 920; Dec. Dig. § 343.*]

In Equity. On final hearing on pleadings and proofs.

William D. Edwards, Gilbert Collins, and M. T. Rosenberg, for complainant.

Warren Dixon, for defendant.

LANNING, District Judge. The question presented by this case is whether the municipal authorities of Jersey City shall be enjoined from interfering with the construction by the complainant, its contractors and agents, of a water main on the complainant's right of way across West Side avenue in Jersey City. The complainant's railroad crosses

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the avenue at grade. Its right of way is 100 feet in width. It requires at Jersey City, and elsewhere in that vicinity, for use in its business, over 1,000,000 gallons of water per day. In November, 1906, a contract was entered into by the Morris & Essex Railroad Company and the Hoboken Ferry Company, both New Jersey corporations, and the Delaware, Lackawanna & Western Railroad Company, a Pennsylvania corporation and lessee of the two New Jersey corporations, all parties of the first part, with the Hudson County Water Company, a New Jersey corporation, party of the second part, by which it is provided that the water company shall procure and deliver to the railroad company (a term used in the contract for all the parties of the first part) all the water which the railroad company may require for use of its cars, locomotives, shops, steamboats, and ferryboats, for the extinguishment of fires, and for all other purposes and requirements on its lines or at its yards and terminals in Jersey City, Hoboken, and Secaucus; shall lay (or procure to be laid by a responsible firm of contractors) and maintain and operate a water pipe line upon the right of way of the railroad company; and shall provide and deliver into the pipe line an ample supply of water for all the uses and purposes of the railroad company, without treatment by the latter, for a period of 25 years, with the privilege to the railroad company of a renewal of the agreement for a second period of 25 years upon the same terms as for the first period of 25 years. The contract also provides that the railroad company shall purchase from the water company, during the term of the agreement and any extension thereof, the entire supply of water required by the railroad company at its Jersey City, Hoboken, and Secaucus yards and terminals, and elsewhere on the pipe lines constructed under the contract. The railroad company also grants to the water company, for the term of the contract, or any extension or renewal thereof, the right, license, and easement to lay, maintain, and operate the main pipe line mentioned in the contract upon the railroad company's right of way, with the privilege to the water company of entering upon the right of way and property of the railroad company to make all necessary repairs, and to make such side or service connections as may be necessary in the business of the water company for the delivery of water to the railroad company and to other customers. It is further provided that if, at the expiration of 25 years, the railroad company shall not avail itself of its privilege to renew the contract for a second period of 25 years, the water company shall have the privilege of a renewal of the use of the right of way, license, and easement, for the maintenance and operation of its pipe lines, branches, and service connections, which at such time shall have been laid, and to lay additional connections to its pipe line or lines, and to repair the same, for a second period of 25 years, upon the payment of such an amount of annual rental as may then be agreed upon between the parties to the contract.

The complainant is the Delaware, Lackawanna & Western Railroad Company only. By an arrangement between it and the Hudson County Water Company the complainant undertook, with its own force of men, but at the expense of the water company, to lay the portions of the pipe line crossing the public streets of Jersey City. In attempt-

ing to lay the pipe line across West Side avenue, the police authorities of Jersey City arrested its men and stopped the work. Hence this suit.

The defendant insists that the Hudson County Water Company is an indispensable party to the suit. This defense is not expressly presented by the answer; but, if the alleged defect be vital to the relief sought, the objection may be good. The contract shows that the pipe line, when laid, will be the property of the water company, and not the railroad company; that the water company will supply the line with water and operate it; and that it may possibly continue to operate the line, on the railroad company's property, 25 years after the railroad company ceases to take water from it. It further appears, as already stated, that the work which the railroad company is attempting to do in the laying of those parts of the line which cross the public streets of Jersey City is for and at the expense of the water company. It follows that the water company has a vital interest in the result of this suit, and might, except for a fact to be hereafter mentioned, have properly been joined as a party hereto.

But the test is whether it is an indispensable party. Can this court, upon the pleadings in their present form, decree such an injunction as is prayed for? To do so means that the water company, and not the railroad company, shall be permitted to continue to tear up the public streets of Jersey City without supervision by or regulation of the city authorities. Conceding, for the purposes of this case, as counsel for the complainant contend, that the railroad company may, under its chartered powers, construct its necessary works across the public streets without municipal consent, and conceding, further, that what it may itself directly do it may have another party do for it, such exemption from municipal control has relation only to its exercise of its own franchises. The franchise to build and operate the water system described in the record of this case, if there be any, is the franchise of the water company, and not the railroad company. The contract shows that the system is designed to be used by the water company in supplying the general public, as well as the railroad company, with water; and after 25 years, if the railroad company then concludes to take its supply of water from some other party, the water company may still continue to use the system for 25 years longer in supplying the general public. These facts show that the railroad company is here asking for an injunction the effect of which, if granted, will be directly to further the interests of the water company and only indirectly to further its own interests.

The defendant insists that as against the water company it has defenses it may not be able successfully to invoke as against the railroad company. For example, as against the water company the defendant may have a control over its streets not possessed as against the railroad company, and may have a vested right to furnish water to the general public from its municipal waterworks to the exclusion of the water company. The defendant insists that it has such defenses. It seems to me clear that an injunction ought not to issue upon the present state of the pleadings. While the nonjoinder of the water company was not objected to in the defendant's answer, the court cannot, upon any principles of equity jurisprudence, make a decree, primarily for the benefit

of the water company, upon the prayer only of the railroad company. I think the water company is an indispensable party to the suit.

The contract between the railroad company and the water company is annexed to the bill of complaint and made a part thereof. The defect above mentioned was therefore apparent on the face of the bill, and was demurrable for want of a proper and indispensable party. The objection having been raised only at the argument, the court, if the case were a proper one for amendment, might afford the complainant an opportunity to amend its bill. But the jurisdiction of this court depends on proper diversity of citizenship of the parties. For the purpose of determining the question of jurisdiction, the alignment of the parties will be fixed by their actual relation to the controversy, without regard to their position on the record as complainants or defendants. If the water company be brought in as a party complainant or defendant, since its interest in the controversy is with that of the railroad company and is opposed to that of Jersey City, it must, under the provision of Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), which gives this court jurisdiction of "a controversy between citizens of different states," be aligned with the railroad company as a party complainant. *Pacific R. R. v. Ketchum*, 101 U. S. 289, 298, 25 L. Ed. 932; *Groel v. United Electric Co. (C. C.)* 132 Fed. 252. As the record would then show a citizen of the state of New Jersey as one of the complainants and a citizen of the same state as defendant, this court would be without jurisdiction to decide the cause.

The suggestion, made on the argument, that the court may enter a decree so restricted in its terms that the water company shall not be allowed to make service connections for the general public, or for any other party than the railroad company, and that the water company will consent to such a decree, does not answer the objection. By such a procedure the water company would virtually become a party to the suit. The court cannot thus acquire jurisdiction of the cause.

The bill must be dismissed, with costs.

NEW YORK CENT. & H. R. R. CO. et al. v. INTERSTATE COMMERCE COMMISSION.

(Circuit Court, S. D. New York. February 8, 1909.)

1. CARRIERS (§ 26*)—INTERSTATE COMMERCE COMMISSION—ORDERS.

Under the provision of section 15 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]), that "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 suspended or set aside, etc., an order relating to rates is not invalid because it fails to prescribe the time it shall remain in force, but in such case the order remains in force for two years, the maximum time prescribed by the statute. The commission should, how-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ever, comply with the implied requirement of the statute and in all cases fix the time.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 26.*]

2. CARRIERS (§ 32*)—INTERSTATE COMMERCE COMMISSION—AUTHORITY—ORDERS.

It is one of the primary purposes of the interstate commerce law to remove discriminations in rates; and under the broad powers conferred on the Interstate Commerce Commission "to execute and enforce the provisions of this act" 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" (Act Feb. 4, 1887, c. 104, § 12, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3162], and section 15, as amended by Hepburn Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]), where it has found that discrimination exists against a shipper or commodity, it may prescribe a relative rate, as that the charge shall be the same as that for a similar service to other shippers or on another similar commodity, instead of fixing an absolute maximum rate, which would enable the carrier to continue the discrimination by reducing the rate to other shippers or on the other commodity.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

3. CARRIERS (§ 32*)—INTERSTATE COMMERCE COMMISSION—ORDERS.

The provision of section 15 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]), that, where the commission shall find that a rate or any regulations or practices affecting rates are unjustly discriminating, it shall "determine and prescribe what will be the just and reasonable rate or rates; * * * and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed," does not require the commission, on finding that a certain rate is discriminatory, to prescribe in detail regulations and practices which are not necessary to remove the discrimination, but which may become necessary for the protection of the carrier, and it may properly authorize or permit the carrier to make such regulations should the necessity arise.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

4. CARRIERS (§ 32*)—INTERSTATE COMMERCE COMMISSION—ORDERS.

An order of the Interstate Commerce Commission designed to remove a discrimination in rates is not invalid or inoperative because it does not go as far as it might, and fails to correct other discriminations found to exist.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

5. CARRIERS (§ 32*)—INTERSTATE COMMERCE COMMISSION—ORDERS.

The Interstate Commerce Commission in inserting in an order commanding carriers to desist from a discrimination a condition for the carriers' benefit cannot be said to have acted outside of its province, even though the subject-matter of the condition be regarded as something subsequent to transportation.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

6. COMMERCE (§ 88*)—INTERSTATE COMMERCE COMMISSION—CONDUCT OF PROCEEDINGS.

The Interstate Commerce Commission is an administrative tribunal dealing with practical problems, and, so long as parties affected by its orders appear and are fully heard, it has power to grant such relief as the facts shown upon the investigation call for, even though such facts may be presented by evidence technically outside of the issues raised by the pleadings, but which were germane to the subject-matter of the investigation.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 88.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. CARRIERS (§ 32*)—INTERSTATE COMMERCE COMMISSION—ORDERS.

An order of the Interstate Commerce Commission requiring railroad companies to cease and desist from according to flour milled in transit at interior points a lower rate for export than was imposed upon grain brought from interior points by a milling company to New York City, and there ground into flour and other grain products and exported, *held* within the powers of the commission and valid on a motion for a preliminary injunction to restrain its enforcement.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

Ward, Circuit Judge, dissenting.

In Equity. On motion for preliminary injunction.

Geo. F. Brownell, for complainants.

P. J. Farrell, for Interstate Commerce Commission.

W. F. Rowe, for Hecker Jones Milling Co.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is an application for an injunction restraining *pendente lite* the Interstate Commerce Commission from enforcing its order dated June 24, 1908, in a proceeding instituted by the Hecker-Jones-Jewell Milling Company against the present complainants as defendants therein. In its complaint in such proceeding the milling company alleged, in substance, that it was engaged in manufacturing wheat into flour at the city of New York both for domestic use and for export; that it was obliged to obtain its supply of wheat in various Western states, and to ship the same to its mills at New York; that the defendant carriers charged it a higher rate upon the wheat shipped over their lines and thereafter ground into flour and exported than they charged upon wheat ground by millers at Chicago and vicinity and exported, and upon wheat ground by foreign millers and sold in foreign markets in competition with its products; and that such rates constituted an unjust discrimination against it. In its prayer for relief the milling company asked for an order "fixing the rate upon wheat and other grains shipped from Chicago points to New York Harbor for manufacture there into flour and other grain products, and thence exported, at the same amount as if fixed upon wheat and grain shipped from Chicago points to New York Harbor points, and thence exported as wheat and grain." It also asked for such regulations as should prevent the continuance of the discriminations complained of, and for general relief. After notice and a full hearing, the commission made an order requiring the carriers to cease and desist on or before the 1st day of September, 1908, "from according to flour milled in transit at interior points a lower rate for export than is imposed upon the grain of the complainant at New York City, which is subsequently ground into flour and other grain products and exported; but this order is made upon condition that said defendants establish the necessary regulations to make certain that the grain upon which the export flour rate is applied is actually exported as flour or other grain products, for which defendants may impose a proper charge to cover the cost of executing such regulations."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is a brief summary of the situation: The Hecker Milling Company obtains its supply of wheat in the West; brings it to New York City, where its mills are located, over the lines of these complainants and by other routes; grinds the wheat into flour and other grain products; supplies an extensive domestic market; and does a large export business. It has heretofore been charged the domestic rate upon all its wheat, regardless of the ultimate destination of the flour ground therefrom, notwithstanding that both export flour and export grain take a lower rate than domestic grain. The export flour rate also applies to grain shipped from the West and "milled in transit" at interior mills upon the carriers' lines. Under these conditions, the milling company complained to the commission that it was being discriminated against; that it was charged a higher rate than western millers and millers who ground the export grain in foreign countries. It asked specifically that the rate charged it upon grain which it ground and exported as flour should be the export grain rate. The commission, however, did not grant this relief, but did order that flour for export milled in transit at interior points should not receive a lower rate than that accorded to the milling company's grain which it ground into flour and other grain products and exported. Assuming that flour milled in transit should continue to take the export flour rate, the milling company's grain which it might grind into flour and export would take the same rate. In other words, the commission treated grain milled at the seaboard as being milled in the course of transportation to foreign countries, and took away the advantage which grain milled in transit at interior points had previously enjoyed.

The carriers now ask this court to restrain the enforcement of the order of the commission pending proceedings to set it aside. They assert that the order is invalid and unenforceable upon various legal grounds, the consideration of which requires the construction of several important provisions of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as amended by the Hepburn law (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]). And, as the determination of these legal questions upon this application has required as exhaustive an examination of them as would be necessary upon final hearing, we deem it desirable, in view of the importance and novelty of the subject and of the able presentation of the case upon both sides, to express our opinion at greater length and in more complete form than would ordinarily be the case in passing upon an application for a preliminary injunction.

The objections to the validity of the order may be conveniently considered as they appear in the complainants' brief.

The first ground of invalidity urged is that the order fails to specify the time during which it shall remain in force. Section 15 of the interstate commerce act as amended, under which this order was made, provides that:

"All orders of the commission, except orders for the payment of money, shall * * * continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission."

The commission did not state in this order how long it should remain in force. Strictly speaking, the directions of the statute were not complied with. Nevertheless we think that this inaction on the part of the commission did not invalidate the order. The act itself prescribes the maximum time an order can remain in force. The commission may prescribe a shorter time, but, in the absence of such limitation, an order remains in force the maximum time—two years. The law reads the limitation into it. But, while we think that the absence of an express limitation in an order does not render it void, we perceive no reason why the direction implied in the statute that the time be prescribed in the order should not be complied with. We find no merit whatever in the contention of the commission, as stated in its answer, that there is a distinction with respect to the application of the two-year limitation between affirmative and negative orders.

The second objection to the validity of the order, as stated by complainants, is that it fails to determine and prescribe the just and reasonable rate or charge to be observed as a maximum, and the just, fair, and reasonable regulation or practice to be followed in respect of the transportation involved. The section of the interstate commerce act already referred to (section 15) empowers the commission whenever, after a hearing, it shall be of the opinion that any rates or charges or regulations or practices relating thereto are unjust, unreasonable, or unjustly discriminatory in violation of the 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." The point of the complainants' contention is that the commission, having found that the rates so complained of by the milling company were discriminatory, was bound to prescribe the maximum rate to be charged in the future for the services, but that it failed to do so, and exceeded its powers by prescribing relative rates. If the power conferred upon the commission were simply and alone to prescribe maximum rates, there would be much force in the complainants' contention. There is a marked distinction between that power and the power to fix minimum or absolute rates. There is still greater distinction between it and the power to fix relative rates; for, strictly speaking, power to prescribe the relations which shall exist between charges is not power to fix them at all. It is necessary to look further than to the power to prescribe maximum rates to find authority for the order in question. This order attempted to remove the discrimination against the milling company. It prescribed, in substance, that the charges against it should be the same as those charged other shippers for services similar in their nature. It did not prescribe how the charges should be equalized. Raising the rate to the

Western shipper would have complied with the order as well as lowering the rate to the milling company. The end to be attained was the removal of the discrimination. Now, the removal of discriminations is one of the primary purposes of the act to regulate commerce, its supplements, and amendments. Many provisions are directed to that end. Consequently it is not to the specific power to prescribe maximum rates, but to the broad powers, applicable in the case of violations of the act by unjust discriminations, conferred by section 12, "to execute and enforce the provisions of this act," and, by section 15, "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," that resort must be had. The complainants apparently do not question the power of the commission to order them to desist from the unjust discrimination, but they contend that the commission cannot stop there—that such determination is merely antecedent to the fixing of a new maximum rate. If this be so, the act loses much of its effectiveness. Discriminations are as well accomplished by lowering as by raising rates. If the commission had prescribed in the present order as the maximum rate the present charge to the Western millers, the same condition would be brought about by making a new and lower rate to them. We think any such construction of the act would fail to give due effect to its provisions, and that the powers conferred by section 12 and 15 furnished the commission authority to make the order in question, and did not require it to go further.

The complainants also urge under the present ground of objection that the order was invalid because it left the carriers to prescribe the regulations and practices necessary to make it effective. It is said that the commission, having made the order for the purpose of removing the discrimination, was itself bound to prescribe in detail the regulations and practices to be followed in accomplishing the desired result. If the regulations referred to in the condition of the order for making certain that only the grain of the milling company which is exported as flour takes the export flour rate are regulations and practices required in removing the discrimination, there is much force in this contention. There is no specific authority in the act under which the commission may require carriers to devise and frame regulations to make its orders effective, and specific power is only conferred upon the commission itself to make regulations and practices in lieu of those which it finds in violation of the act. Therefore the commission says that, as no regulations or practices were complained of by the milling company and none were found to violate the act, it had no power to take the initiative in prescribing regulations or practices in connection with the removal of the discrimination, and could leave the matter to the carriers. The complainants, however, say that this is a non sequitur; that, if the commission had no power to prescribe the regulations itself and no power to require the carriers to make them, it had no power to make the order in question. We think the question discussed by both parties is not quite the question presented to the court. In one aspect of this order no regulations are necessary. If the carriers raise the rate upon export flour milled in transit to equal

the present rate upon the grain of the milling company, nothing needs to be done by way of regulation. The milling in transit privilege is merely taken away. If, on the other hand, the rate upon the milling company's grain which is ground into export flour is lowered, regulations are necessary, but they are not regulations connected with the removal of the discrimination. They are regulations for the benefit of the carriers themselves, having for their object the making certain that no more grain gets the low rate than is entitled to it. The order directs the removal of the discrimination. It does not necessarily follow that any regulations are necessary to carry it out. But, if the carriers determine to remove them in a way which requires such regulations, then the condition applies that the carriers may themselves prescribe them, to be carried out at the expense of the milling company. In other words, the severity of a stringent order is relaxed. A condition is attached for the carrier's benefit. With power to make such reasonable regulations for identifying the grain as they please—all at the expense of the milling company—they can hardly complain that the order is less harsh against them than it might have been. In our opinion, the exercise of the power to remove unjust discriminations is not rendered ineffective by leaving to the carriers the right to initiate the practices to be followed to relieve them from possible mistakes or impositions in the operation of the order.

The complainant further contends that the order was invalid because it failed to correct the most serious discrimination found by the commission—that in favor of foreign millers. But the order was not rendered invalid by being less comprehensive than it might have been. If it removed one discrimination it was not inoperative because it failed to remove others. It was lawful as far as it went, even if it did not go as far as it might.

We also think the contention of the complainants without foundation that the order is invalid because it fails to conform to the decision which forms its basis. It was not absolutely necessary that it should conform. It substantially does.

It is next contended that the order is invalid because it requires the complainant to establish regulations and practices not connected with interstate transportation. The gist of this contention is that any regulation established by the carriers to make certain that the grain of the milling company upon which it receives the export flour rate is actually ground and exported is not connected with transportation, and consequently is no part of interstate commerce. It is said that, when interstate transportation is completed, the power of the commission ends—that it cannot establish regulations covering property after such transportation has terminated. The term "transportation," as defined in the interstate commerce act (section 1), includes "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported." The commission is authorized to prescribe regulations and practices in respect to transportation. Consequently it is urged in answer to the complainants' contentions that the commission, for the purpose of eliminating discriminations in transporta-

tion, may prescribe regulations with respect to the custody of grain designed for export after the railroad carriage thereof has been completed and prior to delivery upon the ship. But we are not called upon to determine the precise question thus presented. As already pointed out, the case discussed upon the briefs is not exactly the one before us. The matter in question before the commission was the discrimination in rates for railroad transportation. The commission found that the relation of rates for such transportation constituted an unjust discrimination, and ordered it to cease. The mandatory part of the order relates solely to transportation, and the object of the condition is only to protect the carriers from unjust rates for transportation service. If the discrimination complained of is removed by raising the rate upon flour milled in transit, no regulations will be necessary. If it is removed by lowering the milling company's rate, regulations will undoubtedly be necessary to protect the carriers from imposition or mistake—to make certain that only flour actually exported gets the export rate for the transportation service rendered. In our opinion the commission, in inserting in the order a condition for the carriers' benefit, cannot be said to have acted outside its province, even though the subject-matter of the condition be regarded as something subsequent to transportation. And this is the more true if the condition be regarded as only authorizing regulations for the determination of the applicability of rates for transportation.

The next objection to the validity of the order is that it is not confined to the issues raised. As already shown, the milling company specifically asked the commission to order the carriage to fix the rate upon grain which it shipped from Chicago points to New York Harbor at the same amount as was fixed upon export grain. The commission did not grant this relief, but, instead, gave the milling company the benefit of the rate upon flour milled in transit and exported. But, as the petition of the milling company also prayed for further and general relief, we should find no difficulty in sustaining the order notwithstanding this variance, if there were any facts in the petition concerning the milling in transit rate or any showing that the milling company should be placed upon the same basis as those enjoying it. But the petition contains no reference to such privilege. Indeed, the complaint seems to be regarding rates enjoyed by millers at Chicago and west thereof, instead of by those located on the carriers' lines east of Chicago and enjoying the milling in transit privilege. If this order were a judgment of a court, we should without hesitation say that the facts alleged in the petition did not support it. The Interstate Commerce Commission is, however, an administrative tribunal dealing with practical problems. So long as parties affected by its orders appear and are fully heard, we think it would be most unfortunate to deny its power to grant such relief as the facts shown upon the investigation should call for, even though such facts might be presented by evidence technically outside the issues raised. Notwithstanding, therefore, that the commission has established rules of practice analogous to those in courts, notwithstanding that its rules even provide that hearings shall be had upon issue joined, we are of the

opinion that the strict rules of pleading should not be held applicable to it. Before we declare an order of the commission invalid as being outside the issues, we think that we should be satisfied that it is outside the issues actually presented to the commission and upon which the parties were heard. We have, therefore, thought it our duty to examine the evidence and consider the claims of the parties made upon the hearing before the commission. Through such examination we find that the milling company and the carriers appeared before the commission, and that the various phases of the discriminations claimed to exist against the milling company were fully inquired into, including that claimed to exist in favor of interior millers enjoying the milling in transit privilege. As the hearing progressed, its scope apparently widened, and at its conclusion we are satisfied that the real question before the commission in the minds of all the parties was whether it was proper and practicable to afford relief like that granted by the order. Indeed, we have no doubt that should we declare this order invalid, and a new petition should be filed, the inquiry would be along the lines of the hearing already had, with, presumably, the same result. We conclude, therefore, that, while the order may have been technically outside the issues raised by the pleadings, it was still germane to the subject-matter before the commission, and should not be declared invalid.

That which has just been said is also applicable to the contention of the complainants that the order is invalid because, while the milling company made no complaint with respect to the grain product rate, the order gives it the benefit of the lower flour rate upon all its grain products. The whole subject was fully presented to the commission. If there was error or inadvertence in according to all the milling company's products the flour rate, application might perhaps be made to the commission to correct it. But we cannot hold as a matter of law that the order was rendered invalid thereby. And, in so far as the objection goes to the reasonableness of the order, we think that it should not be determined upon this application.

The final contention of the complainants is that it is impossible as a practical matter to comply with the order, and that it should be set aside as unenforceable. This objection is not strictly a legal one, but involves the reasonableness of the order. We shall not enter into a full examination of it upon this preliminary application. Indeed, the extent to which this court under the Hepburn amendment may inquire into the mere reasonableness of orders made by the commission is a most serious question. Section 15 provides that orders of the commission shall take effect and remain in force a prescribed time, unless "suspended or set aside by a court of competent jurisdiction." Under one possible construction of this provision, a court could only set aside an order when it infringed upon a constitutional right of the carrier, or failed to comply with the provisions of the statute. The objections to the validity of the present order which have already been examined illustrate these questions which the court undoubtedly has power to pass upon. On the other hand, under another possible construction of the provision, the court has power to pass upon the reasonableness

of the orders of the commission upon their merits. We notice a trend in the decisions toward the latter construction, but we deem it inexpedient to express any opinion in the matter until after final hearing. For the present it is sufficient to say that, assuming that we have the broad power of revision, we are not now satisfied from an examination of the moving papers that the order is unreasonable and impracticable. Certainly we think that it is not so clearly impracticable that its enforcement should be suspended pending suit and without a trial of its working.

The complainants contend that a preliminary injunction should be granted because they would suffer irreparable damage if the order should be put into effect and should subsequently be held invalid. But we are unable to see how the damages of the carriers in that contingency would be any more irreparable than would be those of the milling company in case the order should be suspended, and should subsequently be held valid.

The application for a preliminary injunction is denied.

WARD, Circuit Judge (dissenting). I cannot concur in the opinion of the court because I think the order in question transcends the power of the commission. It is conceded that the charge for transporting export grain and flour should be lower than for the domestic, likewise that the milling in transit privilege is reasonable and valuable to shippers. Owing to the situation of the Hecker Mills at the seaboard, they cannot avail themselves of this privilege as shippers from the interior can. When they get their grain, the contract of the bill of lading is performed, and the transportation is at an end. The Hecker Mills can ask nothing more of the railroad; the relation of shipper and carrier having wholly ceased. It is true that compared with the shippers from interior points they are at a disadvantage in respect to grain which they determine to grind and export as flour after delivery. What the commission's order gives them is really a milling after transit is over privilege, and because this could not be given directly the order takes on the singular form of prohibiting the railroads from charging a lower rate upon flour milled in transit at interior points than is charged the Hecker Mills for grain ground into flour at New York and exported; in other words, from giving a milling in transit privilege to any shipper unless they give the same thing to the Hecker Mills. Undoubtedly uniformity of rates may be accomplished by raising as well as by lowering rates, or, in this case, by depriving the Western shippers of the milling in transit privilege. But, that privilege being accorded by the railroads as reasonable, to take it away would be quite inconsistent with the spirit and intent of the interstate commerce act. The order is sought to be justified as an exercise of the commission's power to prevent unjust discriminations, which, as I understand it, are discriminations made during transportation. But there is no discrimination against the Hecker Mills during transportation; they being properly charged the domestic rate for grain delivered to them at New York. I think discriminations cannot be

created by the shipper's change of mind as to the disposition he will make of his goods after the delivery by the railroad is complete. The motion for a preliminary injunction should be granted.

UNITED STATES v. HOLT.

(Circuit Court, W. D. Washington, N. D. March 4, 1909.)

No. 1,682.

1. CRIMINAL LAW (§ 957*)—MOTIONS FOR NEW TRIAL OR IN ARREST OF JUDGMENT—TESTIMONY OF JURORS.

Where the jurors on the trial of a criminal case on each adjournment were properly admonished against receiving outside impressions of the case, and there is no reason to suppose they failed to observe these instructions, the court will not, on motion of a defendant after conviction, institute an inquisition against them by bringing them into court to be examined for the purpose of eliciting facts to impeach their verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2392; Dec. Dig. § 957.*]

2. CRIMINAL LAW (§ 970*)—GROUNDS FOR ARREST OF JUDGMENT—EVIDENCE BEFORE GRAND JURY.

The fact that incompetent evidence which was excluded on the trial of a criminal case may have been considered by the grand jury, which found the indictment, is not ground for arrest of judgment on a verdict of guilty which is amply supported by competent evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2445; Dec. Dig. § 970.*]

3. CONSTITUTIONAL LAW (§ 72*)—JUDICIAL POWERS—ENCROACHMENT ON EXECUTIVE.

The validity of the title of the United States to land purchased and occupied by it as a military fort, and the identification and definite boundaries of the land, are matters within the scope of the powers and duties of the executive department of the government to determine, and not subject to judicial scrutiny on the trial of a criminal case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 133; Dec. Dig. § 72.*]

4. UNITED STATES (§ 3*)—JURISDICTION—PLACES ACQUIRED FOR MILITARY PURPOSES.

Article 1, § 8, of the Constitution vests in the national government exclusive jurisdiction over places occupied and used for military purposes, when the site has been acquired with the consent of the Legislature of the state in which it is situated.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. § 3.*]

5. CRIMINAL LAW (§§ 853, 854*)—CONDUCT OF TRIAL—SEPARATION OF JURORS—PRESENCE DURING PROCEEDINGS.

The verdict of a jury in a criminal case in a federal court cannot be impeached on the ground that the court, in accordance with its settled practice, permitted the jurors to separate during adjournments and recesses while the trial was proceeding, or refused to exclude the jurors from the courtroom during the argument and decision of motions and questions of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2040; Dec. Dig. §§ 853, 854.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Criminal Law. Case heard on motions after a verdict finding the defendant guilty of murder. Motions denied.

Elmer E. Todd, U. S. Dist. Atty.
Caldwell & Riddell, for defendant.

HANFORD, District Judge. The defendant, having been indicted for the crime of murder committed at the Ft. Worden military post, after a motion to quash the indictment had been denied and a demurrer had been overruled, entered a plea of "not guilty," and after a trial the jury returned a verdict finding him guilty as charged, "without capital punishment." His counsel have interposed in his behalf three motions, viz.: A motion to summon the jurors for examination in open court for the purpose of eliciting facts impeaching the verdict; a motion in arrest of judgment; a motion for a new trial.

The first of the three motions is upon the ground that the trial was prolonged through a number of days, and at each adjournment and recess of the court, previous to the final submission of the case to the jury, the jurors were permitted to separate, and they were free to read, and did read, the daily newspapers in which the case was referred to and commented upon, in a manner prejudicial to the defendant's case. An affidavit in support of the motion alleges that, several days after the verdict had been returned, one of the jurors admitted having had a conversation at his home with a hired man, in which the trial was mentioned. The juror referred to has made a counteraffidavit explaining that the conversation with his hired man was had after the verdict had been returned, and alleging that during the time the case was on trial he did not have any conversation with any person whomsoever in which the case was mentioned.

It is the opinion of the court that the defendant has had a fair trial by a jury composed of fair-minded, intelligent, honest men, and it will not be presumed that they were influenced, in making their decision, by the newspapers. Previous to the arguments made to the jury, the court cited one of the reporters, and in the presence of the jury interrogated him concerning a published article referring to the case, which the jurors necessarily knew was inaccurate, and elicited from him an admission that he was the author of it, and that he had been misinformed in regard to some of the facts; and thereupon the court admonished and advised the jurors to be careful to not give heed to unreliable statements published by the papers, and on each occasion of adjournment the court admonished the jurors to refrain from talking about the case or any subject connected with it, either with each other or with any person, and to not listen to anything which might be said about the case out of court, and to not have any communication on any subject whatever with the parties, witnesses, or attorneys in the case, and to avoid, as far as possible, receiving any impression as to the merits of the case other than what should be made upon their minds by the proceedings on the trial. There is no reasonable ground for supposing that either of the jurors failed to faithfully observe these instructions. I do not entertain even a suspicion of wrongdoing on the part of either of the jurors, therefore I am unwilling to insult

them by instituting the inquisition proposed. It is not good practice to admit the testimony of jurors to impeach a verdict rendered conformably to law, and it would not tend to promote the ends of justice to permit a defendant who has been convicted of a heinous crime to turn the tables by putting his triers on trial, on a mere hope of success in an undertaking to extort from them admissions to prove that the verdict may have been based upon prejudice, and not upon the fact of his guilt proved by the testimony of witnesses.

The motion in arrest of judgment challenges the jurisdiction of the court, the sufficiency of the indictment, and the competency of the evidence upon which it was founded. The specific ground for disputing the jurisdiction of the court will be considered in disposing of the third motion. No flaw in the indictment has been pointed out, nor discovered by the court. As to the remaining ground, it would be sufficient to say that the court does not know what evidence was submitted to the grand jury; but I will make an additional explanation: By the motion to quash the indictment, an attempt was made to show that incompetent evidence in the nature of a confession by the defendant was received and considered by the grand jury, and the present motion is a renewal of that attempt. Such evidence was offered on the trial, and it was excluded by the court; nevertheless, the evidence admitted by the court convinced the trial jury of the defendant's guilt, and it is the opinion of the court that it was amply sufficient to justify the verdict. As the names of the witnesses who testified on the trial are indorsed upon the indictment, there is a necessary presumption that the grand jury was informed by legal evidence of the important facts, and that, if no evidence except that which the court deems competent had been submitted, a true bill would have been founded upon it. It is not the province of the grand jury to pass upon the ultimate question of the guilt or innocence of an accused person. While that body is engaged in the investigation of his case, he is not permitted to be present, nor can his counsel participate in sifting the evidence then. There is no way provided for a review of the evidence elicited upon the preliminary and secret investigation of a case by a grand jury in its entirety, nor will a court permit itself to become involved in endless entanglements by considering affidavits presenting mere fragments of it. Hence all questions as to the relevancy, competency, and sufficiency of the evidence must be determined upon the trial of the case, after a plea of not guilty. It is only in rare instances, when a court is convinced by a showing of facts that the grand jury has been used as an instrument of persecution, or that fundamental principles of jurisprudence have been disregarded in the proceedings of the grand jury, e. g., by compelling an accused person to appear and give incriminating testimony against himself, or where the grand jury was not composed of qualified persons, that a court will set aside an indictment for reasons not apparent on the face of the record. Wharton's *Crim. Pl. & Pr.* (9th Ed.) §§ 363-388; 10 *Enc. of Pl. & Pr.* p. 569; *U. S. v. Terry* (D. C.) 39 Fed. 355.

An instructive opinion on this branch of the law was rendered by Judge Whitson in the case of the *United States v. Wells* (D. C.) 163

Fed. 313. The indictment charged a number of persons with criminal conspiracy, some of whom had been compelled to testify before the grand jury and were subjected to brow-beating cross-examinations. There was a quest for big game, and a United States senator was included among those indicted. He had been acquitted by a jury on a trial before Judge Whitson, and, referring to him in the opinion, the judge said:

"The court has occasion to know that there was no ground for the return of the indictment as to one of the defendants, for it must be assumed that the same evidence was adduced upon the trial that was offered to the grand jury."

The indictment was assailed by pleas interposed by some of the defendants, the opinion sustaining the pleas rests upon substantial grounds, and it does not oppose the general proposition that an exception to a good indictment returned by a lawful grand jury appeals to the sound discretion of the court, and the justice of the case rather than mere technical grounds of objection should be the basis of the court's decision. In that view, the court denied the defendant's motion to quash the indictment, and his motion in arrest of judgment will also be denied.

The grounds for a new trial assigned in the third motion are: (1) Irregularities in the proceedings by which the defendant was prevented from having a fair trial. (2) Misconduct of the jury. (3) Insufficiency of the evidence to prove a crime cognizable in this court. (4) Misconduct of the United States attorney. (5) Errors in the rulings of the court during the progress of the trial and in the instructions to the jury, and in refusing instructions requested in behalf of the defendant.

I believe that the trial was fair, that neither the jury nor the United States attorney were guilty of any misconduct, that no error prejudicial to the defendant occurred, and that a second trial would not result in a verdict more favorable to him. The only points raised by the motion which, in my estimation, are of sufficient importance to require an opinion in writing, are those which challenge the jurisdiction of the court and the regularity of the proceedings.

To decide the question as to the jurisdiction of the court, it is necessary to determine three subsidiary questions, viz.: First. At what place was the murder committed? Second. Is that place within the boundaries of a fort over which the government of the United States exercises military authority? Third. Did the government of the United States have exclusive jurisdiction within said boundaries?

The first is a question of fact for the jury to decide, competent evidence was introduced upon the trial, and the verdict is a conclusive determination of the fact that the murder was committed within an inclosed and guarded tract of land actually occupied by United States soldiers, known as "Ft. Worden," the same being a part of the system of fortifications maintained for the defense of Puget Sound. By documentary evidence and court records, it was proved that the government by purchases made, and condemnation proceedings, acquired land on which to establish said fort, and I hold that the validity of the title so acquired, the identification and definite location of the land, and

the accuracy of its boundaries are matters within the scope of the powers and duties pertaining to the executive branch of the government to ascertain and settle, and not subject to judicial scrutiny in the trial of a criminal case. By this I mean that the property rights and the authority of the national government within defined boundaries cannot be disputed in a collateral proceeding by an individual not pretending to have adverse rights or superior authority. As to all such matters the courts respect the authority asserted by the political department of the government. *James G. Swan (D. C.)* 50 Fed. 108; *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; *Benson v. United States*, 146 U. S. 331, 13 Sup. Ct. 60, 36 L. Ed. 991.

The constitutional provisions and laws applicable to this branch of the case are as follows:

The eighth section of article 1 of the Constitution of the United States vests in Congress, power to provide for the common defense and general welfare of the United States, and—

“to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.”

The Legislature of the state of Washington consented to the acquisition of lands for the public uses of the United States, including the erection of forts, and ceded to the United States jurisdiction over all such lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes aforementioned by statutes enacted January 23, 1890, and February 24, 1891. See *Laws Wash. 1890*, p. 459; *Laws Wash. 1891*, p. 31, c. 18; *Pierce's Code (Ed. 1905)* pp. 1630, 1631, §§ 8900–8902 (*Ballinger's Ann. Codes & St. §§ 2947, 2110, 2111*). The text of the later of these two statutes is as follows:

“That the consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy yards, naval stations, or other needful buildings authorized by any act of Congress, and all deeds, conveyances of title papers for the same shall be recorded, as in other cases, upon the land records of the county in which the land so acquired may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent or other official document or papers describing such land; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided, and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation or set

apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein in the same manner and with like effect as though this assent and cession had not been granted."

Congressional authority for acquiring the site for Ft. Worden is found in acts making appropriations for fortifications and coast defenses. By an act approved June 6, 1896 (Act June 6, 1896, c. 338, 29 Stat. 257 [U. S. Comp. St. 1901, p. 832]), \$500,000 was appropriated for the procurement of land, or rights pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses. Other appropriations were made for similar purposes by acts approved March 3, 1897, 29 Stat. 641, c. 384; May 7, 1898, c. 248, 30 Stat. 400; March 3, 1899, c. 428, 30 Stat. 1250.

Under general authority conferred upon the Secretary of War by Congress (Act Aug. 18, 1890, c. 797, 26 Stat. 316 [U. S. Comp. St. 1901, p. 2518]), these appropriations were expended by military officers subject to the direction of the Secretary of War, and the United States attorney has furnished me with transcripts of records of the War Department, showing that out of these appropriations the necessary sums were allowed for the specific purpose of paying for the site of Ft. Worden.

The question as to the exclusiveness of national authority over Ft. Worden is distinct and separable from the more comprehensive question as to the general scope of national authority by reason of the fact that the definition of murder as a crime against the government of the United States, if committed within a state, includes locality as an essential element; the guilty act must have been committed at a place within the exclusive jurisdiction of the United States, so that exclusiveness of jurisdiction of the national government is an element of the crime and one of controlling importance, affecting the jurisdiction of the court to deal with the murderer.

Early in the history of our government, Mr. Justice Story expounded the seventeenth paragraph of the eighth section of article 1 of the Constitution in the case of the *United States v. Cornell*, Fed. Cas. Nos. 14,867, 14,868. He decided that the phrase "exclusive legislation" comprehended the idea of exclusive jurisdiction, and that when a purchase of land for any of the purposes enumerated in that clause—"is made by the national government, and the State Legislature has given its consent to the purchase, the land so purchased by the very terms of the Constitution ipso facto falls within the exclusive legislation of Congress, and the state jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the State Legislature is by the very terms of the Constitution, by which all the states are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place."

Referring to a clause reserving the right to make service of judicial process of the state contained in the act of the State Legislature consenting to the purchase by the United States government of a site for

a fort, similar in phraseology to the reservation clause in the act above quoted, the learned justice said:

"Not a word is said from which we can infer that it was intended that the state should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state. Now there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another state, in such cases, to execute its processes within its limits. And a cession, or exclusive jurisdiction, may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as, quoad hoc, his own process; * * * and we have not the least hesitation in declaring that a true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Ft. Adams in the United States."

Justice Story's interpretation as quoted harmonizes with the decision of the Supreme Court in the case of *Benson v. United States*, 146 U. S. 326, 13 Sup. Ct. 60, 36 L. Ed. 990. In that case it was further held by the Supreme Court that, without proof of any affirmative act of acceptance by the national government, acceptance of the cession of jurisdiction was to be presumed.

From the laws and proceedings above set forth and the authorities cited, I draw the conclusion that the Constitution vests in the national government exclusive jurisdiction over places occupied and used for military purposes when a site has been acquired with the consent of the Legislature of the state; that the Legislature of this state consented in advance to the acquirement of sites for forts and military posts when authorized by Congress; that, acting under authority conferred by Congress, officers of the United States army, under the direction of the Secretary of War, selected the site of Ft. Worden, and have constructed thereon fortifications and defensive works; and that, at the time of the commission of the crime of which the defendant is accused, the fort was occupied by soldiers of the United States army, and in use as a military post, and that by the verdict of the jury, it has been conclusively determined that said crime was committed within the boundaries of said fort, and therefore at a place within the exclusive jurisdiction of the United States.

The alleged irregularities in the trial of the case, consist of the action of the court in permitting the jurors to separate during adjournments and recesses, and in the refusal of the court to exclude the jury from the courtroom, when requested to do so by the defendant's counsel, in order to permit them to present motions and argue questions of law without the presence and hearing of the jurors. There was no departure from the practice of this court, which has been uniform during the period of 19 years since it was organized, and, although different from the practice in some other courts, nevertheless I am fully convinced that no legal or prejudicial error was committed. The most that can be hoped for from juries in the way of justice and the maintenance of individual rights and the upholding of the laws of the land is that they shall be composed of intelligent, fair-minded, honest men, who have respect for the laws and courage to stand for the principles which they believe in; that the proceedings in criminal

trials in which they participate, shall be conducted without passion or prejudice, and with a purpose to elicit the truth and render true and just verdicts. I deny that in order to be fair towards an accused person, whether he be in fact guilty or innocent, it is necessary or proper to imprison jurors as if they were culprits, or to continually insult their intelligence by excluding them from the hearing of any motion or argument which it is proper for the presiding judge to hear, on a mere supposition that prejudice may be germinated in their minds by hearing the contentions of counsel and the rulings of the court. To so hold it would be necessary to presume that jurors are incapable of understanding rightly what they hear during the progress of a trial, and of discriminating between things that are proper and improper in the application of the law to the facts which they must ascertain, or that by reason of their lack of mental acumen or moral virtue they are objects of suspicion and unfit to be intrusted with the determination of rights dependent upon law and legal evidence. This expression of ideas may shock fogysim, but I believe that it will meet with the approval of conservative believers in the virtue of the jury system, and that it accords with sound principles of jurisprudence.

Holding these views, I cannot convict the court of any irregularities entitling the defendant to a new trial.

UNITED STATES v. BOSTON & M. R. CO.

(District Court, D. Massachusetts. January 5, 1909.)

1. RAILROADS (§ 229*)—OPERATION OF RAILROADS—SAFETY APPLIANCE ACT.

Section 4 of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) requires secure grabirons or handholds at those points in the end of each car where they are reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grabiron or handhold at that point or of any appliance affording equal security with a grabiron or handhold.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

2. RAILROADS (§ 229*)—OPERATION OF RAILROADS—SAFETY APPLIANCE ACT.

If at any place in the end of a car there is not a grabiron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, which afforded equal security with a grabiron or a handhold at that point, the federal safety appliance law (Act March 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), so far as grabiron or handhold at that point is concerned, has not been violated. Having something there which performs all the functions of a grabiron or handhold is just the same thing as having what is properly called a grabiron or handhold at that point.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

3. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—VIOLATION—EVIDENCE.

Unless the government satisfies a jury by a preponderance of the evidence that there was no grabiron or handhold on the car where there should have been one, the jury should find for the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. § 254.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. RAILROADS (§ 229*)—OPERATION OF RAILROADS—SAFETY APPLIANCE ACT—“ENGAGED IN COUPLING AND UNCOUPLING CARS.”

A man in connecting or disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

5. RAILROADS (§ 254*)—SAFETY APPLIANCE ACTS—VIOLATION.

Where a car is not properly provided with grabirons on a given day, and the train stops for a certain time and then goes on again, there are not two violations of the law, but only one, because the car is all the time being moved in the same train. It makes no difference that it is being so moved on two different days.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 769; Dec. Dig. § 254.*]

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

6. RAILROADS (§ 229*)—TRAINS—SAFETY APPLIANCE.

A “train, within the safety appliance act,” is one aggregation of cars drawn by the same engine, but if the engine is changed then there is a different train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7056, 7057.]

(Syllabus by the Court.)

William H. Garland, Asst. U. S. Atty., and Philip J. Doherty, Special Asst. U. S. Atty.

Charles S. Pierce, for defendant.

DODGE, District Judge (charging jury). The statute which we are considering in this case is a statute passed by Congress under the power which is intrusted to Congress by the Constitution to regulate commerce between the several states. Congress makes this law in regulation of interstate commerce; it has the power to make such regulations. If we were dealing here with a railroad or a train which was not engaged in interstate commerce at all, this statute would not apply. It does not seem to be disputed in this case that the defendant railroad, and the car with which you are concerned, were both engaged in interstate commerce, and therefore were subject to the provisions of the statute. The defendant railroad is charged in the declaration which the government has filed against it with five different violations of the statute. It is for the jury to say as to each of those violations charged whether the defendant has committed it or not.

As to three of the violations charged, while the jury is still to say whether this defendant has committed them or not, they are saved the trouble of deciding any disputed questions of fact, as this case goes to them. As to the violation of the statute charged in the second count of the declaration, the defendant admits that it has been committed, and that the jury may find for the plaintiff upon that count. The same as to the third count of the declaration—the jury are to find for the plaintiff also on that count by consent of the defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

As to the fourth count of the declaration, the court has ruled that the evidence is not sufficient to warrant a verdict for the plaintiff, and the jury, therefore, will find for the defendant as to that count by direction of the court. You are aware, gentlemen, that in all cases tried before you questions of law are for the court and questions of fact are for the jury. The question presented here on the fourth count of the declaration is an example of a question of law. The court takes upon itself the responsibility of directing the jury to find for the defendant on that count. In this instance, and in all other instances where either party thinks that the court has decided the question wrongly, they have a remedy by appeal. They may go to the Circuit Court of Appeals within this circuit and have that court determine whether this court has rightly decided the question or not. But it is for you to follow the direction of this court for the time being, in order that the question may be properly presented on appeal. Therefore although your verdict as to the fourth count is by direction of the court a finding for the defendant, it is a verdict of which the court takes the entire responsibility.

Now, gentlemen, I come to the two counts which are submitted to you for your consideration. They both relate to the same car—a car No. 24,089, a car marked “New York, New Haven & Hartford Railroad,” a box car—and the government charges as to that car, that while being hauled in a train from Springfield to the Brightwood yard, that on September 19, 1907, it was not provided with a grabiron or handhold such as the law requires. And in the fifth count, as to the same car, the government charges that on September 20, 1907, while being moved from the Brightwood yard northerly, it was not provided with a grabiron or handhold such as the law requires. It is not disputed, as I have stated, that this car was being used in interstate commerce at these times. Now, the question for you to decide is: Did that car, or did it not, have on it grabirons or handholds such as the statute requires that it should have while it was being moved by the railroad in interstate commerce?

I will read to you once more the language of the section of the statute with which we are concerned:

“From and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.” Act March 2, 1893, c. 196, § 4, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174).

There is no question made either on September 19th or September 20th about the sides of this car. We are concerned only with the ends. Now, taking that section as it stands, and giving due weight to the language in which the requirements are expressed, we have to consider just what they mean as applied to the question arising in this case, and I shall instruct you, gentlemen, that section 4 requires secure grabirons or handholds at those points in the end of each car where they are reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grabiron or handhold at that point or of any appliance

affording equal security with a grabiron or handhold. If at any place in the end of this car there was not a grabiron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, or whatever else you please, which afforded equal security with a grabiron or a handhold at that point, then I shall instruct you that the law has not been violated so far as a grabiron or handhold at that point is concerned. Having something there which performs all the functions of a grabiron or a handhold is just the same thing as having what is properly called a grabiron or a handhold at that point. It may not be possible to say that a coupling lever or a ladder is a grabiron or a handhold, but if it affords the same security to a man who may need to use one that a grabiron or a handhold, properly speaking, would afford, then, in my judgment, the statute has not been violated.

The question of fact, therefore, for you is: Are you satisfied by a preponderance of the evidence that there was anywhere in the end of this car a grabiron or a handhold wanting where it should have been according to the test which I have given you; that is, where a grabiron or a handhold would be reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grabiron or handhold at that point?

Now, that question you are to determine by a preponderance of the evidence here. You have listened to the evidence of the two inspectors of the Interstate Commerce Commission, who tell you that they examined this car on the two days referred to, and they described to you pretty fully what they found on the end of the car in question, and they tell you that at a certain place there was no grabiron or handhold. Now, on the other hand, you have the evidence introduced by the defendant railroad, which may induce you to think that the presence of a grabiron or a handhold where the inspectors have said that one was absent would make no difference, so far as affording greater security to men is concerned. You are to be satisfied by the government in this case by a preponderance of the evidence that there was no grabiron or handhold where there should have been one. If you are so satisfied, you should find for the plaintiff for the government in this case. Unless the government has so satisfied you by a preponderance of the evidence, you should find for the defendant.

Now, you are to remember in this case that you are to decide it according to a preponderance of the evidence. In all the other cases to which you have listened here, and which, as I recall it, have been criminal cases, I have instructed you that the government, in order to convict, must prove its case beyond a reasonable doubt. This not being a criminal case, according to my view, the same rule does not prevail. A preponderance of the evidence in this case is sufficient; and what does that mean? It means that after balancing and considering the evidence on the one side and on the other you are not left in doubt, but that you find that the evidence for the government outweighs the evidence brought here to meet it. If your minds, after weighing and considering the evidence on both sides, are left in doubt,

if they are left equally balanced on the question, there is no preponderance of the evidence; and in that event, as I have told you, your verdict should be for the defendant. It is necessary, in order to find a verdict for the plaintiff, that the evidence for the government should outweigh that for the defendant.

I have stated to you that grabirons or handholds are required by the statute to be at such points in the end of this car where they are reasonably necessary in order to afford greater security to men in coupling or uncoupling cars. Something has been said here about men connecting or disconnecting the air hose with which the air brakes are operated, and the question has been raised, is a man between the cars simply to connect or disconnect air hose a man engaged in coupling and uncoupling cars within the meaning of the statute? Now, on that point I instruct you that a man engaged in connecting or disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the statute, if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars.

The government claims here that it has proved to you by a preponderance of the evidence not only one violation of the statute, but two. Now, on that point, gentlemen, you will consider whether or not this car, in the first place, was unprovided with grabirons or handholds, as it should have been, and, in the second place, whether it was moved by this railroad in more than one train. Let us suppose that you have found that that car was on a given day not properly provided with grabirons and handholds as the statute requires. Let us suppose that that car was at the time being moved in a train. Let us suppose that that train stopped for some purpose, no matter what, for a while, and, after having so stopped for a certain time, started up and went on again. Now, in a supposed case like that, my instruction to you would be that there were not two violations of the law, but only one, because the car was all the time being moved in the same train. I should instruct you, gentlemen, that, so long as the car is being all the time moved in the same train, it makes no difference that it is being so moved on two different days; that so long as the car continues being moved by the railroad on the same train it makes no difference that September 19th has run out and September 20th has come in; that that does not make two distinct violations of the statute, but the movement of the car being, though on those two different days, all the time in one train, there has only been one violation of the statute. You will consider upon the evidence to which you have listened whether this car has been moved in more than one train. If you so find, it will be proper, provided you have been satisfied by a preponderance of the evidence that it was being so moved without the grabirons and handholds which the law requires, to find for the plaintiff both on the first count and on the fifth count. If, on the other hand, you are not satisfied by a preponderance of the evidence that the car was moved in two trains, but was only so moved in one, that both on September 19th and on September 20th the car was continued all the time in one train, you should then find for the

plaintiff only on one of those counts, either the first or the fifth, but you should not find for the plaintiff on both of them.

Is there anything else which counsel desire me to speak to the jury about?

(Counsel confer with the court at the bench.)

The Court: In regard to what makes a train, Mr. Foreman and gentlemen, by "train" I understand one aggregation of cars drawn by the same engine, and, if the engine is changed, I understand there is a different train.

Verdict for government, four counts.

LEWIS et al. v. GARLOCK et al. (UNITED STATES, Intervener).

(Circuit Court, D. South Dakota, W. D. January 7, 1909.)

WOODS AND FORESTS (§ 8*)—TIMBER ON MINING CLAIMS—NATIONAL FORESTS.

Whatever rights the holders of unpatented mining claims may have in the timber on their claims are subject to the paramount title of the government, and, when such claims are in a national forest, timber thereon which is dead, matured, and infested with insects so as to be a menace to the young and growing trees may be sold by the Forest Service under the regulations promulgated by the Secretary of Agriculture.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

In Equity.

Helm & Atwater, for plaintiff.

E. I. Grantham, for defendants Garlock & Ainslee.

Edward E. Wagner, U. S. Dist. Atty., and William G. Porter, Asst. U. S. Dist. Atty.

CARLAND, District Judge. This cause coming on to be heard on this 7th day of January, 1909, at this term of court, was argued by counsel pursuant to notice and stipulation of all of the parties to said action, and thereupon all parties interested being legally before the court, and upon consideration of the stipulation of all the parties, duly filed in this court, the court specifically finds, as follows:

1. That under and by virtue of the provisions of an act of Congress approved June 4, 1897 (Act June 4, 1897, c. 2, 30 Stat. 35 [U. S. Comp. St. 1901, p. 1538]), and an act of Congress approved June 6, 1900 (Act June 6, 1900, c. 804, 31 Stat. 661), and an act of Congress approved March 4, 1907 (Act March 4, 1907, c. 2907, 34 Stat. 1269, 1270 [U. S. Comp. St. Supp. 1907, p. 508]), and the act or acts amendatory thereof and supplementary thereto, and the rules and regulations promulgated by the Secretary of Agriculture pursuant to the said acts, the defendants, Garlock & Ainslee, a copartnership, on the 24th day of September, 1907, made application to purchase at private sale certain timber within the Black Hills National Forest of South Dakota, duly advertised for sale in the Custer Chronicle, a newspaper of general circulation in the state of South Dakota, wherein the said forest reserve exists, by notice of sale published for not less than 30 days before April 22, 1907, no satisfactory bid having been received, the said timber, being nonmerchantable, dead, and insect-in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fested timber, designated by the forest officers, situate upon the southwest quarter of section twenty-nine (29), southeast quarter of section thirty (30), section thirty-one (31) (except northwest quarter of the northwest quarter), west half of the northwest quarter section thirty-two (32), township three (3) south, range five (5) east, and north half and north half of the southwest quarter of section six (6), township four (4) south, range five (5) east, B. H. M., within the Black Hills Forest Reserve, in the state of South Dakota, and within Custer county within said state, estimated to be about 150,000 feet B. M., more or less, of bull pine saw timber, and 19,200 feet B. M. of bull pine sawlogs, and 50 cords of wood, which said application was on the 14th day of October, 1907, duly approved by J. F. Smith, supervisor.

That the said timber, at the time of said purchase, consisted of dead, matured, and large growth trees, and the same was then and there infected with destructive insects, bugs, and timber beetles, and the removal thereof from the said Forest Reserve was necessary for the protection and to prevent similar infection of the standing and growing timber and younger growth on the said Forest Reserve, and the sale thereof to Garlock & Ainslie, copartners, by the United States, intervener, was made largely to effect the removal of the same within a certain time so as to prevent the greater infection of the growing timber and the spread of the ravages of the said insects into the younger growth of timber thereon.

2. That the sale of the said timber was duly advertised and purchased by the defendants, Garlock & Ainslie, copartners, under the provisions of the statutes aforesaid, and particularly under the rules and regulations duly made and promulgated by the Secretary of Agriculture under authority and pursuant to said statutes aforesaid mentioned. That the said timber was duly marked by forest supervisors, and cut under government supervision, and paid for at the government price, to wit, \$1 per thousand feet, the fair and reasonable value thereof, and that no part of said timber in excess of 4,443 feet and one cord of wood has been cut upon the lands and premises aforesaid described and claimed by plaintiffs.

3. That the claim of plaintiffs in and to said lands is based upon the location of two certain mining lodes or claims, known as the Halyfax and the Atlantia lodes, within the boundaries of the lands hereinbefore described. That the said mining lodes or claims have not passed to patent. That a portion of the timber hereinbefore described is situated upon said mining lodes or claims. That the interest of plaintiffs in and to said mining lodes is that of locators of the same under the mining laws of the United States and the state of South Dakota. That no patent has issued to said locators for said mining lodes, and their title is simply held under a certificate of location of the said mining claims.

4. That the timber hereinbefore described belongs to the United States and is the property of the United States, and the title to the same is now and at all times mentioned herein was vested in the United States, and that the United States, intervener in this suit, has the absolute control of the disposal of the said timber hereinbefore described under and by virtue of the said acts of Congress and the rules and

regulations promulgated by the Secretary of Agriculture in accordance with and pursuant to the said statutes. That the forest supervisor of the Black Hills Forest Reserve, under and by direction of the Secretary of Agriculture, and pursuant to authority and laws of the United States and the rules and regulations thereunder, hereinbefore mentioned, took possession about November 12, 1907, of the timber situated upon the said lands and mining claims hereinbefore described, and at the time of the institution of this action, to wit, December 7, 1907, the defendants Garlock & Ainslie, a copartnership, under and by virtue of the aforesaid contract of purchase, had possession of the said dead and down timber and insect-infected timber on the aforesaid lands, and were then and there holding the same under a legal contract for purchase, and that plaintiff then and there had no title or right to the possession and control of the said insect-infected timber hereinbefore described.

5. That the United States, intervener herein, rightfully and lawfully took possession of the said insect-infected timber, then and there a menace to the forest growth upon said lands hereinbefore described by reason of its being infected with bugs and timber beetles, and under the provisions of the said acts of Congress, and pursuant to the rules and regulations promulgated by the Secretary of Agriculture, authorized by said acts of Congress, disposed of the said insect-infected timber. That plaintiffs herein are and were without authority and have no legal right to interfere with or hinder the disposal of said insect-infected timber when seized by the United States, intervener, and disposed of as provided by the statutes of the United States and the rules and regulations authorizing the same. That, under the statutes of the United States and the mining laws of the United States, United States, intervener, possessed and was vested with a paramount right and superior ownership in and to said mining claims and the lands upon which said insect-infected timber was situated within the said Black Hills Forest Reserve, and that whatever rights the plaintiffs possessed following from their location, discovery, and attempted appropriation of said mining lands were inferior to and subject to the ownership of the United States, intervener herein.

6. That the allegations and averments in the amended answer of the said defendants and the United States, as intervener, are true.

Therefore, it is hereby ordered, considered, and decreed that the temporary injunction, granted in the above-entitled action on the 7th day of September, 1907, be, and the same is hereby, in all respects dissolved, and a permanent injunction and restraining order in the above-entitled suit is absolutely denied. That the complaint of plaintiffs be, and is hereby, dismissed upon the merits and for want of equity.

In re S. SPITZEL & CO

(District Court, E. D. New York. February 24, 1909.)

BANKRUPTCY (§ 140*) — ADMINISTRATION OF ESTATE—DISPOSITION OF PATENTED ARTICLES—LICENSE CONTRACT.

A bankrupt was a dealer in patented pens, under a license from the manufacturer and owner of the patent which required him to sell only at a fixed retail price and to account for all pens sold at the list price, and for all not sold, which he was privileged to return. *Held* that, as to the pens on hand at the time of bankruptcy, which had not been paid for, the trustee was bound by the terms of the license, and must either return the same, or, if he sold them, do so at the retail price, and pay over the wholesale price to the manufacturer.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In Bankruptcy.

Watson & Raymond, for petitioner.

Thomas & Oppenheimer, for receiver.

CHATFIELD, District Judge. S. Spitzel & Co. are in bankruptcy. They conducted a jewelry business, and sold Waterman fountain pens, under a license which contains no provisions as to revocation by contingencies such as insolvency, but is terminable at the pleasure of the parties. The contract also contains a provision that the licensee may return, at the cost price, any pens not sold by him, and receive full credit therefor. The license is a privilege to sell at retail for not less than the regular retail price, and to receive credit at the list price for any pens not sold. The Waterman Company is a creditor of S. Spitzel & Co., and has also brought reclamation proceedings for a quantity of pens on hand at the time of the filing of the petition. The matter has been referred to a special commissioner, and he has reported that, without passing upon any question as to what shall be done with the pens, the reclamation proceeding must be denied, inasmuch as title has passed.

The attorney for the receiver has cited certain cases, among them *Wilder v. Kent et al.* (C. C.) 15 Fed. 217, under which a sheriff has been held to have delivered, upon sale under execution, the right to use patented property without the vendee thereof being liable for infringement; and he argues that in the present situation the receiver or trustee in bankruptcy can sell the pens under the original license. As the special commissioner has said, this has no bearing upon the reclamation proceedings; but the question might as well be considered at the present time. The title to the pens has passed. The license was valid, and was a personal one to the bankrupt. The receiver, before adjudication, was merely acting for the court in the place of the bankrupt, and might well be held to have the right to dispose of the individual pens at the same price which the bankrupt would obtain, at least until the license was revoked. After adjudication no sale could be had, unless at retail; for if the trustee stands in the shoes of the bankrupt, to the extent of having the benefit of the license,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he must respect that license to the extent of not violating its terms as to sale.

The question immediately arises, therefore, whether the trustee, if he acts under the license for the purpose of selling the pens (it being assumed that a purchaser at retail for value would not be an infringer, unless he had knowledge and was contributing to the infringement), can repudiate the contract by which he is bound to sell only under certain conditions, and under which he would have to account for all pens sold at retail by him at the agreed rate, and also for all pens not sold. The trustee contends that this would be creating a preference, that he has the right to sell the pens under the license, and, instead of turning in the full wholesale price, to compel the Waterman Company to prove its claim to the entire lot of pens as a general creditor.

The court is not willing to countenance such a situation. The report of the special commissioner is manifestly correct, and must be confirmed. The pens were sold, title passed, and they cannot be made the basis of a reclamation proceeding. But, assuming that they are a part of the bankrupt's estate, nevertheless, as a patented article, they are subject to the rights of license. Such a license is in the nature of a contract, and the conditions of the contract with reference to each pen sold are not fulfilled until the sale. If, therefore, the receiver, representing the bankrupt, or the trustee, desires to carry on the contract, he should comply with its terms; and, assuming that the condition under which the Waterman Company is to receive the contract price for each pen is not fulfilled until the sale is made, such contract would not be carried out until after the payment to the Waterman Company had been made.

If adjudication has been had, or if adjudication has not yet been had at the time of sale of the particular pen in question, still the sale will have been made under a license which, if it has not been revoked, must be considered assumed by the receiver or trustee, and, if assumed, the question of infringement would seem to determine that the exact terms of the license must be complied with, and the wholesale price of the pens accounted for to Waterman & Company, even if they thereby secure somewhat the same results as from a conditional sale under the New York state statute.

In re MORSE.

(District Court, E. D. New York. February 23, 1909.)

BANKRUPTCY (§ 410*)—DISCHARGE—TIME FOR APPLICATION—POWER TO EXTEND.

In view of the provision of Bankr. Act July 1, 1898, c. 541, § 14a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), limiting the time within which application for a discharge may be filed to 18 months, even when the bankrupt was unavoidably prevented from filing it within the year prescribed, a court of bankruptcy has no power to open an adjudication entered on default in involuntary proceedings, and make a new one, to per-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mit the bankrupt to file an application for a discharge, which he neglected to do within the time prescribed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 410.*]

In Bankruptcy. On application to open adjudication.

Armstrong, Brown & Boland (Pierre M. Brown, of counsel), for bankrupt.

Ralph J. M. Bullowa (Walter E. Meyer, of counsel), for creditor.

CHATFIELD, District Judge. The situation in this case is exactly similar to that of *In re Schnabel* (recently decided) 166 Fed. 383. The bankrupt would seem to have been in a position to apply for a discharge in an involuntary proceeding brought against himself upon certain debts and obligations growing out of the insolvency of a corporation whose paper he had indorsed. The adjudication of the petitioner as an individual was had upon the 15th day of March, 1904, and although the time of the bankrupt had been kept open, for the purpose of answering or pleading, for some days after the return, no answer was filed, nor was any question raised in the proceeding, and the matter has been finally closed.

In order to avoid the difficulties of the questions raised in the *Schnabel Case*, supra, the bankrupt has moved to open the adjudication, and for leave to apply for a discharge therein; it appearing that he at that time had, and has now, no assets, so that the creditor's rights are not injured thereby. As has been said, it seems, for the reasons stated in the *Schnabel Case*, impossible to allow, indirectly, relief in a matter as to which the bankrupt has allowed a default, and has thus put himself in a position of having been refused a discharge.

It is suggested on behalf of the bankrupt that this court has power to control—that is, to open—an adjudication made by it at any time, where the circumstances show that no change of relation between the parties has occurred, and where no injustice would result. It has been held that a proceeding in bankruptcy is continuous, in the sense that the sessions of the bankruptcy court are not divided by statute into terms. *In re Ives*, 113 Fed. 911, 51 C. C. A. 541. For this reason a decree in bankruptcy does not become a judgment, which after the expiration of the term can be changed only on appeal, or to correct clerical mistakes. Nor, under the present application, is any such question as the power of a court of equity, when fraud appears, to be considered.

The present motion is not based upon allegations of fraud, mistake, or error of law in the adjudication. The bankrupt admits that he not only allowed (and to a certain extent consciously allowed) the default at the time of the entry of the adjudication, but that he neglected to apply for a discharge within the period specified for that purpose; and, further, it now appears from the record that one of the creditors in the bankruptcy proceeding against the corporation, upon whose notes the present individual bankrupt was indorser, has sued him upon that indorsement, that because of his lack of discharge he could pre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sent no defense to the suit, that judgment has been obtained, and that upon supplementary proceedings he is shown to have a salary which may be reached, to a certain extent, under the laws of the state of New York. If the only question involved were that of opening a default, the court would feel disposed to grant the motion, as no one's rights would seem to be materially injured by the change of status since the adjudication. But section 14 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), after providing that "after the expiration of one month, and within the next twelve months subsequent" to adjudication, a discharge may be applied for, provides specifically:

"If it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

Congress has thereby limited the period within which, even in the case of unavoidable necessity, an application for discharge can be granted, and while in the present instance great hardship would seem to be involved, it would be much more dangerous to attempt to restore conditions by opening an adjudication, and thus to get around the entire system of proceedings under the bankruptcy law, than the equities of any particular case would justify.

In re COLUMBIA FIREPROOF DOOR & TRIM CO. .

(District Court, E. D. New York. February 23, 1909.)

BANKRUPTCY (§ 188*)—LIENS—RIGHTS OF TRUSTEE.

The trustee of a bankrupt corporation, which took title to property expressly subject to certain chattel mortgages thereon, cannot attack the validity of such mortgages on the ground that they were not recorded in a county where one of the original mortgagors resided, as required by the state statute; his rights being measured by those of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 286; Deco Dig. § 188.*]

In Bankruptcy.

Conway & Williams, for trustee.

Chilton, Goldstein & Rockmore, opposed.

CHATFIELD, District Judge. The trustee in bankruptcy has in his possession certain property upon which chattel mortgages were originally given by two men, named Rapaport and Dolgow, on the 24th day of August, 1907. These chattel mortgages were properly filed in the office of the register of Kings county, where the mortgagor Dolgow resided, but were not filed in the county of New York, where the mortgagor Rapaport resided. The statutes of New York provide that a chattel mortgage shall be void against creditors of the mortgagor, unless it is filed according to statute, and further provide that where there are two or more mortgagors, residing in different coun-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ties, the mortgage must be filed in each county where a mortgagor resides.

Shortly after the making of these chattel mortgages, the machines covered thereby were transferred by the mortgagors to a corporation in which the mortgagors were officers, and the title vested in the corporation was taken expressly subject to the rights of the mortgagee. Thus, as between the new corporation and the mortgagee, the debt and the mortgage would be undoubtedly valid, and no question seems to have arisen, up to that point, with reference to any creditor of the original mortgagors. Somewhat later the corporation was thrown into bankruptcy, and the creditors of the corporation now seek to hold these particular machines as free from the mortgage, on the ground that the original filing did not comply with the statute, and that therefore the mortgage is void.

It must be assumed that the creditors of the bankrupt corporation have no greater rights, so far as title is concerned, than the corporation had. They are not in the position of innocent holders for value. The trustee has only succeeded to the title which the bankrupt had, and this title to the machines in question was subject to the claim of the mortgagee. If the mortgagee had been a creditor of the bankrupt corporation when he received the mortgage—that is, if the bankrupt corporation had been the mortgagor, and the mortgage had not been properly filed—the mortgagee would have the rights of a general creditor, and no more. His lien would be lost. In *re Shiebler* (D. C.) 163 Fed. 545. But inasmuch as the estate of the bankrupt was increased only to the extent of the equity in the property over the mortgage, and inasmuch as the creditors have not been injured, nor had their positions changed by any withdrawal or encumbering of the assets of the bankrupt corporation, through the making and failure to record the mortgage in question, there would seem to be no reason for attempting to extend the precise language of the statute, and to hold the mortgage void as against the creditors of the bankrupt corporation, for no reason other than that the mortgage might have been attacked by the creditors of a different individual. This doctrine has been expressly held in the case of *Talcott v. Hurlbert et al.*, 143 Cal. 4, 76 Pac. 647.

In New York the case of *Wooster v. Sherwood*, 25 N. Y. 278, states the same doctrine—that creditors obtain no greater rights than the debtor had—with reference to properties taken subject to an existing lien, even if that lien be imperfect as against a prior owner's creditors. This case held that this doctrine covers even the case of an innocent purchaser of the property in question from the individual who took the property subject to the imperfect lien; that is, a person who acquired property, knowing that it was encumbered by a lien good as against the maker, was held by the New York court to have been guilty of conversion in disposing of that property to an innocent third party, and his transfer, therefore, determined to have passed no title.

The present case does not go nearly so far as the case decided by the New York Court of Appeals, and there would seem to be no doubt that the mortgagee is entitled to the enforcement of his lien.

GAMBLE-ROBINSON COMMISSION CO. v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1909.)

No. 2,712.

1. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—NO DISCRIMINATION BY DEMAND OF PREPAYMENT OF CHARGES.

An interstate carrier does not subject a consignee to an undue or unreasonable prejudice or disadvantage under section 3 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) by exacting, after due notice to it, the prepayment of charges for transportation of all property consigned to it, while it does not require such charges to be paid in advance upon freight consigned to others similarly situated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*]

2. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT PROHIBITS UNDUE AND UNREASONABLE PREJUDICES AND DISADVANTAGES ONLY.

The interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) does not prohibit the giving of all preferences and advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*]

3. CARRIERS (§ 32*)—SAME—CARRIER MAY EXERCISE COMMON-LAW RIGHTS SAVE AS PROHIBITED BY INTERSTATE COMMERCE ACT.

A common carrier has the right under the common law to demand the prepayment of charges for freight of one, and to give credit for them to another similarly situated.

An interstate common carrier is free to exercise all his rights under the common law to the full extent to which such exercise has not been made unlawful by the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*]

4. CARRIERS (§ 32*)—BAD MOTIVE FOR LAWFUL ACT CREATES NO CAUSE OF ACTION.

The fact that a carrier, for the purpose of injuring the business of a consignee, or harassing it, subjects it to a prejudice or disadvantage which is neither undue nor unreasonable, does not change the nature of the prejudice or disadvantage or create any cause of action therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*]

5. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—PREPAYMENT OF CHARGES FOR FREIGHT—“UNDUE OR UNREASONABLE PREJUDICE OR DISADVANTAGE”—FACTS—CONCLUSION.

The plaintiff is a corporation engaged in buying, selling, and dealing for commissions in fruit, vegetables, and dairy products at Minneapolis, and it has offices at St. Paul, Rochester, and Mankato, in Minnesota, and Aberdeen in South Dakota. The defendant is a common carrier. It has railroad stations at those towns, and lines of railroad through those states and adjoining states. It is the custom and usage of such carriers, and of the defendant, for the terminal carrier to advance the charges of connecting lines upon freight consigned to parties at those stations, to transport the freight and deliver it to the consignees, also to receive freight at its stations and to transport and deliver it to the consignees, to hold the bills until the questions regarding the correctness of the charges on its lines and on the connecting lines have been adjusted, and then to collect the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bills of the consignees. From a bad motive the defendant, after notice, refused to advance charges to connecting lines, to receive and transport freight consigned to the plaintiff, unless the charges upon it for transportation were prepaid, while it continued to give credit to other consignees similarly situated according to the usage and custom.

Held: These acts did not subject the plaintiff to undue or unreasonable prejudice or disadvantage within the meaning of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*]

Hook, Circuit Judge, dissenting.

(Syllabus by the Court.)

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

The alleged error in this case is that the court below sustained a demurrer to the plaintiff's complaint, and the material facts alleged therein were these: The plaintiff is a corporation engaged in buying and selling fruit, vegetables, farm and dairy products, and in a general commission business in these commodities at the city of Minneapolis, in the state of Minnesota, and it has branch offices at St. Paul, Rochester, and Mankato in that state, and at Aberdeen in South Dakota. The defendant is a railroad corporation and a common carrier. It has offices, agents, and agencies in St. Paul and Minneapolis. It owns and operates railroads in Iowa, Illinois, Minnesota, Dakota, and Wisconsin, and it has direct connections, by means of its own or other railroads, between its stations in those states and St. Paul, Minneapolis, Mankato, Rochester, and Aberdeen. Prior to December 15, 1906, it was the uniform custom and usage of railroad carriers, and of the defendant, to accept shipments of the products that have been named at local stations without the prepayment of freight, to take from the shipper a written guaranty of such payment, to deliver the products to the consignees in the cities named, and afterwards to collect of these consignees the charges for transportation, "and in case of any question arising as to the correctness of any transportation charge upon the line of the terminal or any connecting carrier, such terminal carrier takes the matter up for adjustment and holds the freight bills until an adjustment is made." In case shipments of these products were received by carriers from connecting lines, the custom and usage was for the terminal carrier to pay the charges of the connecting lines and to collect for the entire transportation from the consignees at destination after it had delivered the goods to them. These customs and usages prevailed in transactions between common carriers and all reputable and responsible business houses, and the plaintiff was one of that character. The plaintiff had built up a commission business, a large part of which can be conducted only by the use of the defendant's railroad, and the charges for transportation which it paid to the defendant amounted to several thousand dollars a month. On December 15, 1906, the defendant notified its agents and connections that it would not thereafter accept freight consigned to the defendant, either from shippers or from connecting lines, unless the transportation charges thereon were prepaid, and it has since refused to accept such freight without prepayment. At the same time it has continued to receive for and to deliver freight to the competitors of the plaintiff who are similarly situated without the prepayment of transportation charges. This course of action was adopted by the defendant to harass the plaintiff, to injure its business and its credit, to give its competitors an unequal and unreasonable preference and advantage, and to subject it to an unequal and unreasonable prejudice in the transaction of its business, and it has that effect. It has impaired the plaintiff's credit and its financial responsibility and caused it considerable loss of business, and for these damages it demands a judgment of \$50,000.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Walter Holsinger, for plaintiff in error.

L. L. Brown (W. D. Abbott and S. H. Somsen, on the brief), for defendant in error.

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

SANBORN, Circuit Judge (after stating the facts as above). Section 3 of the act of February 4, 1887, commonly called the "Interstate Commerce Act," provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 24 Stat. 380, c. 104 (3 U. S. Comp. St. 1901, p. 3155).

Is it a violation of this section for a common carrier which customarily delivers to consignees a certain class of freight, holds the freight bills until after any question arising concerning the correctness of any transportation charges upon its line and upon connecting lines over which the freight has been transported has been adjusted, and then collects them, to refuse to grant such a credit to a particular consignee and to require prepayment of freight bills by it while it still continues to extend credit to others similarly situated? In other words, is it a violation of this section for a railroad company to refuse to loan to one consignee without interest the moneys owing to it for transportation charges earned by it and for those paid by it to connecting lines until the consignee's claims that such charges are incorrect have been settled, when it customarily makes such loans to other consignees? This is the question which this case presents, and it is well to perceive clearly the nature of the controversy inherent in it and the amount actually involved before entering upon the discussion of the issue it presents.

The plaintiff is a commission company dealing in perishable products, such as fruit, vegetables, farm and dairy products, claims for errors in the transportation charges upon which and for damages from the transportation of which frequently arise and are met with great difficulty after the products have been delivered. The plaintiff alleges that it is the custom of the terminal carriers to advance the transportation charges upon such products to connecting lines, to deliver the products to the consignees, "and afterwards to collect the reasonable and proper charges for transportation, and, in case of any question arising as to correctness of any transportation charge upon the line of the terminal or any connecting carrier, such terminal carrier takes the matter up for adjustment and holds the freight bills until an adjustment is made," and that the defendant has refused to follow this custom and has demanded of it prepayment of the transportation charges on the freight consigned to it, and has refused to accept the freight without such prepayment, although it follows the custom in the treatment of its competitors similarly situated. It further alleges

that the sum paid by it to the defendant for its transportation charges and those of connecting lines has amounted to several thousand dollars per month. A liberal interpretation of several thousand in this pleading is three thousand, and the complaint fails to show that the actual amount involved here is more than the interest on \$3,000, for by the deposit with the railroad company at the commencement of each month of \$3,000 to prepay its charges for freight during that month all of its alleged \$50,000 damages would have been avoided. In the light of these facts, we turn to the question of law to be determined.

There is a statute of the state of Minnesota which declares that it is unlawful for any common carrier to make or give any unequal or unreasonable preference to any person or corporation, or to subject any person or corporation to any unequal or unreasonable prejudice (Rev. Laws Minn. 1905, § 2009), and counsel argues that his complaint states a cause of action under this statute. There is, however, no averment in it of any diversity of citizenship of the parties or of any other ground of jurisdiction of a national court over a cause of action for the violation of this state statute, and for that reason the question whether or not the facts alleged disclose a disregard of that law was not judicable in the court below and is not so here, and it is dismissed without further consideration. *Little Rock & Memphis R. Co. v. St. Louis S. W. Ry. Co.*, 11 C. C. A. 417, 419, 63 Fed. 775, 777, 26 L. R. A. 192.

Prior to the enactment of the act of February 24, 1887, to regulate commerce among the states, interstate railway traffic was regulated by the principles of the common law, and under those principles common carriers had the right to require the prepayment of charges for freight of one or more persons or corporations, and to give credit for such charges to other persons or corporations similarly situated. *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699; *Southern Indiana Express Co. v. United States Express Co.* (C. C.) 88 Fed. 659, 662; *Randall v. Railway Company*, 108 N. C. 612, 13 S. E. 137.

That act left common carriers free to exercise to their full extent all the rights and privileges they had under the common law, so far as these rights and privileges and their exercise were not rendered unlawful by the provisions of that act. That act did not make all preferences, advantages, prejudices, or disadvantages unlawful, but those only which are "undue and unreasonable." *Atchison, Topeka & Santa Fé R. R. Co. v. Denver & New Orleans R. R. Co.*, 110 U. S. 667, 673, 680, 682, 4 Sup. Ct. 185, 28 L. Ed. 291, in which the Supreme Court held that under the Constitution of Colorado, which prohibited any undue or unreasonable discrimination in charges or facilities, the refusal of the Santa Fé Railroad Company to stop its passenger trains at a junction of the railroad of the New Orleans Company with its railroad, to carry passengers and freight from that point at the same rate which it would receive if the passengers or freight were carried from the junction of the Santa Fé Company and the Denver & Rio Grande Railway Company in the same town, and to grant to the New Orleans Company through billing, through routing, through ticketing, and through checking of baggage, when it granted

all these things to the Denver & Rio Grande Railway Company, a competitor of the New Orleans Company, was no violation of this Constitution, because the preferences, advantages, prejudices, and disadvantages thus created, though clearly discriminatory, were not undue or unreasonable. Although the opinion in this case was not a construction of the interstate commerce act, it interpreted a provision in the Constitution of Colorado identical in effect with the paragraph in the third section of that act under consideration, and furnished the standard for its construction, as Judge Jackson declared in *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C.) 37 Fed. 567, 629, 2 L. R. A. 289.

Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 263, 276, 12 Sup. Ct. 844, 848, 36 L. Ed. 699, where the Supreme Court held that the charge of a less rate for the transportation of 10 or more persons on a party rate ticket than was charged a single individual, although it created clear inequality and discrimination, did not give to the former an undue or unreasonable preference or subject the latter to an undue or unreasonable disadvantage within the meaning of the third section of the act under consideration, and said, "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable"—page 276 of 145 U. S., page 848 of 12 Sup. Ct. (36 L. Ed. 699), affirming *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.* (C. C.) 43 Fed. 37, 46, 47. *Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 167 U. S. 633, 644, 17 Sup. Ct. 986, 42 L. Ed. 306.

Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co. (C. C.) 51 Fed. 465, 466, 467, 472, 473; *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co.*, 9 C. C. A. 409, 410, 412, 413, 61 Fed. 158, 159, 161, 162. In this case the Northern Pacific Company, which owned a railroad from Portland, Or., to Seattle, Wash., and St. Paul, Minn., refused to receive and transport freight originating east of the 97th meridian and destined to points on its own line and on its connecting lines north of Portland tendered to it by the Short Line Company when such freight was in cars other than its own, unless the Short Line Company would pay to the owner of the cars the usual car mileage for their use, or would transfer such freight from the foreign cars into those of the Northern Pacific Company at Portland, and it also refused to transport such freight unless its charges from Portland to destination were paid, and refused to pay upon receiving the freight the charges due to the Short Line Company and its connecting lines for transporting this freight to Portland, while at the same time it received and transported freight originating west of the 97th meridian without any of these conditions, and paid the charges for its transportation to Portland, and it also received and transported freight originating both east and west of said meridian for the Southern Pacific Company without making any of these exactions. The Northern Pacific Company also refused to transport passengers destined to Puget Sound and other points on its lines upon through tickets from points east of the 105th meridian issued by the Short

Line Company, although it received and transported passengers on through tickets issued by that company from points west of that line and on through tickets issued by the Southern Pacific Company from all points. Mr. Justice Field, in the Circuit Court and the Circuit Court of Appeals, decided that, while these acts constituted clear discriminations, they created no undue and unreasonable preferences, advantages, prejudices, or disadvantages, and hence that they were not violative of the interstate commerce act.

Little Rock & Memphis R. Co. v. St. Louis, Iron Mountain & Southern Ry. Co., Same v. St. Louis S. W. Ry. Co., Same v. Little Rock & Ft. Smith Railway Co. (C. C.) 59 Fed. 400, 406; *Id.*, 11 C. C. A. 417, 63 Fed. 775, 26 L. R. A. 192. In these cases the complainant was the Little Rock & Memphis Railroad Company. The St. Louis, Iron Mountain & Southern Railway Company refused to receive any freight from the complainant at Little Rock without a prepayment of charges, not because it was unwilling to extend credit, but from a desire to oppress that company, while it received freight at that point from all other persons and corporations without the prepayment of charges. The St. Louis Southwestern Company and the Little Rock & Ft. Smith Railway Company refused to honor through tickets or through bills of lading issued by the complainant, or to enter into any arrangement for through billing or through rating, while they honored such bills and tickets and made such arrangement with other railroad companies similarly situated. They also refused to accept and transport loaded cars coming from the complainant's railroad, and required the freight to be rebilled and reloaded into their own cars at points of junction, while they accepted and transported loaded cars coming under similar circumstances from the roads of other companies without any rebilling or reloading. Although these acts clearly gave preferences and advantages to the other companies similarly situated, and subjected the complainant to prejudices and disadvantages, the Circuit Court and this court, after exhaustive argument and upon careful consideration, held that these were neither undue nor unreasonable, and that they constituted no violation of the interstate commerce law. No contrary decision of the Supreme Court, or of any of the Circuit Courts of Appeals, of any of the questions decided by the cases which have just been reviewed, has come to our attention, but the decisions in those cases have been repeatedly followed. *Prescott & A. C. R. Co. v. Atchison, Topeka & Santa Fé R. Co.* (C. C.) 73 Fed. 438, 439; *Central Stockyards Co. v. Louisville & Nashville Ry. Co.*, 192 U. S. 568, 570, 571, 24 Sup. Ct. 339, 48 L. Ed. 565; *Louisville & Nashville R. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483, 497, 498, 25 Sup. Ct. 745, 49 L. Ed. 1135.

General statements that there must be no difference in charges not based on difference in service, that rates must be equal to all under like conditions, and that unjust and unreasonable discrimination is forbidden may be found in the opinions of the courts and of the Interstate Commerce Commission in cases in which they were discussing radical differences in the direct charges for transportation under like conditions (*Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 100, 21 Sup. Ct. 561, 45 L. Ed. 765; *Cincinnati, New Or-*

leans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; United States v. Vacuum Oil Co. [D. C.] 153 Fed. 598, 606, 607; Hays v. Pennsylvania Co. [C. C.] 12 Fed. 309; Tift v. Southern Railway Co. [C. C.] 123 Fed. 789, 791; Scofield et al. v. Lake Shore & Michigan Southern Ry. Co., 2 Interst. Com. R. 67; Daniels v. Chicago, Rock Island & Pacific Ry. Co., 6 Interst. Com. R. 458; Page v. Delaware, Lackawanna & W. R. R. Co., 6 Interst. Com. R. 548; St. Louis Hay & Grain Co. v. Mobile & Ohio R. R. Co., 11 Interst. Com. R. 90, 101), and in cases in which the carriers absolutely refused to carry the property tendered on any terms, as in Crescent Liquor Company v. Platt (C. C.) 148 Fed. 894, 903, or to furnish cars at proper times and places where the rates were the same, as in Castle v. Baltimore & Ohio R. R. Co., 8 Interst. Com. R. 333, 344. Opinions of state courts may also be cited under statutes which depart from the language and the true interpretation of the interstate commerce act, and require certain carriers to grant "equal terms, facilities, accommodations and usages," and forbid them from "granting any terms, credit, privileges, advantages, usages or facilities" to one that are not granted to all (Burns' Ann. St. Indiana 1901, § 3312b), which hold that every person or corporation is lawfully entitled to every privilege and courtesy extended to any other similarly situated, so that under these statutes and decisions no carrier may waive any right or extend any courtesy to any person or corporation without becoming legally bound to do likewise to every other person or corporation under similar conditions, and under this statute of Indiana there is even a decision that if a corporation customarily waives its right to prepayment of freight, pays charges of connecting carriers, and grants credit, it is required by that statute to do so for all. Adams Express Company v. State, 161 Ind. 328, 67 N. E. 1033, 1039.

But such are not the terms and such is not the meaning or the effect of the interstate commerce act. The true interpretation of that act is illustrated by the decisions which have been reviewed. It was expressed by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in Interstate Commerce Commission v. Baltimore & Ohio R. R. Co. (C. C.) 43 Fed. 37, in these words, which have been subsequently three times affirmed and adopted by the Supreme Court of the United States as the true interpretation of this law:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 493, 17 Sup. Ct. 896, 42 L. Ed. 243; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 173, 18 Sup. Ct. 45, 42 L. Ed. 414.

The question, therefore, is, did the defendant subject the plaintiff to any undue or unreasonable prejudice or disadvantage by requiring it to prepay the charges on its freight while the carrier customarily transported freight for others similarly situated without such prepayment? The defendant had the right under the common law to demand prepayment of its charges of the plaintiff and to grant credit to others for similar charges. It had the same right in this regard that every merchant, every man, and every corporation has to grant credit to one or to all but one, and to refuse it to others or to him. There was nothing unjust or morally wrong in the exercise of this right, because the plaintiff had no moral right to the extension of credit, and justice did not require that the defendant should grant to the plaintiff the same credit that it extended to others.

The interstate commerce act did not expressly deprive the defendant of this right or make its exercise unlawful; so far as its express provisions are concerned, it left the right and its exercise among those which the Supreme Court declared that carriers were free to exercise and to manage upon "the same principles which are regarded as sound, and adopted in other trades and pursuits."

The refusal to extend credit to a purchaser of goods, or of transportation, of financial responsibility, credit, and reputation equal to those of others to whom such credit is extended does not in the nature of things subject him to an undue or unreasonable prejudice or disadvantage, while a requirement that such a vendor shall extend equal credit to all purchasers of equal financial responsibility, credit, and reputation, would subject him to unreasonable and undue disadvantage. Reason, sound business principles, and the practice of the business world give the option to extend credit to the seller of his property, or his services, and to the loaner of his money, and not to the purchaser or borrower. There are other considerations besides financial responsibility, credit, and reputation, which condition the rational extension of credit, such as the experience of the seller or the loaner, the habits of the purchaser or the borrower, his fairness and promptness.

The plaintiff avers that the defendant customarily gives credit to all other responsible and reputable business houses, and that it is a house of that character. Fruit, vegetables, farm and dairy products are perishable in their nature, of a character which renders them susceptible to claims for errors in charges for transportation and for damages during transportation. The usage and custom alleged is that the defendant, the terminal carrier, advances to connecting lines their charges upon these products, delivers them to the consignees, holds the bills for the charges for freight until claims arising from alleged errors therein are adjusted, and then collects them of the consignees. It is not inconceivable that a consignee might present under this usage such claims for errors in charges and for damages in transportation, and might so delay their adjustment and the payment of the charges for freight, that it would thereby secure a much greater advantage and preference over other consignees than the prejudice or disadvantage it would suffer by prepaying its charges for freight.

It is said, however, that the fact that a custom and usage exists not to require the prepayment of such charges renders the requirement of prepayment by the plaintiff, while others are given credit under like circumstances, the imposition of an undue and unreasonable disadvantage and prejudice upon it. But since the requirement of the prepayment of the charges for freight by the plaintiff while others similarly situated are granted credit for these charges subjects the plaintiff to exactly the same degree of prejudice and disadvantage in the absence of such a custom and usage as it does in its presence, the existence of the custom or usage cannot make that prejudice or disadvantage undue or unreasonable if it would not be so if the custom or usage did not exist. *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. R. Co.* (C. C.) 51 Fed. 465, 472; *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 155, 86 Fed. 407, 420; *Little Rock & Memphis R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192.

An attempt has been made in argument to distinguish these and other cases in which the requirement of prepayment of charges for transportation by one while no such requirement was made of others has been held to create no undue preference or disadvantage from the case in hand, upon the ground that those were actions by railroad companies while this is an action by a shipper, or by a consignee of a shipper; but an undue or unreasonable prejudice or disadvantage inflicted upon a railroad company falls under the ban of the law as completely as an undue prejudice or disadvantage imposed upon a shipper or a consignee, and it is more deleterious by as much as all the shippers or consignees over the lines of that carrier affected by it are more numerous than a single shipper or consignee, and by as much as the charges for the transportation of their freight are greater than his. Injury to a class by a violation of the interstate commerce act is far more damaging than to a single member of a class. *Crescent Liquor Co. v. Platt* (C. C.) 148 Fed. 894, 901.

One of the averments of the plaintiff in his complaint is that the defendant required the plaintiff to prepay its freight, and gave notice to that effect, for the express purpose of harassing and annoying the plaintiff and injuring its business. But the sole question in this case is whether or not the requirement of the prepayment of the charges for freight constituted a violation of the interstate commerce act. If it did, a noble purpose or a good motive constitutes no defense to the cause of action founded upon it. If it did not, a bad motive or an evil purpose creates no cause of action founded upon the exercise of a legal right. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *Cooley on Torts*, pp. 1503, 1505.

Finally, the question at issue in this case in the presence of a custom and usage not to demand prepayment of transportation charges, in the presence of a motive and purpose by the defendant to harass and oppress the plaintiff by the demand of such prepayment, and in the presence of the subjection of the plaintiff in that case to very

much more aggravated prejudice and disadvantage than those alleged in the action under consideration, was presented, decided, and the considered opinion of this court upon it was delivered by Judge Thayer in 1894 in these words:

"It will be observed that the sole question in the cases filed against the St. Louis, Iron Mountain & Southern Railway Company concerns the right of that company to require the prepayment of freight charges on all property tendered to it for transportation at Little Rock by the Little Rock & Memphis Railroad Company, while it pursues a different practice with respect to freight received from other shippers at that station. At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co.* (C. C.) 51 Fed. 465, 472. Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common-law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the interstate commerce law, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not 'subject any particular person, company, corporation or locality * * * to any undue or unreasonable * * * disadvantage in any respect whatever.' This prohibition is very broad, it is true, but it is materially qualified and restricted by the words 'undue or unreasonable.' One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of Congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common-law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise." *Little Rock & Memphis R. Co. v. St. Louis S. W. R. Co.*, 63 Fed. 777, 11 C. C. A. 419 (26 L. R. A. 192).

The question was decided in the same way by Mr. Justice Field in the Circuit Court in *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. R. Co.*, 51 Fed. 465, 473, 474, affirmed by the Circuit Court of Appeals of the Ninth Circuit in 9 C. C. A. 409, 410, 412, 413, 414, 61 Fed. 158, 159, 161, 162, and by the Circuit Court of Appeals of the Fifth Circuit in *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 154, 155, 86 Fed. 407, 419, 420. It is more than 14 years since this court rendered that decision, no contrary opinion of any national court upon this question has been called to our attention, and because the right of a common carrier to require prepayment of charges for transportation from one and to give credit for them to another similarly situated existed under the common law, because neither this right nor its exercise were made unlawful by the terms

of the interstate commerce act, because the exercise of that right is not in itself unreasonably prejudicial, or disadvantageous, because the former decision of this court rules this case and ought not to be overruled unless it is clearly wrong, and because upon a careful reconsideration of that decision in the light of the subsequent decisions of the courts we are still convinced that it was right, our conclusion in this case is that the requirement by the plaintiff of the prepayment of charges by the defendant for the transportation of its freight, while no such requirement was made of others similarly situated, while there existed a custom or usage for the carrier to advance the charges of connecting carriers, to deliver the freight to the consignees, to hold bills for freight until claims arising out of errors in transportation charges were adjusted, and then to collect them, did not subject the plaintiff to undue or unreasonable prejudice or disadvantage or give to others similarly situated any undue or unreasonable preference or advantage within the meaning of section 3 of the interstate commerce law, and the judgment below must be affirmed.

It is so ordered.

HOOK, Circuit Judge (dissenting). The trial court held that a complaint which set forth the following facts did not state a cause of action. For 15 years the plaintiff and its predecessors had been engaged at Minneapolis, Minn., in buying and selling fruits, vegetables, and farm and dairy products, and in transacting a general commission business in those commodities. In carrying on its business plaintiff availed itself of the services of defendant and its connections as carriers of interstate commerce. It had been the uniform custom of defendant and other railroad companies for many years to accept and transport such products as plaintiff handled, and collect the freight charges at destination; and the existence and prosperity of the commission business largely depended upon its continuance. But on December 15, 1906, defendant, for the purpose of harassing the plaintiff and injuring its business, notified all its agents and connecting lines that:

"Until further advised the company will not accept freight from connecting lines, or at points on its own lines, consigned to the Gamble-Robinson Commission Company unless all charges are prepaid."

This order was enforced against the plaintiff alone. All other commission houses, competitors of plaintiff and similarly circumstanced, continued to enjoy the benefits and advantages of the established custom. There was nothing in the financial condition of plaintiff or in its conduct which justified the discrimination against it.

The question which arises on these averments is whether the plaintiff has been subjected "to any undue or unreasonable prejudice or disadvantage in any respect whatever," contrary to the first clause of section 3 of the interstate commerce act of February 4, 1887 (24 Stat. 379). It is no answer to the question to say that a railroad company is not required to lend money to a shipper, for ordinarily such a transaction could have no relation to or connection with transportation. Nor is it an answer to say that at common law a railroad company was not

bound to credit a shipper, but had the option of demanding prepayment of transportation charges or of awaiting the arrival of the freight at destination before collecting them. The act of Congress was designed to do away with undue and unreasonable discriminations of every character against shippers, localities, and subjects of traffic, whether they pertained to the common-law duty of the carrier or not, and to that extent the right of a railroad company engaged in interstate commerce to conduct its business as it will has been modified. A discrimination within the statute may be in respect of a course of business conduct which the carrier is at liberty to adopt or not as it chooses. To hold otherwise is to read into the statute something it does not contain, to wit, "the discriminations hereby prohibited relate only to the performance of duties imposed by the common law." So the narrow question here is whether the discrimination against the plaintiff is an undue or unreasonable one. Upon such a question it would seem that regard should be had to its effect upon the business of the complaining party, assuming, as we must here, that he is without fault and did not justly bring upon himself the discrimination complained of. If the direct and natural result is to hamper, seriously injure or destroy his business while the like business of others similarly situated is not affected, it would seem quite obvious that the discrimination was undue and unreasonable. If that would not be an unreasonable discrimination, I am at a loss to imagine one. It is averred in the complaint, and indeed it is a matter of common knowledge, that it has long been the custom among railroad companies to collect at destination the freight charges on consignments of produce to commission houses. The consignee deducts from the proceeds of sale the freight charge paid by him when he receives a consignment and also his commission, and then remits the balance to his consignor. This convenience or privilege of having the charges of the carrier paid at destination by the commission merchant is so important and valuable to those engaged in growing or buying and assembling such commodities for shipment to market centers that their selection of a consignee largely depends upon it. It is altogether clear that a discrimination like that complained of is well calculated quickly to ruin an established commission business. An embargo against one of a number of competitors may well be equivalent to a sentence of commercial death. The act forbids the subjection of the shipper to an undue prejudice or disadvantage in any respect whatever, and, if we do not regard the effect upon his business in its relation to the like business of his competitors, what conceivable test or standard is available?

There are many facilities, privileges, and conveniences connected with the transportation of traffic, to which class the one before us belongs, not founded on a common-law duty nor relating to the reasonableness and uniformity of rates of carriage, yet an undue discrimination in the granting or withholding of which may make or unmake the fortunes of shippers and localities. It needs but a moment's reflection to perceive that the doctrine of the foregoing opinion, logically applied, would uphold a persistent course of discrimination tending, for illustration, to drive the wholesale business of the city of St. Paul to its neighbor Minneapolis, or, on the other hand, to impair the well-

known importance of the latter as a wheat market. The question, being one of power under the law, is not affected by the improbability of its exercise. In such a case it could as well be said, as it is here, that at common law the railroad companies were not required to grant to any shipper or locality the facilities, privileges, and conveniences in question, and the discrimination between cities similarly circumstanced and aggressively competing was not unreasonable, though its natural effect would be greatly to injure the commerce of one for the benefit of the other.

The truth is, it seems to me, the purpose of the first clause of section 3 of the act of 1887 was, as its specific terms show, to declare unlawful discriminations of every character which result in undue or unreasonable prejudice or disadvantage. Whether the course of a railroad company is discriminatory involves a consideration of the similarity of conditions and circumstances surrounding those affected, and whether it is unduly or unreasonably so depends largely upon the result or effect of the discrimination, and, if directed against an individual shipper, whether justification may be found in his conduct. That is the rational construction of the law, and it is the one the Interstate Commerce Commission has consistently applied. *Phelps & Co. v. Railway*, 6 Interst. Com. R. 36; *St. Louis Hay & Grain Co. v. Railroad*, 11 Interst. Com. R. 90; *Miner v. Railroad*, 11 Interst. Com. R. 422; *Walker v. Railroad*, 12 Interst. Com. R. 196; *Rogers & Co. v. Railroad*, 12 Interst. Com. R. 308.

The first of these cases is quite like the one at bar. *Phelps & Co.*, who were cotton commission merchants at New Orleans, complained that the railway company unjustly discriminated against them by refusing to deliver uncompressed or flat cotton consigned to them upon the same terms as it delivered such cotton of other consignees in that city. The general custom there was for cotton dealers or factors to have the uncompressed cotton consigned to them delivered direct to compress companies with whom they did business, and for the railroad companies to waive prepayment of their freight charges and their lien on the shipments, and to accept as security in lieu thereof the written guaranty of the compress companies previously executed. In the particular case the railway company, while continuing the custom as to others, refused to accept the guaranty of the compress company with which *Phelps & Co.* did business, though there was no question of its financial responsibility, and refused to deliver cotton consigned to *Phelps & Co.* without prepayment of the charges. The commission held the case to be one of undue discrimination, and ordered that as long as the railway company observed the custom in New Orleans it should desist from making *Phelps & Co.* an exception. In *St. Louis Hay & Grain Co. v. Railroad*, supra, it was held that stopping a commodity for treatment or reconsignment is in the nature of a special privilege which the carrier may concede but which the shipper cannot demand as of right, but in granting or denying it a uniform course must be pursued without unjust discrimination between markets or individuals. Of course the views of the commission in these cases are the views of an administrative body and are not binding on the courts,

but it seems to me they are persuasive, comport with good reason, and reflect the clear intent of Congress in the enactment of the law.

It is said the question is no longer open here because of the decision of this court in *Little Rock & Memphis R. Co. v. St. Louis, etc., R. Co.*, 11 C. C. A. 417, 63 Fed. 775, 26 L. R. A. 192, affirming (C. C.) 59 Fed. 400; but it is clear that that case and those which follow it have no application whatever to the case at bar. It is true that the observations of Judge Thayer, in speaking for this court, when disconnected from the matter before him for decision, would seem to be pertinent now, but he was then considering a liberty of contract left untouched by the interstate commerce act of 1887, while here the right of the railroad company is the subject of express restrictions in the act. In other words, the *Little Rock & Memphis Case* in this court, and, without exception, every case in which it is cited and followed, involved controversies between railroad companies themselves, not complaints made by shippers or on behalf of localities or subjects of traffic; and it was held in those cases that the first clause of section 3 of the act, declaring it unlawful for a carrier engaged in interstate commerce "to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever," was not intended to affect the right of the carriers to select their connecting agencies for transportation upon such terms as were mutually satisfactory to them. The distinction was pointed out in *Oregon Short Line, etc., Co. v. Northern Pacific*, 9 C. C. A. 409, 61 Fed. 158, in which it was held that the provision of the interstate commerce law forbidding discrimination against any locality or description of traffic was for the protection of the locality or traffic itself, and could not be invoked by a carrier against a connecting carrier which discriminated in the matter of requiring prepayment of freight and car mileage. Mr. Justice McKenna, then Circuit Judge, said, in delivering the opinion of the court in that case:

"But we do not think it is competent for a railroad company to appropriate the grievance of a traffic or locality under section 3, and complain of it."

The *Little Rock & Memphis Case* was also cited in *Louisville, etc., R. Co. v. West Coast Co.*, 198 U. S. 483, 497, 25 Sup. Ct. 745, 49 L. Ed. 1135, as authority for the principle that a common carrier has a right to employ auxiliary or connecting agencies and to make contracts with them, and what it does with one it is not bound to do with another. But how obvious it is that such cases have no relevancy here.

I think the judgment of the trial court should be reversed.

ATLANTIC COAST LINE R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. March 1, 1909.)

No. 842.

1. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—COMPLIANCE WITH REQUIREMENTS.

It was the manifest intention of Congress, in the enactment of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174] to require all common carriers engaged in interstate commerce to keep their cars and engines at all times equipped with proper safety appliances. The degree of diligence required by the statute is of the highest order, and the duty thus imposed is absolute and unconditional. Therefore, any failure on the part of the railroad company to comply with its requirements must necessarily subject the railroad company to the penalty imposed.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

2. RAILROADS (§ 254*)—OPERATION—STATUTORY REGULATION—ACTION FOR PENALTY.

While this suit is in the nature of a penal action, yet it does not follow that it is a criminal prosecution. It is really an action for debt.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

3. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—ACTIONS FOR PENALTY—COMPLAINT.

A complaint under the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], alleging that the violation occurred "on or about" a particular date, is not vague and indefinite. Pleading in a civil suit need not be as specific in alleging dates as in a criminal proceeding.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

4. STATUTES (§ 184*)—CONSTRUCTION—MODIFICATION BY COURT.

Even admitting that the requirements of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174] are unduly severe and unreasonable, that fact would not justify a modification of the statute by judicial decision. The courts do not possess the power to read an exception into a statute so as to modify or change the nature of the same and thus defeat the purposes for which the law was intended.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 184.*]

5. RAILROADS (§ 223*)—MANAGEMENT OF TRAINS.

It has been the policy of our lawmakers to grant railroads certain privileges not enjoyed by private individuals, and, while this is a wise policy and has met with general approval, it is likewise proper that due regard should be had for the rights of those employed by railroads in performing duties that are necessarily dangerous in their character; and it cannot be said to be an unreasonable provision to require railroad companies, enjoying privileges thus conferred upon them, to manage and operate their engines and cars so as to minimize the risk incident to travel and employment.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 223.*]

(Syllabus by the Court.)

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For opinion below, see 153 Fed. 918.

This was an action brought by the United States to recover 45 penalties of \$100 each for violations of Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), known as the "Federal Safety Appliance Act," as amended by Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). The complaint alleges that the defendant is a common carrier engaged in interstate commerce by railroad, and is a corporation organized and doing business under the laws of the states of Virginia, North Carolina, and other states of the United States, having an office and place of business at South Rocky Mount in the state of North Carolina.

Of the offenses made the basis of this prosecution, 41 were violations of section 2 of the act (defective couplings), and 4 were violations of section 4 (failure to have secure grabirons and handholds).

The defendant filed a demurrer to each count, alleging nine specific grounds of demurrer. The court below overruled the demurrer, and this case comes here on writ of error to the District Court of the United States at Wilmington, N. C., for the Eastern district of that state.

George B. Elliott (Junius Davis, on the brief), for plaintiff in error.
Harry Skinner, U. S. Atty., and Philip J. Doherty, Special Asst. U. S. Atty. (Luther M. Walter, Special Asst. U. S. Atty., on the brief), for defendant in error.

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

PRITCHARD, Circuit Judge (after stating the facts as above). From an inspection of the record it appears that the plaintiff in error assigns nine grounds of demurrer, but only two of the grounds of demurrer thus assigned are relied upon in this court, the first being that the complaint is vague and indefinite in that it alleges that the violation occurred "on or about" a particular date. The court below, in passing upon this point, held that a pleading in a civil suit need not be as specific in alleging dates as in a criminal proceeding, where prosecution is by indictment.

In matters of practice and pleading the United States courts are governed largely by the practice and pleading of the courts of the state where the suit may be instituted. This rule is based upon the provisions of section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), which reads as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding 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 court to the contrary notwithstanding."

Therefore we must ascertain what the practice is in this respect in the state courts of North Carolina.

While this suit is in the nature of a penal action, yet it does not follow that it is a criminal prosecution. It is really an action for debt. Therefore it is important that we should carefully consider the rulings of the Supreme Court of North Carolina in such cases.

The case of Lumber Co. v. Railroad, 141 N. C. 171, 53 S. E. 823, was an action to recover penalties of the defendant on account of discrimination and overcharge in the shipment of logs, and in that case

it was held that it was sufficient to allege the time of shipment as between the 15th day of November, 1898, and the 30th day of April, 1901, and that the lower court, in refusing to sustain the demurrer, was within the rule, inasmuch as the defendant could have asked for a bill of particulars. Judge Connor, in delivering the opinion of the court in that case, among other things, said:

"In regard to the exception to the complaint for indefiniteness, as to debts, etc., the defendant might, if it so desired, have asked for a bill of particulars. Revisal 1905, § 494. The ruling of his honor was correct."

In this connection it might be well to consider the rule of the Supreme Court of North Carolina in the case of *State v. Long*, 143 N. C. 670, 57 S. E. 349, as showing the practice in this respect in criminal procedure in that state. In that case the defendant was charged in the indictment with bigamy. The defendant moved to quash, and also for arrest of judgment, (1) because the bill of indictment did not charge the date of either marriage; (2) because the indictment did not allege where the second marriage took place; (3) because it did not charge that the offense was committed in Rutherford county and in the state of North Carolina.

Chief Justice Clark, speaking for the court, at page 673 of 143 N. C., page 350 of 57 S. E., said:

"It is sufficient to follow the words of the statute, and the date of the marriage is not required to be charged (Revisal 1905, § 3361). Besides, Revisal 1905, § 3255, provides: 'No judgment upon any indictment for felony or misdemeanor shall be stayed or reversed * * * for omitting to state the time at which the offense was committed, where time is not of the essence of the defense.' Citing *State v. Burton*, 138 N. C. 578, 50 S. E. 214; *State v. Arnold*, 107 N. C. 864, 11 S. E. 990; *State v. Peters*, 107 N. C. 883, 12 S. E. 74. * * *"

Again, at page 676 of 143 N. C., page 350 of 57 S. E.:

"If the defendant had wished fuller information in regard to matters not named in the statute as ingredients of the offense, and therefore not required to be charged (*State v. Covington*, 125 N. C. 642, 34 S. E. 272), so as to prepare his defense, such as the times and places of the marriages, he should have asked for a bill of particulars, as is now provided by Revisal 1905, § 3244. Citing *State v. Brady*, 107 N. C. 826, 12 S. E. 325; *State v. Gates*, 107 N. C. 832, 12 S. E. 319; *State v. Dunn*, 109 N. C. 840, 13 S. E. 881; *Townsend v. Williams*, 117 N. C. 337, 23 S. E. 461; *State v. Pickett*, 118 N. C. 1231, 24 S. E. 350; *Goldbrick Case*, 129 N. C. 657, 40 S. E. 71; *State v. Van Pelt*, 136 N. C. 639 and 669, 49 S. E. 177, 68 L. R. A. 760."

The case of *Conley v. Railroad*, 109 N. C. 692, 14 S. E. 303, is cited in support of the contention that the allegation herein is too indefinite as to time by employing the words "on or about" a certain day. While there may be some parts of the opinion in that case in conflict with the ruling announced in the other cases, which we have mentioned, yet that case was overruled by the case of *Allen v. Railroad Company*, 120 N. C. 548, 27 S. E. 76. Chief Justice Faircloth, who delivered the opinion of the court, among other things, said:

"The demurrer to the sufficiency of the cause stated brings to this court a question of form or uncertainty in the pleadings and not the merits of the action, and thus costs and delay are incurred which might have been avoided by a proper motion below, as we are to assume that the judge would have granted the proper motion, certainly until it appears otherwise.

"Without commending the form in which the plaintiff has stated his case in the complaint, we think the defendant's remedy was by motion and not by demurrer. * * *

The second paragraph contained in the first cause of action reads as follows:

"Plaintiff further alleges that in violation of the act of Congress known as the 'Safety Appliance Act,' approved March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by the act approved April 1, 1896 (Act April 1, 1896, c. 87, 29 Stat. 85), and as amended by an act approved March 2, 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), said defendant, on or about April 27, 1906, hauled on its line of railroad one car, to wit, its own, No. 17,486, used in the movement of interstate traffic, to wit, cabbages consigned from Meggetts, in the state of South Carolina, to Newark, in the state of New Jersey."

In the paragraph following it is alleged, as hereinbefore stated, that on or about said date the defendant hauled said car with said traffic over its line from Rocky Mount, in the state of North Carolina, in a northerly direction toward Richmond, etc.

Here we have an allegation in which is stated the number of the car, and the nature of the traffic, as well as the point from which the car was started and the direction in which it was hauled. It seems to us that such an allegation is sufficiently definite to advise the defendant as to the character of the charge which it is called upon to defend, and to enable it to determine with accuracy as to the particular date on which such car was hauled over its line. It is to be presumed that the railroad company keeps a record of its cars, as well as the numbers of the same, and in a case like this, where the number of the car is given, and the kind of traffic it carried on or about a certain date, it would be an easy matter for the officers of the company to examine its books and ascertain definitely as to the day when such car was moved, and thereby be afforded full and ample information as to any facts which it might desire to use in defending an action of this character. However, if counsel for defendant believed that such allegations were too vague and indefinite, they could have availed themselves of the provisions of the North Carolina statute, and, under the practice in that state could have obtained a bill of particulars setting forth in detail all the desired information. This they neglected to do. Following the well-established practice in the courts of that state, we conclude there was no error in the action of the court below in overruling the demurrer.

The other ground relied upon by plaintiff in error in support of its demurrer is that the complaint does not allege that the defect was discovered, or could, by a reasonable inspection, have been discovered, so that the car could have been repaired before it was hauled or moved, as alleged in the complaint. In construing a statute of this character we must constantly keep in mind the purposes for which it was enacted. As was said by the court in the case of *Holy Trinity Church v. United States*, 143 U. S. 457, 463, 12 Sup. Ct. 511, 513, 36 L. Ed. 226:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy: and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

On the 3d day of December, 1889, President Harrison, in a message to Congress, in referring to the great loss of human life, owing to a failure on the part of railroad companies to properly equip their cars with safety appliances, among other things, said:

"It is a reproach to our civilization that any class of American workmen, in the pursuit of a useful and necessary occupation, should be subject to a peril of life and limb as great as that of a soldier in time of war."

In the case of *United States v. Chicago, R. I. & P. Ry. Co.*, Judge McPherson, of the Western district of Missouri, in his charge to the jury, referring to the safety appliance law, said:

"It is remedial and preventive, and, if observed, will reduce to a minimum the crippling and killing of employés in this country. As I said yesterday, every one of us can recollect about fifteen or twenty years ago that about four times out of five when you went to shake hands with a railroad employé, either a switchman, brakeman, or a freight conductor that had been raised from a brakeman, you took hold of a crippled hand, fingers gone, sometimes an entire hand or leg gone, because of the extremely hazardous business of railroading."

Also, in the case of *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205, 210, 8 Sup. Ct. 1161, 1163, 32 L. Ed. 107, the Supreme Court of the United States said:

"But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employés, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities."

The loss of life among those employed by railroads had reached such enormous proportions that the attention of the public was arrested thereby, and as a result Congress endeavored to frame legislation so as to protect, as far as possible, persons thus employed and engaged in the performance of duties necessarily hazardous in their character.

The law under which this suit was instituted was enacted on the 2d day of March, 1893, and is entitled:

"An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

Section 1 of the act makes it unlawful for a carrier to use a locomotive not equipped with power driving-wheel brakes and appliances for operating the train-brake system. Section 2 makes it unlawful to use a car not equipped with automatic couplers. Section 4 makes it unlawful to use a car not provided with secure grabirons or hand-holds. Section 5 makes it unlawful to use a car whose drawbars do not conform to the standard height. By section 6 it is provided that the United States shall have a right of action to recover a penalty from the common carrier using or permitting to be hauled or used on its line "any car in violation of the provisions of this act." It is provided by section 8 that whenever any employé is injured by any locomotive, car, or train in use in violation of the provisions of the act

he shall not be deemed to have assumed the risk incident to the use of such car or locomotive.

As already stated, counsel for plaintiff in error insist that the demurrer filed herein should be sustained upon the ground that it is not alleged that the plaintiff in error failed to use due care or ordinary diligence to discover or repair defects, or to ascertain if the cars were equipped with safety appliances. To hold that these allegations are necessary as a basis of this prosecution would be tantamount to holding that if an employé should, while attempting to go between cars, receive injuries in endeavoring to couple them in the condition described in the counts against which this demurrer is urged, either because such cars were not equipped with automatic couplers or because they were equipped and allowed to become defective or out of repair through such service or accident, the burden would be upon him to show that the carrier had been negligent in allowing such coupling to remain in use, and that the doctrine of assumption of risk continues to prevail in that class of cases, notwithstanding section 8, the provisions of which are to the contrary. That the effect of section 8 is to change the relation of master and servant by abrogating the doctrine of assumption of risk, in so far as it relates to this class of cases, is, we think, well settled.

The Supreme Court of the United States, in the case of *Southern Railway Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907, passed upon this question. In that case the defendant in error was a flagman in the employ of the Southern Railway Company, and while in the performance of his duty endeavored to couple up in a train certain cars which were provided with automatic couplers, one of which "was not in proper condition." Owing to this defective condition, it became necessary for Carson to go between the cars for the purpose of coupling the same, and he was injured as alleged. A suit was instituted in the court of common pleas for Greenville county, S. C., to recover damages, and upon a trial of the same the jury found for the plaintiff against the defendant in the sum of \$6,500, and a judgment was entered accordingly. On appeal to the Supreme Court of South Carolina by the railroad company, the judgment of the lower court was affirmed. From the statement of facts it appears that Carson was injured while endeavoring to couple up on a side track of the defendant certain cars standing thereon with other cars that had been "kicked" onto the side track. The cars in question were all equipped with automatic couplers, but, "when plaintiff reached" one of the cars "then to be coupled," he discovered that the coupler was out of order, and it therefore became necessary for "the plaintiff to go between said cars for the purpose of adjusting the coupler, and while he was engaged in the work his arm was caught between the deadwoods and was so badly mangled that it had to be amputated." It appears from an inspection of the transcript of the record in the Supreme Court of the United States that the plaintiff, among other things, averred in his declaration that, while he was engaged in the employ of the defendant company as flagman on a certain freight train, he was directed by the conductor in charge of the train to couple up certain cars then being shifted out of his train with other cars

standing on a side track. It also appears that all of said cars had been provided with automatic couplers, which, when in good condition, rendered it "unnecessary for one, in order to make the said coupling, to go between the said cars"; "that when he reached" the car to be coupled "he ascertained that the coupling pin was out and lying under the drawhead of the coupler," and finding the coupler out of order it became necessary for plaintiff to go between the cars in question in order to properly adjust said pin "with his hand," and before he had succeeded in coupling the same, or had sufficient time to do so, "he heard the cars knocking together," and his arm was caught between the dead blocks of the cars between which he was standing and was "horribly mangled." The plaintiff's evidence shows that the automatic coupling appliance was defective in that there was an absence of a "cotter pin," an appliance about the size of a "tenpenny nail," and that the defect could have been remedied "in two minutes." It further appears that plaintiff neglected to report the defect to the conductor in charge of the train. It also appears that the defendant had no knowledge of the defect in the coupler, and, further, that it was against the company's printed rules (knowledge of which was brought home to the plaintiff), for employes to go between cars for the purpose of making couplings by hand. The trial judge, among other things, charged the jury as follows:

"I charge that any railroad engaged in running trains from state to state, under the law, are required to have automatic couplers, and I charge you further that they are required to keep these appliances in good order; that is, in safe and suitable order. * * * The fact that a servant violates the rules of a master is not of itself negligence, and the jury must, under the circumstances of each particular case, say whether or not upon the occasion in question the servant was justified under the circumstances in violating the said rule, and, if not justifiable, whether or not the violation of said rule was the proximate cause of the injury. * * *

"By the act of Congress it is provided that on and after the 1st day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

"I charge that if you believe that the defendant railroad company was a common carrier engaged in interstate commerce, and was using for the purpose of moving interstate traffic the cars mentioned in the complaint as causing the plaintiff's injury, and that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence on the part of the railway company, which negligence continued up to the very moment of the collision. If you believe that there was such a collision and injury in consequence thereof, and if you believe that such negligence was the proximate cause of such injury, your verdict should be for the plaintiff."

The defendant railroad company, in the Supreme Court of the state, in assigning error as to that portion of the charge of the lower court that it was the duty of the railroad company to provide suitable appliances and keep them in good condition, contended that the error consisted in this:

"The duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in order. The charge of the judge imposes this

duty absolutely upon the railway company, practically making it a guarantor of the safe and suitable condition of the coupling apparatus."

As to the charge of the lower court with respect to the duty of the railroads to equip their cars with automatic couplers which would couple automatically by impact, the railroad company assigned error as follows:

"(a) The act of Congress applies only when the railway company fails to use cars equipped with automatic couplers. It does not apply where the railway company has equipped its cars with such couplers, one of which is temporarily out of repair. The complaint alleges, and the plaintiff's evidence shows, that the cars were equipped with automatic couplers, but that one of them was temporarily out of repair; that it could have been repaired in two minutes. The question, therefore, was whether the railroad company had violated its duty to exercise ordinary care in keeping the coupling in repair, but not whether it had complied with the act of Congress. * * *

"(b) It was error to charge that the failure to provide automatic couplers was negligence, which continued up to the very moment of the collision, for the reason that rule 12 (of company's rules) made it the duty of the plaintiff to examine the coupler, and if defective (to) report such fact immediately. The plaintiff admitted that he knew it was defective before he attempted to make the coupling."

The trial judge further charged the jury as follows:

"I charge you that the risk which a railway employé assumes when he enters the employ of a railway company does not extend to such risks as he is exposed to by reason of defective machinery or appliances."

To which charge the defendant railway company assigned errors as follows:

"An employé assumes all risks except those which flow from the master's negligence in his duty in furnishing safe machinery and keeping the same in repair. The charge was erroneous in not so stating."

On appeal to the Supreme Court of the state of South Carolina, that court, in considering the group of exceptions to the charge of the trial judge, which included the above, said that certain cases in that state—

"all hold that it is the duty of the master to furnish safe machinery and appliances to its servants, and also to keep such machinery and appliances in good order. The master is not made a guarantor strictly; but it is his duty to furnish safe machinery and appliances, and to preserve it in good order and repair. * * *

"The act of Congress in relation to couplings to cars engaged in interstate commerce peremptorily demands that carriers of interstate commerce shall use automatic couplers to the cars used by them. This defendant was a carrier of freight of interstate commerce, and of course it was bound by the act of Congress, no matter what rules they may have adopted for the government of their servants. The circuit judge properly stated the rule. It is well known that Congress took control of these matters for wise purposes, among which was the protection of railroad employés. * * * It would be a want of wisdom and a disregard of law for this act of Congress to be emasculated. Courts and the people of this country are obliged to adhere to and be governed by acts of Congress. Of course Congress intended that these automatic couplers should not only be provided and attached to cars, but that such appliances should be kept in proper repair for constant use. It is the law of this state, even if the act of Congress had overlooked this duty of keeping such appliances in good order, which includes proper repair. This exception is overruled."

On writ of error from the Supreme Court of the United States, the Southern Railway Company, as plaintiff in error in that court, assigned errors, among others, as follows:

"(2) The act (March 2, 1893) applies only when the railway company fails to use cars equipped with automatic couplers. It does not apply when the company has equipped its cars with such couplers, one of which is temporarily out of repair."

The charge of the court was as follows:

"If you believe that such cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence," etc.

In connection with this assignment of error, counsel for the plaintiff in error submitted to the Supreme Court of the United States the following argument:

"The law was inapplicable to the case, as it appeared beyond dispute in the complaint and in the evidence that the car in question was equipped with automatic couplers, which, when in order, permitted a coupling automatically by impact. It appeared in like manner that there was a certain pin out of the coupler which allowed the coupling pin to be drawn entirely out of the drawhead, and to this extent the coupler was defective. As a matter of fact the car, owing to this defect, was not equipped with a coupler which would work automatically; but plainly the act of Congress should not apply to a temporary defect, one which could be remedied in two minutes, according to plaintiff's own statement. The error of the circuit judge, we submit, was in practically holding that a coupler which in a normal condition complied with the act of Congress would not do so when temporarily out of repair. The jury naturally concluded that, if there was a broken part in the coupler which prevented for the time being an automatic coupling, it was not such a coupling as the law required. The point of abrasion, the hurting point, in the charge was this: If the company had not complied with the act of Congress, the failure to do so was negligence per se; if it had complied with the act and the appliance was temporarily out of repair, the company's negligence in such event became a question of fact for the jury, they passing upon the question whether the company had exercised ordinary care in keeping it in repair. How the little pin got out of the coupling pin no one knows; the car was on a side track near the factory store, in a factory village, where hundreds of people congregated, and the trouble may have been caused by some meddler. Upon the question of ordinary care the jury was not allowed to pass. They were told, if it was in a condition which would not admit of automatic coupling, the company was guilty of negligence under the act of Congress."

The Supreme Court of the United States affirmed the judgments of both the trial and appellate courts of South Carolina. Chief Justice Fuller, who delivered the opinion of the court, said:

"It is objected that the instructions assumed that, if the automatic coupler was out of repair, the company failed to comply with the act of Congress, but we do not think so, and the Supreme Court of the state held that there was no error, as Congress must have intended that the couplers should be kept in proper repair for use, and, moreover, such was the law of the state, even if the act of Congress had not specifically imposed this duty. By this ruling no right specifically set up or claimed under the act of Congress by defendant below was decided against. There was no pretense that the act of Congress provided that the automatic couplers need not be kept in order, and whether the cars in question were used in moving interstate traffic, and whether the coupling appliances were defective or not, were facts left to the jury and determined by their verdict."

The Circuit Court of Appeals for the Eighth Circuit, in the case of *United States v. Atchison, Topeka & Santa Fé Railway Co.*, 163 Fed. 517, held that the duty placed upon the railroads by the act is the same in both instances, and therefore that that which would be deemed a violation in an action to recover for personal injuries is also to be deemed a violation in an action to recover the statutory penalty.

In that case the court followed the decision of the Supreme Court of the United States in the case of *St. L., I. M. & S. Ry. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, holding that the duty imposed upon a railroad company by the Safety Appliance Act is absolute and unconditional. Circuit Judge Van Devanter, in discussing this point, said:

"Stripped of matters about which there is no controversy here, the violation charged consisted in hauling a car, in the usual course of transportation, when one of the couplers thereon was broken and inoperative, so that it could not be coupled or uncoupled without the necessity of a man going between the ends of the cars. The trial was to a jury, and the single question presented to us is whether or not the duty of the defendant, in respect of the maintenance of the coupler in an operative condition, was correctly stated in the portion of the court's charge, which reads:

"The act, however, must necessarily have a reasonable construction. These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railway companies to use prudence and the ordinary diligence of a business man, keeping in view the purposes of the act, to keep these couplings in repair. * * * And it is for you to determine in this case whether or not the defendant used reasonable care in ascertaining whether the car was in good repair, and then, again, whether the defendant used reasonable care in putting the coupler in good repair, after it ascertained that it was out of repair. If you find that it did use reasonable care in both instances, then it is not liable, and you should return a verdict in favor of the defendant; otherwise, you should find for the United States."

"Applying to the evidence the law as so interpreted, the jury returned a verdict for the defendant, which the court declined to disturb upon a motion for a new trial. *United States v. Atchison, etc., Ry. Co.* (D. C.) 150 Fed. 442. That the interpretation of this law of Congress has been attended with difficulty is attested by many varying opinions in the reported cases, and that there are considerations tending to sustain the construction placed upon it by the district court is attested by the opinion rendered upon the motion for a new trial and by sustaining opinions in other cases, notably *St. Louis & S. F. Ry. Co. v. Delk*, 158 Fed. 931, 86 C. C. A. 95, but, as we read the opinion of the Supreme Court in the more recent case of *St. Louis, Iron Mountain & Southern Railway Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061 (*Neal v. St. Louis, I. M. & S. R. Co.*, 71 Ark. 445, 78 S. W. 220; *St. Louis, I. M. & S. R. Co. v. Neal*, 83 Ark. 591, 98 S. W. 959), it is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the nonliability of the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; it being said in that connection:

"In deciding the questions thus raised, upon which the courts have differed. *St. Louis & S. F. Ry. v. Delk*, 158 Fed. 931, 86 C. C. A. 95, 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 prescribed. 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.

"While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employé, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed upon the railway company, section 5, relating to drawbars, is the same as section 2, relating to couplers, and section 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.

"Because, in view of the later decision in the Taylor Case, the instruction before quoted did not embody a correct statement of the law, the judgment is reversed, with a direction to grant a new trial."

Also in the case of Chicago Junction Railway Co. v. William R. King (decided by the Circuit Court of Appeals for the Seventh Circuit at its October term, 1908) 169 Fed. 372, Circuit Judge Baker, who delivered the opinion of the court, in discussing this phase of the question, said:

"Upon the carrier the statute lays the duty of seeing to it that no cars are hauled or used on its line that are not equipped according to the statutory requirements. This direct statutory duty cannot be evaded by assignment or otherwise. Therefore the act of the conductor who had charge of the train in deciding what should be done with the defective car was the act of the defendant. As to the negligence of the engineer, it is immaterial whether it be taken as that of the defendant or of a fellow servant of plaintiff, for defendant cannot be exempted from liability for its own negligence by reason of the concurrence of another's. Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787; Monmouth, M. & M. Co. v. Erling, 148 Ill. 533, 36 N. E. 117, 39 Am. St. Rep. 187; So. Pac. Co. v. Allen (Tex.) 106 S. W. 443."

Counsel for plaintiff in error are insistent that the provisions of this statute are subject to an exception that lessens the degree of diligence which would otherwise be required at the hands of railroad companies, but a careful examination of the same convinces us that no such exception is contained therein, and while it is urged that the requirements of the statute are unduly severe and unreasonable, even admitting this to be true, the fact would not justify a modification of the statute by judicial decision. The courts do not possess the power to read an exception into a statute so as to modify or change the nature of the same and thus defeat the purposes for which the law was intended.

In the case of United States v. Colorado & N. W. R. R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, the Circuit Court

of Appeals for the Eighth Circuit, in discussing this phase of the question, said:

"Where the Congress makes no exception from the clear and certain declaration of a statute, there is ordinarily a presumption that it intended to make none.

"By so much the more it is true that where the lawmaking body has made exceptions to the general terms of an act, as in this instance, the presumption is that it intended to make no more. Again, if Congress intended to make this exception, it was a secret intention which the safety appliance acts not only failed to express, but which their terms expressly negatived. It is the intention expressed, or necessarily implied, in the law, and that alone, to which courts may lawfully give effect. They may not assume or presume purposes and intentions that are neither expressed nor implied, and then construe into the law the provisions to accomplish these assumed intentions. A secret intention of the lawmaking body cannot be legally interpreted into a statute which is plain and unambiguous and which does not express or imply it."

The contention that this statute works a hardship applies with equal force to any statute which undertakes to control the affairs of individuals or corporations in this way, but in the light of past experience we are inclined to think that this is the only method by which dangers incident to this kind of employment can be minimized. When we contemplate the vast number of accidents resulting from the operation of railroad trains not properly equipped with safety appliances, we are forced to admit the wisdom and fairness of legislation of this kind. It has been the policy of our lawmakers, both state and national, to grant railroad and other public corporations certain privileges not enjoyed by private individuals; and, while this is a wise policy and has met with general approval, it is likewise proper that due regard should be had for the rights of those employed by such corporations in performing duties that are necessarily dangerous in their character, and it cannot be said to be an unreasonable provision to require railroad companies, enjoying privileges thus conferred upon them, to manage and operate their engines and cars so as to minimize the risk incident to travel and employment.

To sustain the contention of the defendant company as to the proper construction to be placed upon the provisions of this act would be to render the act nugatory, while on the other hand, if we construe it in accordance with the well-established rules in such cases, we afford life and vitality to the law and thus give expression to the legislative will. In other words, if Congress had the power, in the first instance, to legislate so as to regulate the conduct of railroads for the protection of employes and in the interest of the traveling public, then it must be admitted that it has not, in the passage of this law, transcended its limitation, and any construction short of holding the act to be absolute would leave undisturbed the situation as it existed prior to its enactment, and it would be difficult to imagine a state of facts upon which railroads would be liable for a penalty or where an employe would be able to recover in an action instituted to recover damages for injuries incurred on account of failure to perform the duties imposed by the statute. It was the manifest intention of Congress, in the enactment of this statute, to require all common carriers engaged in interstate commerce to keep their cars and engines at all times

equipped with proper safety appliances. The degree of diligence required by the statute is of the highest order, and the duty thus imposed is absolute and unconditional. Therefore any failure on the part of a railroad company to comply with its requirements must necessarily subject the railroad company to the penalty imposed.

It must be admitted that some of the cases relied upon by plaintiff in error are in conflict with the views entertained by this court. However, after due consideration of all the cases relied upon by plaintiff in error, we are of opinion that they are not controlling in this instance.

For the reasons hereinbefore stated; the judgment of the court below is affirmed.

HARRILL v. DAVIS et al.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1909.)

No. 2,805.

1. PARTNERSHIP (§ 41*)—CORPORATIONS (§ 225*)—INDIVIDUAL LIABILITY IN CASE OF FAILURE TO INCORPORATE—GENERAL RULE.

The general rule is that parties who associate themselves together and conduct a business for profit under a name adopted or used by them for that purpose are liable as partners for the debts they incur under that name.

This general rule governs if the name used be that of a supposed corporation which the associates have attempted but failed to organize according to law.

But a compliance by such associates with the statutes authorizing them to become a corporation exempts them from other individual liability than that prescribed by such laws for debts incurred after they become a corporation authorized to do business as such.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 56, 58; Dec. Dig. § 41; * Corporations, Cent. Dig. §§ 74, 864, 865; Dec. Dig. § 225.*]

2. PARTNERSHIP (§ 41*)—CORPORATIONS (§ 30*)—INDIVIDUAL LIABILITY—EXCEPTIONS TO GENERAL RULE.

Two exceptions to the general rule that corporators failing to organize legally are individually liable are: (1) Where such associates procure a charter or file articles of incorporation under a general enabling act, secure thereby the color of a corporation, believe they are such, and use the supposed franchise of their corporation, and third parties deal with them as a corporation, they become a de facto corporation, which exempts them from individual liability to such parties, although there are defects in their incorporation. (2) Projectors of a corporation to be organized who inform third parties that they are contracting for such a corporation and assure them that the obligations incurred will become the obligations of the future corporation may escape individual liability to such third parties for obligations thus incurred for services necessary to effect the corporate organization and for machinery and other property necessary to the commencement of the contemplated business of the corporation, where the corporation is subsequently organized, takes the benefit of such contracts, and assumes the obligations.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 56, 58; Dec. Dig. § 41; * Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 30.*]

3. PARTNERSHIP (§ 44*)—BURDEN OF PROOF ON CLAIMANTS OF EXEMPTION FROM LIABILITY.

When the fact appears that parties associated themselves together and incurred liabilities in the conduct of a business under a certain name, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

legal presumption is that they are governed by the general rule and are liable as partners, and the burden is on them to prove that they are duly incorporated or that they fall under some exception to the general rule.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 62, 62½; Dec. Dig. § 44.*]

4. CORPORATIONS (§ 221*)—CORPORATION DE FACTO—COLOR OF ORGANIZATION SUCH AS CHARTER OR FILING ARTICLES REQUISITE.

Color of legal organization as a corporation, such as a charter or the filing of articles of incorporation under some law, and user of the supposed corporate franchise in good faith, are indispensable to the existence of a de facto corporation which will exempt from individual liability those who actively conduct it.

Neither the execution of articles which are not filed, nor statements nor beliefs of the promoters that they are a corporation, nor the treatment of themselves by themselves and by those who deal with them as a corporation, nor all these together, will exempt those who actively conduct the business under the assumed name of such a nonexistent corporation from individual liability for the debts they incur.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 221.*]

5. CORPORATIONS (§ 34*)—CORPORATION DE FACTO—ESTOPPEL FROM DENYING EXISTENCE INAPPLICABLE IN ABSENCE OF COLOR OF INCORPORATION.

One who deals with a corporation de facto may be estopped from denying its existence as a corporation de jure.

But no one is estopped by dealing with parties as a corporation who are actively conducting business for profit under an assumed corporate name when they have no charter, have filed no articles of incorporation, and procured no color of legal organization as a corporation, from denying that they constitute a corporation of any kind or from enforcing their individual liability for the debts they incur under such a name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 84, 91; Dec. Dig. § 34.*]

6. CORPORATIONS (§ 372*)—ULTRA VIRES—CONSTRUCTING AND OPERATING COTTON GIN BEYOND POWERS OF BROKERAGE COMPANY.

A corporation organized for the purpose of "buying, selling, leasing and dealing in lands, securities, bonds, notes, stocks and other negotiable paper and also buying and selling general merchandise" has no corporate power to build and operate cotton gins or to subscribe for stock in and form another corporation for that purpose.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 372.*]

7. STATUTES (§ 226*)—CONSTRUCTION—ADOPTION ADOPTS INTERPRETATION.

The adoption of a statute previously in force in some other jurisdiction is presumed to be the adoption of the interpretation thereof which had been theretofore placed upon it by the judicial tribunal whose duty it was to construe it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 256, 307; Dec. Dig. § 226.*]

8. ELECTION OF REMEDIES (§ 12*)—PURSUIT OF INCONSISTENT MISTAKEN REMEDY NO DEFENSE TO TRUE REMEDY.

The fatuous choice of a fancied remedy that never existed, and the futile pursuit of it until the court adjudges that it never had existence, is no defense to an action to enforce an actual remedy inconsistent with that first invoked.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 15; Dec. Dig. § 12.*]

9. CORPORATIONS (§§ 22, 221*) — PROMOTERS INDIVIDUALLY LIABLE — FACTS — CONCLUSIONS.

The four defendants agreed in April or June, 1902, to take specified shares in a \$10,000 enterprise for the purpose of building a cotton gin

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and carrying on the business of buying, ginning, and selling cotton, and to organize a corporation for this purpose. In June or July, 1902, they commenced to buy material and labor of the plaintiff and to build their cotton gin. In September, 1902, they commenced to buy cotton, and in the first days of October to operate their cotton gin. They transacted a business with the plaintiff consisting of the purchase of lumber, materials, and labor for their buildings and of dealing in cotton with it which amounted to several tens of thousands of dollars, and they remained indebted to it over \$5,000, of which \$4,700 was incurred prior to December 22, 1902, when they first filed articles of incorporation in one of two places required by the statute. During all this time they treated themselves, and the plaintiff treated them, as a corporation.

Held: The defendants did not become a corporation de jure because they failed to file their articles in both the places required by the statute; (2) they did not become a corporation de facto before they filed their articles on December 22, 1902, to such an extent as to exempt them from individual liability because they did not before that time secure any color of legal organization as a corporation under any charter or enabling act; (3) they were liable individually as partners for that part of the plaintiff's claim incurred prior to the filing of their articles.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 62, 64; Dec. Dig. §§ 22, 221.*

Acts of corporators and promoters, see note to *Yeiser v. United States Board & Paper Co.*, 46 C. C. A. 576.]

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 104 S. W. 573.

The Western Investment Company brought this action for a balance due it upon an account for lumber and materials sold, cotton handled, and services rendered to Walter B. Mann, Frank M. Davis, Robert S. Davis, and James G. Knight, as partners doing business under the firm name the "Coveta Cotton & Milling Company." The defendants denied the partnership and their liability, and averred that the indebtedness in question was that of the milling company and that that company was a corporation. The evidence established these facts: One Naylor was the president, and Frank M. Davis was the vice president and general manager, and Naylor, Davis, Edwards, and Wallace were directors, of the Western Investment Company. There were 1,000 shares of the capital stock of that company, of which Naylor owned 520, Davis, Edwards, and Wallace 80 each.

In April or June, 1902, Mann, Frank M. Davis, Robert S. Davis, and Knight agreed to embark in a \$10,000 enterprise for the purpose of building a cotton gin, buying, ginning, and selling cotton, that Mann should take two-fifths of this undertaking and the other three members one-fifth each, and that Frank M. Davis should take his fifth for the Western Investment Company. Neither the Western Investment Company nor any of its directors ever authorized Davis to take this stock on its behalf, and he never reported to the company that he had so taken it until January, 1903, after the indebtedness here in question had been incurred, and at about the time when the milling company ceased to operate its gin. He testified that he had some conversation with Edwards and Wallace about his taking this stock for the corporation, but that he never mentioned it to Naylor, the president, who held a majority of the stock. In February, 1903, after the milling company had ceased to operate its gin, Davis caused an entry of a credit of \$1,150 to that company to be entered upon the account books of the investment company on account of this stock, and the investment company subsequently repudiated this charge and charged the \$1,150 back to the milling company.

In April or June, 1902, F. M. Davis, on behalf of the investment company, agreed with the other defendants to furnish to them materials to build the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cotton gin, and in June or the following month the plaintiff commenced to furnish materials and to render its services for this purpose, which were received by Knight as the representative of the defendants and used by him to construct the cotton gin and to carry on the business which the defendants were conducting. The price of these materials and services were charged upon the books of the investment company to Coweta Gin Company and the Coweta Gin cotton account.

On September 3, 1902, three of the defendants met and signed articles of incorporation as the "Coweta Cotton & Milling Company" and a declaration of the purpose of the incorporation, which the statutes required to be verified by the signers and to be filed with the clerk of the Court of Appeals and with the clerk of the judicial district in which the contemplated corporation was to do business. This declaration was verified by Mann on November 10, 1902, and by Frank M. Davis on December 10, 1902, and it was filed with the clerk of the Court of Appeals on December 22, 1902, and was never filed elsewhere. The balance of indebtedness due to the investment company is about \$5,000 and interest, and all of it but a few hundred dollars was incurred before the articles of incorporation were filed. Frank M. Davis, as general manager of the investment company, treated the milling company as a corporation all the time during which this indebtedness was contracted, and never charged any of it to himself or his associates. He and other witnesses testified that the milling company received the benefit of all materials and services furnished by the plaintiff, and that the defendants received no benefit from them, and that they acted in good faith and without any intent to deceive or defraud any one. The entire amount of money paid into the milling company by the incorporators was not more than \$4,950. That company never had any stock book and never issued any stock. The defendants commenced to buy cotton and to operate their gin under the name of the milling company in October, 1902, and they ceased to operate their cotton gin in January, 1903. Knight managed the construction of the cotton gin and the other improvements for the defendants and the business of the defendants and the milling company from June, 1902, when he commenced the buildings, until January, 1903. About \$3,000 of the claim in suit was for lumber and labor furnished, and for this amount the investment company filed a claim for a mechanic's lien verified by the successor of Frank M. Davis in May, 1903, in which there is a statement that the milling company is a corporation. Upon this state of facts the trial court directed a verdict for the defendants, and refused to instruct the jury that the plaintiff was entitled to recover the portion of the debt incurred prior to the filing of the articles of incorporation on December 22, 1902.

R. C. Allen (J. C. Pinson, on the brief), for plaintiff in error.

Geo. A. Murphey (S. M. Rutherford, W. T. Hutchings, and W. P. Z. German, on the brief), for defendants in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). The patent and indisputable facts in this case are that the four defendants associated themselves together, and from June, 1902, until December 22, 1902, actively engaged in purchasing lumber, material, and labor of the plaintiff, and in constructing a cotton gin under the name "The Coweta Gin Company," and in conducting the business of buying, selling, and ginning cotton for profit under the name "The Coweta Cotton & Milling Company," and that during this time they incurred more than \$4,700 of the indebtedness of \$5,145.48 for which this action was brought. On December 22, 1902, they made their first real attempt to incorporate, and for the first time took on the color or appearance of a corporation. On that day they filed articles

of incorporation with the clerk of the Court of Appeals, but they never filed any duplicate of them with the clerk of the judicial district in which their place of business was located, as required by the statutes in order to constitute them a legal corporation and to authorize them to do business as such. Act Feb. 18, 1901, c. 379, 31 Stat. 794; Mansfield's Dig. Laws Ark. §§ 960, 968, 979.

The general rule is that parties who associate themselves together and actively engage in business for profit under any name are liable as partners for the debts they incur under that name. It is an exception to this rule that such associates may escape individual liability for such debts by a compliance with incorporation laws or by a real attempt to comply with them which gives the color of a legal corporation, and by the user of the franchise of such a corporation in the honest belief that it is duly incorporated. When the fact appears, as it does in the case at bar, by indisputable evidence that parties associated and knowingly incurred liabilities under a given name, the legal presumption is that they are governed by the general rule, and the burden is upon them to prove that they fall under some exception to it. *Owen v. Shepard*, 59 Fed. 746, 8 C. C. A. 244; *Wechselberg v. Flour City National Bank*, 64 Fed. 90, 94, 12 C. C. A. 56, 60, 61, 26 L. R. A. 470; *Clark v. Jones*, 87 Ala. 474, 6 South. 362.

Counsel for the defendants argue with much force and persuasiveness that they escape liability because they became a corporation de facto, although they concede that they never became a corporation de jure, and in support of this position they cite, among other cases: *Wells Company v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003; *Andes v. Ely*, 158 U. S. 312, 322, 15 Sup. Ct. 954, 39 L. Ed. 996; *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U. S. 320, 327, 21 Sup. Ct. 378, 45 L. Ed. 550; *Gartside Coal Co. v. Maxwell (C. C.)* 22 Fed. 197; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147; *Tennessee Automatic Lighting Company v. Massey (Tenn. Ch. App.)* 56 S. W. 35; *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; *Merchants' National Bank v. Stone*, 38 Mich. 779; *Gow v. Collin Lumber Company*, 109 Mich. 45, 66 N. W. 676, 678; *Eaton v. Aspinwall*, 19 N. Y. 119; *Leonardsville Bank v. Willard*, 25 N. Y. 574; *Cahall v. Citizens' Mutual Bldg. Ass'n*, 61 Ala. 232; *Fay v. Noble*, 7 Cush. (Mass.) 188, 192, 193; *Snider Sons' Company v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Cochran v. Arnold*, 58 Pa. 399, 404; *Lafin & Rand Powder Co. v. Sinsheimer*, 46 Md. 315, 321, 24 Am. Rep. 522; *Rutherford v. Hill*, 22 Or. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. Rep. 596. But in every one of these authorities articles of incorporation had been filed under a general enabling act, or a charter had been issued and there had been a user of the franchise of the supposed corporation which had been colorably created by the filing of the articles or the issue of the charter before the indebtedness in question was created, while nothing of this nature had been done before the debt for the \$4,700 which we are now considering was incurred. The authorities which

have been recited rest upon the proposition that where parties procure a charter or file articles of association under a general law, thereby secure the color of a legal incorporation, believe that they are a corporation, and use the supposed franchise of the corporation in good faith, and third parties deal with them as a corporation, they become a corporation de facto and exempt from individual liability to such third parties, although there are unknown defects in the proceedings for their incorporation. The statement of Morawetz on Corporations, at section 748, upon which counsel seem to rely, that:

"If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of the association cannot be charged as parties to the contract, either severally or jointly, or as partners. This is equally true whether the association was in fact a corporation or not, and whether the contract with the association in its corporate capacity was authorized by the Legislature or prohibited by law, or illegal"

—is too broad to be sound. Parties who actively engage in business for profit under the name and pretense of a corporation which they know neither exists nor has any color of existence may not escape individual liability because strangers are led by their pretense to contract with their pretended entity as a corporation. In such cases, they act as the agents of a principal that they know does not exist, and they are liable under a familiar rule, because there is no responsible principal. 2 Kent's Commentaries (14th Ed.) 630; *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356, 364, 30 S. W. 163. The burden is not on the strangers who deal with them as a corporation, but on themselves who act under the name of a pretended corporation, to see that it is so organized that it exempts them from individual liability, and if they fail in this they must pay the liabilities they incur, even in the absence of fraud or bad faith, upon the salutary principle that where one of two parties must suffer he must bear the loss whose breach of duty caused it.

There are cases in which stockholders who took no active part in the business of a pretended corporation which was acting without any charter or filed articles, who supposed that the corporation was duly organized, have been held exempt from individual liability for the debts it incurred; but if they had been actively conducting its business with knowledge of its lack of incorporation, those decisions must have been otherwise. *Seacord v. Pendleton*, 55 Hun, 579, 9 N. Y. Supp. 46; *Fuller v. Rowe*, 57 N. Y. 23, 26.

Neither the hope, the belief, nor the statement by parties that they are incorporated, nor the signing of articles of incorporation which are not filed, where filing is requisite to create the corporation, nor the user of the pretended franchise of such a nonexistent corporation, will constitute such a corporation de facto as will exempt those who actively and knowingly use its name to incur obligations from their individual liability to pay them. Color of legal organization as a corporation under some charter or law and user of the supposed corporate franchise in good faith are indispensable to such exemption.

Under the general law of Arkansas in force in the Indian Territory, the filing of articles of incorporation with the clerk of the Court of Appeals was a *sine qua non* of any color of a legal corporation. Without that there was not, and there could not be, an apparent corporation and the color of a corporation. Agreements to form one, statements that there was one, signed articles of association to make one, acts as one, created no color of incorporation, because there could be no incorporation or color of it under the law until the articles were filed. *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799; *Finnegan v. Noerenberg*, 52 Minn. 239, 243, 244, 53 N. W. 1150, 1151, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Taylor on Private Corporations*, p. 145, *Roberts Mfg. Co. v. Schlick*, 62 Minn. 332, 64 N. W. 826. In *Finnegan v. Noerenberg*, *supra*, Chief Justice Gilfillan well said:

"To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a *de facto* corporation, might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799, in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a *de facto* corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required."

The defendants cannot escape individual liability for the \$4,700 on the ground that the Coweta Cotton & Milling Company was a corporation *de facto* when that portion of the plaintiff's claim was incurred, because it then had no color of incorporation, and they knew it and yet actively used its name to incur the obligation. *Owen v. Shepard*, 8 C. C. A. 244, 59 Fed. 746; *Wechselberg v. Flour City National Bank*, 64 Fed. 90, 94, 12 C. C. A. 56, 60, 61, 26 L. R. A. 470; *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416, 423, 424; *Garnett v. Richardson*, 35 Ark. 144; *Johnson v. Corser*, 34 Minn. 355, 357, 25 N. W. 799; *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356, 364, 30 S. W. 163; *Bigelow v. Gregory*, 73 Ill. 197, 202; *Parsons on Partnership*, p. 544; *Hill v. Beach*, 12 N. J. Eq. 31; *Kaiser v. Lawrence Savings Bank*, 56 Iowa, 104, 8 N. W. 772, 41 Am. St. Rep. 85; *Pettis v. Atkins*, 60 Ill. 454; *Coleman v. Coleman*, 78 Ind. 344; *Lawler v. Murphy*, 58 Conn. 313, 20 Atl. 457, 8 L. R. A. 113; *Hurt v. Salisbury*, 55 Mo. 310, 314; *Beach on Private Corporations*, § 16, p. 25; *Martin v. Fewell*, 79 Mo. 401, 411; *Smith v. Warden*, 86 Mo. 382, 399; *McVicker v. Cone*, 21 Or. 353, 28 Pac. 77.

Another contention is that the defendants are released from liability because the materials and labor for which the \$4,700 became due were furnished to them while they were promoting the organization of the corporation for the future corporation, and that the latter has received the benefit of them and ratified their purchase; and in support of this position they cite *Whitney v. Wyman*, 101 U. S. 396, 25 L. Ed. 1050; *Little Rock & Ft. Smith R. R. Co. v. Perry*, 37 Ark. 164; *Paxton Co. v. First National Bank*, 21 Neb. 621, 33 N. W. 271,

59 Am. St. Rep. 852; *Stanton v. New York R. R. Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110; *Davis v. Montgomery*, 101 Ala. 127, 8 South. 496; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Wall v. Niagara Co.*, 20 Utah, 474, 59 Pac. 399; *Lancaster Co. v. Murray Co.*, 19 Tex. Civ. App. 110, 47 S. W. 387; *Kaepler v. Redfield Co.*, 12 S. D. 483, 81 N. W. 907; *Chase v. Redfield*, 12 S. D. 529, 81 N. W. 951. In *Whitney v. Wyman*, after the articles of incorporation were signed, but before they were filed, three promoters of the incorporation wrote to the plaintiff that the company was so far organized that by direction of its officers they ordered seven lathes and the necessary fixtures for claspings. These lathes were necessary to enable the corporation to commence its contemplated business, were received and used by it, and the Supreme Court held that the promoters were not individually liable for their purchase price.

Little Rock & Ft. Smith R. R. Co. v. Perry was an action against the corporation, and the liability of the promoters was not in issue. The court declared that the rule here invoked grew out of decisions in equity that contracts necessarily made by promoters on behalf of a future corporation in order to obtain its charter or to complete its organization would be specifically enforced against it, as in *Stanley v. Birkenhead Railway Co.*, 9 Simons, 264, 16 Eng. Ch. Rep. 264, where the projectors of a railroad seeking a charter agreed with a landed proprietor, on behalf of the proposed company, in consideration that he would withdraw his opposition to their bill, to pay him £20,000 for the portion of his estate required by the road, and the court enforced the specific performance of this obligation against the corporation when the charter had been granted, and, as in *Edwards v. Grand Junction Railway Company*, 1 Mylne & C. 650, *Preston v. Liverpool, Manchester, etc., Railway Co.*, 7 Eng. L. & Eq. 124, *Webb v. Direct London & Portsmouth Railway Company*, 9 Hare, 129, *Low v. Ct. & Passumpric Railway*, 45 N. H. 375, which are there cited, and the Arkansas court held that in order to recover of such a corporation the plaintiff must show "either an express promise of the new company, or that the contract was made with persons then engaged in its formation and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of the plaintiff and with the assurance on the part of the projectors that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it." But there is no evidence that the materials and labor furnished to the defendants prior to December 22, 1902, were sold by the plaintiff with the assurance on their part, or with the expectation on its part, that their price would not be paid by them, but would become the debt or obligation of a corporation to be organized in the future. On the other hand, *Davis*, who sold these articles for the plaintiff, and *Knight*, who bought them for the defendants, both testified that in the purchase and the sale of all of them they treated themselves as a corporation before, as completely as after, the filing of their articles. The rule of law here invoked applies to contracts preliminary and incidental to the organization or to the commencement of the business of a con-

templated corporation, and this debt for \$4,700 was not the result of any such contract. It is part of the balance of an account of many tens of thousands of dollars which arose out of the conduct of a business preliminary, not to its commencement, but to its close. The business of the defendants was the buying and ginning of cotton. They commenced to construct their buildings in June, to buy cotton in September, to operate their gin in the first days of October, they filed their articles on December 22d, and ceased to operate their gin in the following January. They cannot escape liability for debts incurred in this business prior to December 22d on the ground that their construction of buildings, and their dealing in and ginning cotton for two months and a half were necessary preliminaries to the organization of their corporation or to the commencement of their business, nor on the ground that the claim of the plaintiff was incurred on their assurance that it was for and should become the debt of a corporation to be formed, because these grounds are not sustained by the evidence.

Counsel insist that the defendants are not liable here because one who deals with a corporation de facto is estopped from denying its existence as a corporation; but the true meaning and legal effect of this rule is that such a dealer is estopped from denying its existence on the ground that it was not legally incorporated. One who deals with parties who masquerade under a name which represents no corporation de facto is no more estopped from denying that it is a corporation than he would be from denying that they constituted or acted for the Union Pacific Railroad Company, or any other well-known corporation, when they did not. The fact that the plaintiff dealt with and treated the Coweta Cotton & Milling Company as a corporation did not estop it from denying that it was such before the defendants filed their articles of incorporation, because it was not a corporation de facto before that time and because the indispensable elements of an estoppel in pais, ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel, and action by the latter induced by the misrepresentation of the party against whom the estoppel is invoked, do not exist in the case at bar. Bigelow on Estoppel (4th Ed.) p. 679. The plaintiffs did not, and the defendants did, represent that the milling company was a corporation when it was not. The defendants had better means of knowledge of the fact than the plaintiff, and they knew it was not a corporation, and they were not induced to act on any representation of the plaintiff that it was such, or by its treatment of it as such.

Nor was the plaintiff estopped by the fact that its general manager stated under oath in its claim for a lien in May, 1903, that the milling company was a corporation, first, because the defendants were not induced to take any action by this statement from which they can suffer any injury by the proof of the truth, and, second, because one is not estopped from pursuing his true legal remedy by a mistaken attempt to pursue a supposed remedy that does not exist. *Standard Oil Company v. Hawkins*, 20 C. C. A. 468, 472, 74 Fed. 395, 398, 399, 33

L. R. A. 739; *Barnsdall v. Waltemeyer*, 73 C. C. A. 515, 520, 142 Fed. 415, 420; *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514, 517.

It is said that the plaintiff is estopped from denying the existence of the defendant's supposed corporation because it was one of its promoters and stockholders, but the evidence fails to convince us that it was ever either. F. M. Davis was the general manager of the plaintiff. He testified that in June, 1902, he agreed with the other defendants to take a \$2,000 share for the plaintiff in a corporation to be organized with a capital of \$10,000 for the purpose of ginning and dealing in cotton, that Mann agreed to take a \$4,000 share, R. S. Davis and James G. Knight a share of \$2,000 each, that in September he signed the articles of incorporation and subscribed for this stock, that the other defendants also subscribed, that these subscribers paid the first assessment of \$3,750 on \$10,000 of the stock in the fall of 1902, that the second assessment of \$2,000 was made in January, 1903, that he never reported this stock to the plaintiff until January, 1903, but that in the summer and fall of 1902 he talked with Edwards and Wallace, two of the directors, who had 80 shares of stock each in the plaintiff, about this stock which he was to take and which he had taken, that the plaintiff and they acquiesced in his action and told him to do the best he could with it, but that they did not direct or instruct him to take the stock or agree that he should take it, and that he did not talk with the president, who was the owner of the majority of the stock of the plaintiff, although another witness testified that some time in the fall of 1902 he told Naylor that Davis had taken stock in the milling company for the plaintiff. Davis, however, subscribed for the stock in his own name, and the plaintiff did not. He testified that he paid the first assessment in the fall of 1902, but he never charged the plaintiff and credited himself with that payment; but, on the contrary, on February 23, 1903, after the milling company had ceased to operate its gin, he caused an entry to be made on the books of the investment company charging it and crediting the milling company with \$1,150, the amount of the two assessments on his stock, an entry which the plaintiff subsequently repudiated. There are two reasons why, under the evidence in this record, the plaintiff never became a holder, either in law or in equity, of any share in the defendant's enterprise or company, either as a stockholder or otherwise. In the first place, the construction and operation of a cotton gin was beyond the powers of the plaintiff corporation, the nature of whose business was declared and limited by its articles to "buying, selling, leasing and dealing in lands, securities, bonds, notes, stocks and other negotiable paper, and also buying and selling general merchandise." In the second place, if by any conceivable interpretation the construction and operation of a cotton gin and the formation of the corporation, and the taking of stock therein to accomplish that purpose, could be deemed to be within the powers of this corporation, they are so far beyond the scope of its ordinary business that a general manager could be authorized to commit his corporation to them only by the express authority of its board of directors, or of its principal officers, after a full disclosure to them of all the facts relating to the proposed enterprise, and the desultory

talks which Davis had with the two directors fall far short of any evidence of such authority.

Much is made in argument of the testimony of Davis and Knight that they acted in good faith, that the defendants never received any benefit from the materials and labor for the purchase price of which the plaintiff sues, but good faith and the use of a name which they know represents no corporation as the name of a corporation under which they do business creates a partnership, and neither a corporation de jure nor de facto. And the defendants had all the benefit there was from the materials and labor furnished by the plaintiff, for the milling company never issued any stock, and these defendants owned their respective shares in its property, and whatever it had they had, and, as far as they have not disposed of it, they still have. The fact is that during this entire transaction while Davis was the general manager of the plaintiff he was the partner of the defendants, and, in all transactions between the plaintiff and the defendants, was pecuniarily interested adversely to his principal.

The sum of the whole matter is that the defendants agreed in April or June, 1902, to take certain shares in a \$10,000 enterprise for the purpose of building a cotton gin, and buying, ginning, and selling cotton, and to organize a corporation to carry on this business they bought between June and December 22, 1902, materials and labor with which they built the cotton gin, and between September 15th and December 22d operated their cotton gin and carried on the business of buying, ginning, and selling cotton with the plaintiff to the amount of several tens of thousands of dollars, and there remains a balance of about \$4,700 due the plaintiff on this account. They never issued any stock, but in September, November, and December they signed articles of incorporation which they filed with the clerk of the Court of Appeals on December 22, 1902. During this time they treated themselves and the plaintiff dealt with them as a corporation. They represented themselves to be a corporation when they knew they were not; under the name of a corporation which did not exist they purchased these goods and services.

And our conclusion is that the defendants never became a corporation de facto prior to December 22, 1902, that they never became a corporation de jure, that the indebtedness here in question was not incurred under any promise or assurance of the defendants as promoters that it should become the obligation of a corporation to be formed, that a large part of it was incurred in the conduct of a general commercial business, and not to prepare for the commencement of such a business or for the organization of a corporation, and that the trial court below should have instructed the jury that the defendants were individually liable for that portion of the plaintiff's claim which was incurred prior to December 22, 1902. Its failure to do so was a fatal error which necessitates a reversal of the judgments below.

In view of the conclusion which has now been reached, it is unnecessary to discuss at length or to determine other questions which are presented in this record. It is sufficient to say regarding the portion of the plaintiff's claim incurred subsequent to December 22, 1902, that while there is a conflict of authority upon the question whether

or not incorporators or stockholders remain personally liable after the filing of articles in one office only where the statute requires them to be filed in two offices as a condition of incorporation or of the commencement of business (*Mokelumne Hill Canal & Mining Co. v. Woodbury*, 14 Cal. 265, 267), the statute under which this case arose was brought into the Indian Territory from the state of Arkansas, and the Supreme Court of that state had held, before it was adopted in the Indian Territory, that such corporators or stockholders remain individually liable under this statute unless and until their articles of incorporation are filed in both offices. *Garnett v. Richardson*, 35 Ark. 144. This conclusion is sustained by eminent authority (*Wechselberg v. Flour City National Bank*, 12 C. C. A. 56, 60, 61, 64 Fed. 90, 94, 26 L. R. A. 470, and authorities there cited), and it is an established rule of statutory construction that the adoption of a statute previously in force in some other jurisdiction is presumed to be the adoption of the interpretation thereof which had been theretofore placed upon it by the judicial tribunal whose duty it was to construe it. *Black, Interpretation of Laws*, p. 159, § 70; *McDonald v. Hovey*, 110 U. S. 619, 628, 4 Sup. Ct. 142, 28 L. Ed. 269; *Sanger v. Flow*, 1 C. C. A. 56, 58, 48 Fed. 152, 154; *Blaylock v. Incorporated Town of Muskogee*, 54 C. C. A. 639, 117 Fed. 125.

The judgments of the courts below must be reversed, and the case must be remanded to the proper court for a new trial; and it is so ordered.

MARTIN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1909.)

No. 2,728.

1. UNITED STATES (§ 52*)—OFFICERS—CLERK OF COMMISSIONER NOT AN OFFICER—"OFFICER OF UNITED STATES."

One of the clerks of the commissioner to the Five Civilized Tribes, employed at a salary of \$1,200 a year under authority granted by Congress to the Secretary of the Interior to employ all assistance necessary to perform the duties of the commissioners to those tribes, was not an officer of the United States, and was not punishable under section 5408, Rev. St. (U. S. Comp. St. 1901, p. 3658), which provides that "every officer having the custody of any record, document, paper, or proceeding, * * * who fraudulently takes away, or withdraws, or destroys any such record, document, or paper," shall suffer the penalties there prescribed.

[Ed. Note.—For other cases, see *United States*, Dec. Dig. § 52.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 4947, 4948; vol. 8, p. 7737.]

2. UNITED STATES (§ 52*) — "CUSTODY" — DOCUMENT IN CUSTODY OF CHIEF CLERK NOT IN THAT OF SUBORDINATES WHO HAVE ACCESS TO IT.

"Custody" means keeping, and implies responsibility for the protection and preservation of the person or thing in custody.

A document in a public office in the general custody of a commissioner and in the particular custody of his chief clerk, under whom five or six

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

subordinate clerks are employed who have access to it in order to discharge their duties, is not in the custody of one of the latter.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 52.*

For other definitions, see Words and Phrases, vol. 2, pp. 1800, 1801; vol. 8, p. 7623.]

3. UNITED STATES (§ 52*)—CUSTODY OF DOCUMENTS—"TAKES AWAY OR WITH-DRAWS" MEANS INJURIOUSLY TAKES AWAY OR WITHDRAWS.

The words "takes away or withdraws" in this section, which subjects an officer who "fraudulently takes away or withdraws, or destroys, a record, or document," must be read with the word "destroys," and they mean a taking away or withdrawal whereby some injury is intended, attempted, or inflicted upon the record or document, or upon some one who has an interest in it and is entitled to use it.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 52.*]

4. UNITED STATES (§ 52*)—CUSTODY OF DOCUMENTS—"FRAUDULENTLY" MEANS METHOD WHEREBY ATTEMPT, OR INTENT, OR EFFECT TO ALTER ANOTHER'S RIGHT EXISTS.

An attempt or an intent to injure or alter the rights or interests of another, or an effect to so injure or alter some of them, is essential to a fraud, and, in the absence of such an intent, attempt, and effect, an act cannot be done fraudulently under this section.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 52.*

For other definitions, see Words and Phrases, vol. 3, pp. 2955-2957.]

5. INDICTMENT AND INFORMATION (§ 63*) — CONCLUSION OF LAW — PLEADING — AVERMENT THAT ACT WAS DONE FRAUDULENTLY FUTILE.

An allegation that an act innocent in itself but criminal if done "fraudulently" was performed fraudulently, or with an intent to defraud, without the averment of any acts or facts tending to show fraud, is a legal conclusion and futile. It is insufficient to charge the offense of fraudulently taking away or removing a record or document under section 5408, Rev. St. (U. S. Comp. St. 1901, p. 3658).

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 185; Dec. Dig. § 63.*]

6. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE—PLEADING IN WORDS OF STATUTE INSUFFICIENT WHERE THEY FAIL TO EXPRESS EVERY INGREDIENT OF CRIME.

The crime and every ingredient of which it is composed must be clearly and accurately alleged in the indictment.

Where the statute does not "fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute an offense intended to be punished," an indictment in the words of the statute is insufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

7. STATUTES (§ 241*)—CONSTRUCTION—STATUTE CREATING OFFENSE OF CLASS INCLUDES ONLY THOSE WITHIN ITS EXPRESS TERMS.

A penal statute which creates and prescribes punishment for an offense committed by a specific class must be strictly construed.

One who was not beyond reasonable doubt within the class by the express terms of the statute may not be brought within it after the event by interpretation.

Ex post facto law by judicial construction is as pernicious as ex post facto legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322-323; Dec. Dig. § 241.*]

(Syllabus by the Court.)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 104 S. W. 678.

William T. Hutchings and Henry E. Asp (Geo. A. Murphey and Wm. P. Z. German, on the brief), for plaintiff in error.

William J. Gregg, U. S. Atty.

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

SANBORN, Circuit Judge. The defendant below was convicted and sentenced to imprisonment at hard labor for a year and a day, and to pay a fine of \$100 and costs, under section 5408, Rev. St. (U. S. Comp. St. 1901, p. 3658), because he withdrew from the office of the commissioner to the Five Civilized Tribes a roll containing the names of citizens by blood of the Creek Nation of Indians, hereafter called the "Creek roll," and during nights and Sundays, when it was not needed or used in the office, made a copy of it. The provisions of the acts of Congress relevant to the issues in this case are:

"Sec. 5403. Every person who willfully destroys or attempts to destroy, or with intent to steal or destroy, takes and carries away any record, paper, or proceeding of a court of justice, filed or deposited with any clerk or officer of such court, or any paper, or document, or record filed or deposited in any public office, or with any judicial or public officer, shall, without reference to the value of the record, paper, document, or proceeding so taken, pay a fine of not more than two thousand dollars, or suffer imprisonment, at hard labor, not more than three years, or both." U. S. Comp. St. 1901, p. 3656.

"Sec. 5408. Every officer, having the custody of any record, document, paper, or proceeding specified in section fifty-four hundred and three, who fraudulently takes away, or withdraws, or destroys any such record, document, paper, or proceeding filed in his office or deposited with him or in his custody, shall pay a fine of not more than two thousand dollars, or suffer imprisonment at hard labor not more than three years, or both; and shall, moreover, forfeit his office and be forever afterward disqualified from holding any office under the government of the United States."

The commissioners to the Five Civilized Tribes were authorized "to employ, with approval of the Secretary of the Interior, all assistance necessary for the prompt and efficient performance of their duties," and the Secretary was permitted to detail clerks to aid the commission. Act June 28, 1898, c. 517, § 20, 30 Stat. 502. The defendant had been employed as a clerk by the commission under this authority at a salary at \$75 per month, and had been promoted to be a clerk at \$100 per month, and that change had been approved by the Secretary of the Interior in April, 1904. By the act of March 3, 1905, c. 1479, 33 Stat. 1060, Congress devolved the unfinished work of the commission upon the Secretary of the Interior, and granted to him all the powers of the commission subsequent to July 1, 1905. Thereafter Tams Bixby became the commissioner to the Five Civilized Tribes, and Wm. O. Beal was his secretary. Thereupon, after July 1, 1905, the commissioner made a schedule of all his employes, including the defendant, which the Secretary of the Interior approved on September 27, 1905, and on October 2, 1905, the defendant took and subscribed the oath, a copy of which may be found in section 1757 of the Revised Stat-

utes (U. S. Comp. St. 1901, p. 1202), as did the stenographer, the janitor, and the other employes of the commissioner.

There were five copies of the Creek roll, one in the office of the Secretary of the Interior at Washington, one in the office of the Commissioner of Indian Affairs at Washington, and three in the offices of the commissioner to the Five Civilized Tribes at Muskogee, one with the Creek enrollment division, one in the Creek land office, and one reserved for delivery to the principal chief of the Creek Nation. The roll in the Creek land office was the one which the defendant took away and copied in the early part of the year 1906. At that time W. S. Hawkins was the chief clerk in charge of that office. The Creek roll in that office was in the custody of this chief clerk, and he was responsible for it to the commissioner, who had the general custody of it. The defendant was one of six or seven clerks under Hawkins in this Creek land office, and Hawkins had authority to assign him to any clerical work to be done in and about the office. These six or seven clerks and the janitors had access to this roll.

The defendant was allotment clerk, and his duties were to receive applications for allotments. He had no use for this roll in the discharge of his duties, because the names for him to allot the lands by were furnished to him by the enrollment division. This roll was kept in the vault at night, and it was not one of the duties of the defendant, but it was one of the duties of the janitor, to bring the roll out in the morning and to carry it back at night. The defendant took this roll out of the Creek land office after office hours, copied it nights and Sundays, returned it in each case so that it was in the office during the hours when the clerks and officers desired to use it, and when the copy was completed finally returned it without injury. Upon this state of facts the Court of Appeals of the Indian Territory held that the defendant was an officer of the United States, that he had the custody of this roll, and that he fraudulently took it away or withdrew it, and it affirmed the judgment below. The defendant has assigned these rulings as error:

1. If the defendant was not an officer of the United States, it was no offense for him to withdraw the Creek roll and to make a copy of it. The offense of which a person who is not an officer may be guilty under the statutes of the United States in this regard is defined by section 5403, which provides that it is only when such a person "willfully destroys, or attempts to destroy, or with intent to steal or destroy, takes and carries away" such a document, that he becomes liable to punishment, and the defendant was guilty of none of these things. But if he was an officer, if he had the custody of the Creek roll, and if he fraudulently took away, withdrew, or destroyed it, he forfeited his office, became forever disqualified from holding any office under the government of the United States, and he is subject to imprisonment and fine under section 5408. In the absence of this section, the act of the defendant was neither legally nor morally wrong. The punishment it prescribes is severe, and a penal statute which creates and denounces a new offense should be strictly construed. The definition of such an offense and the classification of the offenders are

legislative and not judicial functions. An act which is not by the expressed will of the Congress an offense may not be made so after its commission by a broad construction of the statute subsequently adopted by the judiciary. One who does not fall clearly within the class of persons specified in such a law before he performs the act charged upon him may not be brought within that class after the event by judicial construction. *United States v. Wiltberger*, 5 Wheat. 77, 96, 5 L. Ed. 37; *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482; *Field v. United States*, 137 Fed. 6, 8, 69 C. C. A. 568, 570; *United States v. Clayton*, Fed. Cas. No. 14,814; *In re McDonough* (D. C.) 49 Fed. 360; *United States v. Lake* (D. C.) 129 Fed. 499.

If section 5408 had declared that every clerk, or every employé, or every person hired by the United States who committed the acts it describes should suffer the punishment it prescribes, the defendant would have fallen clearly within the class thus denounced. But the term "officer" does not designate him as plainly, and as he is charged with a crime as an officer only, if there is a reasonable doubt whether or not he was such, he ought not to be convicted or punished. One who serves the United States for a salary, or for wages, under a contract, is an employé and not an officer. The line which separates officers from employés is shadowy, and possibly not susceptible of precise definition, but there are persons who are readily recognized as officers of the United States, and others who are easily perceived to be employés and not to be officers. The classes have certain characteristics which may well be considered in assigning any person to his proper class. Greater importance, dignity, and independence mark the position of an officer than that of an employé. The clerkship of the defendant was not characterized by much more importance, dignity, or independence than the positions of the stenographers or the janitors, or the other employés about him. He was subject to the orders of the chief clerk, as they were; he was liable to summary discharge by the commissioner without cause, as they were. The duties of an officer are generally, but not always, prescribed by law, but the duties of the defendant were not. His duties, like those of ordinary employés, were to do whatever the chief clerk or the commissioner directed him to do. The emoluments of an officer are ordinarily fixed by law. The salary of the defendant was not. It was named by the commissioner who employed him, and his determination was approved by the Secretary of the Interior.

A definite term of office during which an officer has the right to hold his office is often, though not always, fixed by law. But the defendant held his clerkship by no such tenure, and he held it for no term whatever. When the commissioners to the Five Civilized Tribes who first employed him ceased to continue in office, and their duties and powers devolved upon the Secretary of the Interior, his clerkship ceased, and the commissioner then employed him again. Section 5408 bears in itself inherent evidence that Congress never intended that a clerk holding a position without duration, subject to termination at the will of his superior, and without the right to retain it, without

tenure, should be subject to the penalties it prescribes, because one of those penalties is the forfeiture of his office, and that would be no punishment whatever to one who holds a position without tenure, without duration, without fixed duties or fixed emoluments.

The Constitution of the United States, art. 2, § 2, provides that the President, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not therein otherwise provided for and which shall be established by law, but that Congress may by law vest the appointment of such inferior officers in the President alone, in the courts of law, or in the heads of departments. The clerkship of this defendant was never established by any law. The authority under which his service was secured was not to appoint an officer to an office established by act of Congress or by regulation of the department, but "to employ all assistance necessary for the prompt and efficient performance" of the duties of the commissioners (Act June 28, 1898, c. 517, § 20, 30 Stat. 562; Act March 3, 1905, c. 1479, 33 Stat. 1060), and, when the Secretary of the Interior approved the defendant's employment in common with that of the other employés of the commissioner, he labored under no misapprehension, and did not undertake to create an office for the defendant or to approve his appointment to one. His telegram read:

"Complying with your recommendation in telegram of twenty-fifth schedule of employees on July first hereby approved from October first instead of July first."

An officer generally takes an oath of office, and an employé does not, and the defendant took such an oath. But one may not by taking an oath of office create an office of the United States and make himself its incumbent. And because the defendant's services were secured under authority granted to the Secretary of the Interior to employ assistance, because his position was never made an office by law, because it had neither duration nor tenure, because its duties were not prescribed, nor its emoluments fixed, by law, and because it was without greater dignity, importance, and independence than the positions of many other employés, and it had much less of either than many inferior offices of the United States have, our conclusion is that the defendant was not an officer of the United States, and was not liable to the penalties denounced by section 5408. If Congress had intended that every clerk or employé should be subject to the severe penalties of that section, it would not have failed to use some such apposite expression as "clerk," or "servant," or "person in the employment of the government," and it would be a violation of a familiar and salutary rule of law to insert these terms in this statute by construction after the event. Ex post facto law by judicial construction is not less pernicious than ex post facto law by legislation. *United States v. Schlierholz* (D. C.) 133 Fed. 333; *United States v. Schlierholz* (D. C.) 137 Fed. 616; *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482; *United States v. Mouat*, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463; *United States v. Hartwell*, 6 Wall. 385, 393,

18 L. Ed. 830; *Williams v. United States*, 168 U. S. 382, 387, 18 Sup. Ct. 92, 42 L. Ed. 509; *Throop v. Langdon*, 40 Mich. 673, 685; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302; *Auffmordt v. Hedden*, 137 U. S. 310, 11 Sup. Ct. 103, 34 L. Ed. 674. This conclusion has not been reached without an examination and consideration of the opinions of the courts upon somewhat similar questions under other statutes and circumstances in *United States v. Hendee*, 124 U. S. 309, 8 Sup. Ct. 507, 31 L. Ed. 465, *United States v. McCrory*, 91 Fed. 295, 33 C. C. A. 515, and *McGregor v. United States*, 134 Fed. 187, 195, 69 C. C. A. 477.

2. It was an officer "having the custody" of the record or document specified in section 5408 only that was liable to its penalties, and there was no substantial evidence at the trial that the defendant ever had the custody of the Creek roll. "Custody" means keeping, and implies responsibility for the care and the guarding against harm of the person or thing intrusted to the custodian. He who has the custody of an office building is responsible for its care and preservation, but such a building is not in the custody of those who have access to and use it. The books of a library are in the custody of the librarian, but they are not in the custody of those who may have the right to enter the library and to read and use them. The records and files of a court are in the custody of its clerk, but they are not in the custody of his stenographers, or of his other employes, who are not his legal deputies, or of the attorneys who may examine and use them. There was no evidence that the Creek roll was ever intrusted to the care or keeping of the defendant, or that he ever assumed responsibility therefor. The testimony went no farther than to show that he was one of six subordinate clerks who had access to it and the right to examine and use it in the discharge of their duties, and that it was very seldom that he had occasion so to do. On the other hand, the commissioner and the chief clerk testified, and their testimony was not contradicted, that the roll was in their custody and that they were responsible for its keeping.

3. It is an officer who "fraudulently takes away, or withdraws, or destroys any such record or document," and he only, that may become guilty of the offense denounced by this section. The words "takes away and withdraws" in this statute must be construed with the word "destroys," under the maxim, "*Noscitur a sociis*," to mean a taking away or withdrawal whereby some injury is intended, attempted, or inflicted, either upon the record or document withdrawn, or upon some one who has an interest in it or is entitled to use it in the public office where it is deposited. The use of these words in the statute does not make, and was not intended to make, a withdrawal or removal which in no way interferes with the lawful use of the record or document in its proper place, and in no way injures or changes it, a crime. Hence the removal of the Creek roll from the office and the making of a copy of it nights and Sundays, followed by its restoration without change or injury, was not a violation of this section of the statute unless the defendant performed these acts "fraudulently." There are in the indictment averments that he un-

lawfully and feloniously and fraudulently, and with intent to defraud, removed and withdrew the roll with the intent to make a copy thereof. But he is not liable to punishment under this statute for the removal or withdrawal of the roll unlawfully or feloniously unless he did so fraudulently, and there can be no fraud where there is no endeavor or intent to injure or alter a right or interest of any one, and where no right or interest of any one is in fact injured or altered. One who does an act whereby he neither intends nor attempts to injure the right or interest of any one, and whereby he does not in fact injure or alter the right or interest of any one, cannot do that act fraudulently. Bigelow on Fraud, 5.

Where the words of the statute do not "fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute an offense intended to be punished," an indictment in the words of the statute is insufficient. The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. To this end facts must be stated, not conclusions of law alone. The averment that an act innocent in itself, but criminal if fraudulently done, was done "fraudulently" or with intent to defraud, is but a bald conclusion of law and is futile. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances. *United States v. Cook*, 17 Wall. 168, 174, 21 L. Ed. 538; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588; *United States v. Carll*, 105 U. S. 611, 612, 26 L. Ed. 1135; *Evans v. United States*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 38 L. Ed. 830. This indictment, as well as the proof under it, is fatally defective because it sets forth no facts or acts which indicate any attempt or intent of the defendant to injure or alter the rights or interests of any one by his withdrawing and copying of the roll, or any effect to injure or alter any such right or interest caused by the acts charged against him.

The United States had five Creek rolls, two in addition to the one withdrawn in the custody of the commissioner at Muskogee. The defendant's withdrawal of the roll in the Creek Indian Office during nights and Sundays did not interrupt public business, and it was not noticed at the time. His making of a copy and the subsequent sale of copies of the roll deprived the government of no revenue, because it was not making copies for sale or for fees. The roll was a public document deposited in a public office. It had been made under the authority of a public law for the benefit of the Creek Indians and their successors in interest. It was a link in the chain of the title of each allottee to his allotment. Its publication was a patent protection against the secret machinations of those who alone had the advantage of access to it, and against possible frauds upon the Indians, and it was beneficial rather than deleterious. No law had been enacted and no public policy had been established which forbade the copying and publication of this roll, and a fictitious fraud, which is but the fanciful figment of the imagination, may not be lawfully conceived therein

by the courts in order to punish one for an act which was not a violation of the statute under which he was arrested and tried.

The judgments of the courts below must be reversed, and the case must be remanded to the proper court with instructions to quash the indictment and discharge the defendant.

PUGET SOUND ELECTRIC RY. v. VAN PELT.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1909.)

No. 1,034.

1. MASTER AND SERVANT (§ 264*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTIONS—VARIANCE.

In an action by a motorman against a street railroad company to recover for a personal injury resulting from the exploding of a fuse which was designed to explode in case an excessive amount of electricity passed through it, where the only negligence alleged was the placing of the fuse where it was dangerous to the motorman, whereas it could have been so placed as to avoid such danger, the admission of evidence showing the manner and cause of the explosion was not error as allowing plaintiff to prove a different act of negligence, where the jury were charged that plaintiff must prove the negligence alleged to be entitled to recover, but the evidence was admissible as explaining the circumstances surrounding the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 865; Dec. Dig. § 264.*]

2. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE ESTABLISHED.

Where the jury upon the undisputed evidence must have reached the same conclusion as an expert witness, or where his evidence is on a point on which the jury are entirely competent to decide in accordance with the general experience, the admission of expert testimony will not be regarded on appeal as ground for reversing the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

3. EVIDENCE (§ 219*)—ADMISSIONS—PERSONAL INJURY—SETTLEMENT WITH INSURANCE COMPANY.

In an action for a personal injury, evidence that plaintiff held a policy of accident insurance, and that after the injury, but two months before commencement of the action, he settled with the insurance company on the basis of an injury less serious than that alleged in the complaint, did not intend to prove the admission of any fact by plaintiff tending to contradict the allegations of the complaint, and was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 767; Dec. Dig. § 219.*]

4. MASTER AND SERVANT (§ 295*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTIONS—INSTRUCTIONS.

Instructions, in an action by an employé against the master for a personal injury, on the issue of assumption of risk, considered as a whole, held not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1168; Dec. Dig. § 295.*]

Ross, Circuit Judge, dissenting.

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The defendant in error was employed as a motorman on an interurban electric train running between the cities of Seattle and Tacoma. His duties required him to ride in a small compartment partitioned off in front of the front motor car. In the apparatus used for lighting and heating the cars of the train, there was used what is known as a "heating and lighting fuse," one end of which was connected with the lighting and heating wire of the car. The fuse was filled with a certain kind of powdered substance used for the purpose of producing an explosion in case an unusual current of electricity passed through it. The defendant in error was injured by the explosion of this fuse. In his complaint to recover damages on account of said injuries, he alleged "that this fuse, or 'plug,' as it is commonly called, was by the defendant carelessly and negligently and unnecessarily placed in the front part of the motorman's cab in said motor car herein referred to, and at a height about as high as the motorman's face, and in a position of great danger to the motorman while engaged in the operation of his said car. That this fuse could as well have been placed in some safe place about said car where its explosion would cause no injury to any one, as where it was placed in the motorman's cab in front of his face." And the complaint further alleged that while the defendant in error was in the discharge of his duties on said motor car the said electric fuse or plug exploded with great force and violence, accompanied by a powerful flash of electricity immediately in front of his face, blowing his face and his eyes full of the powdered substance contained therein, and causing him much physical and mental pain, rendering him blind for a long period of time, etc. The plaintiff in error answered, denying the material allegations of the complaint, and setting up the affirmative defenses of contributory negligence and assumption of risk. On the trial the jury returned a verdict for the defendant in error for the sum of \$2,000.

James B. Howe and Hugh A. Tait, for plaintiff in error.

J. F. Fitch, B. F. Jacobs, and Wilmon Tucker, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the court erred in permitting two witnesses for the defendant in error to testify to facts tending to show that the unusual current of electricity which caused the explosion of the fuse was created by a wire connecting two of the coaches of the train, which was pulled out of its coupling, and thereupon fell and came in contact with the hose hanger and grounded the current. It is urged that this evidence was inadmissible for the reason that the only ground of negligence alleged in the complaint was negligence in placing the fuse in the position in the car in which it was, and that it was not alleged that the pulling out of the connecting wire between the trains resulted from any negligence of the plaintiff in error. In other words, the contention is that the defendant in error, having alleged one specific act of negligence, was allowed to introduce evidence of another act of negligence not alleged in his complaint. The plaintiff in error was using a fuse which was so made as to explode upon the sudden irruption of a strong electric current. The negligence charged was the act of placing the fuse and leaving it unprotected in a position where it was dangerous to the motorman, whereas it could have been so placed as to avoid such danger. It was to show how it occurred that a current of sufficient force to cause the explosion came to the fuse that the evidence was introduced, not to show an act of negligence on the part of the plaintiff in error.

While it may not have been necessary to adduce such evidence, there can be no question that it was admissible as showing the circumstances under which the accident occurred. That the current might in the ordinary operation of a train become short-circuited was a contingency likely to occur, and it was probably one that could not in the exercise of due care have been anticipated or prevented. Certainly it cannot be said, under the circumstances shown in this particular instance, that the pulling out of the wire was the result of negligence on the part of the plaintiff in error, and there is no suggestion in the record that it was. The evidence was that it occurred by reason of a screw in the coupling becoming loose. The pulling out of the wire in the manner in which it occurred was one of perhaps several contingencies that might arise to produce a current sufficient to explode the fuse. In fact, the fuse was placed there for the purpose of being exploded. Its office was to explode and thereby cut off a current of dangerous intensity. The court, in charging the jury, held them strictly to the consideration of the specific act of negligence charged in the complaint, and instructed them that the cause of action was grounded upon negligence of the plaintiff in error in placing the fuse without properly guarding it so that it could not injure the motorman in the case of an explosion, and told them that the burden of proof was upon the plaintiff in the action "to prove that the defendant was negligent as alleged—that the fuse was improperly placed; that it could have been placed in a different situation, where it would not have been a menace to the motorman." The plaintiff in error points to the fact that in the course of the charge the court said that the plaintiff must show by the preponderance of the evidence "that the defendant was, as a matter of fact, guilty of some act or acts of negligence which constituted a proximate cause of the injury," and also said, "If you find from a preponderance of the evidence that the defendant did not use such safe and adequate appliances, or that the defendant did not protect the appliances furnished in a safe and adequate manner, * * * your verdict must be for the plaintiff"; but this language cannot be construed, and could not have been understood by the jury, as referring to any other act of negligence or to any other appliance than that which was specifically referred to in the complaint, for the court followed those instructions with further instructions confining the attention of the jury to the issue in the case, which was whether the fuse was in fact dangerous to the motorman in the place where it was located, and could have been so located as not to be dangerous. It is true that, where the specific acts constituting the negligence are alleged, evidence of other acts of negligence is not admissible. The plaintiff in error cites appropriate cases in support of that rule. But it is also true that, "under allegations of the particular acts constituting the negligence, proof of all incidental facts and circumstances that fairly tend to establish the negligence of the primary acts charged is admissible." 29 Cyc. 584. This doctrine is well sustained by the decisions. Thus, in a case where the negligence was alleged to consist in placing, keeping, upholding, and managing a certain gangway upon and against a door, opening, or entrance to a warehouse, evidence that there were no fastenings to retain the gangway in an upright position

was held admissible, the cause of the action being the falling of the gangway, causing the plaintiff's injury. *Morton v. O'Connor*, 85 Ill. App. 273. In *Lucas v. Wattles*, 49 Mich. 380, 13 N. W. 782, Judge Cooley said:

"When the defendant is notified with what negligence he is charged, he is thereby informed that the circumstances which tend to show that he was or was not wanting in due care in that particular will be in issue; and he must be prepared with evidence respecting them."

In *Railroad Co. v. Chinsky*, 92 Ill. App. 50, where the negligence charged was the negligent running of an engine without warning at a crossing, the court held it was entirely proper to allow proof that there were no gates at the crossing, for the purpose of showing the physical conditions and surroundings of the place where the accident occurred. In *C. I. R. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. 513, in a similar case, the court permitted evidence to show that there was no flagman at the crossing, although there was no ordinance requiring that a flagman be placed there. The proof was admitted to show the jury the existing circumstances attendant upon the alleged injury. Of similar import is *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899. In *South Chicago St. Ry. Co. v. Purvis*, 193 Ill. 454, 61 S. E. 1046, the negligence charged was that the defendant carelessly and recklessly moved its street car in approaching a certain avenue. Evidence that the brake and controller were out of repair was held admissible as bearing on the question of the manner in which the car should have been run when approaching the avenue.

Error is assigned to the admission of the testimony of a witness who testified as an electrical expert to the effect that the fuse was placed in a dangerous position. The testimony must have involved a knowledge on the part of the witness of the degree of intensity with which such a fuse would explode and the volume of the attendant electric flash, which would have been within the proper province of expert testimony; but conceding that the question was one of which the jury were competent to judge without the aid of expert evidence, we are of the opinion that the admission of such testimony was not reversible error. The rule is that where the jury, upon the undisputed evidence, must have reached the same conclusion as the expert witness, or where the evidence so admitted is on a point on which the jury are entirely competent to decide in accordance with the general experience, its admission will, upon appeal, be regarded no ground for reversing the judgment. 17 Cyc. 60, and cases there cited.

It is contended that the trial court erred in excluding evidence offered on behalf of the plaintiff in error to show that at the time of the accident the defendant in error had a policy of accident insurance which under its terms provided that the insurance company should be liable to the insured, in case of permanent disability arising from such an accident, for 12 months' total disability, and that 2 months after the accident the defendant in error freely and voluntarily settled with the company, and released and discharged it from liability under the policy, on account of the injury to his eyes, in consideration of the payment by the company of a sum equal to what he would be entitled to receive under said policy for 4 months' total disability and 2 months'

partial disability. It is claimed that this evidence was admissible as tending to show that the injury was not so serious as it was alleged to be in the complaint. It is true that, if the defendant in error in his settlement with the insurance company made admission of any fact which would tend to contradict the allegations of his complaint, evidence thereof would have been properly admissible. The complaint, which was filed nearly 4 months after the accident, alleged, in substance, that the defendant in error was rendered blind for a long period of time, and that after weeks of intense suffering and mental agony, and after treatment by the best specialists known to medical science, his sight had been partially restored, but that he was advised that his sight might never be better, and that there was danger of his total blindness as the result of such injury to his eyes. It must be apparent that a settlement made 2 months after the accident on the terms of the offered proof could have absolutely no probative value as tending to contradict in any degree the averments of the complaint. Such a settlement was no admission of any fact, and we find no error in its exclusion by the trial court.

Error is assigned to the instruction to the jury on the subject of the assumption of risk. The court said:

"To make a complete and valid defense on that ground, it should be proved by a fair preponderance of the evidence that the plaintiff himself was informed as to the risk there was—the nature of the danger in which he was placed for work, with that fuse located as it was. * * * The law does not under any circumstances exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond that he has the right to assume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances."

If these instructions were open to objection, the error therein was fully cured by the remainder of the instructions on the same subject, in which the court said:

"He is chargeable with the assumption of the risks that were necessarily incident to the employment, and with the assumption of risks which he knew about, of which he had knowledge—actual knowledge—and also with the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake. If the fuse was placed in a situation where it would injure him by its explosion, and there was negligence on the part of the defendant in placing it there, the question then to be decided is whether the plaintiff himself knew that it was liable to explode and flash in his eye and do him injury. If he had that knowledge, it should be considered that he assumed all the risk, and he is not entitled to compensation by reason of the injury which he suffered."

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

ROSS, Circuit Judge (dissenting). I am unable to agree to the judgment in this case. As stated in the opinion, the sole negligence alleged in the complaint was the improper and unnecessary placing by the defendant company of the fuse in the front part of the motorman's cab, at a height about as high as the motorman's face, and in a position of great danger to the motorman while engaged in the operation of the car. It appears from the record that on the trial the plaintiff was

permitted, over the objection and exceptions of the defendant, to show by the witnesses Paulson and Owens that the defendant company was negligent in having a loose screw in the coupling, by reason of which one end of the wires dropped down and came in contact with the hose-hanger, thereby grounding the electric current and causing the explosion which injured the plaintiff. Permitting one of the screws in the coupling to be loose was a separate and distinct act of negligence from that alleged, having no connection whatever with the placing of the fuse in the proper place in the car. That a plaintiff cannot allege one cause of action and recover upon another is, according to my understanding, well-established law; one of the reasons for which is that the defendant is entitled to be informed of the precise ground upon which the plaintiff seeks to recover, in order to prepare his defense. Not only may the introduction in this case of the improper proof of negligence, not alleged, have injuriously affected the defendant, but it very likely did do so, in view of that part of the instructions of the trial court in which the jury was told that before it could render a verdict for the plaintiff it must find from a fair preponderance of the evidence "that defendant was, as a matter of fact, guilty of some act or acts of negligence which constituted a proximate cause of the injury received by plaintiff, if you believe he was injured." "Some act or acts" of negligence might very readily have been understood by the jury as including the loose screw in the coupling which Paulson and Owens testified in their opinion caused the explosion complained of.

In respect to the defense of an assumption of risks by the plaintiff, set up by the defendant, the court instructed the jury as follows:

"It will be for the jury to consider the facts as proved by a fair preponderance of the evidence, and determine whether that defense has been sustained or not. To make a complete and valid defense on that ground, it should be proved by a fair preponderance of the evidence that the plaintiff himself was informed as to the risk there was—the nature of the danger in which he was placed for work with that fuse located as it was. He is chargeable with the assumption of the risks that were necessarily incident to the employment, and with the assumption of risks which he knew about, of which he had knowledge—actual knowledge—and also with the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake. If the fuse was placed in a situation where it would injure him by its explosion, and there was negligence on the part of the defendant in placing it there, the question then to be decided is whether the plaintiff himself knew that it was liable to explode and flash in his eyes and do him injury. If he had that knowledge it should be considered that he assumed all the risk, and he is not entitled to compensation by reason of the injury which he suffered."

Upon the same subject the court also gave this instruction:

"The defendant in this case has pleaded that the plaintiff assumed the risk attending the injuries received. You are instructed that the burden of proof is upon the defendant to establish this, as well as every other affirmative allegation pleaded by the defendant. Without considering the question whether the rule charges an employé with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, I think it is sufficient to say that the law does not under any circumstances exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond that he has the right to assume, without inquiry or investigation, that his employer had dis-

charged his duty of furnishing him with safe and proper instruments and appliances."

From the foregoing it will be seen that the trial court, in more than one place, in effect distinctly instructed the jury that, if the defendant negligently placed the fuse where it did, there was no assumption of risk by the plaintiff, unless he knew the fuse was liable to explode and do him injury. In another place the jury was told that the plaintiff was chargeable "with the assumption of the risks which he knew about, of which he had knowledge—actual knowledge—and also with the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake."

In my opinion, the instructions are inconsistent, as well as erroneous. In one respect they are too favorable to the defendant, for I do not understand that it is essential that a plaintiff shall be "vigilant" or "alert" to discover risks, but that the law is that, to justify a finding that an employé assumed the risks of his employment, it is not essential that he shall have had absolute knowledge of such risks, if they were such that an ordinarily prudent man in his situation, by the exercise of reasonable and ordinary prudence, would have known of them. *Choctaw O. G. & R. Co. v. Holloway*, 114 Fed. 458-460, 52 C. C. A. 260; 26 Cyc. 1196-1203, and numerous cases there cited.

For the reasons stated, I respectfully dissent from the judgment here given.

ST. PAUL FIRE & MARINE INS. CO. v. BALFOUR et al.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1909.)

No. 1,526.

1. CUSTOMS AND USAGES (§ 15*) — CONSTRUCTION OF CONTRACT — EVIDENCE TO AID CONSTRUCTION.

On application of plaintiffs, defendant delivered to them a memorandum with a "rider" attached which certified that defendant had insured them "under policy No. 7522" against war risks only on a flour cargo shipped from Portland, Or., to Japanese ports on the steamship *Arabia*. In fact, no policy numbered 7,522 or otherwise was executed to plaintiffs. *Held*, that there was a latent ambiguity in the memorandum as it read, with its reference to the policy, which it was competent to explain by parol, and that evidence was admissible to show a custom in such cases that the standard form of policy in use by the insurance company was understood to be referred to and to be a part of the contract, being retained by the company in its office, such evidence not being inconsistent with the writing.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15; * Evidence, Cent. Dig. §§ 1945-1952.]

2. INSURANCE (§ 669*) — ACTION ON POLICY — INSTRUCTIONS — AVOIDANCE FOR CONCEALMENT.

In an action on a marine insurance policy, the instructions, taken as a whole, *held* to state the correct rule as to concealment by the insured which would avoid the contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.*]

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Milton Andros and F. R. Wall, for plaintiff in error.
Nathan H. Frank, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This case is before us on a writ of error, and the action is one which was brought by the defendants in error (who for greater convenience will be hereafter, in this opinion, referred to as plaintiffs) to recover from the plaintiff in error (hereinafter called the defendant) the sum of \$6,100 on a general policy of marine insurance.

The complaint contains two causes of action: One to recover \$4,350, on account of the alleged loss of 5,000 sacks of flour carried by the German ship Arabia on a voyage from Portland, Or., to Kobe, Japan; the other to recover \$1,750, on account of alleged loss of 2,000 sacks of flour shipped on the same vessel, on the same voyage, from Portland, and to be carried to Nagasaki, Japan.

The complaint, in stating each cause of action, alleges that the insurance was "on account of concerned" and was on flour "lost or not lost," and that in case of loss the amount for which the same was insured was to be paid to the order of the plaintiffs; that the contract of insurance was made in San Francisco, Cal., on July 23, 1904, and was against "war risks" only; that the Arabia and her cargo were captured off the east coast of Japan on July 22, 1904, by a Russian vessel of war, and taken into a Russian port, where the cargo was condemned, under the authority of the Russian government, and confiscated as contraband of war; that thereafter, on August 10, 1904, the plaintiffs, acting for the owners of said cargo, abandoned it to defendant; that Jardine, Matheson & Co., were the owners of the flour at the time of effecting the insurance, and at the time of its seizure and condemnation.

The defendant, in its answer to each alleged cause of action, denied that the insurance was "on account of concerned" or on flour "lost or not lost," or that it ever made any insurance at all upon the flour referred to in the complaint, except such as is contained in a written contract, a copy of which was attached to the answer as an exhibit, and which will be hereinafter more particularly referred to; and, as affirmative defenses, the defendant alleged:

First. That, at the time of the execution of the contract referred to, the plaintiffs represented that the Arabia, with the flour on board, was then on the voyage from Portland to Kobe and Nagasaki; that this representation was false in fact; and that, when made, the Arabia and her cargo had been captured by a war vessel of Russia, and was no longer proceeding on said voyage.

Second. That when the contract of insurance was made there was a material concealment on the part of the plaintiffs, in that they had knowledge of a rumor current in Portland to the effect that the Arabia and her cargo had been captured, and failed to communicate this rumor to the defendant.

The action was tried by the court with a jury, and resulted in a verdict and judgment for the plaintiff for the amount sued for.

1. The plaintiffs upon the trial offered evidence which tended to show the following facts: On July 23, 1904, the plaintiffs made application to the defendant, at San Francisco, for insurance upon the cargo of flour carried by the Arabia upon the voyage referred to in the complaint; the insurance to cover the risks of capture, seizure, and detention in consequence of hostilities or warlike operations. The Arabia sailed on this voyage, 20 days before the application for insurance was made, and the defendant was informed of this fact, and of the further fact that plaintiffs were effecting the insurance for the owners of the cargo. The risk was accepted, the amount of the premium agreed upon, and the defendant, at the same time, delivered to plaintiffs the following memorandum, which is set out in the answer of defendant, and therein alleged to be the only contract entered into by the plaintiffs and defendant:

"No. 7522.

\$6100.

"St. Paul Fire & Marine Insurance Company, M. C. Harrison & Co., General Agents, San Francisco.

"San Francisco, July 23, 1904.

"This certifies that on the 23rd day of July, 1904, this company insured Balfour, Guthrie & Co., under policy No. 7522, the sum of sixty-one hundred dollars, on flour Kobe \$4,350, Nagasaki, \$1,750, valued at \$——— shipped on board the S. S. Arabia, at and from Portland, to Kobe and Nagasaki. Loss, if any, payable to the order of Balfour, Guthrie & Co., on surrender of this certificate properly endorsed.

"In the event of any loss hereunder, it is requested that notice be given immediately to the general agents of this company.

"M. C. Harrison & Co., General Agents.

"War risks as per clause attached.

"This policy only to cover the risk of capture, seizure, and detention, and the consequence thereof, or any attempt thereat, piracy excepted, and also from the consequence of hostilities or warlike operations whether before or after declaration of war."

The clause relating to war risks was upon a slip or "rider" attached to the certificate.

This was the only writing delivered by defendant to plaintiffs as evidence of the contract made between them, and plaintiffs did not at that time have a policy of insurance in the defendant company, numbered 7,522, or any policy in that company.

There was also evidence tending to show that Jardine, Matheson & Co., were the owners of the flour insured, and it was not disputed that the Arabia with her cargo was captured by a Russian war vessel on July 22, 1904, and condemned as contraband of war by the Russian government.

In view of the issues made by the pleadings, it was incumbent upon the plaintiffs to prove the contract of insurance, alleged in the complaint; that is, that the contract was "on account of concerned," and upon flour "lost or not lost," on the voyage described in the complaint; and for the purpose of proving these facts the court, in addition to the matters above stated, permitted the plaintiffs to introduce evidence to the effect that at the date of the certificate, above set out, it was the custom of insurance companies in the city of San Francisco to

issue such certificates as a matter of convenience, and that certificates in that form were understood by those engaged in the business of insurance to be based upon a policy, in the usual form of policies of the company issuing the certificate, and on file in the office of the company, or in the hands of the person to whom the certificate was given; or, in the language of one of the witnesses, "every certificate of that character refers to a policy either on file in the office or in the hands of the insured."

Evidence was also introduced by the plaintiffs which tended to show that the form of the policy of insurance on cargo, which was in general use by the defendant in San Francisco on July 23, 1907, contained stipulations insuring not only the person applying for the policy, but "every other person and persons to whom the subject-matter of this policy does make or shall appertain in part or in all," and "* * * that such insurance shall be and is an insurance (lost or not lost) at and from" designated ports.

The defendant objected to the admission of this evidence on the general ground that it tended to contradict and add to the terms of the contract contained in the certificate above set out, and the action of the court in admitting it is assigned as error.

It is certainly a settled rule of evidence that when a writing is apparently complete on its face, when it specifies the contractual obligations of both parties, and does not appear to leave any terms unprovided for, it cannot be added to or contradicted by parol evidence. *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; *Thomas v. Scutt*, 127 N. Y. 137, 27 N. E. 961; *Naumberg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380.

In *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469, it is said:

"The question whether a writing is upon its face a completed expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well settled as follows: 'If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.'"

The rule implies, and the courts hold, that parol evidence is not to be excluded when the writing evidently does not express the whole agreement. Thus in *Naumberg v. Young*, 43 Am. Rep. 385, the court said:

"Undoubtedly this rule of evidence presupposes that the parties intended to have the terms of their agreement embraced in the written contract. If it was designed that the written contract should contain only a portion of the terms mutually agreed upon, and that the rest should remain in parol, the parties have not put themselves under the protection of the rule."

An inspection of the certificate relied upon by the defendant in this case plainly shows that it falls within the class of writings which may be supplemented by parol evidence, not inconsistent with its terms, for the purpose of showing the entire agreement between the parties. It

is a written memorandum containing an admission upon the part of the defendant that it had entered into a contract of insurance with the plaintiffs for the purpose of insuring the property therein described against war risks "under policy No. 7522."

The certificate upon its face refers to another writing for a more complete statement of the terms of the contract of insurance, and parol evidence is necessary to identify this writing. *Redd v. Murry*, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132.

The words "under policy No. 7522" were evidently inserted with care, and cannot be rejected as surplusage; certainly the defendant, having delivered the certificate, is estopped from asserting that they are meaningless; and it having been shown, in accordance with the contention of the defendant, that it never, in fact, executed to plaintiffs a formal policy of insurance numbered 7,522, or any policy, it was proper to admit evidence showing that by the custom and usage of insurance companies such words inserted in a certificate like that under consideration here do not necessarily refer to an executed policy; that when the insured was not, at the time, the holder of a policy thus described, these words are understood by those engaged in the business of insurance to refer to a standard form of policy in use by the insurance company issuing the certificate, and retained in the office of the company. This evidence was proper for the purpose of removing what otherwise would be a latent ambiguity in the certificate, an ambiguity raised by the parol evidence showing that defendant never, in fact, executed any formal policy to plaintiffs. "A latent ambiguity arises when the writing upon its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain. And it is so well established as to be beyond all possible dispute that parol or other extrinsic evidence is always admissible to explain a latent ambiguity in any written instrument. The reason given for the rule is that, as the ambiguity is raised by extrinsic evidence, the same kind of evidence must be admitted to remove it." 17 Cyc. 676.

We fully agree with counsel for defendant that in those cases in which parol evidence is admitted, in connection with a writing, the parol evidence must be consistent with and not contradictory of the written instrument. *Thomas v. Scutt*, 127 N. Y. 137, 27 N. E. 961; *The Alida*, Abb. Adm. 173; *Id.*, Fed. Cas. No. 200.

The evidence admitted upon the trial does not contravene that rule. The fact that in defendant's standard form of policy war risks are excluded, while in the memorandum clause attached to the certificate such risks are covered, does not raise a conflict between the certificate and the policy, because the certificate and policy are to be read together, as if the certificate, with its war risk clause, were actually attached to the policy, in which case the memorandum clause would be construed as a modification of the policy. Indeed, the form of policy admitted in evidence, itself, provides that "all clauses annexed hereto or stamped hereon, shall control other printed conditions inconsistent with the same."

2. Upon the question of concealment the court instructed the jury:

"A neglect to communicate that which a party to a contract of insurance knows and ought to communicate is called a concealment. A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance."

"The applicant for insurance must disclose not merely facts of which he has actual knowledge, but such intelligence as he may have received from others, which, if communicated to the insurer, would tend to determine him either to decline the risk, or to ask a higher premium for accepting it; and this is the rule though the intelligence ultimately proves erroneous.

* * * * *

"Any fact is material to an underwriter which, if communicated to him, might induce him to refuse the insurance altogether, or not to effect it except at a higher premium.

* * * * *

"It is immaterial whether the omission to communicate a material fact arises from intention, indifference, or mistake, or from it not being present to the mind of the party who should communicate it that the fact was one which it was material to make known; the consequences will be the same; that is, the injured party thereby becomes entitled to rescind the contract."

And then in a subsequent part of the charge the court used this language:

"In whatever aspect the question of concealment may be presented, it is obviously, at last, no more than the simple question, have these underwriters been entrapped or imposed upon or seduced into a contract, of the force, extent, or incidents of which a competent understanding cannot be imputed to them?"

It is urged, in behalf of the defendant, that the giving of this last instruction was error; that it is in direct conflict with the previous instructions given by the court, and "most strongly conveyed the impression to the jury that a fraud in fact must be contemplated by the assured."

We do not think that, when read in connection with other parts of the charge, this instruction will bear the construction placed upon it by the defendant. It is directed entirely to the effect of the alleged concealment upon the mind of the insurer, and the jury were told, in effect, to consider whether by reason of such concealment the defendant was led or caused to make the contract sued on; that is, led to make a contract which it would not have made if there had been no concealment by plaintiffs. The instruction is a restatement in somewhat ambiguous language of that which had been before clearly stated to the jury; and it seems very clear to us that the jury could not have understood from it that they must find that plaintiff was guilty of actual fraud in effecting the insurance in order to justify them in returning a verdict for the defendant, in the face of the statement of the court made more than once in other parts of the charge:

"That a concealment, whether intentional or unintentional, entitles the injured party to rescind the contract of insurance," and that "it is immaterial whether the omission to communicate a material fact arises from intention, indifference, or mistake, or from it not being present to the mind of the party who should communicate it that the fact was one which it was material to make known."

3. There are other assignments of error, all of which we have fully considered, but do not deem necessary to discuss. We find no error in the record.

Judgment affirmed.

BRUNER et al. v. KANSAS MOLINE PLOW CO.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1909.)

No. 2,810.

CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—SALE OF GOODS BY SOLICITOR AND DELIVERY THEREOF IN STATE OR TERRITORY BY FOREIGN CORPORATION NOT "DOING BUSINESS" THEREIN.

The sale of goods in a state or territory by a foreign corporation by means of a solicitor, the delivery of the merchandise thereunder, and the collection of the price, do not constitute doing or carrying on business within such a state or territory within the true meaning of foreign corporation statutes prescribing the conditions of doing business in such states or territories.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640-7641.

Foreign corporations doing business in state, see notes to Wagner v. J. & G. Meakin, Limited, 33 C. C. A. 585; Ammons v. Brunswick-Balke-Clender Co., 72 C. C. A. 622.]

(Syllabus by the Court.)

In Error to the Supreme Court of the State of Oklahoma.

For opinion below see 104 S. W. 816.

William I. Gilbert and Edward H. Bond, for plaintiffs in error.

Frank H. Heskett and Eugene E. Morris, for defendant in error.

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

SANBORN, Circuit Judge. On March 18, 1903, the defendants below, who were partners in business at Waurika, in the territory of Oklahoma, made a written contract with the Kansas Moline Plow Company, a corporation of the state of Illinois, to purchase of it certain agricultural implements for the sum of \$1,223.21. The plow company agreed by the written contract to deliver these goods by way of Rock Island, to the defendants, marked with their firm name, at the plaintiff's warehouse in Kansas City, in the state of Missouri. It delivered the property, but the defendants never paid for it. In an action for the price of the goods the trial court rendered a judgment for the plow company, that judgment was affirmed by the Court of Appeals of the Indian Territory, and the defendants sued out their writ of error to reverse the judgments.

The first specification of error is that the trial court unlawfully denied a motion to change the venue of the action. Section 3556 of the Annotated Statutes of the Indian Territory of 1899 provided that any party might obtain a change of venue, by a motion, upon a petition

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

verified by him and supported by the affidavits of two credible persons, stating that he verily believed that he could not obtain a fair and impartial trial in the division in which the action was pending on account of undue prejudice against him, or his cause, or defense, in that division. The contention of counsel for the defendants below is that the court violated this statute in the ruling of which complaint is here made. But this position is untenable, because no petition of the character prescribed by this statute was presented to that court. Nothing was filed but a verified motion, which contained no statement that the party who subscribed the oath beneath it verily believed that he could not obtain a fair and impartial trial in the division where the action was pending and the affidavits of two persons in support of this verified motion. The position of counsel is also untenable, because the testimony of the two supporting witnesses, which appears in the record, fails to convince that they were credible persons. It demonstrates that they were ignorant of the facts concerning which they testified, and that they knew nothing about the prejudice which in their affidavits they stated that they believed existed. The motion to change the venue was rightly denied.

The trial court declined to permit the defendants to testify what season the implements were bought for, and what time the salesman of the plaintiff said, when he obtained the contract, would be required for the goods to reach Kansas City and Waurika, and whether or not they were all received in the first shipment. These rulings are challenged for the purpose of establishing the defense that the goods were not delivered in time; but the admission of the proffered testimony would have been fatal error, because the written contract expressly provided that the plaintiff should deliver the goods, via Rock Island, at Kansas City, at once; that the prices, terms, and implements were for the season ending July, 1903; and that the written contract contained all the agreements and conditions, verbal or otherwise, that should be recognized by either party. In view of this written agreement, it was immaterial when the goods arrived at Waurika, or whether or not they were received in one or more shipments, or what the representations or statements of the parties were in the negotiations at the time of the agreements; for no fraud was pleaded, and those representations were merged in the written contract.

The defendants claimed that a portion of the goods, for the price of which this action was commenced, were sold in the Indian Territory, and a portion in the territory of Oklahoma. Act Cong. Feb. 18, 1901, c. 379, 31 Stat. 794, 795, provided that, before any foreign corporation should begin to carry on business in the Indian Territory, it should appoint an agent in that territory upon whom service of summons and other process against it might be made, and declared that if such a corporation failed so to do all its contracts with citizens and residents of that territory should be void. There was a similar, but less drastic, statute in the territory of Oklahoma (St. Okl. 1893, §§ 1167, 1169); and a failure of the plaintiff to comply with either. The defendants insist that the contract of sale upon which this action is based was illegal and void, because violative of these statutes, and that for this reason the court erred when it instructed the jury

to return a verdict upon it for the plaintiff. But there is no evidence in this record that the plaintiff ever did any other act in these territories than to make the sale and delivery of these goods and the attempt to collect their price, and the sale of goods in a state or territory by a foreign corporation, by means of a solicitor, the delivery of the merchandise therein, and the collection of the purchase price, do not constitute doing or carrying on business within such a state or territory within the meaning of statutes prescribing conditions under which foreign corporations may do business therein. *Ammons v. Brunswick-Balke-Collender Co.*, 72 C. C. A. 614, 141 Fed. 570; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Fritts v. Palmer*, 132 U. S. 282, 287, 10 Sup. Ct. 93, 33 L. Ed. 317; *Wagner v. J. & G. Meakin, Ltd.*, 33 C. C. A. 577, 589, 92 Fed. 76; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 84 C. C. A. 167, 184, 185, 186, 156 Fed. 1, 18, 19, 20; *Dunlop v. Mercer*, 86 C. C. A. 435, 446, 156 Fed. 545, 556; *Toledo Commercial Co. v. Glen Mfg. Co.*, 55 Ohio St. 217, 45 N. E. 197; *Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117; *Brush Company v. Addickes*, 19 Misc. Rep. 36, 42 N. Y. Supp. 871.

It is assigned as error that the court refused to permit one of the defendants, who had testified that he had tried to use one of the plows which the plaintiff sold them and could not make it operate, to testify what it would have been worth if it had been as ordered. But before this ruling was made he had testified that he did not know what the difference in value was between the plow that the defendants ordered and the plow that they received. He subsequently testified that he did not know the value of the plow as ordered, and the contract in evidence disclosed its purchase price. The refusal to permit a witness to testify of a matter concerning which he has no knowledge is neither erroneous nor prejudicial.

Another specification of error is that the court instructed the jury to return a verdict for the plaintiff. One of the defendants testified that he, with the aid of competent assistants, thoroughly tried the plow which has been heretofore mentioned, that they could not make it operate, that he notified the plaintiff of this fact, that the plaintiff failed to send an agent to make the plow do good work, and failed to send the defendant instructions how to make it do so, and that the plow was worthless. This testimony, if true, establishes a breach of an express warranty of the plaintiff which appears in the written contract. That contract itself shows that the purchase price which the defendants agreed to pay for the plow was \$47, and in the absence of other evidence the contract is prima facie proof that this was the value of the plow as ordered. A careful examination of all the evidence in the record has convinced that there is no substantial proof therein of any other defense to this action, and the result is that it was error for the court below to withdraw from the jury the evidence of the worthlessness of this plow, and in all other respects its instruction to the jury to return a verdict for the plaintiff was right.

The court permitted the plaintiff to introduce evidence on rebuttal to the effect that in May, 1905, some of the defendants had on hand, sold to third parties, and the latter paid them for, a few of the plows

and cultivators which the plaintiff had sold to the defendants. Conceding that this ruling was erroneous, it could not have prejudiced and did not prejudice the defendants, because in the absence of that evidence the record was such that the plaintiff was entitled to a peremptory instruction to the jury to return a verdict in its favor for \$1,176.21 and interest. An error without prejudice is no ground for reversal.

The judgments below must be reversed, and the case must be remanded to the proper court, with instructions to grant a new trial, unless the plaintiff below within 30 days shall file in the office of the clerk of the court wherein the original judgment is recorded a remittitur of \$47 and interest at the rate of 8 per cent. per annum from June 1, 1903, to the date of the judgment, in all \$57.97, and shall also file with the clerk of this court within 10 days thereafter a certified copy of the record of such remittitur in the trial court. In case such remittitur and certified copy are so filed, the judgment below must be affirmed; and it is so ordered.

HAYES v. BARRINGER.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1909.)

No. 2,773.

1. INDIANS (§ 15*)—REAL ESTATE—RESTRICTIONS ON DISPOSITION—"ALIENABLE" AND "INALIENABLE" INCLUDE WILLS.

The words "alienable" and "inalienable," used to restrict the disposition of lands in the Supplemental Agreement with the Chickasaws and Choctaws (Act July 1, 1902, c. 1362, 32 Stat. 642, 643, §§ 12, 15, 16), include disposition by will.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 38; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 1, pp. 302-306; vol. 8, p. 7571.]

2. INDIANS (§ 15*)—EQUITY OF ENROLLED MEMBER BEFORE ALLOTMENT NOT DEVISABLE.

The right and equity of an enrolled member of the Chickasaw Nation of Indians, who died testate in 1903 before receiving an allotment, to a just share of the lands of the Chickasaws and Choctaws, was not devisable, and the title to the lands subsequently derived therefrom was not affected by the will.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 38; Dec. Dig. § 15.*]

3. INDIANS (§ 15*)—CHICKASAW WILLS AND PROBATE BY THEIR COURTS EFFECTIVE PRIOR TO 1906.

Prior to March 4, 1906, the Chickasaw Indians had the right to dispose of their devisable property by wills made in accordance with the laws of the Chickasaws, the proper Chickasaw probate court had jurisdiction to probate these wills, and its judgments are impervious to collateral attack.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 38; Dec. Dig. § 15.*]

(Syllabus by the Court.)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 104 S. W. 937.

Arthur G. Moseley and W. H. L. Campbell (Joel Terrell and C. Porter Johnson, on the brief), for plaintiff in error.

Clinton A. Galbraith (Thomas D. McKeown, on the brief), for defendant in error.

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

SANBORN, Circuit Judge. In July, 1903, Sarah Hayes St. John, a full-blood Chickasaw Indian, duly enrolled and entitled to an allotment under Act June 28, 1898, c. 517, 30 Stat. 495 (the Atoka Agreement), and the Supplemental Agreement of July 1, 1903 (32 Stat. 641, c. 1362), devised all her property to the plaintiff, Ida Hayes, and died. Her will was probated and an administrator of her estate was appointed by the proper probate court of the Chickasaw Nation of Indians. This administrator selected 730 acres of the land of the Choctaw and Chickasaw Nations, and these lands were allotted to the deceased pursuant to section 22 of the Supplemental Agreement. Ida Hayes brought an action of ejectment for this land against the defendant in possession, and pleaded her title under this will. The courts in the Indian Territory sustained a demurrer to her complaint and dismissed her suit. *Hayes v. Barringer* (Ind. T.) 104 S. W. 937.

Prior to March 4, 1906, the Chickasaw Indians had the right to dispose of their devisable property by wills made in accordance with the laws of the Chickasaw Nation; the county and probate court of that nation for Pontotoc county, in which the will here in question was probated, had jurisdiction to hear and allow such a will; and the judgment of the probate of that will is not open to collateral attack. Act June 7, 1897, c. 3, 30 Stat. 83 (U. S. Comp. St. 1901, p. 1618); Act June 28, 1898, c. 517, 30 Stat. 495 (Curtis Act) §§ 28, 29; Atoka Agreement, 30 Stat. 512; *In re Poff's Guardianship* (Ind. T.) 103 S. W. 765; *Gray v. Coffman*, Fed. Cas. No. 5,714; *Elliott v. Garvin* (C. C. A., 8th Circuit) 166 Fed. 278; *Mehlin v. Ice*, 56 Fed. 12, 5 C. C. A. 403; *Cornells v. Shannon*, 63 Fed. 305, 306, 11 C. C. A. 465, 466; *Buster v. Wright*, 135 Fed. 947, 953, 68 C. C. A. 505.

But was the interest of this Chickasaw Indian in these lands devisable in 1903? At that time these were the lands of the Choctaw and Chickasaw Nations, held by them, as they held all their lands, in trust for the individual members of their tribes, in the sense in which the public property of representative governments is held in trust for its people. But these were public lands, and, while the enrolled members of these tribes undoubtedly had a vested equitable right to their just shares of them against strangers and fellow members of their tribes, they had no separate or individual right to or equity in any of these lands which they could maintain against the legislation of the United States or of the Indian Nations. *Stephens v. Cherokee Nation*, 174 U. S. 445, 483, 19 Sup. Ct. 722, 43 L. Ed. 1041; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; *Lone*

Wolf v. Hitchcock, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299; *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540; *Ligon v. Johnston* (C. C. A.) 164 Fed. 670.

By the Curtis Act (30 Stat. 495), the Atoka Agreement (30 Stat. 505), and the Supplemental Agreement (32 Stat. 641), the United States and the Choctaw and Chickasaw Nations had agreed and enacted that the lands of these tribes should be allotted and conveyed to the enrolled members thereof upon certain conditions and subject to certain restrictions upon the disposition thereof which they had lawfully imposed. The testatrix had been enrolled a member of the Chickasaw Nation, but no lands had been selected or allotted to her when she died. The conditions under which she was to secure, hold, and dispose of these lands were: Where an enrolled person died subsequent to July 1, 1902, and before receiving his allotment, the lands to which he would have been entitled, if living, were to be allotted in his name and to descend to his "heirs according to the laws of descent and distribution as provided in chapter 49 of Mansfield's Digest of the Statutes of Arkansas" (Ind. T. Ann. St. 1899, §§ 1820-1843), which chapter by its express terms provides for the descent and distribution of the property of intestates only. Supplemental Agreement (32 Stat. 643) § 22. A homestead, consisting of land equal in value to 160 acres of average allotable land, selected by the allottee, "shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment." Section 12 (32 Stat. 642). The remainder of the land allotted "shall not be alienable by the allottee, or his heirs, at any time before the expiration of the Choctaw and Chickasaw governments [which expired March 4, 1906 (30 Stat. 512)], for less than its appraised value," but may be alienable one-fourth in acreage in one year, one-fourth in acreage in three years, and one-half in acreage in five years, from the date of the patent. Section 16 (32 Stat. 643). Lands allotted shall not be affected or incumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated, nor shall said land be sold except as herein provided. Section 15 (32 Stat. 642).

The courts below were of the opinion that under these restrictions the inchoate right of the testatrix to acquire these lands was not subject to devise, and counsel earnestly argue that this decision was erroneous, because the words "alienable" and "inalienable" do not include disposition by will, and because the terms of the restrictions when read together, prohibit contracts, sales, gifts, and conveyances among the living only. There is a decision of the Supreme Court of Kansas which tends to sustain the first reason given by counsel for their contention by an argument that an owner of lands does not alienate them by a devise, because it is death, and not the testator, that separates him from the lands. *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232. But the opinion in that case is a construction of section 9, art. 15, of the Constitution of the state of Kansas, which prohibits the alienation of a homestead without the joint consent of the husband and wife. The decision is neither controlling nor very persuasive of the meaning of the words "alienable" and "inalienable" in acts of Congress and agreements with Indian Nations, where they are used to carry into effect the settled and

salutary public policy of the nation and of the tribes to prevent shrewd and intelligent men from alienating simple, unlearned, and improvident Indians and their heirs from their homesteads and lands. The question here is not whether or not it is the act of a testator or death that alienates a testator from his property; but it is: What did the Congress of the United States and the Chickasaws and Choctaws mean when they agreed and enacted that the lands of the latter should be inalienable for specified times? It is more important that rules and the meaning of words in the law of real property shall be certain and fixed than that they shall be logical, or even right. If they are certain and unchangeable, all men may safely act, and acquire and protect their rights in reliance upon them; but if they are to be changed whenever the reflection of a brilliant intellect may find, or the ingenuity of an inquiring mind may discover, some reason for a modification, there will be little security to titles in property.

Where words have acquired a well-understood meaning by judicial interpretation or definition, it is to be presumed that they were used in that sense in a subsequent statute, unless the contrary clearly appears. *United States v. Trans-Missouri Freight Association*, 58 Fed. 58, 114, 7 C. C. A. 15, 71, 24 L. R. A. 73. It is a familiar rule of construction that a word or term which has a common meaning, well understood, is presumed to be used in its accustomed sense. *Brun v. Mann*, 151 Fed. 145, 156, 80 C. C. A. 513, 524, 12 L. R. A. (N. S.) 154. The words "inalienable," "alienable," and "alienation" are familiar terms, commonly used in relation to the disposition of real estate. In their accustomed sense, and by the great weight of judicial interpretation and definition, they included the disposition of real estate by will, as well as by conveyance, when the acts of Congress and the agreements under consideration were enacted, and it was undoubtedly in that sense that Congress and the Indian Nations used them in these acts and agreements. They intended to restrict, and by the use of these terms they did restrict, the disposition of the property of the Choctaws and Chickasaws by will as well as by deed. 2 Blackstone's Comm. (Lewis' Ed.) cc. 19 and 23; *Burbank v. Rockingham M. F. I. Co.*, 24 N. H. 550, 558, 57 Am. Dec. 300; *Lane v. Maine Mutual Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Harty v. Doyle*, 49 Hun, 410, 3 N. Y. Supp. 574, 575; *Butler v. Fitzgerald*, 43 Neb. 192, 204, 61 N. W. 640, 27 L. R. A. 252, 47 Am. St. Rep. 741, 750; *Anderson's Law Dictionary*, p. 48; *Kerr on Real Property*, § 267; *Jackson v. Thompson*, 38 Wash. 282, 80 Pac. 454, 456; *United States v. Zane*, 4 Ind. T. 185, 69 S. W. 842, 844, 845.

Nor do all the terms of the restrictions contained in the acts and agreements, when read and construed together, either convince or indicate that the intention of the parties to them was to forbid or limit conveyances, sales, and gifts *inter vivos* only. They disable the allottees, it is true, from affecting the title to their lands for limited times by deeds, debts, or obligations of any character (section 15); but they also declare that these lands shall not be alienable within terms specified (sections 12, 16). Nor is this all. They expressly provide that where, as in the case of the testatrix here, the enrolled person dies subsequent to July 1, 1902, and before receiving an allotment, her lands shall de-

scend to her heirs according to the laws of descent and distribution, as provided in chapter 49, § 22, of Mansfield's Digest. When this section was adopted there were laws of the Chickasaws and Choctaws which governed the disposition of the property of their deceased members by devise and by descent in the absence of a will. There were laws of the state of Arkansas in Mansfield's Digest which provided for the disposition of property by will (chapter 155, Mansf. Dig. [sections 3562-3620, Ind. T. Ann. St. 1899]), and by descent and distribution (chapter 49). The United States and the Chickasaw and Choctaw Nations selected the latter chapter from these various laws, and agreed and enacted that the lands allotted to an enrolled member of the Chickasaw or Choctaw tribe after his death should descend to his heirs as provided in that chapter, and there is no rational or logical escape from the conclusion that the lands in controversy in this case so descended. The equitable right to receive a just share of the lands of these Indian Nations, which the testatrix had when she made her will and when she died, was not devisable, and her will was ineffectual to deprive her heirs of it, or of the lands derived from it. *Jackson v. Thompson*, 38 Wash. 282, 80 Pac. 454; *United States v. Zane*, 4 Ind. T. 185, 69 S. W. 842, 844.

The opinion of Judge Dillon in *Gray v. Coffman*, Fed. Cas. No. 5,714, cited by counsel for the plaintiff, has not been overlooked. Judge Dillon there held that a will of a Wyandot Indian, made and probated according to the laws of the Wyandots, before any statutes of wills or of descent and distribution had been enacted by the Legislature of the territory of Kansas, was effectual to convey the testator's absolute right to select and to receive a patent to a section of land "never to be conveyed" by him "without the permission of the President of the United States." That decision is inapplicable to the case in hand, because the restriction in that case was on "conveyance," and in this it is on "alienation," and because in that case there was no act of Congress, agreement, or statute, other than the laws of the Wyandots, prescribing the disposition of the property upon the death of the Indian testator, while in this case there is an act of Congress, embodied in an agreement between the United States and the Indian Nations, that the right to this land and the land itself shall descend to the heirs of the testator as provided in chapter 49 of Mansfield's Digest.

The judgments below are right, and they are affirmed.

MARRASH et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 233.

1. CONSPIRACY (§ 47*)—CIRCUMSTANTIAL EVIDENCE—FORMAL AGREEMENT.

Conspiracy to defraud the United States, under section 5440, Rev. St. (U. S. Comp. St. 1901, p. 3676), is not necessarily established by direct evidence. Circumstantial evidence may suffice. A formal agreement need not be proved. It is sufficient to show that the parties are acting together understandingly to accomplish the same unlawful purpose, even though

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

individual conspirators may do acts in furtherance of the common unlawful design, apart from and unknown to others.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

2. CONSPIRACY (§ 43*)—QUESTION FOR JURY.

The questions whether a conspiracy existed, as charged in an indictment, and whether an act was done by one or more of the defendants to effect the object of the conspiracy, are questions of fact for the jury.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 110; Dec. Dig. § 48.*]

3. CRIMINAL LAW (§ 561*)—EVIDENCE—"REASONABLE DOUBT."

The rule that, to warrant conviction for a crime, the evidence must in every case be of such a character as to exclude every reasonable hypothesis of innocence, is but another way of saying that the defendants must be proved guilty beyond a "reasonable doubt." If a reasonable doubt exists, there must be a reasonable hypothesis of innocence; and where such hypothesis does not exist there can be no reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

4. CRIMINAL LAW (§ 304*) — CONSPIRACY — CUSTOMS DUTIES—JUDICIAL NOTICE OF LAWS.

In a prosecution for conspiracy to defraud the customs revenue, it is not requisite that proof should be given that the imports involved were dutiable, or were not within a provision exempting from duty goods of American origin. The court can take judicial knowledge of the laws of the United States and the fact that the imports were dutiable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 706; Dec. Dig. § 304.*]

5. CRIMINAL LAW (§ 564*)—PROOF OF VENUE.

Where conspirators had been doing business together in the judicial district in which they were tried prior to and at the time of the crime, and there was no evidence that they had been together outside of the district, the jury were justified in finding the conspiracy to have been in that district.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1277-1284; Dec. Dig. § 564.*]

6. CONSPIRACY (§ 47*)—PARTICIPATION IN OFFENSE—EVIDENCE.

Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not sufficient to involve him in the conspiracy; nor is mere suspicion that he was a party to the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

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

On writ of error to review a judgment of conviction under an indictment charging the defendants with having conspired to defraud the United States of customs duties due on certain importations of laces. Selim Marrash was sentenced to imprisonment for 12 months and to pay a fine of \$500, George Sara was sentenced to imprisonment for 3 months and to pay a fine of \$500, and Habib Marrash was fined \$500 and to stand committed until the fine was paid. Seventy-five errors are assigned by the defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ernest E. Baldwin, for plaintiffs in error.

Henry L. Stimson, U. S. Atty. (Goldthwaite H. Dorr, Asst. U. S. Atty., on the brief), for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The indictment charges that the defendants on and before October 9, 1906, in the Southern District of New York, did conspire with other persons unknown to defraud the United States of large sums of money, which the defendants should have paid on the importation at the port of New York of dutiable goods from foreign countries. The indictment alleges that the manner in which the said conspiracy was to be effected was in brief as follows:

The defendants were to cause said merchandise to be shipped to New York, consigned to the defendant Sara, or other persons unknown, upon false invoices containing false descriptions of the goods. The merchandise was to be falsely entered, as containing only crushed wheat, pistache nuts, etc., whereas in fact it contained laces and lace articles, the purpose being that these valuable articles should enter at the port of New York without paying duty. The indictment charges that the act done to effect the object of the conspiracy was as follows: On October 9, 1906, Sara caused to be entered at the port of New York, 12 cases of pistache nuts, crushed wheat, etc., and 10 bags of crushed wheat imported by him from Syria. That the entry was made upon two invoices, describing the merchandise as aforesaid, whereas in fact one of the bags contained 50 dozen handmade Syrian lace handkerchiefs, and one of the cases contained one can and another case contained two cans of lace and lace articles.

The indictment was based upon section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), which provides in substance that if two or more persons conspire to defraud the United States in any manner, and one or more of such parties do any act to effect the object of the conspiracy, all the parties thereto shall be liable to fine or imprisonment, or to both, in the discretion of the court. There can be no doubt as to the truth of the following propositions:

First. The October importations were made on false invoices, bills of lading, and entry, on none of which appeared any mention of the laces concealed in the crushed wheat and pistache nuts.

Second. The laces were so concealed that had the ordinary procedure in such cases been followed they might easily have escaped the observation of the custom officers.

Third. The disclosure that the importations contained concealed laces was not made until after Selim Marrash had been informed that, instead of the usual one package in ten, the entire importation had been ordered to the public stores for examination. Within an hour thereafter Selim had disclosed the presence of the contraband goods and had asked permission to amend the entry.

Fourth. The December and January entries of goods consigned to Petrakian and Marrash Bros., respectively, by the same importers at Damascus and Aleppo, were packed and started on their way before the discovery of the laces in the October entry was known to the ship-

pers. The December and January consignments had lace concealed in lentils, squash, and crushed wheat.

It cannot be denied that these facts were sufficient to cast suspicion strongly upon the defendants. One importation of nuts and wheat, with valuable laces carefully concealed therein and no suggestion of their presence on bills of lading, invoices, or entry, might have been made inadvertently and therefore with no criminal intent. When, however, five similar importations more or less directly connected with the defendants, shipped at different dates from exporters residing in cities separated from each other by several hundred miles of desert, arrive at the port of New York with the same contraband articles concealed in the same way, the presumption is persuasive that the consignees knew what goods they were receiving.

A letter discloses not only the character of the writer but also the character of the person to whom it is sent. A thief or a smuggler does not write to an honest man the details of his plans to steal and defraud. It is safe to assume that the recipient of such a letter is, if not a confederate, the same character of man as the writer. So, in the case before us, it is hardly conceivable, unless the exporters and importers were in accord, that so many packages of goods dishonestly packed and falsely billed would have been sent out. If the exporters had been honest, they would not have sent the goods under a false invoice and bill of lading. It is equally true that, if dishonest, they would not have sent the goods so packed and billed unless they knew the men with whom they were dealing.

Gellad at Aleppo and Debahi at Damascus knew that the moment the defendants discovered the hidden lace it would be their duty, on the assumption that they were not in the plot and were honest men, to denounce the fraud and sever all business relations. The importers, not the exporters, were to be benefited if the lace came in duty free, and it seems to us most improbable that the latter would have taken such a risk unless the situation was fully understood between them. In other words, the presumption is strong that both knew of the dishonest scheme and were acting in accordance therewith. The attempted explanation was discredited by the jury, and they were justified in disregarding it.

Selim Marrash testified that within an hour after he had been informed that the entire importation was to be sent to the public stores for examination, with a strong probability that the hidden lace would be discovered, he received a letter from Sara, mailed at Watertown, N. Y., October 6, 1906, which inclosed a letter from the exporters at Damascus, dated September 17, 1906, in which they say in substance that during their absence an employé took the liberty of sending bills of lading and a consular invoice from Beirut without disclosing the fact that the package of handkerchiefs and the two cans of needlework were concealed in the wheat and pistache nuts. How the employé of Debahi at Damascus succeeded in getting the handkerchiefs hidden in Gellad's crushed wheat at Aleppo, and how, in the absence of telepathic communication, he became familiar with the contents of Gellad's bill of lading from Alexandretta, is not ex-

plained. If Gellad were also afflicted with an incompetent or officious employé the letter does not disclose his identity. It would also appear that the employé who caused the trouble, or one equally negligent, was still in Debahi's employ on October 12th and 26th, for on these dates packages of lentils and squash were sent forward with lace concealed therein, no mention of the lace being made on the bill of lading.

We are convinced that the questions whether a conspiracy existed as charged in the indictment and whether an act was done by one or more of the defendants to effect the object of the conspiracy, were clearly questions of fact for the jury and that their verdict should not be set aside as against the weight of evidence.

It is argued that there was no direct evidence of conspiracy and the circumstantial evidence was insufficient to warrant a conviction. Under section 5440 it was necessary to prove that two or more of the defendants, Selim Marrash and George Sara, for instance, conspired to defraud the United States of duties lawfully due on imported laces, and that either Marrash or Sara did an act to carry it out. It is not necessary to establish the conspiracy by direct evidence. Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine. It is enough that they have a common purpose to defraud and that they act together for that purpose.

It is not necessary that a formal agreement be proved; it is sufficient if the testimony shows that the parties are acting together understandingly to accomplish the same unlawful purpose, even though individual conspirators may do acts in furtherance of the common unlawful design apart from and unknown to the others. It is manifest, therefore, that in many and, indeed, in most cases of conspiracy the corrupt agreement is proved by circumstantial evidence. Such evidence must, of course, satisfy the jury beyond a reasonable doubt, but in this respect there is no distinction between circumstantial and direct evidence.

Counsel for the defendants quotes from *United States v. Richards* (D. C.) 149 Fed. 443, 454, as follows:

"Circumstantial evidence, to warrant conviction, must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendants."

But the same charge would have been laid down if the evidence had been direct. The evidence in every case must be of such a character as to exclude every reasonable hypothesis of innocence; and this is but another way of saying that the defendants must be proved guilty beyond a reasonable doubt. If a reasonable doubt exists there must be a reasonable hypothesis of innocence, and where such hypothesis does not exist there can be no reasonable doubt.

The testimony of the false invoices and bills of lading, not only in the instance charged in the indictment, but in other instances in which the defendants were interested, raised a strong presumption against them, which called for an explanation. Such explanation was attempted, but it was so extraordinary and so inherently improbable

that the jury evidently regarded it as fabricated to meet the dilemma in which the defendants found themselves. It was for the jury to say upon all the evidence whether the defendants were guilty as charged.

It is argued that there was no conspiracy to defraud the United States of its duties because it has not been shown that the imported articles were subject to duty. The court can take judicial knowledge of the laws of the United States. The tariff act of 1897 (Act July 24, 1897, c. 11, § 1, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]) provides for all articles of foreign production or manufacture. Every such article, unless on the free list, is subject to duty, if not under a specific paragraph, then under the general "catch-all" provision. Nothing can escape. The importations in question were evidently laces and lace articles. They were produced in court and it required no expert evidence to establish their general character.

Paragraph 339 of the tariff act provides for "laces, lace window curtains, tidies * * * and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles made wholly or in part of lace," etc. Paragraph 390 provides for "laces, and lace articles made wholly or in part of lace," etc. It is too obvious for argument that the articles in question were dutiable, the rate of duty being immaterial in a prosecution of this character.

But it is argued that "articles the growth, produce and manufacture of the United States, when returned after having been exported," are on the free list (paragraph 483) and that it was incumbent on the government to show affirmatively that the lace articles in question were not made in the United States. We think this contention is too theoretical for practical application.

It is argued that there was no evidence submitted to the jury that the conspiracy was entered into in the Southern district of New York, though the precise exception or assignment of error which presents the question has not been pointed out. No request to charge on this point was made by the defendants, and no exception was taken to the charge.

The defendants had been in business in the southern district for years prior to October, 1906. We are referred to no evidence that they were together, during that period, at any point outside the Southern district of New York. They were there at and just prior to the time that the overt act was done and when, as the jury found, they were acting pursuant to the conspiracy between them. The point has been discussed at great length on both sides; but we deem it unnecessary to follow the arguments, which are based largely upon assumed facts and hypothetical situations. It is suggested that the conspiracy might have been formed in Syria, but how persons residing in New York could plot and plan in Damascus passes our comprehension. There is no evidence upon which the jury could find that the conspiracy was formed elsewhere than in the Southern district of New York.

It is not necessary to speculate as to the complications which might arise if the conspiracy had been originally formed in Syria or in the

Northern district of New York. It is sufficient that it was not formed in either place, and that at and prior to the time the act was done, which made its object effectual, the defendants were in the Southern district, acting together pursuant to its unlawful purpose.

The circumstances relating to the December entries by Petrakian were immaterial unless the defendants were connected with the transactions. There was evidence tending to show not only that the defendants were cognizant of the facts, but also that the merchandise was imported for their benefit. The jury may have so found, and if so, as before stated, the evidence bore strongly upon their intent. It showed that, but for the discovery of the fraud, the defendants were in the way to receive lace goods from the same exporters, concealed in lentils and squash, shipped under false bills of lading.

We have examined the other exceptions relating to the exclusion and admission of testimony, and are of the opinion that none presents a case of reversible error.

We are unable to find sufficient evidence to sustain the verdict against Habib Marrash. There are some suspicious circumstances and facts which seem to indicate that he had knowledge of the illegal nature of the transactions, but there is nothing which rises to the dignity of proof required in criminal causes. Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough. Mere suspicion that he was a party to the conspiracy is not enough. *United States v. Newton* (D. C.) 52 Fed. 275.

The judgment is reversed as to Habib Marrash and affirmed as to the other defendants.

ALFREY et al. v. COLBERT.

COLBERT v. ALFREY et al.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1909.)

Nos. 2,729, 2,837.

1. INDIANS (§ 15*)—DEEDS—VALIDITY—MENTAL INCAPACITY OF GRANTOR, COUPLED WITH INADEQUACY OF CONSIDERATION.

Evidence held to sustain a decree canceling two deeds made by an Indian allottee on the ground that when the first was made he was a minor and was also at the time, and when the second confirmatory deed was executed, illiterate and of weak mind and incapable of caring for his interests, and that the consideration paid was not over one-fourth of the actual value of the property.

[Ed. Note.—For other cases, see *Indians*, Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—LANDS—ALIENATION BY ALLOTTEES—"PARAGRAPH."

Act June 30, 1902, c. 1323, 32 Stat. 500, ratifying a supplemental agreement with the Creek Indians, etc., by section 16 provides that lands shall not be alienated by allottees before the expiration of five years, except with the approval of the Secretary of the Interior. At the close of the section is the following provision: "Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity." By Act April 21, 1904, c. 1402, 33 Stat. 189, 204, all restrictions upon aliena-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of lands, except homesteads, were removed as to members of the Five Civilized Tribes "who were of full age and not of Indian blood." The above provisions of the earlier act are in separate paragraphs, grammatically considered. *Held* that, in view of the evident intent of Congress, the word "paragraph," as used in the second provision, must be construed to include the entire section, and that a conveyance made by an allottee, although not of Indian blood, while a minor and without the approval of the Secretary, was void, and could not be ratified after he reached majority.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.*

For other definitions, see Words and Phrases, vol. 6, p. 5164.]

3. STATUTES (§ 199*)—CONSTRUCTION—"PARAGRAPH."

The term "paragraph," in an act of Congress, will be construed to mean "section," whenever to do so accords with the legislative intent.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 199.*]

4. INFANTS (§ 31*)—CONVEYANCES—AVOIDANCE—RETURN OF CONSIDERATION.

If a conveyance made by a minor be disaffirmed, he will be required to restore such of the consideration as remains in his hands; but repayment of the consideration will not be required where it has been wasted, disposed of, or consumed during minority, and his estate has not benefited thereby.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 46, 50-63; Dec. Dig. § 31.*]

Appeal from the United States Court of Appeals in the Indian Territory.

Appeal from the Supreme Court of Oklahoma, as Successor of the United States Court of Appeals in the Indian Territory.

Robert F. Blair, for plaintiff.

Charles G. Watts, for defendants.

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

HOOK, Circuit Judge. Perry Colbert, by his next friend, James Colbert, sued R. J. Alfrey and G. D. Carl for the cancellation of a deed conveying 120 acres of land in the Indian Territory which had been allotted to him as a citizen of the Creek Nation in the distribution of the tribal property by the Dawes Commission. He is a freedman without Indian blood, and the land in controversy did not embrace his homestead. The grounds for cancellation were that complainant was a minor when the deed was executed, was without contractual mental capacity, and was induced by defendants to part with his land for a grossly inadequate consideration. The cause was referred to a master, who, upon hearing the evidence, reported as his conclusions that complainant was not of age when the deed was made, that he was "very ignorant and inexperienced in all business matters," and that the price paid for the land was grossly inadequate. He recommended a decree declaring the deed null and void and requiring a reconveyance of the property. After the report was made up, but before it was presented to the court, defendants filed a supplemental answer, setting forth a second deed, executed by complainant after the evidence had been heard by the master, and reciting as considera-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion the payment of the money for the first deed and the additional sum of \$5. It is conceded complainant was of age when the second deed was executed. The issues upon the validity and effect of this deed were referred to another master, who, after taking additional testimony, reported against the defendants and recommended a decree for the cancellation of both deeds and a reconveyance of the property. The reports of the masters were confirmed by the trial court, and that court also made findings that complainant was a minor when the first deed was executed and the consideration therefor was wholly inadequate; also that when both deeds were executed complainant, though not insane, was inexperienced, of limited education and training, and of a weak and feeble mind, and that his property should be placed in the hands of a curator. It was accordingly decreed that the complainant within a time fixed refund to defendants the moneys paid him, with interest, and that the deeds be canceled. The defendants appealed. The complainant also appealed from that part of the decree requiring a refunding of the moneys. The United States Court of Appeals in the Indian Territory affirmed the decree, and the case was brought here.

While there is some doubt as to complainant's age when he made the first deed, we think there was sufficient evidence to support the findings of the masters and the trial court upon that issue. The findings were approved by the appellate court in the territory, and under familiar principles applying to the circumstances stated they should not be disturbed here. There is no doubt that, aside from his minority, complainant was incapable of caring for and safeguarding his property interests, or that the consideration paid him was grossly inadequate. The evidence was clear that he was a weak-minded, illiterate negro boy, without ability to protect himself from being overreached and defrauded. He was regarded as lacking in mental capacity from childhood. When quite young a bell was put on him, as on a domestic animal, to give information of his whereabouts, and thenceforth, and until he attained his majority and afterwards, he was generally looked upon as being unreliable and irresponsible. His conception of amounts and values is indicated by his offer on the day the first deed was made to sell the 120 acres of land to another party for "\$15 per acre, or \$750," and by his subsequent lease of the 40 acres of land set apart as his homestead for the gross sum of \$10 for a term of five years, or 5 cents per acre per annum. For the first deed defendants paid him \$550, or a little more than \$4.50 per acre for the tract of 120 acres. They shortly afterwards asked \$20 or \$25 per acre for it, and within two months of their purchase they contracted to sell it for \$2,700; but the bringing of the suit defeated the sale. They sought to show that when they bought the land the doubt whether the owner had a right to sell made the price paid a fair one; but that is not the test in a case like this. It is quite clear the land itself was worth four or five times as much as was paid for it.

There is another consideration which affects the validity of the first deed and the attempted ratification by the second. Act June 30, 1902, c. 1323, 32 Stat. 500, entitled "An act to ratify and confirm a supple-

mental agreement with the Creek Tribe of Indians and for other purposes," provides:

"Lands allotted to citizens shall not * * * be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior."

The time had not expired when the deeds were made, nor did the Secretary approve either of them. The provision quoted appears in what may for the moment be called the sixteenth section of the act. Various other provisions are made therein regarding the disposition of homesteads, etc. At the conclusion of the section is the following:

"Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

The later Act April 21, 1904, c. 1402, 33 Stat. 189, 204, removed all restrictions upon the alienation of lands of allottees of either of the Five Civilized Tribes of Indians (among whom are the Creeks) who were of full age and not of Indian blood, with an exception as to homesteads. On April 25, 1904, four days after the approval of this act, the purchase from complainant was made and the first deed executed; but he was then a minor, and the restriction against his alienation still remained. When the second deed was made complainant was of age, and defendants, assuming he was otherwise capable of contracting, rely upon it as a ratification of the first. Whether the first deed was susceptible of ratification depends upon the construction of section 16 of the act of June 30, 1902, and particularly upon the meaning of the term "paragraph" in the final clause. As it now appears in the statute book, there are two paragraphs of section 16, though not designated as such, nor distinguished from each other by letter or numeral, and the five-year restriction against alienation applicable to complainant appears in the first. Defendants contend that the final clause forbidding ratification, in which the term "paragraph" appears, relates exclusively to the matters contained in the latter part of the section as printed, while the position of complainant is that by "paragraph" is meant the entire sixteenth section or subdivision of the act.

We are of opinion that it was the intention of Congress that no conveyance forbidden by any of the terms of the sixteenth section of the act should be susceptible of ratification or be made good by estoppel. The section in its completeness has a common subject-matter, the disposition of allotments, and the provisions regarding it would naturally be grouped or placed in a single subdivision or paragraph of an agreement or in a single section of a law. The express restrictions upon alienation as to both homesteads and surplus lands appear in the first paragraph, not in the second, and it was to them the final clause was obviously directed. The act of June 30, 1902, differs from acts of Congress in general, in that the subdivisions thereof are not designated as sections. The body of the act was a prior agreement between the Dawes Commission and representatives of the Creek Tribe of Indians,

and, with some changes, it was confirmed by Congress and submitted to the tribal council for ratification. The subdivisions or paragraphs of the prior agreement were consecutively numbered, and that arrangement was preserved when it was incorporated in the act. A similar arrangement and omission to designate numbered subdivisions or paragraphs as sections will be found in the agreement with the Choctaws and Chickasaws embodied in Act July 1, 1902, c. 1362, 32 Stat. 641. We think it quite clear that "paragraph" was used synonymously with "subdivision" or "section," and that it does not mean the minor undesignated part of the text, the arrangement of which may well be the mere result of taste, without intention to control the sense or import. The term "paragraph," in an act of Congress, will be construed to mean "section," whenever to do so accords with the legislative intent. *Marine, Collector, v. Packham*, 3 C. C. A. 210, 212, 52 Fed. 579.

As to the part of the decree requiring complainant to refund the consideration paid for the deeds: There was no showing that when the suit was brought, or when complainant became of age, he still had any of the money paid him, or any property that had been acquired with it, or that any part of it had been devoted to the improvement of his land. Such proof as there was tended to show the money was quickly squandered after he got it, and the effect of the decree in its present form would be to diminish the estate he possessed during minority. To hold a minor to the restoration of what he received, but has dissipated, is to go counter to the very reasons upon which his incapacity to contract is founded. The Court of Appeals in the Territory sustained the decree in this particular because it appeared complainant orally represented he was of age when he made the sale; but such representation does not differ in its effect from that which is implied from the act of conveyance. "A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed." *Sims v. Everhardt*, 102 U. S. 300, 313, 26 L. Ed. 87. If a contract made by a minor be disaffirmed, he will be required to restore such of the consideration as remains in his hands; but repayment of the consideration will not be required, where it has been wasted, disposed of, or consumed during minority. *MacGreal v. Taylor*, 167 U. S. 688, 698, 17 Sup. Ct. 961, 42 L. Ed. 326. It follows, therefore, the court erred in this particular, and in dividing the costs between the parties.

The decree is modified by excluding therefrom the provision that complainant repay the moneys he received, with interest, and also by awarding him recovery of costs. As so modified, the decree is affirmed.

CHICAGO & N. W. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1909.)

No. 2,794.

1. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CARS OUT OF REPAIR.

The federal safety appliance act (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 886]), includes, first, vehicles actually moving in interstate traffic; second, such vehicles, though empty, when moving to points for the purpose of receiving interstate traffic, or otherwise commercially used by the carrier; and, third, vehicles used in connection with vehicles embraced in either of the two former classes. This would include cars that were out of repair, and were being transported solely for the purpose of repair, if they were placed in trains whose vehicles come within either of the first two classes.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—DEFECTIVE EMPTY CARS.

The necessary movement of a defective empty car alone, for purpose of repair only, and not in connection with any cars commercially used, does not subject the carrier to the penalties of the acts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 766; Dec. Dig. § 254.*]

3. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—DEFECTIVE EMPTY CARS.

A carrier may move empty cars by themselves to repair shops, for the purpose of having them placed in condition to conform to the safety appliance act (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 886]), without being guilty of a violation of those acts while thus engaged in an honest effort to meet their requirements.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

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

For opinion below, see 157 Fed. 616.

C. C. Wright (B. T. White and B. H. Dunham, on the brief), for plaintiff in error.

Luther M. Walter, Sp. Asst. U. S. Atty. (Charles A. Goss, U. S. Atty., and A. W. Lane, Asst. U. S. Atty., on the brief), for defendant in error.

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

AMIDON, District Judge. This action was commenced by the government to recover penalties under Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 886). The complaint alleges that:

"The defendant, on or about June 7, 1906, hauled on its line of railroad one car, to wit, its own No. 69581; said car being an empty car and generally used in the movement of interstate traffic, said car, at the time of the viola-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of the above act, being consigned from Omaha, in the state of Nebraska, to Council Bluffs, in the state of Iowa."

It was further alleged that when the car was so hauled the grab iron or handhold on the right-hand side of the "B" end of the car was missing. The answer admits these facts, and alleges that the defect in the car was discovered while it was in the yards at South Omaha, Neb.; that the most convenient place of repair was at the defendant's shops in Council Bluffs; that the car was empty, and was moved from Omaha to Council Bluffs for the sole purpose of being repaired. A general demurrer was interposed to this answer, and sustained. Thereupon the court found the defendant guilty, and adjudged it to pay a fine of \$100 and costs, and the present writ of error is brought to review that judgment.

Section 4 of the act of March 2, 1893 (27 Stat. 531), is as follows:

"That from and after the 1st day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

The amendment of 1903 (32 Stat. 943) had three objects: First, to extend the safety appliance act to traffic in the District of Columbia and the territories; second, to remove the doubt as to the meaning of the term "cars," as used in the act, created by the decision of this court in the Johnson Case, 117 Fed. 462, 54 C. C. A. 508; third, to enlarge the scope of the safety appliance act, so as to include not only "the cars, locomotives, tenders, and similar vehicles," etc., therein referred to, but also to embrace "all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

Reading these statutes together, as they have been interpreted by the courts, they include, first, vehicles actually moving interstate traffic; second, such vehicles, though empty, when moving to points for the purpose of receiving interstate traffic, or otherwise commercially used by the carrier; and, third, vehicles used in connection with vehicles embraced in either of the two former classes. This would include cars that were out of repair, and were being transported solely for the purpose of repair, if they were placed in trains whose vehicles come within either of the first two classes.

The shovel car involved in the Schlemmer Case, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, "was part of a train on its way through Pennsylvania from a point in New York." The same is true of the cars referred to in *United States v. St. Louis, I. M. & S. R. Co.* (D. C.) 154 Fed. 516. In fact, so far as we have been able to examine the authorities, the cases in which carriers have been held liable for moving defective cars over their lines for purposes of repair have all presented the feature that such cars were moved in trains whose other vehicles were actually engaged in interstate commerce, and were used "in connection with" such cars, within the meaning of the last clause of section 1 of the act of 1903.

The present case, upon a fair construction of the pleadings involves a movement of the defective car alone for purposes of repair only.

In our judgment, neither the car nor the locomotive which hauled it was used in interstate commerce, within the meaning of section 4 of the act of 1893, or "in connection with" any locomotive, tender, car, or similar vehicle engaged in such commerce within the provision of the act of 1903.

The object of the safety appliance statutes was manifestly to require interstate carriers to maintain their rolling stock in a certain condition of safety. It could not have been the intention of Congress to impose this duty upon carriers, and at the same time deprive them of the only practical method of meeting its requirements. Rolling stock must necessarily become defective, within the terms of these statutes, both by use and by accident. Repair shops cannot be kept on wheels. Such shops cannot be brought to the defective vehicle. The only practical method of railroading requires that such vehicles, when out of repair, shall be taken to the shops; and if they are wholly excluded from commercial use themselves, and from other vehicles which are commercially employed, they do not fall within any of the classes covered by the safety appliance acts. A carrier may move one or more cars by themselves to repair shops, for the purpose of having them placed in a condition to conform to the safety appliance acts, without being guilty of a violation of those acts while thus engaged in an honest effort to meet their requirements.

The judgment must be reversed, and the cause remanded, with directions to grant a new trial; and it is so ordered.

In re HANNA.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 194.

1. BANKRUPTCY (§ 415*)—PROCEEDINGS IN OPPOSITION TO DISCHARGE—AMENDMENT OF SPECIFICATIONS.

A special master, to whom was referred a bankrupt's application for discharge, had power to permit the amendment of specifications of objection filed on behalf of a number of creditors, but signed and verified only by an agent of one, by allowing the same to be signed and verified by one of the other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 415.*]

2. BANKRUPTCY (§ 409*) — GROUNDS FOR REFUSAL TO DISCHARGE — FAILURE TO KEEP BOOKS OF ACCOUNT.

Under Bankr. Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), the failure of a bankrupt to keep correct books of account, "with intent to conceal his financial condition," debars him from the right to a discharge, whether his intent was fraudulent or not.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 409.*]

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Kellogg, Beckwith & Emery, for appellant.
James, Schell & Elkus (Robert P. Levis, of counsel), for respondent.
Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a judgment of the District Court reversing an order of a referee, acting as special master. July 23, 1907, John W. Hanna was adjudged a bankrupt on his own petition. November 19th he filed a petition for a discharge. December 16, 1907, on the return of the order to show cause, J. M. Prendergast & Co., Hamilton Manufacturing Company, and Lawrence & Co., creditors objecting to the discharge, appeared by attorney. December 26, 1907, specifications of objections were filed by the same attorneys on behalf of Prendergast & Co., Hamilton Manufacturing Company, and Cocheco Manufacturing Company, signed only by Cocheco Manufacturing Company, by Lawrence & Co., Agents, and verified by a member of the firm of Lawrence & Co.

The matter was referred by the District Judge to one of the referees as special master, with power to pass on all exceptions to the specifications. January 9, 1908, it came on for hearing before the special master, when it transpired that Lawrence & Co. were not creditors, but only agents for the Cocheco Manufacturing Company, creditors. The special master permitted the specifications to be amended by adding the verification of the Hamilton Manufacturing Company. January 17, 1908, amended specifications, duly signed and verified by the Hamilton Manufacturing Company, were filed. The District Judge overruled the bankrupt's objections to the action of the special master, held that he had power to permit the amendment, and that he was guilty of no abuse of discretion in doing so. The special master, or certainly the District Judge, had the power to allow the amendment. The result is that the Hamilton Manufacturing Company appeared seasonably as an objecting creditor and duly signed and verified specifications of objection. The irregularities have caused no injury to the bankrupt, and we discover no reason for revising what has been done in the court below.

The only specification of objection relied on was that the bankrupt had failed to make entries in his books of account of loans and payments of money, with the specific intention of concealing his transactions. As to it the special master held that the bankrupt was entitled to his discharge because, although he had failed to enter in his books of account a loan considerable in proportion to the amount of his assets, he did so, not for the purpose of defrauding his creditors, but for the purpose of concealing his real financial condition from his manager. The District Judge found that the referee had, by agreement of the parties, power to allow the amendment, and, discovering no abuse of discretion, sustained his action. On the merits, however, he differed from the referee, and denied the bankrupt his discharge.

We think the District Judge was right. Section 14, subd. b (2), of the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), originally provided that no discharge should be granted if the applicant—

"with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained."

In 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026]) it was amended to read:

"With intent to conceal his financial condition, destroy, conceal or fail to keep books of account or records from which such condition might be ascertained."

The contention now made by the bankrupt would have great force under the act as it originally read, but has none under the act as amended. Obviously the present reading is much more exacting, and is intended to prevent a bankrupt from obtaining a discharge, if he, whether in contemplation of bankruptcy or not, for any reason, fraudulent or otherwise, has kept his books with intent to conceal his financial condition. A provision intended to insure the keeping of correct and complete accounts should be rigidly enforced, especially one whose operation is made to depend upon intention, excluding mistake or neglect. The fact is indisputable that Hanna omitted to enter the loan in question for the specific purpose of concealing his financial condition. He very frankly admits it. It makes no difference that he did so for the purpose of preventing his confidential manager from knowing his financial condition, and not for the purpose of defrauding his creditors. It remains true that he intentionally kept his books so as to conceal his financial condition, and he is therefore, by the express terms of the act, not entitled to a discharge.

The judgment is affirmed.

EIMER & AMEND v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 138 (4,963).

CUSTOMS DUTIES (§ 25*)—CLASSIFICATION—BLOWN GLASS FLASKS—"BOTTLES" —"BLOWN GLASSWARE."

The term "bottles," in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99. 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633), has a meaning that excludes blown glass flasks for chemical laboratories. Such articles are dutiable under paragraph 100, 30 Stat. 157 (U. S. Comp. St. 1901, p. 1633), as "blown glassware."

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 46; Dec. Dig. § 25.*

For other definitions, see Words and Phrases, vol. 1, pp. 812-848; vol. 8, pp. 7591, 7592.]

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

This cause comes here upon appeal from a decision of the Circuit Court, affirming a decision of the Board of General Appraisers, which sustained the action of the collector in classifying for duty certain importations under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626).

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Walden & Webster (Henry J. Webster, of counsel), for appellants.
D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The articles imported are chemical glassware, consisting of thin blown glass vessels, such as Joliet's flasks, CO₂ flasks, etc., designed for use in chemical laboratories. The collector classified them for duty under—

"Par. 100. Glass bottles, decanters, or other vessels or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers), and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware; all of the foregoing filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem."

The importer contends that they should be classified under—

"Par. 99. Plain green or colored, molded or pressed, and flint, lime, or lead glass bottles, vials, jars, and covered or uncovered demijohns and carboys, any of the foregoing, filled or unfilled, not otherwise specifically provided for, and whether their contents be dutiable or free, (except such as contain merchandise subject to an ad valorem rate of duty, or to a rate of duty based in whole or in part upon the value thereof, which shall be dutiable at the rate applicable to their contents) shall pay duty as follows: If holding more than one pint, one cent per pound; if holding not more than one pint, and not less than one-fourth of a pint, one and one-half cents per pound; if holding less than one-fourth of a pint, fifty cents per gross: Provided, that none of the above articles shall pay a less rate of duty than forty per centum ad valorem."

The articles are in fact blown glassware. The importers put in some evidence, which is vague and unpersuasive, to the effect that they were blown in a mold. We do not decide this case, however, on any insufficiency of proof. If it were conclusively shown that each one of these variously shaped flasks had been blown in a mold, it would not follow that they were "bottles, vials, jars, demijohns or carboys" and thus entitled to classification under paragraph 99. The word "bottle" has a tariff meaning which does not include these articles. "Chemical glassware" was provided for eo nomine in Tariff Act March 3, 1883, c. 121, par. 142, 22 Stat. 497, and in Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule B, par. 107, 26 Stat. 572. In Act Aug. 27, 1894, c. 349, 28 Stat. 509, there was no provision for chemical glassware; but paragraph 88 provided, not only for glass bottles, but also for "molded or pressed green and colored and flint or lime bottle glassware." This last phrase is descriptive of the articles in question. They were held dutiable under that paragraph in *Eimer v. United States* (C. C.) 99 Fed. 423, where the court said:

"The expression 'bottle glassware' is broader than glass bottles, and seems to cover something different from mere bottles used as containers. These bottle-shaped receptacles come within that description and seem to be included by it."

In the act of 1894 there was no provision for blown glassware. In the present act "blown glassware" is included in paragraph 100, and the "molded * * * bottle glassware" of 1894 is omitted from the new paragraph 99. It would seem to be the natural conclusion that

Congress intended that these articles should no longer be grouped with "bottles," but should be included in the larger group, "other blown glassware."

The decision is affirmed.

UNITED STATES v. AUTO IMPORT CO.

UNITED STATES v. ARCHER & CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

Nos. 198, 199 (4,915, 4,918).

CUSTOMS DUTIES (§ 26*) — CLASSIFICATION — ENTIRETY — AUTOMOBILE WITH TIRES UNATTACHED.

When an automobile is imported without tires attached, but tires are contained in the same crate as the car, such tires are not dutiable separately from the car; but the whole is dutiable as an entirety, though before use other tires may be substituted for those imported with the car.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

Noyes, Circuit Judge, dissenting.

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

The Circuit Court reversed decisions by the Board of United States General Appraisers, which had overruled protests by the importers. Note G. A. 6,567 (T. D. 28,044).

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

Brooks & Brooks (Frederick W. Brooks, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The only question presented is whether, under the circumstances attending their importation, certain rubber automobile tires should be considered as part of the automobile with which they came, and assessed under the appropriate paragraph, "193, manufactures wholly or in part of metal," or should be held to be separate articles of importation and assessed as manufactures of india rubber under paragraph 449 (Act July 24, 1897, c. 11, § 1, Schedules C, N, 30 Stat. 167, 193 (U. S. Comp. St. 1901, pp. 1645, 1678).

The automobiles in question were imported in crates, each crate containing a complete machine, including four tires, which were not (and had not at any time been) placed on the wheels. The theory upon which the importer contends that each of these automobiles and the tires which came with it should be considered as separate entities for duty purposes may be found in the following summary of the testimony:

Automobiles are sometimes imported with tires in place on the wheels. In very many cases they are imported without tires. In sell-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing a machine it is the custom of the trade to give the purchaser an option as to what kind of tire shall go with it, so that as to any imported machine the importer cannot tell whether it will eventually be sold with the tires which the foreign maker sent with it, or with some other kind of tire, domestic or imported. Tires are separate articles of commerce, and dealers in machines keep a large stock of them of various kinds. They come in standard sizes for the different sizes of wheel, and, so far as the evidence shows, although the tires in these two instances had not been, in fact, placed on the wheels, they might be so affixed, and the machines would then be complete and fit to run. The importer testified that he was not prepared to say that these tires were not ordered for the particular machines they came with, and added: *

"I can tell just how they were ordered. We anticipated our wants. We had to order. I did it personally, and I accepted these cars, and accepted these tires; but when I sell them again to my customers, it may be six or eight months after I have specified these orders, I give my customer the option whether he wishes tires, whether he wishes to purchase his own tires, or to buy a different make."

Upon this state of facts an importer may import incomplete cars and tires separately, and if he does so they will pay duty as separate entities, even though it be his intention, after he gets them here, to assemble them and thus produce completed cars. *United States v. Schoverling*, 146 U. S. 76, 13 Sup. Ct. 24, 36 L. Ed. 893. But the majority of this court is of the opinion that, under our decision in *United States v. Irwin*, 78 Fed. 799, 24 C. C. A. 349, when the incomplete car and the four tires necessary to put it in running order are imported together, shipped by the same vessel for the same importer, and entered at the custom house at the same time, the parts are dutiable as a whole. As pointed out in that case, had the importer procured a policy of insurance against loss by fire or the perils of the sea, upon an "automobile on board the steamship *Victorian*," the policy would have covered the complete machine, although the chassis, the body, and the tires were in separate cases, and had never before loss, been actually assembled.

Reference is made to our decision in *Hillhouse v. United States*, 152 Fed. 163, 81 C. C. A. 415, where it was held that exemption from duty as a "household effect" of a car used abroad for more than a year would not cover new parts added to it just before shipment. It would be an unreasonable extension of that proposition to hold that importations dutiable at some particular rate as completed articles may be constructively separated for duty purposes into parts subject to different classifications.

The decision of the Circuit Court is reversed.

NOYES, Circuit Judge (dissenting). I cannot agree that rubber tires should be assessed as manufactures of metal merely because they are imported in a crate with an automobile upon the wheels of which they never have been, and it is wholly problematical whether they ever will be, placed. In my opinion *United States v. Irwin*, 78 Fed. 802,

24 C. C. A. 349, applies only where parts of articles are imported to be assembled upon arrival.

I think that the decision of the Circuit Court should be affirmed.

NOTE.—The following is the opinion of Platt, District Judge:

PLATT, District Judge. The importations herein consisted of automobiles "with tools and accessories," so called. Duties were assessed thereon as entireties at the rate of 45 per cent. ad valorem, under the provision in paragraph 193 of the act of July 24, 1897, for "articles or wares * * * composed wholly or in part of iron, steel, * * * or other metal." The claim in the protests is that the tires which accompanied said automobiles, but which were not attached to the rims of the wheels, are properly separately dutiable at 30 per cent. ad valorem under paragraph 449, which is the tariff provision for manufactures of india rubber. It has been decided, as I understand it, in *Hillhouse v. United States*, 152 Fed. 163, 81 C. C. A. 415, that in applying the tariff law a single article may be constructively separated into parts subject to different classifications. The petition for certiorari in that case (208 U. S. 615, 28 Sup. Ct. 568, 52 L. Ed. 646), shows that the contention was as to whether parts of a machine taken abroad and brought back with new ones in their place could be treated as separable from the rest of the machine, which seems to settle the general principle contained in the *Hillhouse* decision.

In order that merchandise which is distinctively a manufacture of rubber, or a manufacture of wood, or a manufacture of this or of that, shall be classified as a manufacture of metal, it is necessary that the entire article manufactured shall have existed as an entity before importation and have been purchased as such an assembled entity. In such a case it would be an evasion for the foreign maker to break the entity into fragments and expect each fragment to be treated as if it were complete in itself. If the article has never been assembled on the other side, so that it is capable of immediate use, it ought not to be treated for tariff purposes as if it had been put into that condition on the other side. In the cases at bar there is no evidence that the rubber tires in issue had been attached to the wheels of the automobiles in the country of production in such a way as to be capable of immediate use. That being so, it seems to me that under the rulings in the shotgun cases it is wrong to attempt to treat them at the port of entry as if they had been so attached. *United States v. Irwin*, 78 Fed. 799, 24 C. C. A. 349; *United States v. Schoverling*, 146 U. S. 76, 13 Sup. Ct. 24, 36 L. Ed. 893.

It is to be observed, also, that the tires are not so markedly a part of the automobile as the nuts, bolts, beams, angle irons, etc., because these latter things are individual to the particular make of machine and are intended to stay until worn out, when they will be replaced by like parts; but the tires are detachable and interchangeable, and may or may not be used on the particular automobile, according to the whim or caprice of the owner.

In the light of these thoughts, and others which time forbids me to note, the decision of the Board of General Appraisers is reversed, and the tires in question held properly dutiable under the provision in said paragraph 449.

UNITED STATES v. MERCK & CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 129 (3,922).

CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—EUQUININE—"SALTS OF CINCHONA BARK."

In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 647, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1687), the provision for "salts of cinchona bark" is not in the language of chemical science. It was meant to include

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

derivatives of cinchona bark which preserved its essential medicinal element; and euquinine, which is such a preparation, though not chemically a salt, is within said provision.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 27; Dec. Dig. § 38.*]

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

This cause comes here upon appeal from a decision of the Circuit Court reversing a decision of the Board of General Appraisers, which sustained the collector's classification for duty of certain merchandise imported under Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626).

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

Comstock & Washburn (Albert H. Washburn, of counsel, and Charles A. Darius, on the brief), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The article in question, "euquinine," is, as its name implies, a preparation more or less directly from cinchona bark, for use in medicine. Its medicinal qualities are substantially the same as those of sulphate of quinia and other preparations from the same source. The physical qualities have been so modified that the bitter taste, usually characteristic of quinine preparations, has been eliminated, and the disagreeable sensation in the ears, which often accompanies the administration of quinine, is also avoided. Alcohol is used in its preparation. The collector classified it under—

"Par. 67. Medicinal preparations containing alcohol or in the preparation of which alcohol is used, not specially provided for in this act, 55 cents per pound, but in no case shall the same pay less than 25 per centum ad valorem." Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631).

The importer contends that it is covered by the free list:

"Par. 647. Quinia, sulphate of, and all alkaloids or salts of cinchona bark."

The board held that it "is not a salt of cinchona bark, but it is an ester, and a medicinal preparation in the preparation of which alcohol is used," and sustained the collector. There is a great deal of chemical testimony in the case, which we do not find it necessary to discuss. The word "ester" is a term of the German chemists, and applies to what the English chemist calls compound ethers. The weight of the expert evidence is to the effect that an ester is not in the strict use of chemical nomenclature a salt, although some of the witnesses say it is "an ethereal salt." But that is not determinative of the question. Congress did not use the language of chemical science in paragraph 647. It provides for "salts of cinchona bark," and all the experts agree that there is no such thing. What it meant undoubtedly was that quinine (sulphate of quinia) and the other derivatives from cinchona bark, which preserved the controlling or essential medicinal element of the bark, should be admitted free of duty. Since the group thus designat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed is a more specific one than that covered by paragraph 67, "medicinal preparations containing alcohol," etc., we concur with the judge who heard the cause at Circuit.

The decision is affirmed.

NOTE.—The following is the opinion of Platt, District Judge:

PLATT, District Judge. The merchandise in controversy is invoiced and known as "euquinine." Duty was assessed thereon at 25 per cent. ad valorem under paragraph 67 of the tariff act of 1897, and it is claimed in the importers' protest to be free under paragraph 647 of said act. There is an alternative claim under paragraph 21 of the act, but which was not urged upon the argument. The relevant paragraphs are as follows:

"67. Medicinal preparations containing alcohol, or in the preparation of which alcohol is used, not specially provided for in this act, fifty-five cents per pound, but in no case shall the same pay less than twenty-five per centum ad valorem."

"647. Quinia, sulphate of, and all alkaloids or salts of cinchona bark."

I think, when Congress used the expression "salts of cinchona bark," it meant the salt which can be found in and extracted from such bark. It is conceded that the essential principle of euquinine is found in cinchona bark, and that euquinine is an ester. The only question then remaining to be determined is whether an ester is a salt. Witnesses for the importer say that it is, and Dr. Schieffelin, who appears to be the chief witness for the government, says that euquinine is both an ester and an ethereal salt, but that, in his opinion, the latter term is a misnomer, and that it ought not to be so called. The final conclusion seems to be that the merchandise in dispute is an ethereal salt, and that it is derived from cinchona bark in the same way that sulphate of quinia is derived from the bark.

The decision of the Board of General Appraisers is reversed.

DREVET MFG. CO. v. MOORE BROS. GLASS CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 143.

JUDGMENT (§ 585*)—MATTERS CONCLUDED—ACTION FOR PRICE OF GOODS SOLD.

Where, in an action for the price of goods sold, a breach of warranty is unsuccessfully relied upon as a defense, it cannot subsequently afford a cause of action for damages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1095; Dec. Dig. § 585.*]

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

Anton Gronich (Nathan Ottinger, of counsel), for plaintiff in error.
Albert H. Atterbury (John Brooks Leavitt and Stuart G. Gibboney, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. In this action the defendant in error, hereinafter called the plaintiff, sued to recover the agreed price of certain glass bottles made upon request. The defendant set up a breach of warranty as a defense. It alleged, among other things, that the plaintiff agreed that the bottles should stand the test used by Dr. Marchard—

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its president—and that they did not. The defendant offered evidence of the alleged agreement and that a large proportion of the bottles delivered did not stand the test. It appeared that some of the bottles for which the plaintiff sought to recover had been delivered and that others had not. The jury brought in an irregular verdict for the plaintiff for the full amount claimed, but providing for a test of the undelivered bottles.

The trial court refused to accept this verdict, and explained why. It then went on to say:

“If you are of that opinion and inclined to find a verdict for the plaintiff, the effect of your verdict, among other things, would be that the bottles now on hand and stored or kept by the plaintiff, as they say, for account of the defendant, would become the property of the defendant; and if those bottles, and if any other bottles already delivered to, and used by, or attempted to be used by, the defendant, do not live up to, survive, or endure the test properly considered, then the defendant has his action for damages against the plaintiff for the defective quality of those bottles, whether they have been delivered, or whether they are still in the plaintiff’s storehouses.”

This charge was erroneous. The defendant, having set up as the basis of its defense of breach of warranty that the bottles were defective and would not stand the agreed test, and having offered evidence in support of its allegations, could not, after verdict and judgment for the plaintiff, maintain an action for damages on account of the defective quality of the bottles. The matter became *res adjudicata*. When a breach of warranty is unsuccessfully relied upon as a defense to a suit for the price, it cannot subsequently afford a cause of action for damages. *Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976.

The plaintiff apparently contends that this conclusion does not follow in the case of undelivered goods—that when, after a verdict for the manufacturer for the price of undelivered goods, the vendee obtains them, and finds them not in accordance with the contract, he may still sue for the breach of warranty. Undoubtedly this would be true, if he had not set up and attempted to prove a breach of warranty in the action for the price. If he had, we see no distinction between goods undelivered and delivered. But, if such distinction exists, it was not recognized in the charge of the trial court, which stated that the defendant would have its cause of action for damages, whether the bottles had been delivered or were still in the plaintiff’s storehouses. In view of the verdict which had been brought in just before these instructions were given, it is obvious that the error was prejudicial to the defendant.

We find no other errors in the rulings or charge.

The judgment of the Circuit Court is reversed.

WALTER BAKER & CO., Limited, v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

SHIPPING (§ 132*)—ACTION FOR LOSS OF CARGO—DEFENSES—CONTRACT GIVING CARRIER BENEFIT OF INSURANCE.

Under a provision of a bill of lading giving the carrier, in case of loss or damage to the property for which it is liable, the benefit of "any insurance that may have been effected upon or on account of such property," the burden rests upon the carrier, when sued for a loss, to prove that there was insurance, to the benefit of which it was entitled.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

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

For opinion below, see 162 Fed. 496.

William Greenough, for appellant.

Horace L. Cheyney, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The libel alleges that the libelants delivered 1,215 bags of cocoa to the respondent, to be carried from New York to Milton, Mass., and there delivered to the libelants under a bill of lading annexed thereto; and, further, that 815 of the bags were lost in transit in the East River November 21, 1906, to the libelants' damage in the sum of \$18,594.82.

The answer admits the allegations of the libel, except the amount of damage, and then sets up as a defense the following clause of the bill of lading:

"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 such property."

It proceeds further to allege that at the time of its loss the cocoa was fully covered by insurance, but that it has not had, nor have the libelants offered to give to it, the benefit of the same.

The only evidence offered in the case was a floating policy of marine insurance offered by the respondent which was taken out by the libelants March 10, 1902, and canceled December 17, 1906. It covered merchandise, principally cocoa, on board railroads ^{and}/or steamers at and from New York to Milton, Mass., valued at invoice cost, risks applicable to the policy to be reported as soon as known to the insured. The policy contained the following clause:

"It is also agreed that this insurance shall be void in case this policy or the interest insured hereby shall be sold, assigned or transferred or pledged, without the previous consent in writing of the insurers."

The respondent proceeded on the theory that the libelants were bound to show what, if any, insurance they had upon or had collected for the goods lost, and that they could not recover without doing so. The libelants, however, were not bound to take out any insurance at all, but only to give the respondent the benefit of any they might have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on the cocoa. That they had or had not insurance was no part of their case, but purely a matter of defense. The clause relied upon is quite unlike those referred to by counsel exempting carriers from liability for losses, of which notice is not given by the shippers within a fixed time. Such provisions are regarded as limitations of or conditions precedent to the right of recovery. *The Westminster*, 127 Fed. 680, 62 C. C. A. 406; *Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419. There being no proof in the case whatever that the goods in question were reported as risks applicable to the policy offered in evidence, the respondent failed to show that the libelants ever had or collected any insurance on the cocoa of which the respondent was entitled to have the benefit.

This makes consideration of the other interesting questions discussed by counsel unnecessary.

The decree is affirmed, with costs.

HELLER v. NATIONAL WAISTBAND CO.†

(Circuit Court of Appeals, Second Circuit. March 23, 1909.)

CONTEMPT (§ 66*)—APPEAL OR WRIT OF ERROR—CONTEMPT.

Where an order imposing a fine for violating an injunction is to reimburse the party injured by the violation, it can be reviewed only by appeal, as writ of error will lie only where the fine is punitive and in vindication of the authority of the court.

[Ed. Note.—For other cases, see *Contempt*, Cent. Dig. §§ 214-221; Dec. Dig. § 66.*]

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

Hans von Briesen, for the motion.

A. A. Berman, opposed.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. It is well settled that, when an order imposing a fine for violation of injunction is substantially one to reimburse the party injured by the disobedience, it is to be reviewed only by appeal. Writ of error will lie only when the fine is clearly punitive, and in vindication of the authority of the court, as is the case where the fine is made payable in whole or in part to the United States. *Matter of Christensen Eng. Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072.

The writ of error is dismissed. Defendant's remedy is by appeal.

LEONARD v. CUTLER-HAMMER MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 114.

PATENTS (§ 328*)—INVENTION—ELECTRIC CIRCUIT-CONTROLLERS.

The Leonard patent No. 673,274, for an electric circuit-controller, combining in the same device an overload and an underload switch, claims 1, 6, 7, and 11, are void for lack of invention in view of the prior art.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep' Indexes
† For opinion on motion for rehearing, see 168 Fed. 1020.

Claim 10, if given a broad construction, is also void for lack of invention. If limited to the form shown and described in the drawings and specification, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

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

For opinion below, see 156 Fed. 791.

Wm. Houston Kenyon, for appellant.

Charles Neave, W. Clyde Jones and Robert Lewis Ames, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit in equity to restrain the alleged infringement of letters patent No. 673,274 granted to the complainant April 30, 1901, for an improvement in electric circuit-controll-ers.

The patentee thus states the principal object of his invention:

"The object of my invention is mainly to provide a circuit-controller of the character referred to, with an electro-responsive device responding to abnormal increases in current, hereinafter referred to as 'overload-currents'; which will be effective at all times; that is, both while the controller is being operated by hand to adjust it to the normal position and after adjustment—the overload switch or controller operated or controlled by said electro-responsive device being operative to respond to an overload-current even while the switch-operating lever of the controller is being moved by the operator."

It will be observed, therefore, at the outset, that, while the patent is said to relate to circuit-controll-ers, its main purpose is to provide automatic protection against excessive or "overload" currents, when a manually operated starter is employed in an electric circuit. And at the outset it should also be observed that, while the claims of the patent are not limited to shunt-wound motors, the devices which they describe are in their useful application practically confined to the regulation of the flow of the current to motors of that character—as distinguished from series motors—and the case has been presented upon both sides as if the claims referred specifically to them.

Before examining the claims of the patent, therefore, it will be desirable to ascertain what shunt motors are, the difficulties and dangers attending their use, the early protective devices, and the situation existing when the complainant made his alleged invention.

Shunt motors are electric motors having a stationary field magnet and a revolving armature, both of which are wound with wire. The winding on the former is the field winding, and the winding on the latter is the armature winding. When the current traverses the two windings it magnetizes the field magnet and the armature magnet, and the former, by attracting and repelling the latter, causes the armature to rotate and enables it to do its work. The field winding and armature are connected in parallel branches or side by side between the electric mains instead of being in series. The current flowing through the field winding has only to magnetize the stationary element of the motor, and the winding is such that it is constant and small when compared

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with that traversing the armature winding. The field magnet, therefore, has little need of protection. The armature winding, however, ordinarily offers little resistance to the current, and as the armature—the working part of the motor—has many different conditions to meet, it would be liable to be injured were it not that when once started it is able to automatically adjust itself to the amount of current, and, consequently, to the amount of work to be done.

This automatic action is effected by means of what is technically called the "counter electromotive force" of the motor armature. When the armature rotates it produces, by dynamo action, a back voltage or force proportioned to the speed, which operates in opposition to the current flowing from the source of supply. Thus when the motor has started and is running in normal operation, this counter force protects the armature from an excess of current and governs the flow when the work to be done varies. When, however, the motor is not running, no counter electromotive force is generated, and, if in this condition the full current is permitted to enter and bear upon the armature, it is liable to burn it out. The problem is to start the motor gradually and give the armature opportunity to catch up with its back pressure.

This problem was met early in the art by the use of a hand-operated starting rheostat or gradual-resistance switch in the line of the flow of the current to the motor. Such a switch usually consists of a series of resistance coils attached to adjacent contact segments which can be swept over by a pivoted switch arm. With such a switch the operator gradually cuts out the resistance sections, and as they are cut out the current in the armature tends to increase. But as they are being cut out the speed of the armature also increases, and it regulates itself by generating the back pressure, so that when they are all cut out it is running protected. The starting rheostat, therefore, without other device, serves to protect the armature in the admission of the current during the period of starting.

But should the current be suddenly shut off at any time after the starting switch has been closed, it would remain in an "on" position. Then, should the current be resumed, there would be nothing to protect the armature from its sudden inflow. The danger would not lie in the "no voltage" condition, but in the resumption of the current. To meet this contingency it was old in the art to provide an arrangement called a "no voltage" or underload switch or cut out which would open the circuit and protect the armature in case of the interruption of the current supply and return the contact lever to an "off" position. This was accomplished in a prior Blades patent by a device in which the contact lever was held in an "on" position when the current was passing through by a retaining magnet in the circuit acting in opposition to a retracting spring, and which was carried to an "of" position by the force of the spring when the current was interrupted.

This underload cut out, however, afforded no protection in the case of an excessive current without antecedent "no voltage" conditions. To meet this danger it was old in the art to arrange the apparatus so that the switch which was opened in the case of "no voltage" was also opened in the case of excessive currents. Thus in one form of the Fiske device an overload magnet was so arranged as to de-energize the

underload or no voltage magnet, release the resistance switch, and open the circuit in case of an excessive current, while also permitting the latter magnet to open the switch when de-energized by the failure of current. In another form, a single magnet was made to open the switch in response to either an excess or interruption of the current. But in all these cases the underload and overload devices operated only upon one and the same switch.

Independent devices for opening circuits in the case of excessive currents—overload circuit breakers—were also old in the art at the time of the complainant's alleged invention. At first fuses were provided which would carry the normal full-load current, but which would melt in the case of an overload and cut off the flow of the current before the motor could be injured. Fuses, however, were found to serve their purpose only imperfectly, and automatic overload circuit breakers came into use in electric circuits. In a common form of such a device a magnet was introduced into the circuit and became energized thereby. In case of an excessive current this magnet was so arranged as to actuate an iron core which unlatched the overload switch lever and opened the circuit. Fuses were commonly used with shunt motors, but whether the automatic circuit breakers were so used is a question which we need not now determine. Certainly there is evidence of such use.

The complainant contends that the development of electrical invention and use in the direction of the protection of shunt motors had not progressed further at the time of his invention than as we have just outlined. Whether it had progressed further is a question which we shall consider after examining the nature of the complainant's alleged invention and the claims of his patent which are in suit.

The conception of the patent goes further than the installation in the circuit of a shunt motor of the "no voltage" switch; goes further than the installation of the overload circuit breaker; goes further than, and meets the difficulties attendant upon, the installation of the overload and underload devices acting upon the single switch. It covers broadly the association in the same circuit of the underload and overload circuit breakers acting independently and automatically in response to the abnormal conditions affecting them respectively. As stated by the patentee at the commencement of the patent:

"My invention relates to the class of switches or rheostats provided with means for automatically opening or closing, regulating, or otherwise affecting or changing the condition of a circuit upon the occurrence of an abnormal increase or decrease in current to prevent injury to the translating devices in the circuit, said means being controlled or operated by electro-responsive devices."

Complainant's counsel designates the device of the patent as a "double break" circuit controller. By the phrase "double break" it is appropriately only meant that, when the current is broken by the action of the overload circuit breaker, the magnet of the no voltage circuit breaker becomes de-energized and that switch opens also. One break in the circuit follows another break. It is of interest to note, however, that in the device which the complainant has made under his

patent it is doubtful whether the overload break does anything more than to initiate the second break. But this is not of importance.

Turning now to the claims of the patent, we find that the broad claims involved in this suit are 1, 6, and 11, while the structural claims involved are 7 and 10. We shall examine the former first. They read as follows:

"(1) In a circuit-controller, the combination of two independently-movable switch-levers, an electro-responsive device for controlling one of said levers and responding to failure or abnormal decrease of current to release said lever, means for moving said lever when released to affect the circuit, an electro-responsive device for controlling the other lever and responding to abnormal increases of current to release said second lever, and means for moving said lever, when released to affect the circuit."

"(6) In a circuit-controller, the combination of two movable switch members for controlling the same circuit, and two electro-responsive devices for controlling said switch members, each switch member and its electro-responsive device operating automatically and independently of the other to affect the same circuit, one when excessive current flows and the other upon failure or abnormal decrease of current."

"(11) In a circuit-controller, the combination of two movable switch members for controlling the same circuit, said members being adapted to be held in a normal operative position and operating respectively to effect the circuit upon the occurrence of overload and underload currents, and overload and underload electro-responsive devices functionally connected with said switch members and operating independently of each other to release the overload and underload switch members respectively."

These claims all embrace substantially the same elements, and with one exception, which we shall later notice, it seems unnecessary to differentiate between them. Claim 11 may be taken as illustrative. It covers a combination of the following elements in the circuit controller: (1) A movable switch member adapted to be held in normal operative position and operating to affect the same circuit as a second switch member upon the occurrence of overload currents. (2) Another movable switch member adapted to be held in normal operative position and operating to affect the same circuit as the first switch member upon the occurrence of underload currents. (3) An electro-responsive device functionally connected with the first movable switch member and operating independently of a second electro-responsive device to release the overload switch member. (4) Another electro-responsive device functionally connected with the second movable switch member and operating independently of the first electro-responsive device to release the underload switch member. In other words, the claim calls for a hand starter associated with: (a) A switch member and an electro-responsive device in conjunction therewith to open the circuit in case of an abnormal excess of current. This is the circuit breaker of the art which we have noticed. (b) A switch member and an electro-responsive device in conjunction therewith to open the same circuit in case of an abnormal decrease of current. This is the "no voltage" or underload cut out of the art which we have also noticed.

It will be observed that no electrical connections are prescribed in the claim, except that both switch members must control the same circuit. In fact, the patentee in his specifications disclaimed any particular connections:

"The electro-responsive devices may be connected in the circuit in any suitable way. They may be connected in series or otherwise and arranged in the path of the entire current flowing to the translating device, or arranged to be affected by only part of such current, or either or both devices might be in a different circuit from that in which the translating device is connected. When the apparatus is employed in the circuit of a motor, I connect the underload responsive device in most instances in series with the shunt field-winding of the motor and the overload responsive device in series with the motor-armature. * * * Nor do I claim herein the circuit connections for a motor-starting rheostat, as shown in Fig. 2, since all those features are made the subject of a divisional application."

"The translating device in the circuit"—in the language of the patent—which is to be protected by the association of the overload and underload switches is, according to all the testimony, the armature of the shunt motor, when they are used—as they are designed to be—with a motor of that class.

We have thus treated the broad claims as containing the same elements and as illustrated by claim 11. But the complainant contends that, while two circuit breakers arranged in the armature circuit would satisfy claim 1, their installation in the main circuit feeding both armature and field is required by claims 6 and 11. This installation would, it is said, not interfere with the "closed local loop" constituted by the shunt arrangement of the armature and field circuits, and would possess many advantages. But we find no warrant whatever for reading as an element the "closed local loop" into claims 6 and 11, nor is this loop a feature necessarily present in those claims. The patent disclaims specific connections, especially the connections of the only figure showing the "closed local loop." The claims read upon the figure which possesses no such loop. They only require the installation of the two circuit breakers so as to affect the same circuit. When they are used with a shunt motor the armature is the device needing protection, and all that the claims and specifications require is that the switches shall be arranged in the circuit to afford such protection. Claim 1 specifies, as complainant's counsel was particular to point out, that the switches shall affect "the circuit." Claims 6 and 11 provide that they shall affect "the same circuit." We see no distinction between the phrases, and think that both refer—when a shunt motor is used—to the circuit of the motor armature.

The defense to the broad claims of the patent is want of novelty, and in considering this defense we shall, for the purposes of this opinion, assume that certain of the contentions of the complainant are well founded. In the first place, we shall assume that, with only the separate use shown in the prior art of the underload and overload switches, patentable invention would have been involved in associating them in the same circuit as stated in the claims. In the second place, we shall assume that, with only the associated use shown in the prior art of underload and overload electro-responsive devices acting upon a single switch, patentable invention was involved in inserting in the circuit two independent switches and electro-responsive devices as stated in the claims. In the third place, we shall assume—and the evidence certainly supports such assumption—that the conception of the patent, if novel, possesses great merit and many advantages over the single-

break type of controller. In the fourth place, we shall assume that the claims in question were not anticipated in any earlier patent. In the fifth place, while we may briefly consider the matter of prior publication as indicating the teachings of the art, we shall assume that the defense of prior publication is not established. Finally, we shall assume that the date of the invention may be carried back from the date of the application—March 27, 1899—to April 17, 1897, when the complainant made a sketch in his note book. With these assumptions we have only to address ourselves to the questions of prior use as determining the novelty of the invention. In taking up this investigation, it will be well to see at the outset just what must be found in the prior art to anticipate.

Referring, then, to the claims, it appears that it will be necessary to find a prior use of a circuit controller with these elements: (1) A movable switch lever and electro-responsive device to open the circuit in case of an overload—an overload circuit breaker. (2) A movable switch and electro-responsive device to open the same circuit in case of an underload—a “no voltage” or underload cut out. And, going outside the claims, we shall assume that it is also necessary to show that the circuit-controller was used with a shunt motor, and that the translating device protected was the armature of such motor.

Turning now to the evidence, we find these facts with respect to what is called the “Shipbuilding Company use” established by documentary and parol testimony so clear as to carry conviction beyond any reasonable doubt: In 1896 the General Electric Company furnished to the Newport News Shipbuilding Company certain motor equipment for the coal trimmers of the steamship *La Grande Duchesse*. It was desired to operate the coal trimmers of this vessel by electric motors, and the correspondence, bills, and parol testimony show clearly that two 15 horse power shunt motors were supplied. These motors were to be directly connected to the sprocket shafts of the coal trimmers, which were liable to become jammed and to suddenly stop the motor. It would also be necessary sometimes to start the motor upon full load. Consequently the protection of an overload circuit breaker for the motor armature was required. And the protection of a no-voltage cut out was, of course, as necessary as in the case of any hand-starter. The General Electric Company, therefore, as appears by the correspondence, drawings, and parol testimony, furnished to the shipbuilding company a starting rheostat provided with a no-voltage release magnet and a type M—overload—circuit breaker. The testimony and sketches of the General Electric Company employes show that these two devices were intended to be put in the same circuit for the protection of the motor armature. The testimony of the electricians of the shipbuilding company is that the shunt motors and rheostats were installed, and that the underload and overload switches were in fact connected as they were intended to be. The testimony of these witnesses is also that the motors as so connected were used upon the vessel for the purpose for which they were designed. There is nothing to indicate that such use was unsuccessful, and, in view of the testimony concerning the merits of the associa-

ted use of the two circuit breakers, no reason appears why it should not have been successful.

Reading this testimony in connection with the broad claims in question, it seems clear that this prior use anticipates. One of the movable switch members of the claims is found in the switch of the circuit breaker used. It was held in normal position by a latch, and operated to affect the circuit upon the occurrence of an overload current. The overload electro-responsive device of the claims is found in the coil with its co-operating parts, which were functionally connected to the overload switch and operated to release it in case of excessive current. The second movable switch member of the claims is found in the rheostat arm of the starting box, which was normally held in operative position against spring action by the action of the retaining or "no-voltage" magnet, which, when de-energized, released it and allowed the switch to open. The second of the two electro-responsive devices was the retaining magnet and its co-operative parts, which were functionally connected with the underload switch member—the rheostat arm—and released it in case of no voltage. The two switch members operated independently to protect the same circuit—that in which the motor armature was located. This prior use took place before the patentee's date of invention, and more than two years prior to the date of his application. After the most careful consideration of the evidence covering this prior use, we are unable to see that it is open to the objections urged by the complainant, and are constrained to hold that it anticipates the broad claims in suit. And even if we were of the opinion that these claims covered some particular connections, so that there might be a doubt of strict anticipation, we should be obliged to hold that with separate and independent overload and underload switches in the circuit of a shunt motor—and also a manually-operated starter—shown in the prior art, the claims in question would be invalid for want of invention.

The complainant contends with respect to this prior use that there is no satisfactory evidence that the circuit connections of the motor were his particular connections. But, as we have already seen, the complainant in his patent expressly disclaimed having any particular connections. All that the claims require is the placing of the two switches in the same circuit. The specifications say that the devices are intended "to prevent injury to the translating device in the circuit"—the armature of a shunt motor—and the proof in the case of the shipbuilding company use is that both switches were installed in the same circuit for this very purpose.

The complainant also says with respect to this use and others:

"The two switches were so combined with each other and with the motor circuits as that they were not in series in the same circuit, and, in consequence, they, by their protective operation, broke the local loop containing the motor armature and field."

This contention is not, we think, well founded in fact. The testimony is that the two switches were installed in series in the same circuit—the circuit of the motor armature. This, according to all the experts, was the translating device to be protected. Moreover, while

it may be preferable to arrange the two switches so as to protect the field also by not interfering with the "closed local loop," as we have seen, there is nothing whatever in the claims in question regarding such an arrangement, nor is it required by the specifications.

In view of our conclusions concerning the shipbuilding company use, it is unnecessary for us to consider the testimony concerning other alleged prior uses contained in the record. One of these uses, however, we shall briefly refer to—the Government Printing Office use. We have carefully examined the testimony concerning this use, and are fully satisfied that prior to 1897 there were installed in the Government Printing Office at Washington and used in the same circuit of a shunt motor for the protection of the armature: (1) An automatic overload circuit breaker manufactured by the Cutter Electrical Company. (2) A starting box and no-voltage release attachment made by the Cutler-Hammer Company. This prior use seems clearly to anticipate the broad claims in question. And, as already pointed out, if there was a question about strict anticipation, with such a use in the prior art the claims would disclose no invention. The complainant seeks to discredit the testimony of the electricians in the Government Printing Office concerning this prior use. But while some minor inconsistencies in the testimony are shown, the witnesses seem to be entirely credible, competent, and disinterested, and no adequate reason is shown why their statements should not be accepted as the truth.

The complainant also urges, with respect to all the testimony concerning prior uses, that it is inherently improbable that prior to March, 1897, any one should associate in a motor circuit independent overload and underload switches; that such association was contrary to the teachings of the art. While we are not prepared to hold that with underload and overload switches used separately their association in a circuit for the protection of a shunt motor was obvious, we are certainly unable to assent to the converse proposition that it was so obscure as to be unlikely to be thought of. And with respect to the teachings of the art, we find in the *Electrical World*, of February 6, 1897, an illustrated article concerning circuit breakers in which it is said—apparently as nothing particularly new or novel:

"An automatic overload circuit breaker, which may be single pole, inasmuch as a double pole fusible cut out is usually installed, may be used in connection with any improved hand-starting box, preferably with a magnetic open circuit release."

For these reasons claims 1, 6, and 11 of the patent are held invalid for want of patentable novelty, and only the structural claims 7 and 10 remain to be considered.

Claim 7 is as follows:

"In a circuit-controller, the combination of two levers pivotally connected, a spring constantly tending to move said levers, a latch for holding one of said levers in its normal position, an electro-responsive device for releasing said lever, and the other lever carrying a keeper and normally held by an electro-magnet."

The spring, the latch, and the electro-responsive devices of claim 7 are manifestly old; are used for their ordinary purposes, and in the combination produce no new result. The only element which could

be claimed to be at all novel is the mounting of the two switch levers upon the same pivot, and this seems to be the essential element of the claim. But the Gibbs patent (No. 555,503, dated March 3, 1896), the Schneider patent (No. 593,817, dated November 16, 1887), and an earlier Leonard patent (No. 568,088, dated September 22, 1896) show that it was old to mount two switches upon one pivot, and no new result is obtained by combining these pivotally mounted levers with the other elements of the claim. With the patents referred to in the prior art, claim 7 seems clearly invalid for want of invention. Indeed, the only apparent advantage arising from having the two levers "pivotally connected" is to make the apparatus more compact, and possibly to more conveniently permit the resetting of the levers. But even without the prior art we could hardly regard this mechanical arrangement as involving invention.

Claim 10 of the patent is as follows:

"In a circuit-controller, the combination of an overload-switch, a latch for holding said switch, a solenoid-magnet in the main current having a moving core for releasing said switch, and an underload-switch functionally connected with the overload-lever and normally held against a spring by a second magnet."

This claim is essentially for the "underload switch functionally connected with the underload lever."

The purpose of this functional connection between the two switches is to close the circuit breaker when the resistance lever is moved to its "off" position. But a similar functional connection of the two switches is found in the prior patent of the complainant (No. 568,088, dated September 22, 1896) as well as in other earlier patents. We think this claim, based broadly upon a functional connection of the two switches, is invalid in view of the prior art.

And, if the claim be given a narrower construction and be confined to the form illustrated in the drawings and shown in the specifications, the defendants' device does not infringe. When the underload switch lever of the patent is moved to the open position, it contacts with and carries the switch arm of the overload circuit breaker, closing the switch. The operating handle is upon the underload arm, and only one movement—that of the underload arm—is required or intended to be made. In the defendants' device, on the other hand, there are two handles, and two movements are required to close the two switches. The underload lever does not automatically close the overload lever, although the latter when open is so locked that it cannot be closed until the former is carried back to the open circuit position. In other words, the defendants do not employ the functional device shown in the specifications of the patent, but use an interlocking two-handle device along the lines of earlier patents. The rather indefinite suggestion in the patent that the invention includes within its scope means "whereby the underload switch could not be closed until the overload switch is closed" certainly does not embrace the defendants' structure, which requires that the overload switch shall not be closed until the underload switch is open.

For these reasons, the decree of the Circuit Court must be, and it is, affirmed, with costs.

J. L. OWENS CO. v. TWIN CITY SEPARATOR CO.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1909.)

No. 2,525.

1. PATENTS (§ 177*)—GENERAL CLAIM—NOT LIMITED BY SPECIFIC CLAIM IN SAME PATENT.

Where a patent contains a general claim for a combination of certain elements and a specific claim for a combination of a particular form, composition, or construction of an element of that combination with its other elements, the general claim is not limited to the particular form, composition, or construction of the element claimed in the specific claim, but the general claim protects the element and its mechanical equivalents, although they may differ from the form, composition, or construction claimed in the specific claim.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 253; Dec. Dig. § 177.*]

2. PATENTS (§ 178*) — NOT LIMITED TO IMMATERIAL DETAILS OR DESCRIPTION IN SPECIFICATION.

The description in a specification or drawing of a form, or a composition, or a construction of a mechanical element, when that form, composition, or construction is not essential to the combination or improvement claimed, is the mere pointing out of the best mode in which the patentee contemplated applying the principle of his invention pursuant to section 4888, Rev. St. (U. S. Comp. St. 1901, p. 3383), and it does not deprive him of protection against mechanical equivalents of the element, nor does it indicate that he intended to give up all other modes of application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. § 178.*]

3. PATENTS (§ 328*)—CONSTRUCTION—PARTICULAR PATENTS.

The specification and drawings of a patent described a lap deck composed of a rigid short deck and a flexible apron secured to its upper edge and extending beneath and beyond it. The patent had two claims, one general, for a combination of other elements with the lap deck, another specific, for a combination of the other elements with the lap deck, composed of a rigid deck and a flexible flap shown in the specification. The composition of the lap deck was not essential, and the flexible flap performed its function alone as efficiently as the rigid deck and the flap together.

Held: The first claim was not limited to a lap deck composed of a rigid part and a flexible flap, but it protected the patentee against a lap deck made of the flexible flap alone, which was the mechanical equivalent of the lap deck of that claim.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

4. PATENTS (§ 64*)—FINDING PARTS OF PATENTED COMBINATION OR MACHINE IN DIFFERENT PRIOR PATENTS OR PUBLICATIONS NO ANTICIPATION.

It constitutes no anticipation and no defense to a claim of infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent or publication, and others in another, and still others in a third. It is indispensable that all of them, or their mechanical equivalents, be found in the same description or machine, where they do substantially the same work by substantially the same means.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. § 64.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. PATENTS (§ 109*)—CLAIM—LIMITATION WHERE REJECTION AND AMENDMENT.

A patentee who acquiesces in the rejection of his claim on references is estopped from maintaining that an amended claim covers the combinations and devices shown in those references, or that it has the breadth of the rejected claim.

But he is not estopped from claiming and securing by an amended claim every improvement and combination he has invented that was not disclosed by the references on which his original claim was rejected.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. § 109.*]

Amendment of application, see note to *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, 68 C. C. A. 239.]

6. PATENTS (§ 243*)—INFRINGEMENT—IMMATERIAL CHANGES OF FORM, COMPOSITION, OR CONSTRUCTION, WILL NOT AVOID.

Changes of the form, composition, or construction of parts of a device, or of some of the elements of a combination, will not avoid infringement, where the principle or mode of operation of the patentee is taken, and the changed form, composition, or construction is neither a distinguishing characteristic of the invention nor material to the device or combination, or its operation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 384; Dec. Dig. § 243.*]

7. PATENTS (§ 328*)—PARTICULAR PATENTS—INFRINGEMENT—EVIDENCE.

The substitution for the flexible dividing aprons of the combination of Froslid's patent No. 684,751, which are about four inches in length and which divide the stock, overlap at their delivery ends the receiving ends of the dividing aprons beneath them, and act as riders and carriers, of long flexible aprons with transverse slots whereby these aprons are in practical effect divided into sections about four inches long, which divide the stock, overlap at their delivery ends the receiving ends of the sections beneath them, act as riders and carriers, occupy the same relation to the other elements of the combination and perform the same functions as the dividing aprons of the patent, is the use of mechanical equivalents, and it will not avoid infringement.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

8. PATENTS (§ 328*)—CLAIM 1 OF PATENT NO. 668,175, AND CLAIMS 1, 2, AND 3 OF PATENT NO. 684,751, VALID AND INFRINGED—CLAIM 1 OF PATENT NO. 626,746 NOT INFRINGED.

Claim 1 of patent No. 668,175, issued February 10, 1901, to Anton S. Froslid, and claims 1, 2, and 3 of patent No. 684,751, issued October 15, 1901, to Anton S. Froslid, for improvements in grain separators, are valid, and were infringed by the defendant.

Claim 1 of patent No. 626,746, issued June 13, 1899, to Charles E. Bird, was not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

9. PATENTS (§ 325*)—COSTS EQUITABLY DIVIDED WHERE COMPLAINANT'S SUCCESS PARTIAL.

Where a suit is brought upon several claims of one or more patents, and the complainant succeeds in obtaining relief upon some of the claims and fails to recover upon others, an equitable division of the costs proportioned to the expense of litigating the respective claims should be made, because the defendant is not justly liable for the costs of litigating those claims upon which the complainant was entitled to no relief.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 607; Dec. Dig. § 325.*]

(Syllabus by the Court.)

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. C. Paul, for appellant.

James F. Williamson, for appellee.

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

SANBORN, Circuit Judge. This appeal involves a decree for the usual injunction and accounting for the infringement of claim 1 of letters patent No. 626,746, issued June 13, 1899, to Charles E. Bird, claim 1, of letters patent No. 668,175, issued February 19, 1901, to Anton S. Froslid, and claims 1, 2, and 3, of letters patent No. 684,751, issued October 15, 1901, to Anton S. Froslid. These patents illustrate an advance in the art of separating oats from wheat, and disclose improvements in sieves and aprons, and in the arrangement of sieves and aprons in fanning mills, to accomplish such a separation. The fact that oats pass endwise but cannot pass sidewise through perforations no larger than required to permit the passage of wheat was obvious, and rigid and flexible aprons had been used as riders upon the mixed wheat and oats as they passed over vibrating sieves to prevent the oats from taking a vertical position, and thus passing through the perforations with the wheat, long before these patents were issued. The use of these aprons aided, but it failed to effect the separation satisfactorily. A fanning mill provided with a gang of sieves or screens inclining slightly downward from their receiving ends or heads and secured in a vibratory shoe was old in the art. A top sieve provided with a flexible apron resting upon the succotash upon it as a rider to keep the oats in a horizontal position, called a "scalping sieve," had been frequently used with an underlying gang of sieves, but these had proved ineffectual to accomplish well the result sought. Froslid attained that result in this way: He placed a gang of five sieves inclined downward from their receiving ends or heads in the vibratory shoe of a fanning mill, so that each underlying sieve extended farther to the rear than the sieve next above it. He hung upon a transverse bar over the head of the upper sieve by one end a long flexible apron or flap which extended the entire length of and served as a rider upon this uppermost or scalping sieve. When the succotash was fed to this sieve the kernels of wheat, which were smaller and heavier than the oats, commenced to rattle rapidly through it and through the screens beneath it near their heads, while the kernels of oats, which were lighter, tended to pass on toward the tails of the screens. Many of these oats, however, assumed a vertical position as they fell through the screens, and slipped through the parts of them more remote from their heads and then through the screens beneath, and mingled with the cleaner wheat which had dropped through near the heads of the screens. The problem he sought to solve was to find some way to keep the cleaner wheat that came through the head ends of the screens separate from the other parts of the stock until the latter could be completely cleaned, to deliver these other parts under aprons riding upon the screens which would keep the kernels of oats horizontal upon the screens below the scalping sieves, so that these parts of the stock might be separately subjected to the process

until the wheat therein was completely extracted from the oats, and to prevent the stock from falling upon any parts of the screens not covered by imperforate aprons. He conceived such a mode of operation and embodied it in these means. Beneath the scalping sieve and its single long, imperforate flexible apron riding upon the succotash which was fed to this sieve near its head he placed four sieves so that the tail of each one extended a short distance beyond that of the screen next above it, and over each of these sieves he hung four short, dividing flexible imperforate aprons by their heads upon transverse wires so that the four transverse wires were about four inches apart, and the tail of each apron extended a short distance over the head of the corresponding apron beneath it between the screen on which it rode and the next screen below, and so that each of the aprons, except the four tail aprons, extended a short distance under the head of the next apron toward the tail of the sieve upon which it rested. The principle of this combination was (1) that the succotash which fell through the scalping sieve was immediately divided by these short aprons into parcels according to its grade, (2) that the cleaner parcel which fell through near the head of the scalping sieve was practically prevented from again mingling with the dirtier parcels until all the wheat had passed through the four screens and the process of separation was completed, (3) none of the oats or succotash fell upon any part of any of the four screens below the scalping sieve, but all of it fell upon imperforate aprons or imperforate heads of screens, and after being shaken into a horizontal position was slid off the heads of the screens and off of the imperforate aprons upon a screen beneath a riding apron, and (4) that each of the dividing aprons performed the offices of a rider, keeping the oats beneath it in a horizontal position, and of a carrier bearing along and delivering beneath the next rider upon its sieve or over its tail the stock which fell through the screen above it. The fanning mill which Fros-lid constructed in this way satisfactorily separated wheat from oats, went into general use, and became commercially valuable, and then the defendant constructed a mill which accomplished the same result by placing upon each of the three lower sieves beneath the scalping sieve a single flexible imperforate apron with four transverse slots in it about four inches apart and with pieces of wood upon the tail sides of these slots to divide the stock and cause it to pass through the slots, and by so arranging these slots that the delivery end of each of the sections of the apron beneath them overlapped the receiving end of the section of the apron upon the next screen below it.

The validity of the patents in question and their infringement by the defendant are challenged, and the patents which are cited as anticipations will now be noticed.

Bodge in 1865, in letters patent No. 51,687, had disclosed boards fastened by cleats at the proper distance above screens to allow oats and other grains to rise upon their ends freely, but not sufficiently to enable them to pass through the screens.

In 1866, by his patent No. 58,052, upon which the defendant seems chiefly to rely, he had described an improvement in grain separators,

made, as he said, to force longer or broader grains to pass over sieves flatwise while the shorter or narrower grains pass through them, which consisted of a single sieve which had three perforate and three imperforate parts alternating along its length, three wooden covers in the form of parallelograms rigidly secured far enough above the perforate parts of the screen to permit oats and wheat to pass between three flexible aprons secured to the undersides of these wooden covers respectively and the perforate parts of the sieve, and three chutes just over the imperforate parts of the screen, one at the end of the front cover, one between that cover and the middle cover, and one between the middle cover and the tail cover. In operation one-third of the stock was fed down each chute, where it would fall upon an imperforate part of the sieve and pass towards its tail upon the next perforate part and under the next flexible apron. Counsel argue, and experts testify, that this improvement may be made to accomplish the same result as Froslid's combination by substantially the same means if one places two or three of Bodge's screens in suitable positions beneath the single sieve he described. If so, that result would flow, not from any improvement disclosed or any mode of operation portrayed by the drawings, specification, or claims of the patent to Bodge, but from the mode of operation conceived and described and the mechanical means adopted by Froslid. The patent to Bodge contains no suggestion or description of the simple and effective combination of Froslid from which a mechanic skilled in the art could have constructed the latter. The fact that, while such a device as that of Froslid was constantly sought, all the suggestions of the patent to Bodge failed to inspire any mechanic with the happy thought that the multiplication beneath the scalping sieve of screens in the proper positions covered by short dividing aprons hung at their heads would reach the desideratum, is a demonstration that more than mechanical skill was required to accomplish this end, and that the patent of Bodge did not anticipate the invention of Froslid. In truth, it described nothing but a single scalping sieve divided into perforate and imperforate parts and short flexible aprons secured to wooden covers and riding on the perforate parts of the sieve. The raw stock was fed upon each perforate part as it was upon the ordinary scalping sieve with a single apron. Bodge's sieve accomplished nothing that the common scalping sieve failed to accomplish, and it performed the function of the latter less efficiently than the ordinary sieve, because it exposed the larger portion of the stock to less perforate surface. It failed to suggest the division for treatment of the material which fell from the scalping sieve, the prevention of the mingling of the cleaner with the dirtier grain until the process of separation was completed, the multiplication of sieves or their arrangement beneath the scalping sieve, or the use of dividing aprons simultaneously as riders and carriers.

A series of bare screens receding successively from upper to lower (Noah, 31,428, February 12, 1861), bare receding sieves whereby the grain which passed through the upper sieve was divided into three divisions (Brooks & Ogden, 35,360, May 21, 1862; Hurlbut, 77,490,

May 5, 1868; Youngs, 39,090, June 30, 1863), a separate plate perforate or imperforate beneath the tail third of a sieve (Youngs, supra), rigid covers or plates over screens to hold oats in a horizontal position (Putney, 30,183, September 25, 1860; Thomas, 41,872, March 8, 1864), and an endless apron moved over stock upon a screen by rollers to force the wheat through it (Watson, 33,617, October 29, 1861), appear among the improvements described in the prior patents cited; but while in some of them descriptions of some, and in others descriptions of other elements of Froslid's device may be found, none of them suggested, much less portrayed, the complete and effective combination he formed. And it was in the state of the art which has now been disclosed that the improvements claimed in the patents in suit to which we now turn were conceived and described.

Bird placed a longer sieve beneath a shorter one, so that the tail of the latter extended nearly the length of the shorter sieve beyond it, and attached to the tail of the shorter sieve the head of an imperforate flexible apron or flap which extended over the tail third of the longer sieve, rode upon it, and carried the stock which it received from the tail of the upper sieve down over the end of the longer sieve, and thus served as a tailings extension of the former and a rider of the latter; and the claim of his patent was:

"In a grain-separator, the combination with a shaking shoe of a pair of overlapping sieves of unequal length, and a flexible flap mounted to serve as a tailings extension for the upper or shorter sieve, and as a rider for the lower sieve, substantially as and for the purposes set forth."

The nearest approach in the prior art to this combination seems to be the rigid board cover of Putney, which acted as a tailings extension for an upper and a cover for a lower sieve. But that inflexible board lacked the automatic action of Bird's flexible apron, necessarily failed to conform to the volume and flow of the stock beneath it, and could not have performed its function as cheaply and effectively as Bird's device. The majority of the court, however, are of the opinion, in which the writer does not concur, that the defendant did not infringe this claim, because the improvement it describes is so slight that a patent protects only against those who use the very device claimed, and the defendant has no pair of sieves of unequal length in combination with a flexible flap so that they fall within the terms of the claim.

We come, then, to the patents to Froslid. In the first one he shows a series of three sieves which receive the stock that has passed the scalping sieve upon the head of the upper sieve. The tail of each of the two lower sieves projects beyond that of the sieve next above it. Each of the lower screens has an imperforate deck which lies under the head half of the screen above it, and receives the cleaner wheat which falls through that part of the overlying screen, and delivers it upon the head of its sieve, where it falls through that screen. Under the tail half of the screen above each of these sieves an imperforate lap deck is suspended which receives the dirtier stock that falls through that half of the screen above it, carries it over the head end of the sieve beneath it through which the cleaner wheat is passing, and delivers it upon an intermediate part of that screen. This lap

deck has a flexible apron attached to its head, which rides upon the sieve beneath it and acts as carrier and rider. This combination partially, but not completely, separated the stock into two sections and separately treated those sections. It caused all the stock passing through the screens to fall upon imperforate parts, and caused it to be carried forward on to the screens and delivered under flexible riders. The claim of the patent here in suit reads:

"In a grain-separator, the combination with a series of overlapping sieves receiving the passed stock, one from the other, the lower sieves projecting successively in a given direction, of a corresponding series of main or head decks underlying each higher sieve for receiving from the head portion of the overlying or higher sieve and delivering to the head of the next lower sieve, and a corresponding series of lap decks underlying the lower portion of each higher sieve and overlying the upper portion of each lower sieve, said lap decks inclining in the same direction as said main decks and sieves, for receiving from the lower portion of the overlying sieve and delivering to the central portion of the lower or underlying sieve, substantially as and for the purposes set forth."

The defendant insists that there was no novelty in this combination, and cites Putney, Nash, Brooks & Ogden, Hurlbut and Bodge. Putney shows a conducting board beneath a sieve, but no flexible apron acting as rider and carrier, and no series of overlapping and successively projecting sieves; Nash, a gang of screens without the arrangement of Frosolid and without lap decks; Brooks & Ogden, a series of three overlapping and successively projecting plates with perforate and imperforate sections, but without lap decks with flexible flaps which serve as riders and carriers; Hurlbut, a complicated arrangement of screens without lap decks with flexible flaps; Bodge, wooden decks with flexible flaps over the parts of a scalping sieve, but no overlapping and successively projecting screens with lap decks between them to treat the stock after it has passed the scalping sieve. None of them discloses the combination of Frosolid, and it is no defense to a claim of an infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent or publication, and others in another, and still others in a third. It is indispensable that all of them, or their mechanical equivalents, be found in the same description or machine, where they do the same work by substantially the same means. *Imhaeuser v. Buerk*, 101 U. S. 647, 660, 25 L. Ed. 945; *Bates v. Coe*, 98 U. S. 31, 48, 25 L. Ed. 68; *Latta v. Shawk*, 1 Bond, 259, Fed. Cas. No. 8,116; *Machine Co. v. Pearce*, 10 Blatchf. 403, Fed. Cas. No. 4,312; *Manufacturing Co. v. Steiger* (C. C.) 17 Fed. 250, 252; *National Cash Register Co. v. American Cash Register Co.*, 3 C. C. A. 559, 53 Fed. 367; *Rhodes v. Lincoln Press-Drill Co.* (C. C.) 64 Fed. 218, 219; *Packard v. Lacing-Stud Co.*, 16 C. C. A. 639, 641, 70 Fed. 66, 68. The combination of the first claim of this patent was novel; it does not appear in any prior patent or publication; it marked a distinct advance in the art, a step toward the perfected combination of Frosolid's second patent which no mechanic with all the references now cited before him had ever taken; and this record is far from making it clear that the findings of the Commissioner of Patents and of the

court below that it evidenced invention, which are presumptively correct, were erroneous in law or mistaken in fact; and the validity of the first claim of this patent must be sustained.

While conceding that the defendant uses every other element of this combination except the lap deck, counsel insists that its machine does not contain that element, and hence does not infringe this claim. The function of the lap deck is to extend over the imperforate deck and the head of the sieve below it, to catch the stock falling from the part of the sieve just above it, to carry it forward to an intermediate part of the screen below it, and at the same time to act as a flexible rider to the part of the screen just beneath it. Now the defendant has between its screens long flexible aprons, each of which covers and rides upon the sieve beneath it, catches the stock falling through the sieve above it, and has three transverse slots in it, four inches apart, through which the stock thus caught is delivered to the sieve beneath it at intervals of four inches. In operative effect these slots divide the long apron into four short aprons. The head apron upon each sieve, the four inches of apron between the head of the apron and the first or head slot, laps over the imperforate deck at the head of the screen beneath it, catches and carries to the head slot, and there delivers to an intermediate part of the sieve beneath it the stock which it has received from the screen above it, and at the same time rides upon the sieve beneath it, and thus in every way performs the very function of the lap deck of Froslid by means of a flexible apron in the exact relation to the sieves that Froslid's bears.

But counsel contends that the defendant escapes infringement because in the specification of his patent and in his drawings Froslid shows a lap deck composed of a rigid element, such as a zinc plate, about half as long as the deck, and a flexible apron or flap, the head end of which is fastened to the head end of this plate while the remainder of it rides upon the sieve below and holds the oats in a horizontal position. But the description in a specification or drawing of a form, or a composition, or construction, of a mechanical element, when that form, composition, or construction is not, and is not claimed to be, essential to the combination or improvement claimed, is the mere pointing out of the best mode in which the patentee contemplated applying the principle of his invention under section 4888, Rev. St. (U. S. Comp. St. 1901, p. 3383), and does not deprive him of protection for mechanical equivalents or indicate that he intended to give up all other modes of application. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 418, 28 Sup. Ct. 748, 52 L. Ed. 1122; *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 45 C. C. A. 544, 566, 106 Fed. 693, 715; *City of Boston v. Allen*, 91 Fed. 248, 249, 33 C. C. A. 485, 486.

Again, in the claim in suit the patentee does not specify or claim the two elements of the lap deck, but claims the lap deck simply as one element of his combination; while in his second claim, that is not here in suit, he specifies and claims the rigid element and the flexible element of a lap deck as elements of the combination there described; and where a patent contains a general claim for a com-

bination of certain mechanical elements and a specific claim for a combination of a specified form, composition, or construction of one of those elements with the other elements of the general claim, the legal presumption is that the two claims secure different combinations, and the general claim is not limited to the specific form, composition, or construction claimed in the specific claim, but protects the element and its mechanical equivalents, though in form, composition, or construction differing from that of the specific claim.

Mere changes of the form or composition of a device or of some of the mechanical elements of a combination will not avoid infringement, where the principle or mode of operation of the patented improvement or combination is adopted, unless the form or composition is the distinguishing characteristic of the invention. *Columbus Watch Co. v. Robbins*, 64 Fed. 384, 396, 12 C. C. A. 174, 187; *New Departure Bell Co. v. Bevin Bros. Mfg. Co.* (C. C.) 64 Fed. 859; *Machine Co. v. Murphy*, 97 U. S. 125, 24 L. Ed. 935; *Winans v. Denmead*, 15 How. 342, 14 L. Ed. 717; *Robinson on Patents*, § 141, p. 201; *Blandy v. Griffith*, 3 Fed. Cas. p. 678, No. 1,529; *Bonnette Arc Lawn Sprinkler Co. v. Koehler*, 82 Fed. 431, 27 C. C. A. 200; *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 45 C. C. A. 544, 562, 106 Fed. 693, 711.

"If two devices do the same work in substantially the same way and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape." *Machine Co. v. Murphy*, 97 U. S. 125, 24 L. Ed. 935. A lap deck composed of the flexible flap alone properly fastened in place by its head performs the same function in the combination of the first claim of this patent in substantially the same way and by substantially the same means as one composed of a rigid element and a flexible element, and hence the one is the plain mechanical equivalent of the other.

The next contention is that the file wrapper and its contents show that the patentee inserted in his specification the two elements of the lap deck in order to obtain his patent, and that he is thereby estopped from claiming one composed of a flexible flap alone as an equivalent of the lap deck he claimed. The file wrapper and contents have been examined, but they fail to support this contention. The original specification describes these lap decks as imperforate deck sections with flexible flaps secured to them. All the claims, 14 in number, attached to this specification were rejected on March 15, 1899. Thereupon the specification and the claims were practically rewritten, and the lap decks were described as composed of a rigid deck section and a flexible flap; but this was no modification or change of the original specification, because the description in that specification clearly showed that the deck sections to which the flexible flaps were described as secured must have been rigid. Three claims were submitted with this specification. The first and second of these claims, so far as they relate to the composition of the lap decks, were identical in meaning and effect with those allowed under those numbers in the subsequent patent. The first claim sought to secure the lap decks in combination without any specification of the elements of which they were com-

posed, and the second claim specifically claimed the rigid element and the flexible element of the lap deck in combination with the other mechanical elements of the first claim. On April 21, 1899, the first claim was rejected. Frosolid answered this rejection that the feature of construction in claim 1 was new and patentable, that this fact was practically conceded by the examiner's statement that he would allow claim 2, that claim 2 differed from claim 1 only in the fact that the lap decks there named called for rigid sections and flexible sections, and that it must be obvious that the results pointed out in the specification would be accomplished if the lap decks were in single sections of suitable material. After this argument, and on July 15, 1899, claim 1 was again rejected. Frosolid then amended it, inserting in their places therein these words, "the lower sieves projecting successively in a given direction," and "said lap decks inclining in the same direction as said main decks and sieves," but made no change in the portion of the claim relating to the lap decks, and wrote to the examiner concerning it:

"The claim sets a novel combination in which the so-called lap decks operate in a manner which is entirely novel, the remaining claims have been indicated as allowable, and it is therefore respectfully submitted that this case is now in condition for allowance."

The claim was then allowed. Thus it may be seen that, instead of acquiescing in any limitation of his first claim to a lap deck composed of a rigid and a flexible element, the file wrapper and its contents prove that Frosolid always insisted that his second claim secured to him that specific composition of a lap deck, and that his first claim was for the combination of the other elements with a lap deck, whether composed of one or two elements, that he pointed out that a lap deck of a single element might be the mechanical equivalent of one with the two elements named in the specification, and that the Commissioner of Patents after that argument and declaration sustained and granted the first claim.

If a patentee acquiesces in the rejection of his claim on references, he may be estopped to maintain that an amended claim covers the combinations shown in those references, or that it has the breadth of the rejected claim, but he is not estopped from claiming and securing by the amended claim every improvement and combination which he has invented and which was not disclosed by those references. *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 45 C. C. A. 544, 565, 106 Fed. 693, 714. The references which induced the amendment of the first claim did not disclose a lap deck composed of a flexible flap in the combination of Frosolid, and hence they did not limit his first claim to a combination in which the lap deck is composed of a rigid element and a flexible element.

The result is that the first section of the long flexible apron of the defendant performed the same work in substantially the same way and accomplished the same result as the lap deck of Frosolid's first claim, and was therefore its mechanical equivalent, and, as the defendant used every other element of this combination, it did not escape infringement.

In May, 1901, 28 months after he filed his application for the patent just considered, Froslid made an application for a patent on the perfected combination which has proved successful and valuable, and that patent was issued in October of that year. The differences between the three claims of this patent are not material in this case, and claim 2 has already been set forth to illustrate them. The principle of the combination claimed, the means by which the patentee put that principle in operation, the beneficial results he secured, the prior state of the art, the fact that no prior patent or publication disclosed his combination or its equivalent, the reasons why the Bodge patents failed to anticipate it, and the means used by the defendant to take the mode of operation of Froslid's combination, have been set forth in the earlier part of this opinion, and it is unnecessary to repeat them. Certain specific objections to the validity of this second patent remain to be noticed.

It is said that it is demonstrably untrue that the parcels of the stock divided by Froslid's aprons can never again commingle. This may be literally true, but the proof convinces that while it is possible for a few grains to pass from one parcel to another, and a few may do so, the practical effect of Froslid's mode of operation and of the machine of the defendant which adopts it is to maintain the separation of the parcels until the separation of the oats from the wheat is completed, and it is not material if thereafter these parcels commingle in the chute which carries them elsewhere.

It is said that the alleged advantage from the overlapping aprons is purely imaginary, and that they operate as well when they do not overlap. But the evidence convinces that the lapping of the tail ends of the overlying dividing aprons over the head ends of the underlying aprons is not without beneficial effect.

It is said that the second Froslid patent is anticipated by the first, and there is testimony to show how readily the combination of the latter could have been modified to constitute that of the former, and to the effect that the necessary change was one of degree. But it was a far cry from the three sieves of the first patent with the single lap decks between the upper and middle sieves and between the middle and lower screens to the gang of four sieves with their dividing aprons, each about four inches in length, acting simultaneously as riders and carriers covering the entire surface of the three lower sieves with the tail ends of the overlying aprons lapping over the head ends of the underlying aprons, and the conception and embodiment in mechanical means of the mode of operation of the latter were not the product of mechanical skill, but they clearly evinced the intuitive genius of the inventor. They constituted the final step to an efficient and valuable machine to separate oats from wheat, which immediately went, and has since continued, in successful operation, the commercial value of which the defendant did not fail to perceive. The combinations of the three claims of Froslid's second patent were novel, useful, and patentable, and they must be sustained.

The last question is, does the machine of the defendant infringe the claims of this patent? Its counsel maintains that it does not, because

it has no dividing aprons, because it has no sieves extending beyond the ends of such dividing aprons, because it has no delivery ends of overlying dividing aprons lapping over the receiving ends of like underlying aprons, and because it has no dividing aprons which are overlapped by those upon the same sieve. All these objections, except the last, rest upon the proposition that the long slotted aprons of the defendant are not the mechanical equivalents of the dividing aprons of the complainant. But the sections of these long aprons between the transverse slots completely divide the stock into separate parcels according to its grades, and substantially keep these parcels separate until the process of separation of the wheat from the oats is completed; they are of substantially the same length as the dividing aprons of Froslid; they serve as riders for the screens beneath them, and as carriers of the stock which falls upon them from the screens above; their delivery ends overlap the receiving ends of the sections which lie beneath them, and they perform the same function by the same imperforate flexible aprons as do the dividing aprons of Froslid. It is true that none of the sections lap under the sections upon the same sieve, but they nevertheless deliver the stock through the slots upon sieves inclining downward toward their tails beneath the next sections, and thus accomplish the function of the overlapping of the corresponding aprons of Froslid by the same mode of operation and with an immaterial change of form. They are, therefore, the mechanical equivalents of the dividing aprons of the Froslid second patent. The truth is that the defendant has taken the principle, the whole substance of the invention claimed by Froslid, embodied it in mechanical means which are the obvious equivalents of those which the patentee described, in means which differ from them only in matters of slight and immaterial form, and the finding of the court below that it was guilty of infringement upon the three claims of this patent may not be lawfully reversed.

The result is that the defendant below succeeds in its defense to claim 1 of the patent to Bird, on the ground that it is not guilty of infringement thereof, and the complainant below succeeds upon claim 1 of the first patent and upon the three claims of the second patent to Froslid. Where a suit is brought upon several claims of one or more patents, and the complainant succeeds in obtaining relief upon some of the claims but fails to recover upon others, an equitable division of the costs proportioned to the expense of litigating the respective claims should be made, because the defendant is not justly liable for the costs of litigating those claims upon which the complainant was entitled to no relief. *Ide v. Troerlicht, Duncker & Renard Carpet Co.*, 53 C. C. A. 341, 354, 115 Fed. 137, 150; *Willcox & Gibbs Sewing Machine Co. v. Merrow Machine Co.*, 35 C. C. A. 269, 93 Fed. 206; *Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.* (C. C.) 71 Fed. 886; *Johnson v. Foos Mfg. Co.*, 141 Fed. 73, 90, 72 C. C. A. 105. The claim of the Bird patent was of minor importance, and the substantial issue in this suit involved the other claims.

The decree below must be reversed, the appellant may recover one-fifth of its costs in this court, and the case must be remanded to the

Circuit Court with directions to dismiss the bill as to the first claim of patent No. 626,746 to Bird, and to enter the usual decree for an injunction and an accounting upon claim 1 of patent No. 668,175 to Frosolid, and upon claims 1, 2, and 3 of patent No. 684,751 to Frosolid, and to award to the complainant four-fifths of its costs in the Circuit Court up to the time of the entry of the decree.

It is so ordered.

HOOK, Circuit Judge, concurs in the result.

WAYNE MFG. CO. v. BENBOW-BRAMMER MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1909.)

No. 2,809.

1. PATENTS (§ 328*)—CLAIM 1 OF PATENT No. 535,465 TO SCHROEDER FOR MEANS FOR OPERATING WASHING MACHINES SUSTAINED.

Claim 1 of letters patent No. 535,465, issued to John Schroeder, for means for operating washing machines, March 12, 1895, was not anticipated by figure 371 of Brown's "507 Mechanical Movements," nor by British letters patent No. 2,940, February, 1876, nor by letters patent No. 304,549, issued September 2, 1884, to Frank L. Palmer, and it is valid.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 19*)—IN OLD CROWDED ART EACH INVENTOR ENTITLED TO HIS OWN IMPROVEMENT.

Where an art is old and crowded so that no pioneer patent exists, and many inventors conceive and construct machines, combinations, and improvements therein which accomplish the desideratum with varying degrees of success, each inventor is entitled to his own machine, combination, or improvement, so long as it differs from those of his competitors and does not include theirs.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 19; Dec. Dig. § 19.*]

3. PATENTS (§ 27*)—APPLICATION TO NEW USE WHEN INVENTION AND PATENTABLE—WHEN NOT.

The application of an old machine, combination, or device, found in an analogous art, without substantial modification, to a new use, is not invention nor patentable, where its applicability would occur to a person of ordinary mechanical skill.

But such an application is invention and patentable where its applicability would not be perceived by a person of ordinary mechanical skill, where it is incapable of performing the function requisite to the new use without substantial modification, and where it was not designed by its maker, nor adapted, nor actually used, to perform such a function.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

4. PATENTS (§§ 235, 237*)—INFRINGEMENT—CHANGES IN FORM WILL NOT ESCAPE.

Changes of the form of a machine or combination secured by patent will not avoid infringement, where the principle of the invention is taken, unless the form is the distinguishing characteristic of the invention.

The substitution for two rows of teeth, which mesh around and engage with the cogs of a pinion in a patented device, of a single row of two

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

faced teeth which performs the same function in the same way, will not avoid infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 371, 374; Dec. Dig. §§ 235, 237.*]

5. PATENTS (§ 109*)—CLAIM—LIMITATION BY REJECTION AND AMENDMENT.

A patentee who acquiesces in the rejection of his claim on references is estopped from maintaining that an amended claim covers the combinations and devices shown in those references, or that it has the breadth of the rejected claim.

But he is not estopped from claiming and securing by an amended claim every improvement and combination he has invented that was not disclosed by the references upon which his original claim was rejected.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. § 109.*]

(Syllabus by the Court.)

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

For opinion below, see 157 Fed. 559.

Hugh K. Wagner, for appellant.

Taylor E. Brown (C. Clarence Poole, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

SANBORN, Circuit Judge. On October 23, 1894, John Schroeder filed an application for a patent for "certain new and useful improvements in means for operating washing machines." In his specification he wrote:

"My invention relates to an improvement in means for operating washing machines, and it consists in a shaft which is revolved continuously in one direction by the operator, combined with an angular revolving shaft, which is made to revolve first in one direction and then in the other, and a vertically moving cylinder placed upon the angular shaft, and which is provided with a double row of teeth or cogs which extend partially around the cylinder, and which mesh with the pinion upon the driving shaft for the purpose of causing the angular shaft to revolve. * * * The object of my invention is to provide a mechanism for reciprocating rotary washing machines, whereby when the driving shaft is revolved continuously in one direction a rotary reciprocating motion is imparted to the operating shaft, the latter being provided with a pronged head which causes the clothes to move first in one direction and then in the other, in the frame of the washing machine. * * * A represents the body or frame of the washing machine, and B the operating shaft which has the pronged head C secured to its lower end inside of the frame A, for the purpose of moving the clothes around first in one direction, and then in the other, as is customary with this class of machines."

And he claimed:

"An operating shaft having a rotary reciprocating motion, a cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder extending at an angle to the shaft, combined with a driving shaft having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction, substantially as shown."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On March 12, 1895, letters patent No. 535,465 were issued to him upon his specification and claim. On February 25, 1901, this court sustained the validity of this claim, and a decree for an injunction against and an accounting for the infringement of it. *Brammer v. Schroeder*, 46 C. C. A. 41, 106 Fed. 918.

In the opinion in that case may be found a drawing and a detailed description of the machine of that claim, and a statement of its purpose and of its mode of operation. They will not be here repeated. It is sufficient now to say that it consisted of a horizontal driving shaft with a pinion upon it, a vertical operating shaft and a vertical cylinder which was provided with a double row of teeth or cogs set horizontally upon it adapted to engage with the cogs of the pinion, and which was splined upon the vertical shaft so that it would slide up and down thereon, and so that any rotary motion of the cylinder would be imparted to the shaft by means of the tooth-bearing cylinder driven by the pinion. In operation the continuous rotation of the driving shaft in one direction imparted a planetary motion to the double row of teeth which traveled around and in mesh with the pinion of the driving shaft, and caused them, the sliding cylinder and the vertical shaft, to rotate first in one direction and then in the other.

The defendant below, the Wayne Manufacturing Company, made and sold washing machines which embodied the combination of Schroeder's first claim, except that the defendant substituted for the double row of teeth or cogs upon the sliding cylinder a single row of double-faced teeth or pins which meshed with the pinion of the driving shaft upon each side. The Benbow-Brammer Manufacturing Company, the plaintiff below, claimed to be the owner of this patent to Schroeder, and on April 20, 1906, exhibited its bill in the court below against the defendant for the infringement of the first claim of this patent, and upon a final hearing a decree was rendered in its favor, from which the Wayne Company has appealed. The appellant assails in this court the title of the complainant below, the validity of the first claim of the Schroeder patent, and the finding of the court below that it infringed.

The Title.

In the complainant's chain of title there is an assignment of the patent, which it proved in this way: The grantors testified that they executed and delivered it to the grantee. The grantee testified that he received it, that he gave it to his attorneys to record, that he had never seen it since, but that he had made a search through his papers for it and had never been able to find it. In answer to a question on cross-examination he testified that some years previous he had made a settlement with H. F. Brammer Manufacturing Company at Keokuk, Iowa, that there were some papers in the court there, and that the assignment might be among them. His attorney, to whom he delivered the assignment for record, testified that he received and recorded it, and that after its record it was returned to him, and he delivered it either to the grantee or to Mr. Susemihl. Mr. Susemihl testified that he did not think that he had ever received it, but that he had searched through his office and papers for it and could not find

it. A certified copy of the record of the assignment in the Patent Office was introduced in evidence, and it is assigned as error that this copy was incompetent because the proof of the loss of the original was insufficient. The only ground for this specification of error is that the grantee testified that there were some papers at Keokuk some years previous, and that the assignment might be there. There is no testimony that this witness left it there or saw it among the papers in the court there, and his mere conjecture is clearly insufficient to overcome the testimony of the diligent and fruitless search made among their papers where it would probably be found, if anywhere, by those who would be most likely to have it, and there was no error in the admission of the certified copy, or in the conclusion of the court below that the complainant was the owner of the patent.

Validity of Patent.

Counsel contend that the court below should have stricken down the first claim of this patent because the improvement it discloses was anticipated in 1868 by Fig. 371 of Brown's "507 Mechanical Movements," in 1876 by British letters patent No. 2,940 to James Norris, and in 1884 by letters patent No. 304,549 to Frank L. Palmer, which were not presented to this court in the case of *Brammer v. Schroeder*.

Fig. 371 of Brown's "507 Mechanical Movements" portrays a horizontal driving shaft and a pinion thereon which meshes with teeth inserted radially just beneath the periphery of a large wheel or disc, which has an opening near and in its periphery through which the pinion may pass from one face of the wheel or disc to the other as the wheel revolves, so that, as the driving shaft is continuously rotated in one direction, it causes the rotation of the wheel first in one direction and then in the opposite direction. In the former consideration of this case mangle-wheels, mangle-racks, and various devices to modify the mangle-wheel motion were considered, and held insufficient to anticipate the first claim of the *Schroeder* patent. Brown in his description of Fig. 371 states, what is evidently true, that this figure discloses a modification of the mangle-wheel motion; but the sliding tooth-bearing cylinder of *Schroeder*, one of the essential elements of his machine, is not portrayed by the figure nor suggested in the description of it, and they fail to anticipate the simple means which he devised to translate the continuous rotary motion of the driving shaft in one direction into the reciprocating rotary motion of the operating shaft in both directions by the use of this cylinder, and they must be here dismissed. The court below is sustained in the conclusion which it reached upon an examination of the figure and description that have been considered by the decisions of the Circuit Court of the Southern District of New York and of the Circuit Court of Appeals of the Second Circuit in which we concur. *Benbow-Brammer Mfg. Co. v. Straus*, 158 Fed. 627, 632; *Benbow-Brammer Mfg. Co. v. Straus* (C. C. A., 2d Cir.) 166 Fed. 114.

The patent to *Norris* describes a cumbersome and complicated lot of machinery assembled for the purpose of using the old mangle-rack to produce reciprocating rotary motion in the hollow drum of a

washing machine, which in this patent is shown in a horizontal position. In Norris' machine a floating pinion on the driving shaft is actuated by a belt running over a fixed pulley on its shaft. This pinion engages the teeth or pegs of a reversing rack upon a large wheel. As the pinion reaches the end of the rack it strikes a peg, which raises it in a slot provided for that motion, so that it passes to the other side of the rack and causes the wheel to revolve in the opposite direction until the pinion reaches the other end of the rack, when it repeats the operation. The reciprocating rotary motion thus produced is imparted to the operating shaft of the hollow drum of the washing machine by means of a belt running over a drum on the reversible wheel and a fixed pulley on the shaft of the hollow drum of the washing machine. In this machine of Norris the driving shaft and the operating shaft are parallel. Between the pinion on the former and the operating shaft there are interposed the large reversible pegged wheel, its drum, the belt thereon, and the pulley on the shaft, unnecessary machinery which it was one of the objects of Schroeder to eliminate, and which he did eliminate by his single element, the tooth-bearing sliding cylinder, which alone translates the continuous motion of the driving pinion into the reciprocating rotary motion of the operating shaft. It is obvious that this interposed machinery of Norris, the reversible pegged wheel, the drum upon it, the belt upon that drum, and the fixed pulley on the operating shaft of the washing machine drum over which this belt runs do not disclose or suggest Schroeder's sliding tooth-bearing cylinder, which does the work of all of them, nor the inexpensive machine in which Schroeder embodied it, and for this reason the first claim of the patent to Schroeder is not anticipated by the specification or drawings of the patent to Norris.

The letters patent to Palmer show a horizontal shaft, a large cylinder splined thereon bearing upon its surface numerous pattern racks of various shapes formed by driving pins or pegs into the surface of the cylinder, and a driving shaft with a pinion thereon capable of engaging with or being disengaged from the pins of the respective patterns at the will of the operator. The primary purpose of this invention was to construct machinery that would so move the fabric beneath the needle in a quilting machine at a uniform speed that desirable patterns might be wrought into the quilt by means of the needle. Palmer wrote in his specification:

"My new movement may be employed for various useful purposes, and particularly for changing the relative position of the fabric and needle as shown in my application for United States letters patent filed June 13, 1884, and of which the serial number is 134,735. The invention consists in the combination, with a body capable of movements in planes transverse to each other, and bearing upon its surface a pattern rack, or track, of a positively operating engaging device occupying a fixed position and acting upon said rack or track, whereby there is imparted to the movable body a movement in a direction conforming to the shape of the pattern rack or track and at a uniform speed throughout its extent."

He called his invention a new and useful mechanical movement, and stated in his specification that one of its objects was to convert a uniform rotary motion continuous in one direction into a variable

continuous or intermittent rotary motion in either direction. He stated that the forms or designs in which the pattern racks were delineated in his drawings were arbitrary and were made simply for illustrations. In these drawings he portrayed six designs, among which were a figure with nine sides, a parallelogram, and an ellipse. In the nine-sided figure the row of pegs which forms it incloses two long narrow spaces in the forms of parallelograms open at one end, so that it brings two rows of pins parallel and in close proximity at these portions of the figure for some distance. Counsel rely upon these open parallelograms in this figure to anticipate the double row of teeth of Schroeder's device. But the pegs which inclose these open parallelograms were a part of the single row of pegs which formed the large nine-sided figure, and they were not adapted to translate continuous rotary motion of the driving shaft in one direction directly into reciprocating rotary motion only, nor to constantly produce without intermission the alternating rotary motion of the vertical shaft of a washing machine. Palmer's machine portrays no double row of teeth or cogs whereby, without unnecessary intervening longitudinal motion, constant reciprocating rotary motion of a shaft could be produced. Moreover, while a method is shown whereby the shaft within the cylinder could be made to drive other machinery by means of a fixed pulley upon its end, the primary purpose of the invention was not to cause that shaft to operate other parts, but it was to produce a movement of the surface of the cylinder in any preferred direction, so that patterns might be wrought in quilts upon it as it moved the quilts beneath the needle. In other words, the shaft within the cylinder was primarily a passive or carrying shaft, and not an operating one.

It is true, as counsel contend, that this patent to Palmer discloses means of translating continuous rotary motion into reciprocating rotary motion, that the patentee was entitled to the benefit of every use to which these means could be put, whether he conceived them or not, and that the specifications and drawings of the patent anticipated every such means that the skill of the mechanic would deduce from them. It is equally true that Schroeder described and claimed means to attain the same general end, to translate continuous rotary motion in one direction into reciprocating rotary motion in both directions; but it does not follow from these facts that the device of Palmer necessarily anticipates the claim of Schroeder, because machines and combinations and improvements thereof for the purpose of effecting this translation existed from time immemorial. The art of this translation is crowded. It is so old that no pioneer patent now exists in it. Nevertheless, many inventors have labored and are still laboring and successfully endeavoring to make improvements in mechanical devices for this purpose. And where an art is crowded and so old that no pioneer patent exists therein, and many inventors have conceived and made machines, combinations, and improvements in it which accomplish the desideratum with varying degrees of success, each is entitled to his own machine or combination or improvement, so long as it differs from those of his competitors and does not include theirs. *Railway Company v. Sayles*, 97 U. S. 554, 556, 24 L. Ed.

1053; McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930; Stirrat v. Excelsior Mfg. Co., 10 C. C. A. 216, 217, 61 Fed. 980, 981; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 563, 106 Fed. 693, 712.

Not only this, but the translation of continuous rotary motion into reciprocating rotary motion is necessary and applicable to hundreds of different uses, and, because different mechanical means of accomplishing the general object of translation are requisite and convenient for different uses to which they may be applied, it is relevant and instructive to consider in the determination of the question of the anticipation of one improvement or combination in the general art by another the diverse uses for which the respective inventors conceived and constructed their machines, combinations, or improvements. The statute requires each applicant for a patent to describe his invention, and, in case of a machine, to explain the principle thereof and the best mode in which he has contemplated applying that principle. Rev. St. § 4888 (U. S. Comp. St. 1901, p. 3383). Palmer and Schroeder complied with this law. The best mode Palmer pointed out was by the use of his driving pinion engaging and disengaging at the will of the operator with pattern racks formed by the pins on the surface of his large splined cylinder, so that this quilt-bearing surface could be moved in any direction at a uniform speed beneath the needle. The best mode which Schroeder disclosed was by the use of his driving pinion constantly engaging with two rows of teeth set transversely on his vertical cylinder, which was splined to the shaft within it, and by which alone rotary reciprocating motion was imparted to the latter for the primary purpose of agitating clothes in a tub and thereby washing them. Instructed by Schroeder's improved means of translation of motion, it may seem easy now for a skilled mechanic to deduce his machine from the specification and drawings of Palmer. But that question is more wisely determined by the lesson of experience than by conjecture after the event. The record is full of proof of attempts to bring forth improved devices to serve the use of Schroeder's, to operate rotary washing machines. And yet in the 10 years between the patent to Palmer and that to Schroeder the eye of the mechanic never saw in Palmer's description, and his skill never produced from it, the simple, inexpensive, and effective device of Schroeder.

It is said that Schroeder's specification and claim is nothing but the portrayal of the application of the machine of Palmer to another use in the same or in an analogous art. It is a familiar rule that the application of an old machine or device, found in an analogous art, without substantial modification, to a new use, is not invention or patentable where its applicability would occur to a person of ordinary mechanical skill. On the other hand, such an application is invention and is patentable where its applicability would not be perceived by a person of ordinary mechanical skill, where it would not perform the function requisite for the new use without substantial modification, and where it was not designed by its maker, nor adapted, nor actually used, to perform such functions. *Topliff v. Topliff*, 145 U. S. 156, 161, 12 Sup. Ct. 825, 36 L. Ed. 658; *Potts v. Creager*, 155 U. S. 597,

608, 15 Sup. Ct. 194, 39 L. Ed. 275; *Hobbs v. Beach*, 180 U. S. 383, 390, 21 Sup. Ct. 409, 45 L. Ed. 586. The quilting pattern-bearing cylinder of Palmer with its driving shaft and carrying shaft parallel, conceived for the primary purpose of slowly moving the cylinder with uniform speed beneath the quilting needle, could not be made to perform successfully the function of driving a shaft of a rotary washing machine without radical modification. It was not designed by Palmer, nor adapted, nor actually used, to perform functions of that character. During the 10 years after the issue of Palmer's patent and before the issue of that to Schroeder, no mechanic ever deduced the device of the latter from that of the former. Palmer's patent was discovered and cited by the Examiner before the patent to Schroeder was issued, and yet that patent was granted by the Commissioner in the face of that fact. For 10 years now solicitors and courts have been searching the records and the law to decide attacks upon the validity of this patent, and no court has ever held that the specification and drawings of the Palmer patent anticipated or rendered it void. These facts are too persuasive and compelling to permit us to hold that there was no invention in conceiving Schroeder's improved means of translating continuous rotary motion into reciprocating rotary motion in the light of Palmer's patent and the prior state of the art, and our conclusion is that the mechanical means described in his first claim were novel, useful, that they evidenced invention, and that his patent for them is valid. *Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co.* (C. C.) 144 Fed. 429 (Ray, J.); *Benbow-Brammer Mfg. Co. v. Richmond Cedar Works* (C. C.) 149 Fed. 430 (Kohlsaat, J., on motion for injunction); *Benbow-Brammer Mfg. Co. v. Knapp* (Anderson, J., unreported); *Benbow-Brammer Mfg. Co. v. Richmond Cedar Works* (C. C.) 159 Fed. 161 (Kohlsaat, J., on final hearing); *Benbow-Brammer Mfg. Co. v. Straus* (C. C.) 158 Fed. 627 (Ray, J.); *Benbow-Brammer Mfg. Co. v. Straus* (C. C. A.) 166 Fed. 114.

Infringement.

For the double row of teeth or cogs on the sliding cylinder of Schroeder the defendant substitutes a single row of two-faced teeth, which, by the same mode of operation, perform the same function as does the double row of Schroeder, and it relies upon this modification for its defense to the charge of infringement. But mere changes of the form of a device secured by patent do not avoid infringement, where the principle of the invention is taken, unless the form modified is the distinguishing characteristic of the invention; and the form of a double row of teeth as distinguished from the single row of two-faced teeth is not such a characteristic of this invention. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 45 C. C. A. 544, 562, 106 Fed. 693, 711; *Columbus Watch Co. v. Robbins*, 12 C. C. A. 174, 187, 64 Fed. 384, 396.

In order to escape from the effect of this principle, counsel invoke the rule that, where a patentee acquiesces in the rejection of his claim on references and subsequently amends it, he is estopped from claiming that the amended claim secures the device disclosed by the ref-

erences, or that it has the breadth of the rejected claim, and they contend that claim 1 of Schroeder's patent is limited to two rows of teeth, because, before the patent was granted and upon the citation of Palmer's patent, he substituted claim 1 for this earlier claim in his application:

"(1) A vertical operating shaft, and a cylinder placed upon said shaft and having a rising and falling movement thereon, and teeth or cogs upon its side, and through which teeth or cogs a rotary reciprocating motion is imparted to the shaft; combined with the driving shaft, having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being turned continuously in one direction substantially as shown."

But Palmer's patent fails to disclose either a single row of two-faced teeth or a double row of teeth whereby the actuating sliding cylinder of Schroeder could be given the constant rotary reciprocating motion required to accomplish the purpose of his invention. And, while the rejection on the reference to the patent to Palmer and the subsequent amendment may estop the plaintiff from claiming the improvements shown in Palmer's patent, they do not estop it from claiming and securing every improvement and combination which Schroeder invented that was not disclosed by Palmer's patent. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 45 C. C. A. 544, 565, 106 Fed. 693, 714; *J. L. Owens Co. v. Twin City Separator Co.* (C. C. A.) 168 Fed. 259 (8th Circuit, filed February 25, 1909). The defendant has taken the principle and mode of operation of Schroeder's invention. The single row of two-faced teeth is the plain mechanical equivalent of Schroeder's double row of teeth. It was not disclosed in the specification or drawings of Palmer, and the defendant's use of it did not relieve it of the charge of infringement.

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

ROTH et al. v. HARRIS.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 148.

1. PATENTS (§ 310*)—ANTICIPATION—SUBSEQUENT PATENT ON PRIOR APPLICATION.

An unpleaded patent issued after the patent in suit cannot be used to defeat the latter because the specification states that the application was filed on a date prior to that of the filing of the application for the patent in suit, especially in the absence of proof that no changes were made in the application after such filing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 522; Dec. Dig. § 310.*]

2. PATENTS (§ 328*)—INVENTION AND INFRINGEMENT—TUNE-SHEET ATTACHMENT FOR PIANOS.

The Hobart patent No. 765,240, for a tune-sheet attachment for automatic pianos, in which the tune-sheet and feed roller are contained in a box detachable from the piano case, was not anticipated, and dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

closes invention, and, while not generic, marks a distinct improvement in the art. Also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

3. PATENTS (§ 112*)—PRIORITY OF INVENTION—CONCLUSIVENESS OF DECISION OF PATENT OFFICE.

The decision of the Patent Office on the question of fact as to priority of invention between two contesting parties in interference proceedings is conclusive in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 165; Dec. Dig. § 112.*]

4. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—COSTS.

In a suit for infringement of two patents, where defendant prevails as to one, he is entitled to the same costs as though there had been a separate suit thereon.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 607; Dec. Dig. § 325.*]

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

On appeal from a decree of the Circuit Court for the Northern District of New York holding valid and infringed letters patent No. 765,240, granted to Adam Hobart, July 19, 1904, for improvements in tune-sheet attachments for auto-pneumatic pianos. The application was filed May 21, 1904. The opinion below is reported in (C. C.) 162 Fed. 160.

Kerr, Page & Cooper, for appellant.

Briesen & Knauth, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The invention of Hobart relates to a tune-sheet attachment, which is separable from the piano case and permits tune-sheets to be inserted readily. When the attachment is secured to the case a true engagement is at once established between the tune-sheet and the duct bridge and, simultaneously, the tune-sheet feed roller is intergeared with the driving shaft. The specification states that the invention consists in providing an auto-pneumatic piano, or piano player, with a box containing the tune-sheet and rollers, which is separable from the piano case. When this box is connected to the piano case a proper engagement is made immediately between the duct bridge and driving shaft attached to the piano case and the tune-sheet and feed roller in the box, the perforations in the sheet registering accurately with the openings of the duct bridge.

The first four claims and claim 6 are involved. The first claim is as follows:

"An auto-pneumatic piano case having a duct bridge, combined with a box having a tune-sheet and tune-sheet rollers, and means for detachably securing said box to said case, substantially as specified."

The other claims are more limited, embracing several subsidiary elements. Infringement is not denied. The defense relied on is lack of novelty and invention.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The invention of Hobart is not generic but it marks a distinct improvement in the art. By arranging and adjusting the tune-sheet in a separate box before it is attached to the piano he avoids the difficulty which had theretofore existed and which frequently resulted in the tearing and destroying the sheet and spoiling the music. The adjustment of the sheet to the old rollers required the services of a person of skill and experience, whereas a novice can successfully make the necessary adjustment in the patented structure. By detaching the box the entire apparatus is in plain view and it is manifest that a sheet can be removed and a new one substituted without encountering any of the difficulties which existed when the rollers were attached directly to the back frame of the piano.

Hobart's improvement is concisely described by Judge Holt as follows:

"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 alleged Brockway prior use is unavailable for various reasons. It is, however, only necessary to say that the defendant has fallen far short of complying with the rule which requires him to establish the defense by proof that "shall be clear, satisfactory and beyond a reasonable doubt." *Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. The most charitable view to be taken of the testimony is to conclude that the witnesses were mistaken.

The patent to Parker of March, 1892, does not cover a device which operates an endless tune-sheet. It is true that the claims of the Hobart patent are not expressly limited to an endless tune-sheet but the specification describes and the drawings show such a sheet and it is not easy to see how the apparatus could operate with any other sheet. The tune-sheet of the Parker patent is known as the spool variety, each spool having a sheet attached to and wound upon it. When in use the free end of the sheet is attached to another roller which unwinds it from the first. When the tune has been played the music stops and the sheet is rewound on the first roller, which is removed from the piano, and, if another tune is desired, another roller carrying it must be substituted. Hobart's rollers will operate any number of endless tune-sheets, whereas Parker requires as many rollers as there are tunes and his apparatus could not operate the sheets of the patent in suit. The Parker patent was not pleaded in the answer and cannot be used as an anticipation. It may be considered as showing the prior art, but, as Parker and Hobart were dealing with different problems, there was ample room for the exercise of the inventive faculty in making the improvement of the later patent notwithstanding the disclosures of the former.

The patent to Davis of June, 1898, describes a device for operating the keys of the piano by electro-magnets instead of pneumatically, and is therefore outside the claims of the patent in suit in each of which "an auto-pneumatic piano case having a duct bridge" is an ele-

ment. It is not easy to see how the Davis device can be regarded as an anticipation when it must be conceded that if made now for the first time it would not infringe. Furthermore, like the Parker construction, it shows a spool sheet wound upon and permanently secured to the roller.

The patent to Shonnard of April, 1897, is also for an electric piano player and it may be said, as applicable to both Davis and Shonnard, that perforated paper sheets cannot be used successfully upon pianos of this type for the reason that the paper becomes torn by the spring fingers and charred by sparking at the contacts. Paper sheets were a failure commercially and have generally been discontinued in electric devices. The Shonnard structure as described and illustrated by the drawings appears to be inoperative, but in any view it fails to invalidate the Hobart claims. It cannot be denied that prior to Hobart's invention, tune-sheets had been carried by movable boxes or drawers but Hobart was the first to carry an endless tune-sheet in a movable box so arranged as to establish perfect connection with the duct bridge of an auto-pneumatic piano.

The second patent to Shonnard, No. 780,687, cannot be considered as an anticipation, first, because it is not pleaded and, second, because it was not issued until January 24, 1905, six months after the Hobart patent. *Dubois v. Kirk*, 158 U. S. 58, 64, 15 Sup. Ct. 729, 39 L. Ed. 895; *Anderson v. Collins*, 122 Fed. 451, 458, 58 C. C. A. 669.

In *Writing Machine Co. v. Wagner Co.*, 151 Fed. 576, 582, 583, 81 C. C. A. 120, we held that a model filed in the Patent Office, which is a full operative embodiment of the patented mechanism may be considered upon the question of invention arising upon a subsequent patent. But we have never gone to the extent of holding that an unpleaded patent issued after the patent in suit may defeat the latter because the specification states that the application was filed prior to the application of the patent in suit. Counsel for defendant concede that the Shonnard patent cannot be used as an anticipation but they contend that the specification and drawings may be used as showing the prior art. Just where the line of distinction, from a practical point of view, is to be drawn, it is difficult to perceive.

If such drawings are permissible to show the state of the art, and they show it to be identical with the device of the disputed patent, it is not easy to understand why the patent is not anticipated. Assuming, however, that specification and drawings may be considered, we think they are entitled to little weight unless supplemented by proof showing their condition at the time of filing and that no material changes have been made in either. We have here nothing but the printed date on the Shonnard specification as proof that his device was made before Hobart's and nothing but inference to show that the specification and drawings were those filed in December, 1902. It would be a dangerous rule to establish that a patent granted in 1904 may be destroyed by the disclosures of a patent granted in 1905, the latter not being pleaded and no word of proof being offered as to what changes were made during the two years and more it remained in the Patent Office, inaccessible to the public.

The second Shonnard patent like the first is for an electric player and though the drawings show a receptacle containing an endless tune-sheet it could not be substituted for the Hobart box without several important changes. Apparently the tune-sheet has to be cut in order to be put in place as one of the rollers over which it passes is a fixture. After being adjusted the ends must be fastened together.

The objections to using a device designed for an electric piano in an auto-pneumatic piano, heretofore alluded to, are equally applicable to the second Shonnard patent. The differences and similarities between the devices of Shonnard and Hobart may be illustrated by comparing the first claim of the Hobart patent with the first claim of the Shonnard patent, which is as follows:

"(1) In an electric self-playing musical instrument, a music-sheet box, a common roller-terminal, contact-fingers and a case for said fingers; in combination with said pieces above and on opposite sides of said box, rails attached to said case and set into notches in the sides of said side pieces, and springs bearing upon said rails to hold them in place, substantially as described."

The foregoing are the patents principally relied on by the defendant and, after endeavoring to understand them, we have reached the same conclusion as the Judge of the Circuit Court and agree with him in the following statement:

"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 attachment 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 protracted and stubbornly contested interference in the Patent Office between Hobart and Goolman, one of the members of the defendant's copartnership—the Automatic Musical Company—which only ended when the Court of Appeals of the District of Columbia finally decided in favor of Hobart, is wholly inconsistent with the defendant's present contention that the patent is void for lack of patentability. Men do not struggle for years to secure a valueless thing.

The defendant asks that we find that Goolman and not Hobart was the inventor of the patented structure. This we decline to do.

In *Morgan v. Daniels*, 153 U. S. 120, 125, 14 Sup. Ct. 772, 773, 38 L. Ed. 657, the Supreme Court says:

"Upon principle and authority, therefore, it must be laid down as a rule that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction."

We may say, however, that having read the opinion of the Court of Appeals of the District of Columbia we are satisfied that the case was correctly decided and that the result would have been the same if the

additional testimony found in the present record had been included in the record of the Patent Office.

The bill alleged the infringement of a patent to F. C. Whitmore and the cause came on for hearing before the Circuit Court upon the Hobart and Whitmore patents. As to the latter the bill was dismissed but full costs were awarded the complainants. As the defendant succeeded as to the Whitmore patent he was entitled to the costs to which he would be entitled had there been a separate suit against him on that patent.

As the principal litigation relates to the Hobart patent we think the proper disposition to make of the matter is to permit the defendant to tax his costs and disbursements incident to the defense of the Whitmore patent and deduct the amount from the decree.

The decree, as so modified, is affirmed with the costs of this court.

WILLIAM MANN CO. v. KALAMAZOO LOOSE LEAF BINDER CO. et al.

(Circuit Court, S. D. New York. March 3, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—TEMPORARY BINDER.

The Leslie patent No. 603,428, for a temporary binder, consisting of two back pieces, a cord connecting them and passing through one, and means for shortening such cord so as to bring the back pieces together uniformly, is for an improvement on the prior art, and the combination as a whole discloses patentable invention; but the patent is entitled to only a narrow construction, and is limited to the precise device shown and described. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit to restrain alleged infringement of United States letters patent for temporary binder, and for an accounting.

E. Hayward Fairbanks (Samuel E. Darby, of counsel), for complainant.

Chappell and Earl (Frederick C. McLaughlin, of counsel), for defendants.

RAY, District Judge. The complainant claims infringement of claims 3, 4, 7, and 12 of United States letters patent to William Mann Company, assignee of Leon M. Leslie, the inventor, No. 603,428, issued May 3, 1898, on application filed January 23, 1897, for temporary binder.

The claims alleged to be infringed read as follows:

"(3) In a binder, the combination of the back pieces, with the single cable or cord connecting said back pieces and passing through one of them, and means for effectually shortening said cord.

"(4) In a binder, the combination with the apertured sheets or leaves, of the back pieces, the single cord or cable connected to one of said back pieces and passing through the apertures in said sheets, and means for effectually shortening said cord whereby the back pieces will be drawn together and the sheets clamped thereby."

"(7) In a binder, the combination of the back pieces, and the cord or cable, attached at its ends to one of said back pieces with the other back piece

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

movable relative to the first back piece, and connections between said second back piece and the cord, the continued operation of which first adjusts said cord so that the tension is uniform throughout its length and then effectually shortens it so as to cause said back pieces to approach each other, substantially as described."

"(12) In a binder, the combination of the back pieces, with the single cable or cord connecting said back pieces and passing through one of them, and means for effectually shortening said cable to hold unyieldingly said back pieces and any desired number of sheets, substantially as described."

Resolved into its elements, claim 3 calls, in a binder, for the combination of (1) the back pieces, (2) a single cable or cord connecting said back pieces and passing through one of them, and (3) means for effectually shortening said cord.

So far as this claim is concerned, read by itself, it would be answered by two flat sticks of metal or wood (back pieces) which, when brought together, would operate to bind leaves of paper between them, connected by a cable or cord of any flexible material having one end fastened to one back piece and the free end then passing through an aperture in the other, from one side to the other, one end to the other, or otherwise, and then being fastened to the other back piece and adding some sort of windlass arrangement or take-up device for this cord or cable, which, when operated, would wind it up and thereby shorten the cord or cable. This, aside from the specifications, in view of the prior art, would be clearly void for want of patentable invention.

Claim 4 adds apertured sheets or leaves, and while the cord is attached or connected to one of the back pieces only, as expressed in the claim, and only passes through the apertures in the sheets, still, as we have some sort of means for effectually shortening the cord—that is, taking it up or winding it up, "whereby the back pieces will be drawn together and the sheets clamped thereby"—we are to infer from the claim itself that the cord is in some manner connected to the second back piece, so that when "shortened," as the claim has it, the two back pieces will be drawn together.

Claim 12 is the same as claim 3, except that it adds or describes the purpose of shortening the cable or cord, viz., "to hold unyieldingly said back pieces and any desired number of sheets, substantially as described."

Claim 7 is more specific and certain. We have as elements in combination, in a binder (1) the back pieces, (2) the cord or cable attached at its ends to one of said back pieces, with the other back piece movable relative to the first back piece, (3) "connections" between the second back piece and the cord, the continued operation of which "connections" first adjusts said cord so that the tension is uniform throughout its length and then effectually shortens it (that is, takes or winds it up), so as to cause said back pieces to approach each other, substantially as described. The "means for effectually shortening said cord" is the same as "connections between said second back piece and cord." On reading the other claims, and turning to the specifications, we find that the claims in issue have nothing to do with the two pieces of levers or lazy tongs. The specifications state that "my improvements relate to that class of temporary binders known in the trade as" per-

petual ledgers, "and designed to constitute books which, in ordinary use, are firmly bound, yet any leaf of which can be readily extracted without displacing or releasing the others from the binder."

The patent does not show or describe but one construction, but does say:

"It will be understood that my invention is not limited to the exact structure shown and described, but includes such modifications thereof and constructions as are indicated by the terms of the following claims as interpreted by the state of the art."

That is, while the patentee showed one form of construction only, he has claimed everything broadly, so far as the state of the art permits him to do so. He claims all back pieces, a single cord or cable, and all means for shortening or winding or taking up a cord or cable so as to shorten it, and all apertural leaves. He must be limited, if at all, by a reference to the prior art.

The sheets, or leaves, of his book or binder, have perforations to receive the cord or cable which passes through and carries and supports them, when not bound and held firmly together by the back pieces. Even then the cord passing through them prevents any slipping or displacement. A slit, less in width than the diameter of the aperture, extends therefrom to the edge of the leaf, so that the cord may be slipped along in this slit into the aperture, and as there is an aperture at each end of the sheet and near the corner nearest the back of the binder, and the apertures proper are at the same distance apart as the two parts of the cord as they pass, the one part from the one back piece to the other at the lower part of the page, and the other part back again at the upper part of the page after passing through the second back piece from end to end, the leaf is held in position by the cord when drawn taut. By slightly concaving the sheets they are easily engaged with or disengaged from the cord or cable. The back pieces themselves are merely flat pieces of wood or metal, and may be of any suitable width and of any length to accommodate the sheet of paper used for leaves. As to back pieces and cords and cables and leaves, it is unnecessary to describe at length the prior art. All were old. So of "means" and "connections between the second back piece and the cord" for drawing the back pieces toward each other so as to bind the leaves when (so to speak) strung on the cord firmly, as in a bound book. I discover nothing in complainant's patent, aside from mere form or arrangement, that differs materially from the prior art, except the means for shortening; that is, winding up the cord or cable for the purpose of drawing the back pieces toward each other and holding them in position so as to grip and bind the sheets. I find nothing particularly new and novel in these "connections" between the cord and back piece, or "means for effectually shortening the cord," in and of themselves, but the combination, as a whole, may, I think, disclose such improvement on the prior art as to show patentable invention. It is not of a high order, however, and does not permit any considerable range of equivalents. If there be conception amounting to patentable invention, it resides in the means adopted and made an element of the combination for

taking up the cord or cable uniformly and equally from two different directions at the same time and releasing it in the same way.

With complainant's complete binder, containing leaves, open before us, we have the second back piece, A, carrying the take-up device, at our left, hinged to the left-hand or (when closed) top cover, and the first back piece, B (so referred to in claim 7 of the patent), at our right. I shall refer to them hereafter as "A" and "B." When the ledger is closed, A is the upper back piece. The cord or cable is attached, in any suitable manner, to the interior face (the face next the leaves) of B at a point near its end, and passes to the left through the apertures in the leaves and into and through an aperture in the base of A at the same distance from its end as was the cord fastened to B from its end, thence over a pulley or roller fastened to the outer face of A proper (which has a cap or cover, and hence we will refer to it as hollow, and also speak of passing through it from end to end, but A proper is the base and not the cap or cover) or the base of A, and thence through A towards the other end of A. At a point midway the ends of A the cord passes through a diagonally disposed aperture in a revoluble spindle or post, held in position between the base and cover of A and pivoted therein, and then onto another pulley or roller, near the end of the base on the outer face of A proper, and over such pulley and through another aperture in the base of A proper, and then through the apertures in the leaves to B, where it is fastened thereto on its interior face at the same distance from the end as was the other end of the cord fastened thereto at or near the other end of B. The revoluble spindle mentioned carries a ratchet placed midway the base and cover of A, which revolves with the spindle and is carried with it in either direction. The mouths of the aperture in the spindle through which the cord or cable passes are located one below and the other above the ratchet, and, assuming that the cord is evenly divided as to length by the spindle, it is seen that by continuously turning the spindle in one direction the cord or cable is wound thereon and taken up evenly from both directions, so that A and B are drawn towards each other, and this drawing may be continued until the leaves on the cords between them are held or bound tightly and securely between these back pieces. To prevent a backward movement of the spindle and a consequent unwinding of the cord or cable, A, on the outer face of its base and near the spindle, is provided with a spring-pressed dog which engages with the ratchet and holds it and the spindle securely until released by moving the tail of the dog, which projects from the side of A, and is readily reached and moved by the hand of the operator. When moved and the dog disengaged from the ratchet, the spindle will turn in the other direction, and the two back pieces are easily separated as the cord unwinds and the leaves are loosened on the cord or cable, and may be then separated and one or more of them removed and one or more new ones inserted. The outer end of the spindle is pivoted in the cover of A, as stated, and two notches are cut in this end of the spindle for the insertion of a key, and by turning this key we wind or take up the cable or cord and shorten the free part thereof holding the leaves. The space between the base of A and the ratchet is equal to that between the

ratchet and the cover, and these spaces are sufficient to permit the free coiling of the cord or cable about the spindle. Each element of this combination is old in this art, but this combination of such elements is new, so far as I can discover. The back pieces, leaves with notches, cord, or cable, the pulleys or rollers, the spindle provided with a ratchet and dog, with projecting tail to engage or disengage it with the ratchet, are all old, although the precise form of ratchet is not shown in the prior art. I think this immaterial. It became a mere matter of selection in choosing the form of spindle and ratchet; and the same may be said of the spring-controlled dog. In fact, I do not understand that any patentable novelty is claimed in these appliances of themselves or in the pulleys. No one of them performs any new function. As the spindle turns it carries the ratchet, which is held by the dog controlled by the spring. As the cord or cable passes through the aperture in the spindle it may be pulled in either direction by hand, by pulling A away from B, so as to divide it in two equal parts, one part on each side of the spindle, and insure an even and equal pull at both ends of back piece, B, when the spindle is turned. Unless the cord is thus evened up or divided by hand before we commence turning the spindle, it cannot be done thereafter by the pull of winding, as the cord turns such a short corner at the entrance to the aperture in the spindle that it binds and will not run through and evenly divide itself by any pull or strain the hand of the operator can exert on the key. This is proved by actual and repeated experiments.

The applicant, Leslie, under date of September 22, 1897, in writing the Patent Office, defined his invention and stated in what it consisted, as he understood it, viz.:

"A reconsideration and allowance of claims 12, 13, 14, 15, 23, 24, and 25, as amended, is respectfully requested, as these claims are limited to the employment of a single cable as distinguished from the employment of two or more cables, as has been uniformly done in the prior art. The use of this single cable with its mechanism for tautening the cable uniformly throughout its length, and thereby binding the leaves firmly, is believed to be the distinguishing feature of applicant's invention, and to constitute a valuable and useful improvement in the use of which the applicant should be protected."

The applicant, Leslie, was clearly in error in stating that two or more cables had been uniformly employed in the prior art. The patent in suit was applied for January 23, 1897, and issued May 3, 1898, after many changes and limitations as shown by the file wrapper.

In May, 1890, George A. Blackburn and Daniel J. Brimm applied for United States letters patent, No. 443,954, issued December 30, 1890, for temporary binder, which plainly and distinctly shows and describes a binder with a single cable as distinguished from the employment of two or more cables. This binder had two back pieces, A and A' (called "cases" in the patent), to which respectively, as in the patent in suit, the covers of the ledger were hinged. In Blackburn and Brimm the cases are hollow. A has a revoluble rod, C, extending its entire length and projecting at one end so as to permit the adjustment of a key for turning it. Attached to this is a strip of suitable material, such as stout cloth, which extends through a slot in the rear part of A, and has, at-

tached to its outer edge, a rod which is glued in a groove on the outer side of A', the outer back piece. By turning the rod, C, A and A' would be drawn towards each other, and this back of cloth or leather shortened accordingly. But this back piece itself is aside from the "ribbon G, which is preferably made of metal, but may be of other suitable material" used for drawing the two back pieces, A and A', together, and firmly and unyieldingly binding the sheets or leaves of paper between them. This ribbon, G, which answers to the cord or cable of the patent in suit, is a single ribbon, enters A at a slot, g, near one end of A, passes through its interior nearly its entire length, and passes out at a slot, g, near its other end. There is perfect freedom of movement to this ribbon in the case or back piece, A, and by taking hold of the ends of the ribbon we may pull it readily in either direction so as to have the projecting ends of equal length. Back piece A', for shortening or taking up the ribbon and thereby drawing the back pieces A and A' towards each other until they meet, or until they firmly and unyielding bind the interposed leaves, has a screw-threaded rod, C', extending from end to end of A' and attached to the case of A' at its ends. The screw thread of one end of C' has a pitch opposite the screw thread of the other end, and each screw thread terminates at the center of the length of the rod. Mounted on each end of this rod, C', is a block having a screw-threaded perforation which fits the screw thread of C'. These blocks move freely in A', being carried backward and forward on the rod, C', as it is turned the one way or the other by means of a key which is adjusted to the end of C' which projects from the case or back piece, A'. To each of the before-mentioned free ends of the ribbon, G, is attached a block or shoulder, G', which are respectively inserted within the case or back piece, A', through a slot, one slot near each end of A', and on the inner sides of the said screw-threaded blocks respectively; that is, on the sides of the blocks nearest the center of the screw-threaded rod, C'. It is seen that by turning C' in one direction the screw-threaded blocks, and consequently the blocks attached to the ends of the ribbon, respectively, are carried inwardly—that is, towards the center of C'—and that this takes up and shortens the ribbon between the cases or back pieces, A, A', and that they are thus drawn towards each other evenly or uniformly, and held unyieldingly, as are the leaves placed between them. Turn the rod, C', in the other direction, by means of the key, and the tension on the ribbon is released, whereupon A and A' may be separated from each other, the leaves released, and some taken out and others inserted, etc.

It is seen that we may substitute a cord or cable for the ribbon and the operation of the binder is the same, and the result the same in every respect. He who should have substituted a cord or cable for the ribbon would have infringed. "Ribbon" is one of the synonyms of "cord." Soule's Dictionary of English Synonyms. A cord is a string, and a string is a ribbon, broadly.

In this Blackburn and Brimm binder we take up, by turning the key, the ribbon from both directions evenly. Loosen the back pieces or cases to their full extent, and leave the ribbon drawn taut at one end

with the far ends of A and A' together, and turn the screw-threaded rod, C', and the ribbon, freely movable through A, will adjust itself, and A and B will come together evenly. Here Blackburn and Brimm is superior to Leslie. It is said that in Blackburn and Brimm the ribbon, or cord, or cable, whatever is used, will bind at the slots where they emerge from A. Possibly this is so, as here the ribbon turns at a right angle. In Leslie the cord or cable, after passing through the slot or aperture in back piece, A, on its way to the spindle, turns at a right angle, but is made to pass over a pulley or roller, and so, at the other end of A, before passing out on its way to back piece, B, it passes over another roller or pulley. This, of course, relieves the friction and consequent binding, but the idea is so old and common that, if necessity existed in Blackburn and Brimm, the most common skill would have overcome the difficulty. In short, the take-up device of Leslie, as a whole, is different from that of Blackburn and Brimm, and has some advantages, but as to ultimate results the idea is the same. Both have the same object, and both accomplish the same result in substantially the same way but by different mechanical means. That the mechanism of Blackburn and Brimm tautens the cord or cable or ribbon uniformly throughout its entire length and securely holds it in place cannot be questioned.

We should now go to the prior art for the spindle for taking up the cord, the ratchet and spring-controlled dog for holding it, if they may be found therein. In Geesaman, No. 150,148, dated April 28, 1874, we have two boards or suitable stiff material for pressing and holding the sheets of paper together; a revoluble drum attached to the outside of one of them, to which is attached the cord or cords connecting the two pieces together, which pass through staples to prevent displacement. By turning the drum all loose cord is taken up and wound thereon, and the holding boards are brought firmly together, pressing the leaves or sheets of paper between them. When thus tightened the drum is prevented from turning in the other direction and loosening the cord by a thumbscrew instead of a ratchet and spring-pressed dog. The one is the well-known equivalent of the other.

Turning to Blackburn and Brimm, United States letters patent No. 410,346, dated September 3, 1889, for temporary binder, we find perforated leaves with slots running therefrom to the edge of the leaf so as to permit their engagement with the bands or strips running from back piece to back piece, and which, wound up, taken up, or shortened, draw the back pieces together. In this patent the back pieces are called "boxes" or "cases." The bands or strips extending from back piece to back piece, by turning a roller, are wound thereon, thus bringing the cases or back pieces together. We may here substitute a cord or cable for the bands and have the same mode of operation and precisely the same result. This roller is stopped at any point in the winding up and held firmly in position and prevented from unwinding, turning backward, by means of a ratchet wheel, which may be engaged with a double-toothed pawl when it is desired to prevent the shaft from turning, and which is made accessible to the operator. Says the patent, "or any other convenient form of ratchet and pawl might be employed."

Says this patent on this subject:

"To one of the boxes there are connected bands or strips 15, made of heavy tape or of metal, which said bands or strips are carried through openings, b, formed in the inner wall of the opposite box, there to be secured to a roller, 16, which is provided with a head, 17, of proper form to be engaged by a key or wrench socket. Upon the shaft, 16, there is mounted a ratchet wheel, 20, that is engaged at such times as it is desired to hold the shaft from turning by a double-toothed pawl, 21, the stem of the pawl extending upward through a longitudinal slot, c, formed in the upper wall of the case, the head of this stem riding in a recess, d, so as to leave the upper face of the box flush; or any other convenient form of ratchet and pawl might be employed. In connection with the head of the stem, 21, we arrange a spring, 22, said spring being employed to hold the double-toothed pawl in engagement with the ratchet, 20, or to hold said pawl out of engagement with the ratchet * * *

"In certain instances it might be desirable to bind leaves that were not specially cut for use in connection with our binder; and to this end we employ the modified construction shown in Fig. 10, wherein the bands are shown at 15a, and run in planes at right angles to the planes in which the bands, 15, run, the post or shaft, 16a, to which the bands are secured, being centrally arranged, as shown in Fig. 10. * * *

"The binder is useful as a file for letters, bills, invoices, etc.; but for this purpose we would employ the construction shown in Fig. 10, these letters, etc., being bound in such a manner as to enable the bookkeeper to arrange them alphabetically or chronologically, and any one of the letters may be withdrawn and replaced at pleasure without moving the other sheets held by the binder."

In this patent we have a modified form (Fig. 10) in which the bands or strips pass from the one case or back piece to the other from points near the respective ends of one to corresponding points in the other, then enter that other through slots or openings and turning at right angles pass to and connect with a revoluble post or shaft located centrally of the ends of said box or case containing it. This post or shaft has the ratchet, etc., and by turning it as before mentioned the bands are wound up thereon, evenly and uniformly from each direction. This modified form of Blackburn and Brimm, shown in their earlier patent, would be practically the same as Leslie, should we place therein the pulleys or rollers for the bands to pass over on entering the box or case and turning towards the shaft or spindle. It was improvement to add them, but not invention. So in this modified form of case and attachment of the bands to the spindle the band or strip is not continuous. There are two, one coming from one end, the other from the other end, and ending at the spindle and attached thereto, but on turning the spindle the two bands wind up evenly and uniformly. Here, to have satisfactory work and results, we are not compelled to even up the length of cord or band each side of the spindle by hand before we commence the turning of the spindle. It is seen that, in improving on the prior art, Leslie adopted the drum, or its equivalent, the spindle, with ratchet and dog, to take up the cord or cable, and the modified form of Blackburn and Brimm, shown in their earlier patent, in taking his cord or cable into the back piece, where it was to be taken up, instead of the screw-threaded rod with blocks having perforated threaded portions fitting the thread of the rod mounted thereon as shown in Blackburn and Brimm patent of 1890, and where it is described as follows:

"Mounted longitudinally in the cases, A and A', are the rods, O and O', said rods having squared ends, c, projecting through the lower ends of the

cases, and by means of which the rods may be turned. The rods, C and C', are held in position in their respective cases by the pins, c', which project through the lower portions of the rods and rest against the inner surface of the case ends. * * *

"The rod, C', is screw-threaded, as shown, the screw thread of one end having a pitch opposite to the screw thread on the other, and each screw thread terminating in the center of the rod.

"Mounted on each end of the rod, C', is a block, F, having a perforated threaded portion which fits the thread of the rod, C', the outer contour of the block corresponding to the inner contour of the case, A'. The blocks, F, will thus be movable in the case, A, and when the rod, C', is turned in one direction the blocks, F, will move toward the center of the rod, and when turned in the opposite direction the blocks, F, will move toward the ends thereof.

"A ribbon, G, which is preferably made of metal, but may be of other suitable material, extends nearly the entire length of the case, A, and passes out through the slots, g, near each end of the case, and through the slots g of the opposite case, A', the ends of said ribbons being provided with blocks or shoulders, G', which are placed within the case, A', on the inner sides of the blocks, F, the case, A' having near each end a slot, g', in the angular face, a', thereof, to permit the easy insertion of the shoulders, G'. The two cases, A A', and the covers, B, hinged thereto, will thus be held together by the ribbon, G, and by turning the rod, C', so as to force the blocks, F, toward the center of the rod, the ends of the ribbon will likewise be forced toward the center of said rod, thus bringing the two cases nearer together, and by turning the rod in the opposite direction there will be sufficient slack in the ribbon to afford more space between the cases.

"In using the device the papers, leaves, or other articles to be bound are placed with their inner edges between the cases, A and A', and by means of the rod, C, the back, D, is adjusted to the thickness of the material, and by means of the rod, C', the blocks, F, shoulders, G', and ribbons, G, the cases are forced toward each other, thus firmly binding the material between the cases in position. As the covers, B, project below the lower ends of the cases, A and A', the ends of the rods, C and C' will not project below the lower edges of the covers, and the binder and contained material may be placed upon a shelf, like an ordinary book."

Defendants' Structure.

Turning to defendants' binder, alleged to infringe, we find: (1) Two solid back pieces of wood hinged to two covers for the completed ledger or binder. (2) These back pieces have corresponding perforations, one near each end, for the passage of the cord, cable, ribbon, or strap used to draw the two back pieces together with the leaves interposed. (Defendants use a strap or very heavy cord.) (3) The two covers are hollow; one for substantially its entire length and width, which we will name A, and the other for about one-half its length and substantially its entire width, which we will name B. These covers are made up of a covered framework. The covers, except at the edges, are of thin sheet iron or tin—a thin board might answer the purpose—on a frame, and are covered in turn by heavy cloth or leather. The covers at the ends next the back pieces have apertures corresponding to those in the back pieces which extend into the hollow portions. (4) In B we have a semicircular block firmly attached to the interior of the cover. In some binders this is omitted. (5) In A, in the hollow portion thereof, we have a revoluble screw-threaded rod extending from end to end of the cover, and journaled, or set, at one end, in the crossbar of the frame next the back piece, and at the outer end journaled in the outer or end crossbar of the frame, and having its outer end projecting into a recess in the frame, and so shaped as to permit a key

to be attached for the purpose of turning the rod. Mounted on this screw-threaded rod, and at right angles thereto, is an arm, or long block, having at its center a screw-threaded perforation which fits the screw thread of the rod. The ends of this arm are substantially opposite the openings in the back piece and crossbar of the frame before mentioned, and each end, in some constructions, has an aperture therethrough for securing thereto the ends of the single cord, cable, ribbon, or strap. In all of defendants' structures that I have seen a heavy leather thong or strap is used. Whether it be round or flat is, in my judgment, immaterial. This heavy strap or thong passes through B and behind the semicircular block, when used, and the ends respectively pass through the openings or apertures in the frame of B, into and through the corresponding apertures in both back pieces and the frame of A, and into the hollow portion of A, where they are attached to the respective ends of the arm, or long block, before mentioned, mounted on the screw-threaded rod and at right angles thereto. By affixing the key to the outer end of the screw-threaded rod, and turning it in one direction, the arm travels away from the back piece at the inner end of A, draws evenly and uniformly on both ends of the strap or thong, and draws the other back piece and cover with it until the back pieces are brought firmly together, clasping, holding, and firmly and unyieldingly holding them and any interposed leaves or sheets of paper. By turning the key and consequently the rod in the other direction, the arm is made to travel in the opposite direction—that is, towards the back pieces—and the strap or thong is loosened and the back pieces may be separated from each other, the leaves detached, and new ones inserted or additional ones inserted. The entire apparatus for taking up or shortening the strap, or thong, or cable, or whatever is used in its place, is within the hollow of the cover, A, and this apparatus has no rollers or pulleys, no spindle, no ratchet, no spring-controlled dog. It is a substantial duplication of the means for shortening the strap, thong, cord, or cable, found in the patent to Blackburn and Brimm of December 30, 1890, No. 443,954, but simplified. The screw-threaded rod, with its attachments mounted thereon, instead of being located in one of the cases, or back pieces, is placed in the hollow cover, and, instead of standing parallel to the back pieces, stands at a right angle thereto. By thus changing the location and angle at which it stands, and lengthening the arm or block and substituting one arm for two, we get a straightaway pull on the strap, cord, or cable, and do away with considerable friction—the turning of two corners.

If by any hocus-pocus we construe the defendants' device as an infringement of Leslie, we must construe Leslie as an infringement of Blackburn and Brimm's 1890 patent. Leslie was not, in any sense, a pioneer. He worked along a certain line in improving a take-up device utilizing well-known devices, which defendants do not use, but he did not obtain a monopoly of all improved means for effecting that end. He did not cut off the right of Blackburn and Brimm to use or improve their device in which they use other elements to create their take-up device. Giving to Leslie the full benefit of all of the doctrine of equivalents to which he is entitled, he was not entitled to include in his means and monopolize Blackburn and Brimm's screw-threaded

rod with a screw-threaded arm mounted thereon, or any modifications thereof or improvements thereon operated by a key. Clearly he did not monopolize the prior art or entirely different means operating in a different way to produce a given result. His particular combination of old elements to constitute his means he did cover by his patent, but not other combinations of other elements operating differently.

In *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 556, 18 Sup. Ct. 716, 42 L. Ed. 1136, Mr. Justice Brown, quoting from and approving *Burr v. Duryee*, 1 Wall. 531, 570, 17 L. Ed. 650, said:

"Much less can any inference be drawn from the statute that an inventor who has made an improvement in a machine, and thus effects the desired result in a better or cheaper manner than before, can include all previous inventions and have a claim to the whole art, discovery, or machine which he has improved. All others have an equal right to make improved machines, provided they do not embody the same or substantially the same devices or combination of devices which constitute the peculiar characteristics of the previous invention."

And at pages 568 and 569 of 170 U. S., at page 722 of 18 Sup. Ct. (42 L. Ed. 1136), he further said:

"An infringement," says Mr. Justice Grier in *Burr v. Duryee*, 1 Wall. 531, 572, 17 L. Ed. 650, "involves substantial identity, whether that identity be described by the terms, 'same principle,' same 'modus operandi,' or any other. * * * The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term 'equivalent.'"

"We have no desire to qualify the repeated expressions of this court to the effect that, where the invention is functional, and the defendant's device differs from that of the patentee only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee. But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there. As was said in *Burr v. Duryee*, 1 Wall. 531, 573, 17 L. Ed. 650, an infringement 'is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way. * * * That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used are, therefore, mere equivalents for those of the other.'"

There is no identity of operation between complainant's take-up device and that of the defendants. True, by operating each the same ultimate result, the bringing together of the back pieces, cases, and the consequent binding of the interposed leaves, is attained. The function of each device is to do this; but a function cannot be patented. See *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 556, 557, 18 Sup. Ct. 707, 42 L. Ed. 1136.

Conceding that the functions of two devices are practically the same, there must be substantial identity of means to justify us in saying they are mechanical equivalents. Same case, page 571 of 170 U. S., 18 Sup. Ct. 707, 42 L. Ed. 1136. Leslie winds up all loose cord, cable, or strap on a revoluble spindle having a ratchet and held from unwinding by a spring-pressed dog, while defendants do not wind up the loose cord, cable, or strap at all. Take away Leslie's dog, which defendants do not use, and a slight pull will unwind the cord and loosen the bound sheets or leaves. With the defendants' device no amount of pulling can revolve the screw-threaded rod backward and loosen the strap. But the defendants used and had the right to use the same device, substantially, they now use before Leslie came into the field at all. Leslie must be deemed to have incorporated into his claim the same means he has fully described in his specifications. He has not given those described as a preferred form, but as the form and the devices of his take-up mechanism. He can lay no claim to the spindle with a perforation to permit the passage of the single cord therethrough and a ratchet attached, all controlled by the dog. This was an old and well-known mechanical device. See patent to Huber and Miller of November 3, 1896, No. 570,803. So the straight-away pull, utilized by the defendants, was shown in this art as early as 1884. See Slade, English patent, No. 597. The lazy tongs are also shown in the prior art, and constitute such an old and well-known mechanical device that any one was at liberty to use them. They play no important part in this controversy. They have nothing to do with the actual operation of the device.

From all the evidence and exhibits in the case, I am satisfied that the claims of the Leslie patent in issue here (complainant's), broadly construed so as to cover defendants' device, are void as failing to disclose patentable invention in view of the prior art; that, construed somewhat narrowly, as they must be, having the prior art in view, defendants do not infringe.

There will be a decree dismissing the bill with costs.

SHARP v. BELLINGER et al.

(Circuit Court, N. D. New York. March 5, 1909.)

No. 7,159.

1. PATENTS (§ 165*)—CONSTRUCTION—LIMITATION BY LANGUAGE OF CLAIMS.

Courts will go far to save a patent for a meritorious invention, but they cannot reconstruct claims and disregard their very terms, and add or substitute material words not found therein, but necessary if the true invention is to be covered.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 174*)—CONSTRUCTION—IMPROVEMENT PATENT.

When the invention of a patent is not a pioneer invention, the inventor is held to a rigid construction of his claims, and is not entitled to any considerable range of equivalents; and when, in a patent for a mere im-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

provement, which in view of the prior art is extremely narrow, he has limited his claims by specific words to a specific form of device or element, he is bound thereby.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 249; Dec. Dig. § 174.*]

3. PATENTS (§ 328*)—INVENTION AND INFRINGEMENT—FIRE-ESCAPE.

The Sharp patent No. 835,985, for a fire-escape, consisting of a stationary frame carrying a reel upon which is wound a cable by means of which a person may lower himself to the ground, the movement of the cable being controlled by brake-shoes, discloses patentable invention in the manner and means of applying the brake-shoes, but is only for an improvement, and the claims must be limited according to the precise means shown and described. As so construed, the patent is not infringed by the device of the Davy patent No. 818,526.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit to restrain alleged infringement of United States letters patent and for an accounting.

See, also, 155 Fed. 139.

Franklin H. Hough and Charles J. Williamson, for complainant.
Robinson, Martin & Jones, for defendants.

RAY, District Judge. The complainant alleges infringement by the defendants of claims 1 and 7 of United States letters patent No. 835,985, dated November 13, 1906, and issued to Judson C. Sharp, the complainant, for fire-escape, on application filed July 13, 1904.

The claims in issue read as follows:

"(1) A fire-escape comprising a frame, a shaft carried thereby, a spring-actuated reel journaled upon the shaft, a cable secured to and winding about the reel, a fixed ring positioned about said shaft, semicircular brake-shoes having corresponding ends recessed, the bottoms of said recesses being inclined, a lever having inclined portions engaging said recesses, a centrifugally-movable weighted member, and means intermediate the same and said reel whereby said member may be rotated and thrown against said lever for the purpose of expanding the brake-shoes against said ring, as set forth. * * *

"(7) A fire-escape comprising a frame, a shaft carried thereby, a reel journaled upon said shaft, a cable around said reel, a stationary ring about said shaft, a centrifugally-movable weighted member, semicircular brake-shoes with slotted ends, a lever adapted to engage the slotted ends of said shoes to expand the same, a rotatable collar, gear connections between the same and said reel, and means carried by said weighted member for contact with said lever, whereby the brake-shoes may be expanded as the latter are rotated, as set forth."

The elements of claim 1 are (1) a frame, (2) a shaft carried thereby, (3) a spring-actuated reel journaled upon the shaft, (4) a cable secured to and winding about the reel, (5) a fixed ring positioned about said shaft; (6) semicircular brake-shoes having corresponding ends recessed, the bottom of said recesses being inclined, (7) a lever having inclined portions which engage the recesses and conform to the shape thereof, (8) a centrifugally-movable weighted member, and (9) means intermediate the weighted member and the reel whereby the weighted member may be rotated and pressed against the lever for the purpose of expanding the brake-shoes and pressing them against the fixed ring positioned about the shaft.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Claim 7 calls for a frame, a shaft carried thereby, a reel journaled upon the shaft but not for a spring-actuated reel, a cable around said reel but not a cable secured to and winding about the reel, a ring about the shaft, a centrifugally-weighted member, semicircular brake-shoes with slotted ends instead of semicircular brake-shoes having corresponding ends recessed, a lever adapted to engage the slotted ends of said shoes to expand the same, instead of a lever having inclined portions engaging the recesses, also a rotatable collar and gear connections between the collar and the reel, and also means carried by the weighted member for making contact with the lever so that the action of the lever upon the brake-shoes when actuated by the weighted member will expand the brake-shoes as they are rotated.

The cable secured to a reel and winding about it may be quite different from a cable around a reel. A reel journaled upon a shaft is different from a spring-actuated reel journaled upon a shaft.

Turning to the specifications, I fail to find anything which indicates that Sharp had in mind any reel other than the spring-actuated reel. A spring-actuated reel is what he describes, and he speaks more than once of the winding and unwinding thereof and of the rewinding of the cable on the reel.

The operation of this device is substantially as follows: The frame may be attached to the walls of a room. One end of the cable is attached to the reel, and the cable is wound up thereon. The free end of the cable has means for attachment to the body of a person who may get outside the building and let himself down towards the ground without other support than the cable and the friction created by the contact of the brake-shoes with the fixed ring positioned about the shaft. As the person begins to descend, the cable is unwound from the reel, which rapidly revolves and sets in motion gearing which causes the weighted member to rapidly revolve, and the rapid motion tends to throw the weight away from the center, and this brings a flange of the weighted member against the end of the lever not engaged with the semicircular brake-shoes, and the pressure upon the lever engaged at the other end with the brake-shoes in the manner described pries the ends of the brake-shoes apart, one in one direction and the other in the opposite direction, against the inner surface of the fixed ring positioned about the shaft, creating thereby friction of the brake-shoes in contact with the ring, which retards the revolution of the reel weight and brake-shoes and correspondingly retards or controls the descent of the person attached to the free end of the cable. The device is operative and useful, and is an improvement upon any device of the kind of the prior art shown in the proofs. There is improvement in the general construction of this device and in the arrangement of the parts. There is a new mode of operation in one respect, viz., the manner of expanding the brake-shoes and the means for doing it. Otherwise the device is old and devoid of novelty. I think, on the whole, patentable invention is disclosed, and so hold. As Sharp was an improver in this field of invention and not a pioneer, his claims must be limited accordingly.

March 11, 1902, Sharp took out letters patent No. 695,001, for fire-

escape, which, so far as I can see, were, except in arrangement and mere change in form of parts, with some added details of construction, a duplication of the prior art. But this is not material in the aspect of the case now being considered. That device was not compact. In the specifications of the patent in suit Sharp says:

"This invention relates to new and useful improvements in fire-escapes; and the object of the invention is to generally improve upon and render more efficient and simple this class of inventions, and in the present invention it has been my aim to improve upon my invention covered by letters patent in the United States, No. 695,001."

In making his alleged improvements he introduced no new element whatever. Taking them one by one, we find the frame in several prior patents; also the shaft carried thereby; the reel journaled upon the shaft, and a cable secured to the reel and winding about it, in Johnson, No. 286,306, of October 9, 1883; the same, spring-actuated, in Hill, No. 388,491, of August 28, 1888; and a cord or rope or cable simply passing over a drum or reel, but not winding up thereon, is shown in Tapley, No. 139,484, of January 3, 1873. A fixed ring positioned about the shaft and semicircular brake-shoes and levers engaging the brake-shoes and centrifugally-movable weighted members and means for rotating the said member, and throwing or pressing it against the lever so as to actuate it and thereby press the brake-shoes against the fixed ring, are shown in the following: Tapley, No. 139,484, which has the ring and the weights so shaped that they act as a brake-shoe; Johnson, No. 286,306, of October, 1883, which has weights and semicircular brake-shoes which are pressed by the weights against a flange or device in the reel; in Hill, No. 388,491, of August, 1888, which has a frame, a winding drum, spring-actuated, with cord or cable wound thereon, a fixed ring positioned about a shaft, semicircular brake-shoes, levers actuated by centrifugally and movable weighted members so as to press the brakes against the fixed ring when the device is in motion, and means intermediate the weighted member and the reel whereby said member may be rotated and pressed against the said levers at one end so as to press the other end thereof against the brake-shoes and press them against the fixed ring and thereby produce the friction. In Hill, the weighted member with weights, levers, etc., is constructed as follows:

"a indicates a spider fixed to the shaft, Y, and rotating within the flange-disk, Z. This spider carries upon it two sets of pivoted levers, b, c, which are exactly alike and are placed opposite each other on the spider. The lever, c, is provided with a brake-shoe, d, and with a spring, e, seated upon a lug, f, projecting from the spider and bearing radially outward against the lever, c, and always tending to keep the brake-shoe out of contact with the flange, g. The long arm of the lever, b, is weighted at h, so that when the spider is rotated centrifugal force tends to throw it outward tangentially, the effect of which is to instantly force the brake-shoe against the inner surface of the flange, g. These parts are so adjusted that as soon as the rotation of the winding-drum reaches a certain moderate degree of rapidity at which it will be desirable to check the speed of lowering, the brake-shoes will then instantly be forced against the inner surface of the flange, g, which checks the speed and secures perfect safety lowering."

Here the weighted arm or lever, b, has prongs at the end where it engages with the end of lever, c, which is recessed to permit such en-

agement. When the inner end of *b*, is thrown outwardly, the other end moves inwardly towards the center or shaft, and, by reason of the said engagement of one end of *b* with *C*, this end of *C* is also carried inwardly, and the other end, provided with a brake-shoe, is thrown outwardly, and the shoe is pressed against the fixed ring or "flange-disk, *Z*." Regarding *c* and *d* as one whole and as constituting the brake-shoe, it has one end recessed, and lever, *b*, has teeth or projections fitting therein so as to actuate both *c* and *d* at the same time. It is readily seen that the brake-shoes of Hill differ from those of the patent in suit, as do the connections between same and the lever moved by the weighted lever. The mode of operation is somewhat different. But turning to Mignot, No. 639,751, of December 26, 1899, fire-escape, we find a circular fixed ring positioned about the shaft with a circular brake-shoe therein and fitting the interior of the ring. This shoe is divided but not recessed. We have a lever weighted at one end and slotted so as to be movable lengthwise. This connects with another curved lever, running at right angles to the first-mentioned lever, the outer ends of which enter between the divided ends of the circular brake-shoes. This second lever is pivoted at a little distance from the divided ends of the shoe, and recessed or notched so as to engage these free ends of the divided brake-shoe. When the weighted end of the first lever moves outwardly it draws one end of the second lever inwardly, and throws one side of the other end sidewise against one free end of the divided brake-shoe, and pulls the other side of such second lever, at a point inside its pivot, against the other free end of such brake-shoe, and the consequence is that the circular brake-shoe is pressed against the interior surface of the fixed ring so as to create the required friction. Here we have substantially the same mode of operation in applying the brake-shoes as in the patent in suit. It is unnecessary to describe Porter, No. 715,691, of December, 1902, which shows a brake-shoe and some details of construction quite similar to those of complainant's device.

The construction and operation of complainant's braking apparatus is thus described:

"A pinion-wheel, *O*, is loosely journaled upon the shaft, and is in mesh with the pinion-wheel, *J*, whereby, as the arm, *K*, of said collar is swung about the shaft and carrying with it the rotating wheel, *J*, a rotary movement will be imparted to said pinion-wheel, *O*, which operates the governor mechanism.

"Fixed to the arms of the section, *B'*, of the frame is a ring, *I*, with a flange, *I'*, at one edge thereof, and *MM* designate two frictional shoes which are of semicircular shape and are adapted to be expanded against the inner circumference of said ring in order to afford a frictional brake to the apparatus. Corresponding ends of said shoes are notched, as at *M'*, and are adapted to receive one end of an arm, *O'*, which projects from the hub portion of the pinion-wheel, *O*, as shown clearly in Fig. 1 of the drawings. The opposite ends of said friction brake-shoes, *M*, have recesses, *m*, the bottom walls of said recesses being inclined and tapering inward toward each other. Said slotted ends of the brake-shoes are spaced apart slightly, and a brake-throwing lever, *Q*, having a curved shank portion, is provided, one end of which has a triangular-shaped end, the opposite inclined edges of which are adapted to engage with the inclined bottoms of said slots as the lever is tilted, whereby said shoes may be thrown in opposite directions frictionally against the inner circumference of said ring to regulate the movement of the reel in unwinding.

"A plate, *R*, is provided, one end of which, *R'*, is weighted and projects over

the circumference of said ring and is longitudinally slotted, as at R2, the walls of said slot having a play in the oppositely-disposed parallel recesses, O2, formed in the hub portion of the pinion-wheel, O. By the provision of said plate having a weighted end it will be observed that as the pinion-wheel, O, is rotated said plate will be given a rotary movement, and the faster the pinion rotates the greater the tendency of the weighted plate to be thrown outward by centrifugal force. A projection, R3, upon one face of the plate, R, is adapted to contact and bear against the outer end of the shoe-throwing lever as the plate rotates, and it will be readily understood that the faster the plate rotates the greater the centrifugal force will be upon said plate, and the greater will be the pressure which is applied to said shoe-throwing lever for the purpose of expanding the friction brake-shoes, causing the same to brake and reduce the speed of the rotating parts."

I think it obvious that the only material change from the prior art is found in the engagement of the lever device with the ends of the brake-shoes for the purpose of expanding them, and the form of lever used. It is an improvement on the prior art for the reason the engagement is much more secure, less liable to displacement, and a much better and greater pressure is exerted on the brake-shoes.

It is claimed that defendants have infringed by making or selling or using this precise device; also by making, using, and selling another device, or fire-escape, which is a duplicate of complainant's fire-escape except in the particulars of the engagement of the lever device with the brake-shoes and the form of lever employed, and the connection of the cord or cable with the reel and its operation. This last-mentioned fire-escape is covered by United States letters patent No. 818,526, dated April 24, 1906, and granted to defendant Charles F. Davy, for fire-escape. The material parts of the Davy device is described in his specifications as follows:

"Secured in the frame and encircling the shaft, 2, there is also provided a stationary friction-ring, 7, which ring receives semicircular expandible friction-shoes, 8, 8. At adjacent ends these friction-shoes, 8, are provided with a notch or recess, 8a, which receives the outer end of an arm, 4a, provided on and integral with the pinion, 4, on the shaft, 2, so that when the pinion, 4, is rotated around the shaft, 2, the shoes, 8, will be caused to move in a circle around the shaft, 2, within the friction-ring, 7. In the sides of the pinion, 4, and including in part the arm, 4a, there are provided grooves which receive the thinner portion of the actuating-weight, 9, which weight has a plate-like portion slotted, as indicated at 9a, to receive that portion of the pinion, 4, which lies between the aforesaid grooves. By this arrangement the weight is mounted on the pinion, 4, and is free to have a radial movement with reference thereto. It may be noted that the main portion of the weight is in the head, 9b, thereof, which is the effective part so far as weight is concerned. The plate-like portion of the weight, 9, also serves to support the shoes, 8, in their position within the friction-ring, 7, or rather prevent displacement from the friction-ring toward the middle of the machine. The weight, 9, is connected with the friction-shoes, 8, by means of the toggle-joint levers, 11 and 12. These levers at their outer ends are provided with substantial cylindrical heads, 11a and 12a, respectively, which heads are respectively adapted to engage in a suitable recess, 8b, provided in the friction-shoes, 8. The engaging ends of the toggle-joint levers, 11 and 12, are also provided with cylindrical heads, 11b and 12b, respectively, which are halved together, as shown, and provided with a pin, 13, which prevents relative displacement. The inner ends of the toggle-joint levers, 11 and 12, are received between projections, 14 and 15, on the weight, 9, the upper ends of which projections are preferably hooked inwardly, so as to retain the toggle-joint levers in position against lateral displacement. These toggle-joint levers are also preferably made crooked, as shown, whereby their length can be readily adjusted by

straightening them or bending them more, as occasion requires. The projection, 15, also preferably includes a projecting portion, 15b, adapted to strike the friction-shoes, 8, and prevent the outward movement of the weight, 9, to such an extent as to pass the toggle-joint levers by the dead-center or even allow them to come so close to a straight line as to not open with facility when the pressure thereon of the weight is relieved."

To read the two descriptions, on account of differences in phraseology and the use of different names in describing the same things, we would naturally fall into some confusion, and might be led to suppose that there is considerable difference in the two devices; but with them before us—and both are in evidence—we see that the two are identical, until we come to the form of the ends of the shoes and the lever and lever connections. Says Sharp:

"Corresponding ends of said shoes are notched, as at M', and are adapted to receive one end of an arm, O', which projects from the hub portion of the pinion-wheel, O, as shown clearly in Fig. 1 of the drawings. The opposite ends of said friction brake-shoes, M, have recesses, m, the bottom walls of said recesses being inclined and tapering inward toward each other. Said slotted ends of the brake-shoes are spaced apart slightly, and a brake-throwing lever, Q, having a curved shank portion, is provided, one end of which has a triangular-shaped end, the opposite-inclined edges of which are adapted to engage with the inclined bottoms of said slots as the lever is tilted, whereby said shoes may be thrown in opposite directions frictionally against the inner circumference of said ring to regulate the movement of the reel in unwinding."

It is with the "opposite ends of said friction brake-shoes" and their formation and the "brake-throwing lever" and its engagement with the ends of the shoes alone that we are now dealing. The function of the inserted end of the lever is to pry the ends of the brake-shoes apart. In the Davy patent this formation of these "opposite ends of said friction brake-shoes" is abandoned. The described "brake-throwing lever, Q," above described, is also abandoned. In place of the recessed ends, we have plain square ends for the friction brake-shoes, and, in place of such recesses at the ends thereof as are described, we have recesses at some little distance from such ends, 8b, adapted to receive the respective cylindrical heads of a toggle-joint lever presently to be described. These recesses of Davy are of different shape from those of Sharp. In place of the "brake-throwing lever" we have, actuated by the weighted member, "the toggle-joint levers, 11 and 12. These levers at their outer ends are provided with substantially cylindrical heads, 11a and 12a, respectively, which heads are respectively adapted to engage in a suitable recess, 8b" (above mentioned), "provided in the friction-shoes, 8." As these toggle levers are interlocked and both pressed upon at their inner ends, where they join, at the same time and by the same means, they are actuated at the same moment, act in unison, and as one lever, and the cylindrical heads engaged in the recesses, 8b, press the ends of the friction brake-shoes further apart, expand them, and consequently press the brake-shoes against the fixed ring positioned about the shaft. The function of the toggle lever is precisely that of the lever in complainant's device, and it operates in substantially the same way to produce substantially the same result. The change of levers and points of engagement with the

brake-shoes produces no new or improved result, no different or better mode of operation in the brake-shoes. It is clearly the substitution of well-known equivalents. The questions are: (1) Is the complainant's invention of such a character that he is entitled to the benefit of the doctrine of equivalents, and (2) has the complainant so limited himself by the wording of his claims that he is limited to the particular lever and brake-shoes described therein and in his specifications?

Claim 1 says, "semicircular brake-shoes having corresponding ends recessed, the bottoms of said recesses being inclined, a lever having inclined portions engaging said recesses." Claim 7 says, "semicircular brake-shoes with slotted ends, a lever adapted to engage the slotted ends of said shoes to expand the same." The specifications say, "the opposite ends of said friction brake-shoes, M, have recesses, m, the bottom walls of said recesses being inclined and tapering inward toward each other," and, as to the lever, "a brake-throwing lever, Q, having a curved shank portion, * * * one end of which has a triangular-shaped end, the opposite-inclined edges of which are adapted to engage with the inclined bottoms of said slots as the lever is tilted."

It is well settled that the inventor of a meritorious device having patentable novelty and disclosing mental conception of a high order may so limit himself by the words of his claim or claims as to deprive himself of the benefits of his labor and skill. So the Patent Office may impose limitations which, if acquiesced in, will deprive the claimant of that which he is really entitled to. Courts will go far, however, to save a patentee having a meritorious invention (*Benbow-Brammer Mfg. Co. v. Straus* [C. C.] 158 Fed. 627, affirmed by the Circuit Court of Appeals December, 1908, 166 Fed. 114), but they cannot reconstruct claims and disregard their very terms, and add or substitute material words not found therein, but necessary if the true invention is to be covered. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, 24 L. Ed. 344; *Universal Brush Co. v. Sonn et al.*, 83 C. C. A. 422, 154 Fed. 665, 668; *Wagner T. Co. v. Wyckoff S. & B.*, 151 Fed. 585, 81 C. C. A. 129.

In *Keystone, etc., v. Phoenix Iron Co.*, supra, the court said:

"They (the patentees) cannot expect the courts to wade through the history of the art, and spell out what they might have claimed but have not claimed. * * * But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. * * * As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim, or, if broader, they must be held to have surrendered the surplus to the public."

There is a difference however, between primary inventions and mere improvements. In *Wagner T. Co. v. Wyckoff S. & B.*, supra, the court, per Coxe, C. J., said:

"Courts look with favor upon patents for primary improvements which are novel and a manifest departure from the principles of prior structures, and which constitute the final step necessary to convert failure into success. * * * A strict construction of the claims of a patent should not be resorted to, if the result would be a limitation on the actual invention, unless it is required by the language of the claim. * * * Infringement is not avoid-

ed by changes in a patented machine which are nonessential, as by changing the positions of parts, or transferring a function from one part to another, without affecting the principle or mode of operation."

Neither Sharp nor Davy has substantially departed from the prior art (prior to Sharp), except in the matter of the lever and its manner of connecting or interlocking with the brake-shoes. Sharp described with great particularity and definiteness a specific form of lever and a specific form of interlocking with the shoes. He gave a specific form to the end of the lever and to the very ends of the brake-shoes. Here in these specific forms his improvement showing patentable novelty resided. Defendant Davy does not use them, and for this reason he has not appropriated the new and novel means or idea of Sharp. A strict construction of a claim should not be resorted to if the result would be a limitation of the actual invention, unless such strict construction is required by the language of the claim itself. *Wagner T. Co. v. Wyckoff*, 151 Fed. 585, 591, 81 C. C. A. 129, citing and approving *Smead Co. v. Fuller & Warren Co.*, 57 Fed. 626, 6 C. C. A. 481.

But "when an invention is not a pioneer invention, the inventor is held to a rigid construction of his claims" (*Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64), and is not entitled to any considerable range of equivalents (*Kokomo Fence Machine Case*, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689; *Cimiotti, etc., v. American F. R. Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; *Computing Scale Co. v. Automatic, etc.*, 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645), but still the range of equivalents depends upon the extent and nature of the invention (*Paper Bag Patent Case*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; *Miller v. Eagle M. Co.*, 151 U. S. 207, 14 Sup. Ct. 310, 38 L. Ed. 121). And when, in a patent for a mere improvement which, in view of the prior art, is extremely narrow, the patentee has limited his claims by specific words to a specific form of device or element, he is bound thereby. *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263; *McClain v. Ortmyer*, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; *Burns v. Meyer*, 100 U. S. 671, 672, 25 L. Ed. 738; *Keystone Bridge Co. v. Phoenix, etc.*, 95 U. S. 274, 278, 24 L. Ed. 344.

In *McClain v. Ortmyer*, supra, the court said (page 425 of 141 U. S., page 78 of 12 Sup. Ct. [35 L. Ed. 800]):

"But if the language of the specification and claim show clearly what he desired to secure as a monopoly, nothing can be held to be an infringement which does not fall within the terms the patentee has himself chosen to express his invention."

In this case, the patent to Sharp, in issue, is an improvement merely, of narrow scope, entitled to but a limited range of equivalents, and his claims are further narrowed and limited by the specific language used and specific lever and brake-shoes described therein. Then the Patent Office itself has recognized a patentable difference in the two structures or machines by granting a patent to Davy. This is not conclusive, but raises a presumption that there is a patentable difference.

In view of these considerations, I cannot find that defendants infringe by making or selling, or offering for sale or using, the Davy fire-escape as modified in respect to the toggle-joint lever, conceding the stipulation shows they have done either of these acts. I find no proof whatever that defendants, or either of them, have made, sold, offered for sale, or used one or more fire-escapes made according to or like the Sharp patent in suit.

Taking this view of the case, it is unnecessary to consider the other defense urged.

There will be a decree dismissing the bill, with costs.

BALL v. COKER et al.

(Circuit Court, D. South Carolina. February 24, 1909.)

1. PATENTS (§ 1*)—NATURE OF PATENT RIGHTS.

The right to a patent monopoly exists only by virtue of the laws of the United States, and cannot be affected by state laws.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 1.*]

2. PATENTS (§ 196*)—TRANSFER—REQUISITES ON VALIDITY.

A patent monopoly can only be transferred in the manner prescribed by Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387), namely, by a written instrument signed by the owner of the patent and duly recorded.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 196.*]

3. EXECUTION (§ 26*)—PROPERTY SUBJECT—PATENT RIGHTS.

A patent right cannot be sold on execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 67; Dec. Dig. § 26.*]

4. RECEIVERS (§ 67*)—TITLE TO PROPERTY—PATENT RIGHTS.

A patent right does not pass to a general assignee or receiver of property of the owner.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 67.*]

5. PATENTS (§ 265*)—SUIT FOR INFRINGEMENT—TITLE TO SUPPORT—RECEIVER.

The mere appointment of a receiver to take charge of, manage, and control a patent does not vest in him title to the patent which will enable him to maintain a suit for its infringement in his own name, Rev. St. § 4919 (U. S. Comp. St. 1901, p. 3394), giving the right to recover damages only "in the name of the party interested either as patentee, assignee or grantee." To vest the receiver with such right of action, it is essential that the court compel or cause an assignment of the patent to him in the name of the owner.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 265.*]

In Equity.

Legare, Holman & Baker, for complainant.

Miller, Whaley & Bissell, for defendants.

BRAWLEY, District Judge. The plaintiff above named filed his amended bill in this court March 30, 1908, alleging, among other things, that he had been appointed by the court of common pleas for the county of Charleston, S. C., receiver of letters patent No. 807,990, issued to W. T. Ball, George S. Legare, Thomas R. Harney, Hampton

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

K. Lea, and Charles Miner, which patent was for a process called the "double-hulling process," for hulling cotton seed of various sizes without disintegrating the meats, and charged that the defendants had for more than two years last past employed, practiced, and used the said double-hulling process, and prayed for a decree for infringement, and for an accounting of the profits, for damages, and so forth. The answer of the defendants, among other defenses, required proof that the plaintiff had qualified as such receiver, and alleged that he is not the owner of said letters patent, and is not entitled to file said bill of complaint, or to bring suit upon said patent as such receiver. It appears that letters patent No. 807,990 were granted December 19, 1905, to William T. Ball, Hampton K. Lea, George S. Legare, Thomas R. Harney, and Charles Miner; that on May 31, 1905, the parties above named entered into an agreement in writing referring to the application for letters patent then pending, and agreed that each should have an equal interest in and to said invention, and that no assignment, grant, license, conveyance, permit, or any right whatsoever under said invention should be made without the written consent of all the parties thereto, and that, in the event of any disagreement as to the propriety of any sale, assignment, grant, or conveyance, any matters of dispute should be submitted to arbitration, and so forth. It further appears that disagreements did arise, and that in October, 1907, a complaint was filed in the court of common pleas for the county of Charleston, state of South Carolina, in which W. T. Ball and George S. Legare were plaintiffs, and Hampton K. Lea, Thomas R. Harney, and Charles Miner were defendants. The complaint, among other things, charged that, for certain personal and selfish motives on the part of the defendants, Thomas R. Harney and Charles Miner, they have failed and refused to co-operate with the other owners of said patent in the use, management, and control thereof. The complaint prayed that a receiver be appointed pending the litigation to take charge of, control, and manage the patent mentioned, and that the same be sold under an order and decree of that court. An order was entered in that cause by the presiding judge of the court November 19, 1907, reciting, among other things, that Charles Miner, one of the defendants, resided in the state of North Carolina, and Thomas R. Harney, one of the defendants, resided in the District of Columbia, and that upon the commencement of the action an order of publication was obtained, and that said defendants had been personally served with the summons and complaint, and on motion of the plaintiffs' attorneys it was ordered that William T. Ball "be and he is hereby appointed receiver of said letters patent, and he is authorized, required and commanded to take charge of, manage and control the same, as fully and effectually as the owners thereof could do in such behalf"; and it was further ordered that "any revenue received by receiver from said patent be deposited in some reputable bank, and the funds held subject to the further order of the court."

The bill in this case was filed by the receiver pursuant to his appointment, and the question for decision is whether a suit can be maintained in the name of the receiver.

Section 4919 (U. S. Comp. St. 1901, p. 3394) of the Revised Statutes provides:

"Damages for the infringement of any patent may be recovered by action on the case in the name of the party interested, either as patentee, assignee or grantee."

Section 4898 (U. S. Comp. St. 1901, p. 3387) of the Revised Statutes provides that:

"Every patent or any interest therein should be assignable in law by an instrument in writing, and 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."

The statute further provides for the recording of any assignment, grant, or conveyance in the Patent Office.

That the receiver, the plaintiff in this case, is not the patentee, assignee, or grantee is plain, and by the terms of the statute damages for the infringement, it is claimed, can only be brought in the name of such party. Without going at great length into the learning as to the nature of the property rights in patents, it may be said that such rights are wholly the creation of the statutes of the United States. In *Stevens v. Gladding et al.*, 17 How. 451, 15 L. Ed. 155, Mr. Justice Curtis says:

"There would certainly be great difficulty in assenting to the proposition that patent and copyrights held under the laws of the United States are subject to seizure and sale on execution. Not to repeat what is said on this subject in *Stephens v. Cady*, 14 How. 531, 14 L. Ed. 528, it may be added that these incorporeal rights do not exist in any particular state or district. They are coextensive with the United States. There is nothing in any act of Congress, or in the nature of the rights themselves, which give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts."

The case referred to in 14 How. 531, 14 L. Ed. 528, is *Stephens v. Cady*, a case of copyright, where Justice Nelson, who delivered the opinion of the court, says:

"But the incorporeal right secured by the statute to the author to multiply copies of the map by the use of the plate, being intangible and resting altogether in grant, is not the subject of seizure or sale by means of this process, certainly not at common law. No doubt the property may be reached by a creditors' bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling the transfer and sale of the stock for the benefit of the creditors; but in case of such remedy we suppose it would be necessary for the court to compel a transfer to the purchaser in conformity with the requirements of the copyright act in order to invest him with a complete title to the property. * * * An assignment, therefore, that would vest the assignee with the property of the copyright, according to the act of Congress, must be in writing and signed in the presence of two witnesses, and it may, I think, well be doubted whether a transfer, even by a sale under a decree of a court of chancery, would pass the title so as to protect the purchaser unless by a conveyance in conformity with this requirement."

2 *Robinson on Patents*, § 766, states the law as follows:

"That rule that an assignment can be made only by the actual owner of the patented invention admits of no exception in the interest of creditors. Valuable as his property therein may be, it cannot be subjected to the payment of his debts by any of the ordinary methods of involuntary alienation. This is

not due to any peculiar sanctity which the law attaches to this class of property, but to the fact that the statutes which create the monopoly provide no other mode of transferring it than through the voluntary act of its real owner. The ownership of the patented invention cannot be seized and sold on execution by a sheriff like a personal chattel, nor, like other incorporeal rights, does it vest in a receiver or trustee in insolvency by virtue of the judicial decree of the court by which these various officials are appointed. Thus neither a bankrupt court nor a court of equity, nor any person acting under their authority, can affect the ownership of a patented invention without the actual or presumed co-operation of the individual in whom such ownership is vested by the issue of the patent or by assignment from the patentee. Either of these courts may have the power to compel the owner to transfer the ownership by an assignment to the receiver or trustee, and a court of equity on his refusal may treat the equitable rights as vested in the creditors and appoint a trustee for the owner to convey the legal title in his name and behalf to the officer in charge of his bankrupt estate, but the title in all such cases is still derived from him on whom it was originally conferred. That Congress has the power at any time to meet this difficulty by creating methods of involuntary alienation, there can be no doubt, but, in the absence of such statutes and judicial orders, the patented invention remains entirely and exclusively under the control of its owner, and may be retained or conveyed by him at his pleasure, without reference to any existing condition of insolvency."

And a note to this section, on page 524, is as follows:

"That the patent privilege does not rest in a receiver merely by virtue of his appointment, see *Dick v. Struthers* (C. C.) 25 Fed. 103."

That was a suit for infringement, and Acheson, Judge, says:

"By the law of Pennsylvania, Ames is the mere custodian of the property of the corporation. By virtue of his appointment as receiver, no title to the patent passed from the corporation to him. Doubtless it was competent for the court appointing him to authorize him to bring suit on the patent, but then it should have been brought in the name of the corporation. The objection therefore that the plaintiff, Ames, has no title upon which to maintain this suit, the same being in a corporation, which is not a party hereto, is well taken, and for this cause the demurrer is sustained."

In *Gordon v. Antony*, 16 Blatchf. 234, Fed. Cas. No. 5,605, a suit had been brought in the state court to recover a debt and judgment obtained, and in proceedings supplementary to execution one Beamish was appointed by said court "receiver of all and singular the debts, property, equitable interests, rights and things in action, of Ebenezer Gordon, the plaintiff, and he was ordered to execute and deliver an assignment of the same to said receiver," but it did not appear that any such assignment was ever executed. The receiver presented a petition to the state court, alleging his appointment and so forth, and that he became vested with all the estate, property, and interest of said Ebenezer Gordon, and, among others, the invention patent, letters patent, and patent rights, and that it was for the interest of the trust that the same should be sold. The sale was thereupon made, reported to the court, and confirmed. Upon the bill filed by Ebenezer Gordon against Antony and others for infringement, the defendants contended that by virtue of such proceedings and such appointment any right which the plaintiff had to recover against them for an infringement of the patent sued on had become vested in the defendants. Judge Blatchford cited the provisions of the statute substantially the same as section 4898, above cited, and says:

"Under them no person may bring suit for profits or damages for infringement who is not the patentee, or such assignee or grantee as the statute points out. The claim to recover profits or damages for this infringement cannot be severed from the title by an assignment or grant so as to give the right of action for such claim in disregard of the statute. Profits or damages for infringement cannot be sued for except on the basis of title as patentee, or as such assignee or grantee to the whole or part of the patent, and not on the basis merely of the assignment of a right to a claim for damages severed from such title. Therefore, if in the present case no such assignment or grant has been made by the defendants as the statute contemplates, they could not bring suit in their own name under the assignment made to them to recover any claims, profits, or damages for infringement which belonged to Gordon, nor could they use the assignment as a defense against any such claims existing against themselves in favor of Gordon. In this case there has been no assignment executed by Gordon. The right claimed for defendants rests, therefore, wholly on the transfer by operation of law."

He then cites *Stephens v. Cady*, and *Stevens v. Gladding*, above quoted, and *Ashcrop v. Walworth*, Fed. Cas. No. 580, where it was held that the title of an insolvent debtor to or his interest in a patent does not pass to his assignee in insolvency by an assignment of his property made by a judge under the insolvency law of Massachusetts. This decision was made on the ground that the assignee in insolvency acquired no title because the conveyance was not such an one as was contemplated by section 11 of the act of 1836, c. 357, 5 Stat. 121, namely, the written instrument signed by the owner of the patent and duly recorded.

In *Gayler v. Wilder*, 10 How. 478, 13 L. Ed. 504, Chief Justice Taney, in delivering the opinion of the court, says:

"The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of common law. It is created by the act of Congress, and no rights can be acquired in it unless authorized by the statute in the manner the statute prescribes."

Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942, reviews most of the cases above cited, and the effect of the decision is that an assignee in insolvency or a receiver appointed under the laws of the state does not by virtue of the assignment or appointment, merely, without any conveyance made by the patentee, or specifically ordered by the court, acquire a title in patent rights, and that in such cases it would be necessary for the court to compel a transfer in conformity with the requirements of the statute in order to vest a complete title to the property, and concludes:

"Both defendants in the case at bar are before the court and have filed answers. The debtor's interest in the patent rights is property assignable by him, and which cannot be taken on execution at law. The case is thus brought directly within the opinion delivered by Mr. Justice Nelson in *Stephens v. Cady*, of the soundness of which we entertain no doubt. The clause of the decree below appointing a trustee to execute an assignment if the patentee should not himself execute one as directed by the decree has not been objected to in argument, and is clearly within the chancery powers of the court as defined in the statute of Maryland of 1785, which is in force in the District of Columbia."

In *Jewett v. Atwood Suspender Company (C. C.)* 100 Fed. 647, the suit was brought upon letters patent issued to Clough, who had assigned in writing to Beaman Bros. Beaman Bros. were adjudged in-

solvents, and the court had appointed one Stone assignee. The court says:

"The defendant relies upon the insufficiency of this assignment from the assignee to convey title. No other title is alleged. Of course, the plaintiff cannot maintain the action without having the title at the time of infringement, and the right to maintain the action depends upon the sufficiency of this title. The allegations follow the state statutes in alleging this title. They provide that the judge of the court of insolvency should assign and convey to the assignee the estate, real and personal, of the debtor, and that the assignment shall vest in the assignee all the property of the debtor, real and personal, that he could have lawfully sold, assigned, or conveyed, or which might be taken on execution. The patent does not confer even the right to this invention; the inventor had that before. It is merely an incorporeal right to exclude others from using the invention throughout the United States, conferred by the government in compliance with certain requirements, and is transferable only according to the laws of its creation, which the state statute cannot affect. This is a personal right. Section 4898, Rev. St. Patents can be reached under the bankrupt law because they are wholly subject to the laws of the United States. They cannot be reached otherwise for debts, except by voluntary proceedings to compel a personal assignment. Here is no voluntary assignment from the Beaman Bros., the assignee of the patent, nor any compulsory assignment from them or proceedings for compelling such an assignment; so the plaintiff does not appear to have had any patent to infringe."

The bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) is a recognition of the general law that no title passes except by voluntary or compulsory assignment from the patentee, for it expressly provides that the trustee shall have whatever title the bankrupt had in any patent or patent right or right of action thereunder at the date on which he was adjudged bankrupt. The bankrupt act of 1867, c. 176, 14 Stat. 517, excepted from the corresponding transfer of property which was provided for by that law all patents and other property held in trust by the bankrupt. Under the law of 1867 the title to the patent passed to the assignee in bankruptcy, subject to his election. Walker on Patents, § 290, says:

"Corresponding proceedings in insolvency under the state laws do not have the operation of bankruptcy proceedings in this particular. They do not confer upon the assignee in insolvency any legal title to the patent rights of the insolvent, but a state court which has jurisdiction of such proceedings may compel the insolvent to execute such an assignment to the assignee in insolvency as will convey the same rights to the latter as those which, without such a document, are conveyed to a trustee in bankruptcy under the bankrupt act of 1898 for a state may subject patent rights of an insolvent citizen to the payment of his debts."

And the same writer, in section 155, says:

"The reason why the state may regulate the sale of the patented thing, and may not regulate the sale of the patent covering that thing, is explainable as follows: A patentee has two kinds of rights in his invention; he has a right to make, use, and sell specimens of the invented thing, and he has a right to prevent all other persons from doing either of those acts. The first of these rights is wholly independent of the patent laws, while the second exists by virtue of those laws alone. The patentee, therefore, holds the first of these rights subject to the police powers and the taxing powers of the state, and to the law regulating common carriers, while the second, being the creation of the laws of Congress, is wholly beyond state control or interference by anti-trust laws or otherwise."

And in section 156:

"A court of equity may, in pursuance of its powers in such cases, decree that the debtor patentee pay the judgment upon which the bill is based, or, in default thereof, that his patent right be sold under the direction of the court, and an assignment thereof be executed by him, and, in default of his executing such an assignment, that some suitable person be appointed to proceed to execute the same in his place, or that the master in chancery of the courts perform that function."

On the subject of partition, which it seems was the object of the proceedings in the state court, Walker says (section 295):

"Partition of a patent right held by tenancy in common law may of course be made by the common consent, and mutual action of all the owners of that right, but no such partition can be made against the will of either owner."

The order appointing the receiver was entered November 19, 1907, and by its terms he is "authorized, required, and commanded to take charge of, manage, and control the same as fully and as effectually as the owners thereof could do in such behalf." He is further required to deposit any revenue received from the patent in some bank subject to the further order of the court. The bill in this case, filed in March, 1908, alleges an infringement for more than two years last past. If it should be held that the appointment of the receiver was equivalent to an assignment of the patent, it is doubtful that that would carry with it a transfer of the right to damages for an infringement committed before such assignment. No statute of the state of South Carolina has been brought to my attention defining the duties of receivers, but it may be assumed that all of the actual, visible property of parties to a suit within its jurisdiction may be vested by a court in a receiver appointed by it; but as the jurisdiction of such court is limited by the lines of the state, it does not follow that an incorporeal right, such as that of a patent, which owes its existence to the laws of the United States and extends to all the states, is vested in such receiver. The right to this patent is in the five persons named, and the statute prescribes the method of devolution. It seems to me clear, therefore, that the mere appointment of a receiver does not in itself vest in him the title to the patent which will enable him to maintain a suit for infringement. A state court having jurisdiction of the parties may compel them to execute an assignment to the receiver, and as it seems plain that at least three of the owners of the patent are desirous that the receiver be clothed with the necessary power to conduct this suit, and apparently it is to the interest of all, the bill will be held to enable the parties to execute the necessary assignment, and, in the event that any of the parties decline to execute such an assignment, such reasonable time will be given as may enable the parties interested to apply to the state court for such orders as may be necessary to compel the needful assignments.

JOHNS-PRATT CO. v. SACHS CO. et al.

(Circuit Court, D. Connecticut. March 12, 1909.)

No. 1,241.

PATENTS (§ 328*)—INFRINGEMENT—SAFETY FUSE.

The Sachs patent No. 660,341, for an electrical safety fuse, construed, and *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

See, also, 155 Fed. 129.

Wetmore & Jenner, for complainant.

Bartlett, Brownell & Mitchell, for defendants.

PLATT, District Judge. This is the usual patent suit, based on letters patent to Joseph Sachs, No. 660,341, for an improvement in safety fuses. The defense is noninfringement. All the claims are involved, but it is enough to quote the first one:

"(1) A safety fuse comprising a case and a filling of nonconducting material, and a fuse strip therein of thin flat metal of extended area, substantially as and for the purposes set forth."

We must at the beginning settle the principle upon which we shall examine the patent, because of the story surrounding it.

Mr. Sachs, the patentee, was employed by the complainant when he applied for and obtained this and other patents at its expense. The contract under which he worked persuades one that he is a man of capacity and genius. He sold the patent in suit, with others, to the complainant for value. Thereafter he was discharged from the service of complainant, and organized the defendant corporation. The complainant alleges that safety fuses made and sold by said defendant corporation come within the monopoly transferred to it by the sale of said patent.

The statutes permit the person who has invented a new and useful thing to obtain a monopoly thereof for a specified length of time, after making such a clear exposure of his invention as to enable those skilled in the art to use it. If he sells to another for value his evidence of title in that monopoly, and then invades it, he cannot be heard to say that he did not invent a new and useful thing. Others may do so, but he may not. On the other hand, when charged with such invasion, it is of the first importance to find out what the invention was that he disclosed and meant to claim, and what the government intended him to monopolize.

So understanding the law, it strikes me as proper to examine the proceedings about the patent from the time of the application therefor until the grant, and to study the prior art, if it be necessary, in so far as it may be of service in learning what the new thing was that the patentee invented. Taking up, then, the file wrapper and contents, we find that the patentee in his disclosures has given us a pret-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ty extensive résumé of the prior art relating to safety fuses, but he particularly calls attention to wires which had been inclosed in a tubular case and surrounded with a filling material, and is quite reticent about flat strips which had been similarly treated. Flat strips, however, had been so treated, and the patentee knew it, because he had used them himself. (See claim 1, patent 522,232.) The flat strips formerly used, however, had been heavy, and it was necessary to cut them nearly in two at one point in order to insure a quick break when the fuse was overloaded with electric current. Now, what the patentee was after was to avoid "hanging," which means that, when the metal of the fuse is melted by excess heat due to an overload of electric current, the melted particles must be at once dissipated and diffused to such an extent as that the current cannot avail itself of the disorganized mass and thereby leap over beyond the break. Pretty much every possible expedient to eliminate this deadly hanging quality had been tried in the art, and when strips had been used they had been made thick and heavy, but attenuated at the crucial point, as before suggested. The patentee's idea was to put in a very thin strip with a reasonable width, so that, when the excess current furnished heat enough to melt it, the whole strip would be melted and the particles instantly dispersed into the surrounding filling, thereby leaving no disorganized coagulated mass for the electrical current to utilize. The words used in his disclosures and all the arguments addressed to the examiners emphasize the idea of thinness and appreciable area. That is where the novelty lies, beyond peradventure.

Thus it appears that the novelty of the thing resided in the use of a thin flat strip of appreciable area, which by reason of such construction would be endowed with the nonhanging function. That such a novel strip is patentable has been decided in the Incandescent Lamp Case, 52 Fed. 309, 3 C. C. A. 83. There a rod was reduced to a filament, and it was held that such a change in dimension produced a new result, and was therefore a difference in kind rather than degree.

Having found the invention, it is obvious that the claims must be construed in accordance therewith. When we examine the defendant's device in the light of the knowledge we now have, it is manifest that although it may be read upon the language of the claim, unexplained by the matters referred to and others, it in no sense responds to the actual invention which the claim covers. It contains, in a combination of which all the other elements are old, nothing more or less than the attenuated thick flat strip of the prior art.

During my illness two years ago a preliminary injunction was denied in this suit. *Johns-Pratt Co. v. Sachs Co.* (C. C.) 155 Fed. 129. Since then many experiments and tests have been indulged in by both parties, but I cannot see that they throw very much light upon the central thought which struck Judge Martin at the threshold, as it strikes me now at the end. At the hearing on preliminary injunction the complainant seems to have taken the same position which it takes now. Judge Martin, quoting evidently from complainant's brief, says:

"Complainant asserts that * * * the novelty consists in uniting a wide thin strip with the filling so it will completely envelop the fuse, and thus best

utilize the properties of the ready fusibility and the quick dispersion of the heat of the strip when melted."

The trouble with complainant, then and now, is that it has overlooked the Mordey patent No. 622,511, which was cited against Sachs in the Patent Office. That patent shows all the elements of the patent in suit, combined in the same way and for the same purpose, except that the Mordey strip is not the "thin strip of extended area" of the patent in suit. Nobody had discovered such a strip as Sachs disclosed. He satisfied the Patent Office that the finding of that kind of a strip containing the qualities and uses which it contained was an inventive act. It was not an easy matter to satisfy the office in that respect. He argued it out to one obstinate examiner, and then lost him. He was forced to convince a new doubter. Much of his argument is left to our imagination, but enough remains to demonstrate its cogency. The writer is assured that he knows what the patent means, and, reading the claims as they must be read, the defendant does not infringe.

While the application for the patent in suit was pending, the complainant, under the management of Mr. Sachs, was marketing safety fuses, which had as one of the elements of their combination a flat strip of some thickness, but attenuated at the crucial point so as to expedite quick breaking under extra electrical load and prevent hanging. Nothing in the disclosures, either verbal or pictorial, of the patent hints at such a construction. Such omission is strongly suggestive of the working of the patentee's mind at the time. The very thing made then by complainant is still made by it, and by many others as well as by defendant, and is the identical construction which is said to infringe.

Let the bill be dismissed.

L. H. GILMER CO. v. GEISEL.

(Circuit Court, E. D. Pennsylvania. March 9, 1909.)

PATENTS (§ 289*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION— LACHES.

A preliminary injunction will not be granted restraining a defendant from the manufacture and sale of an article alleged to infringe a patent, where the patentee, with knowledge that such article was being made and sold by defendant, delayed several years before bringing suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 468; Dec. Dig. § 289.*

Laches as a defense in suits for infringement, see notes to Taylor v. Sawyer Spindle Co., 22 C. C. A. 211; Richardson v. D. M. Osborne & Co., 36 C. C. A. 613.]

In Equity. On motion for preliminary injunction.

R. W. Barrett and T. R. White, for complainant.

Frederick J. Knaus, for defendant.

J. B. McPHERSON, District Judge. In my opinion the patentee's delay in asserting his rights under the patent in suit furnishes a suf-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ficient reason for refusing relief by preliminary injunction. During several years he has known that the respondent was making the belts that are now complained of, but he took no steps to prevent the manufacture until a few weeks ago, when the business rivalry became objectionable for the first time. Having waited thus long, I think he and the complainant company may properly be asked to wait for several months longer, until the case can be prepared for final hearing. Moreover, as the respondent justifies under a subsequent patent, which was pending before the office for some time while the examiners were also considering the patent in suit, and was granted without the declaration of an interference, there is apparently the greater need for caution in sanctioning so severe a remedy as a preliminary injunction. The motion is refused.

UNITED STATES v. NATIONAL SURETY CO.

(District Court, E. D. Pennsylvania. March 1, 1909.)

No. 3.

COSTS (§ 184*)—ACTIONS BY UNITED STATES—EXPENSES OF OFFICERS AS WITNESSES.

Rev. St. § 850 (U. S. Comp. St. 1901, p. 655), which provides that "where any clerk or other officer of the United States is sent away from his place of business as a witness for the government his necessary expenses stated in items and sworn to, in going, returning and attendance on the court shall be audited and paid; but no mileage or other compensation in addition to his salary shall in any case be allowed," includes officers in the military service, and when the United States recovers a judgment it is entitled to have included therein as costs the necessary expenses of such witnesses in lieu of mileage and per diem, and it is immaterial whether the distance traveled was more or less than 100 miles.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 184.*]

Appeal from Taxation of Costs.

John C. Swartley, Asst. U. S. Dist. Atty.

William H. Wylie, for defendant.

J. B. McPHERSON, District Judge. In this controversy the government recovered separate verdicts against a contractor and his surety, and presented a bill of costs, to part of which objection is taken by the surety. The items attacked are the detailed expenses of four witnesses, of whom two were called and sworn and the other two were in attendance. The fact that the expenditures were made is not denied, and no objection is made on the ground either that they were not necessary, or that only two of the witnesses were called to testify. It appears without contradiction that each of the witnesses is an officer in the military service of the United States (one having been retired shortly before the trial), and that three of them were obliged to travel more than 100 miles from the respective places where they were stationed to the city of Philadelphia, where the trial took place. The clerk allowed the items in dispute, and the present appeal from his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

decision is based upon two objections, which are thus stated by the appellant:

"Because the defendant has been taxed to the actual expenses of witnesses, including parlor cars, porters, and meals en route.

"Because the defendant has been taxed for mileage in excess of 100 miles from place of trial."

That the actual expenses of clerks from the executive departments at Washington are properly taxable as part of the costs in a civil suit brought and won by the government was expressly decided by the Supreme Court in *United States v. Sanborn*, 135 U. S. 281 et seq., 10 Sup. Ct. 812, 34 L. Ed. 112. It was there held that the allowance of such expenses as part of the costs was provided for by section 850 of the Revised Statutes (U. S. Comp. St. 1901, p. 655):

"When any clerk or other officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid, but no mileage or other compensation in addition to his salary shall in any case be allowed."

The opinion of the court examines the various statutory provisions on the subject of witness fees, and states the ground of the decision as follows (page 285 of 135 U. S., page 817 of 10 Sup. Ct. [34 L. Ed. 112]):

"It is not disputed that the United States, if successful in a suit, is entitled to have included in the judgment the statutory fees for per diem and mileage for its witnesses, other than its officers who may be sent away from their places of business to attend upon the court. And we cannot think it was intended by section 850 to deny to the government the right, when successful in a suit, to have even the necessary expenses of witnesses of the class described in that section included in the judgment for costs; or that the United States intended to remit to its defeated adversary not only witness fees for per diem and mileage, but the necessary expenses of witnesses who happened to be in its employment, and whom it sent away from their place of business to testify in its behalf. As a person of that class receives, while absent, his stipulated salary, and is paid in that way for his time, it is not deemed just that he should also receive mileage and per diem, but instead thereof he is allowed his necessary expenses, which, being audited by or under the direction of the court upon which he attends as a witness, he is entitled to have paid to him; and the government, being under an obligation to pay them, is entitled to have the amount so audited included in its bill of costs, and in any judgment rendered in its favor. In other words, when the government is successful in a suit, the 'necessary expenses' of its witnesses of the class described in section 850, take the place in its bill of costs of the per diem and mileage, which, but for that section, would have been taxed and allowed in its favor, just as a marshal may elect to take his actual traveling expenses instead of mileage where mileage is allowed to him."

From the reasoning of the court it is clear, I think, that military officers of the United States are also included under section 850, and that their necessary expenses are to be taxed in place of the per diem fees and mileage to which they would otherwise be entitled. The Attorney General's Department also has decided, on three occasions at least, that section 850 applies to officers and soldiers in the military service of the government. 15 Op. Atty. Gen. 486; 16 Op. Atty. Gen. 113; Id. 147.

Even if the appellant's position were generally correct, namely, that section 863 (page 661) (when read in connection with section 876 [page 667]) permits, and perhaps requires, the taking of depositions where a witness lives "at a greater distance from the place of trial than 100 miles," and therefore implies that the personal presence of such a witness is to be looked upon with disfavor, thus operating to refuse mileage for more than the specified distance in case he does attend—a position upon which I intimate no opinion—it is clear from the foregoing language of the Supreme Court that such a question cannot arise about the proper mileage to be allowed to a government officer. Mileage as such is not to be computed in his favor at all; he is to be allowed his necessary expenses for travel and maintenance without regard to the actual distance. Whether, therefore, he lives at a greater or less distance than 100 miles from the place of trial, is of no importance.

The appeal is dismissed, and the taxation of the clerk is affirmed.

ROBERTS v. CHICAGO, B. & Q. R. CO.

(Circuit Court, E. D. Missouri, N. D. March 5, 1909.)

No. 489

REMOVAL OF CAUSES (§ 12*)—RIGHT OF REMOVAL—RESTRICTIONS AS TO DISTRICT OF SUIT.

Where an action in a state court against a foreign corporation, commenced in a federal district other than that in which plaintiff resided, was removed on change of venue into such district, the defendant had the right at the first term thereafter to remove the same into the federal court, when the amount involved was such as to give that court jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 12.*]

On Motion to Remand to State Court.

Hart, Tunnell, Bresnehen & West and J. T. Baker, for plaintiff.

Guthrie & Franklin, N. O. Borders, and Geo. A. Mahan, for defendant.

DYER, District Judge. This is a motion to remand to the state court. The conceded facts in the case are these: The plaintiff, Millie Roberts, is and for a long period of years has been a citizen and resident of Linn county, Mo., within the Northern division of this district. The defendant is a foreign corporation organized under the laws of the state of Iowa. The plaintiff instituted this suit in the county of Sullivan, in the Western district of Missouri, in which neither the plaintiff nor the defendant resided. At the term of the circuit court of Sullivan county to which the defendant was required to appear, it did appear and filed an application for a change of venue to some circuit other than the one in which Sullivan county is located. Neither the plaintiff nor the defendant residing in the Western district, no application was made or could be properly made to remove the cause to the federal court. The venue, by order of the judge of the circuit court of Sullivan county, was changed to the county of Macon,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within the Northern division of this district. On the first day of the term of the circuit court of Macon county, held at La Plata, Mo., the defendant appeared and filed its application for removal to the federal court, and the removal was ordered. The plaintiff now comes and moves to remand this cause to the circuit court of Macon county, and the grounds set forth in the motion to remand are as follows:

"(1) Because the case was originally brought in Sullivan county, in the Western district. (2) Because it was brought to the October term, and was triable at said term, and the defendant appeared by filing application for change of venue, and did not file its petition for removal until the 23d day of November. (3) Because the said petition was not filed before the defendant was required to plead. (4) Because the defendant, by filing its application for change of venue, submits itself to the jurisdiction of the state courts."

The defendant could not, from the facts stated, have sustained an application for the removal of the cause to the United States Circuit Court for the Western District of Missouri from Sullivan county, for the reason that neither it nor the plaintiff was a resident of that district. The first opportunity that would make an application to remove available was embraced by the defendant when the case was reached in the circuit court of Macon county, Mo. Whether the suit was originally brought in Sullivan county for the purpose of avoiding federal jurisdiction is not necessary to consider now. Certain it is that the defendant had a right to remove from a state court to the federal court this particular action, provided the plaintiff was a resident of the district. The plaintiff is a resident of the Northern division of this district, and the defendant is a citizen of another state. If this case had been originally brought in either Linn or Macon counties, there could be no question as to the right of the nonresident defendant to remove to the federal court. The circuit court of Macon county having by proper process obtained jurisdiction of the case, it was then for the first time that defendant could properly ask for a removal. The law gives a citizen of another state the right to remove a case from the state to the federal court, when the plaintiff is a citizen of the state and a resident of the district in which the suit is brought. This right of removal cannot be abridged or denied.

The motion to remand is denied.

ST. LOUIS & S. F. R. CO. v. HADLEY, Atty. Gen., et al. (and seventeen other cases).

(Circuit Court, W. D. Missouri, March 8, 1909. Supplemental Opinion, April 17, 1909.)

Nos. 2,988-3,004, 3,006.

1. COURTS (§ 489*)—FEDERAL COURTS—CONCURRENT JURISDICTION—COMITY.

The federal courts should not decline on the ground of comity to take jurisdiction of a suit in equity involving rights under the Constitution of the United States, where its determination depends upon questions of fact, since, if brought in a state court, the case can only be reviewed by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Supreme Court of the United States on writ of error, where findings of fact made by the state court are conclusive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324–1341; Dec. Dig. § 489.*]

2. COMMERCE (§ 61*)—MEANS OF REGULATION—CONSTITUTIONALITY OF STATE STATUTE REGULATING RATES—INTERSTATE COMMERCE.

State statutes fixing maximum fares and rates on shipments on railroads between points within the state are not unconstitutional, as regulations of interstate commerce, because of the fact that between certain cities in the state there are lines of road lying wholly within the state, and other lines which run in part through another state, and by long-established custom and from the necessities of competition the latter are compelled to make the same rates as the former, where the statutes have not been construed by the courts of the state to directly apply to the interstate lines.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 61.*]

3. CARRIERS (§ 12*)—STATE REGULATION OF RATES—VALIDITY OF STATUTE.

It is not a ground for holding state statutes fixing maximum railroad rates invalid that they have been the cause of the discharge of a large number of railroad employes.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

4. CARRIERS (§ 12*)—STATE REGULATION OF RATES—VALIDITY OF STATUTE.

The fact that state statutes fixing railroad rates are not enforceable as to particular railroads, because the rates as applied to such roads are not compensatory, does not render them invalid as to other roads.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

5. CARRIERS (§ 12*)—STATE REGULATION OF RATES—VALIDITY OF STATUTE—REASONABLENESS OF RATES.

In determining the reasonableness of freight and passenger rates established by a state on intrastate railroad traffic, as applied to a railroad during both interstate and intrastate business, the difference in the cost of handling each kind of business as related to the earnings from each should be taken into account, and in apportioning the total expenses between the two kinds of business the most logical and satisfactory method is to make the division on the basis of the relative earnings from each kind and class of business.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

6. CONSTITUTIONAL LAW (§ 47*)—DETERMINATION OF VALIDITY—STATE REGULATION OF RATES—VALIDITY OF STATUTE.

In the determination by a court of the constitutionality and validity of railroad rate statutes of a state, the question of the consideration given to the subject by the Legislature before their passage is wholly immaterial.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 47.*]

7. CARRIERS (§ 26*)—STATE REGULATION OF RATES—REASONABLENESS OF RATES—STATE AND INTERSTATE BUSINESS.

In determining whether a state statute regulating railroad rates is confiscatory with respect to a given railroad company doing both interstate and intrastate business, the only question is whether its earnings under such rates from its intrastate business, after deducting the expenses properly chargeable thereto, are remunerative, taking its property within the state at a fair valuation, and its earnings from interstate or outside business are immaterial.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 26.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. CARRIERS (§ 12*)—STATE REGULATION OF RATES—VALIDITY OF STATUTE—REASONABLENESS OF RATES.

Railroad property, properly built and properly managed, is entitled to earn an annual income of 6 per cent. on its fair valuation, and a statute fixing rates under which it cannot make such income is confiscatory and unconstitutional.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

9. CARRIERS (§ 12*)—STATE REGULATION OF RATES—VALIDITY OF MISSOURI STATUTES.

Act Mo. Feb. 27, 1907 (Laws 1907, p. 170), establishing two cent passenger fares on railroads within the state, and Act March 19, 1907 (Laws 1907, p. 171), establishing maximum freight rates, held confiscatory and unconstitutional on evidence showing that none of the railroads doing business thereunder can earn to exceed 3 per cent. net income on its state business under such rates, while as to some the business must be done at a loss.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

10. COSTS (§ 60*)—DISCRETION OF COURT IN EQUITY—DIVISION OF COSTS.

In an equity suit the award of costs is discretionary, and where, through the faults of both parties, an unnecessarily large and expensive record has been made, the costs will be divided as seems equitable.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 264; Dec. Dig. § 60.*]

11. CONSTITUTIONAL LAW (§ 55*)—STATUTES (§ 64*)—STATE REGULATION OF RATES—VALIDITY OF STATUTE—EXCESSIVE PENALTIES.

The penalty provision of the Missouri two-cent passenger fare statute of February 27, 1907 (Laws 1907, p. 170), which imposes a fine for each violation of not less than \$100 nor more than \$500, and that of the freight rate statute of March 19, 1907 (Laws 1907, p. 171), which imposes a fine for its violation of not more than \$5,000, are both void because of the excessive penalties provided, as an indirect attempt to preclude the railroad companies from litigating in the courts the question of the reasonableness of the rates, which is a judicial question; but, such provision in each case being separable from the remainder of the statute, its invalidity does not render the other provisions invalid.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 55;* Statutes, Cent. Dig. § 58; Dec. Dig. § 64.*]

See, also, 155 Fed. 220; 161 Fed. 419.

Prior to the argument, the court requested counsel on both sides to submit requests for findings of fact. Complainants' counsel did this. Defendants' counsel have not done so. Complainants' requests have been considered, some of which are embodied within the following findings, and some are not.

The following are the findings of fact that the court makes as based upon the evidence herein:

(1) The complainants are the 18 railroad companies owning and operating lines of railroad in Missouri, they doing all of the state and interstate railroad business therein, and all of them except the St. Louis & Hannibal Company having lines of railroad both within and without the state. That company is wholly within the state, extending from Hannibal, Mo., to the south 120.61 miles. The Kansas City, Clinton & Springfield Company is a road of about 160 miles in length, with 151.01 miles in the state. All the other companies have lines extending into a number of other states, one of them extending into 13 other states and territories. These roads, with their own lines and with their connecting carriers, carry all the traffic and do all the business, freight and passenger, within the state, whether of state or interstate character. The intrastate business is at all times herein referred to as "state business." That part of the interstate business which neither originates within, nor has its destination within, but passes across the state of Missouri, is called "trans-state business."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(2) The same roadbed, locomotives, cars, and trains, including all facilities, are used for both classes of business, state and interstate. It is not practicable to conduct the business in any other way. This is so both from the standpoint of the public and that of the companies. If state business were to be carried alone upon some cars and trains, and interstate alone upon others, the expenses would be enormously increased, and almost if not quite prohibitive, while the public would be subjected to delays, inconveniences, and great expense. By reason of all this the business cannot practicably be separated.

(3) Both from a geographical and railway standpoint, Missouri is situated differently from the other states of the Union, there only being two or three other states that have a resemblance to it in these particulars, and each of them in a lesser degree. This is so because the Mississippi is its boundary on the east all the distance. From a railroad standpoint, the Missouri river is its boundary line on the west, although physically the Missouri river is only the western boundary line from the northwest corner of the state about halfway to the southwest corner. But at the halfway point, namely, Kansas City, the river turns directly to the east, and continues its way to the Mississippi river. In its production, business, and commerce all that part of Missouri to the north of the Missouri river is practically like the south half of Iowa, the country districts producing large quantities of live stock and grain for the market, as well as much bituminous coal. The south half of Missouri is entirely different. The amount of grain and live stock is much less than in the north half of the state. But the south half has a large amount of timber, stone, lime, lead, zinc, iron, and fruits. St. Louis on the east is a city of nearly 1,000,000 people, Kansas City on the west nearly half as many, while St. Joseph has more than 125,000 people. These three cities carry on large manufacturing interests. The grain, live stock, and packing-house interests at Kansas City and St. Joseph are enormous. For a third of a century or more, for reasons which need not be repeated, rates from the East were fixed to the Mississippi river, and, later on, from thence to the Missouri river. The interstate rates either in or out were the one plus the other. It was the same from the West. It was likewise the same for the transstate business going in either direction. Such is the method existing to-day. This brought about the fact, which for years has existed and exists to-day, that the short line of road between the two rivers fixes the freight rates. To illustrate, the Burlington Road is the short line between the rivers, being 198 miles from Hannibal to St. Joseph, and the same distance, within a few miles, to Kansas City. The roads between Kansas City and St. Louis—and there are four, at least, of them—including the Burlington, is an average distance of nearly 300 miles, but some of the roads being 50 miles or more farther between the points than the others. This brings about the fact that all freight rates between any one point on the one river and any point on the other river are the same as the rate from Hannibal to St. Joseph over the Burlington Line. That is to say, the freight rates on any road, regardless of distance, are the same between St. Louis and either Kansas City or St. Joseph that they are between Hannibal and St. Joseph over the Burlington Line. This has given the three cities of St. Louis, Kansas City, and St. Joseph great advantages over other points. Competent persons say that to change this system will work irreparable harm to the three cities named, as well as to all other places within the state, by driving both the jobbing and manufacturing business to seaboard points. As to this, no finding is made nor opinion expressed, because it is believed to be a matter of policy upon which this court in these cases should express no opinion. As to the passenger rates, by reason of competition the fare is the same between Kansas City and St. Louis, the shorter line fixing the rates, thereby compelling the longer road to be at much expense without remuneration. This is likewise true as to all competitive points.

As to the foregoing question of rates and fares, there is no United States statute governing the same, and there is no Missouri statute upon the subject except the two statutes questioned by the bills, one dealing with certain commodities per car per distance, and the other fixing the passenger fares at two cents. Aside from these two statutes, and as to any bearing they have as to charges between the two rivers, the conditions named have been brought

about and exist to-day by reason of a long-time custom, and by reason of transportation, actual and probable, upon the two rivers.

Still further bearing on the question are the following facts: Joplin is a city in the southwestern part of the state, of more than 25,000 people. There are a number of towns adjacent thereto, giving that county (Jasper) a population of 200,000 people. It is a very large mining district of lead and zinc. Between Kansas City and Joplin three of complainants herein have railroads. The Missouri Pacific at all points between the said places is within the state. Each of the other two between said points is partly without the state, starting within and going out and coming back, thereby making it interstate business as to two of the roads between Kansas City and the Joplin district. Between Kansas City and St. Joseph, four roads do the business. The Missouri Pacific and Chicago Great Western is each part of the distance within the state of Kansas, while the Burlington and St. Joseph & Grand Island Company is each wholly within the state of Missouri between the two cities. Between St. Joseph and St. Louis two of complainants do practically all the business, which is very large in both passenger and freight. These are the Burlington and Missouri Pacific. Between said cities the Burlington Line is wholly within the state. But the Missouri Pacific line is partly within the state of Kansas, crossing the Missouri river at Atchison, and coming back into the state at Kansas City. On the foregoing facts the finding is that the short line between two competitive points necessarily fixes the rate, and the Missouri statutory rates under the statutes in question fix the rates between the cities named. But this is so solely because of the geographical location of cities and railroads, and competition, and long-time custom. It is not so either because of a statute or any judicial determination by any of the courts of Missouri.

(4) Pending this litigation, each of the complainant companies made and delivered to defendants statements showing the earnings and expenses for certain periods, which statements have been taken by both sides as sufficiently illustrative of the situation for the determination of these cases. The companies extended to the state officers, defendants herein, acting by experts by them selected, the opportunity to examine the statements and the books, papers, vouchers, and records of the companies. The freight rate statute of 1907 (Laws 1907, p. 170) as to commodities mentioned allowed greater rates than did the statute of 1905 (Laws 1905, p. 102 [Ann. St. 1906, § 1194]), assailed by the original bills of complaint herein, and it was conceded at the trial that, if the rates fixed by the act of 1907 were confiscatory, those fixed by the act of 1905 were likewise.

(5) The parties were producing evidence and preparing their evidence for about one year with the aid of experts on each side. These experts were all men of high character and great proficiency as railroad accountants. The experts on each side were given the fullest opportunity and all the time desired to obtain the information and put the same in form in exhibits, schedules, and reports, all of which are in evidence in the cases, supplemented by the oral testimony of each of the experts with reference to all of these things.

(6) It was conceded by the experts that the companies fairly, accurately, and honestly kept their books showing the facts in these findings set forth. The experts of the state and of the companies have thereby been enabled to present with certainty and precision all the earnings within the state, both state and interstate business. But obtaining and compiling this information by the experts has been at great expense of time and money. One exception to the foregoing is to be noted as to passenger fares for a short period of time after the two-cent fare law became operative. By agreement of both sides in open court in June, 1907, this court issued a temporary writ of injunction against the enforcement of the freight rate statute. The complainants asked for a temporary injunction against the enforcement of the two-cent passenger fare statute. This court held that the statute should be given a trial for five months and ascertain the result by actual operation. In preparing the order, counsel, no doubt by inadvertence, fixed three months as the period for trial as to results. But by acquiescence of both sides, or, if not, by delays with which the court was not chargeable, such status remained for more than one year, and the cases were not actually brought on for trial until in November,

1908. But after the statute became operative in June, 1907, and this court denied the temporary writ of injunction, the interstate passenger rates remained as they were for a period of about two months. During the time that condition prevailed, parties both coming into and going out of Missouri on interstate journeys would buy tickets to the state line, thereby obtaining the benefit of the two-cent fare for all distance within the state. It was not possible for the companies to show the truth as to the number of such trips, and therefore it is not possible for the court to find just how much of the earnings were on account of such interstate trips. But the extent, whatever it was, would make an erroneous showing as to state earnings, though favorable to defendants, because such earnings were of an interstate character. But even though for the short time a part of the business was thus carried on so that additional earnings were erroneously placed to the credit of the state, still the results are not changed, for the error was against, and not in favor of, complainants.

Freight earnings, both state and interstate, are made up from earnings of transportation and another item called "miscellaneous freight," composed of switching, demurrage, and storage charges, and track and equipment rentals. Passenger earnings are made up of passenger fares and miscellaneous, the latter covering mail, express, excess baggage, storage, rentals, and possibly some other terminal earnings.

No difference of consequence has arisen between the parties as to the expense of doing the entire business in the state. With reasonable certainty the expenses for doing the freight and passenger, including miscellaneous of each, can be and have been separated.

The earnings are known and fixed, and in these findings stated to a certainty. But as to the expenses as between state and interstate business, there has been a controversy, and such is the principal controversy in the cases. There is no known fixed or certain rule for determining how this separation of expenses shall be made. The same cannot be made with mathematical certainty. Complainants claim that the division should be made upon the revenue basis; defendants claim that it should be made upon the ton mile basis for freight, and passenger mile basis for passengers, classifying the miscellaneous earnings as and with freight and passenger earnings respectively. By the revenue basis is meant to assign such proportion of the total expense in the state on that class of business as the earnings of that class of state business bear to all the earnings, state and interstate, from the same class, or, which is the same thing, ascertain what the percentage of all expenses is of all earnings, then multiply that by the state earnings of any class, and thus obtain the sum to be assigned as state expense. The ton mile basis as to freight means the assignment as state freight expenses of any class of business such proportion of all state expense as the number of ton miles of state freight bears to the total ton miles of all freight hauled within the state. By the passenger mile basis is meant the assignment as state passenger expenses such proportion of all passenger expenses as the number of passengers in state business carried one mile bears to the whole number of passengers, state and interstate, carried one mile.

For reasons stated in an opinion herein filed, the revenue basis has been and is adopted as the only logical basis to use in arriving at a correct conclusion. The one basis or the other as a whole must be adopted. Either side can make a better showing by adopting the one basis in part of the accounting, and the other basis for the other. Neither should be and is allowed to do this. As will presently appear, the state has attempted to do this in making its passenger earnings accountings.

(7) Each basis for accounting has some defects, but they are minor and not controlling, and do not change the result if the revenue basis is taken.

The expense of doing the state business over interstate is greater for carrying freight by at least 50 per cent., and at least 25 per cent. for carrying passengers. Therefore this extra cost must be added to the expenses after they have been ascertained so as to obtain the total expense. If the ton mile basis of division were adopted, the extra cost should also be added. This would require the use of another multiplier sufficient to bring the sum total of the state freight expense equal to that found herein, to actually represent

the cost as shown by the evidence. Any apportionment of passenger expense upon the passenger mile basis would be unfair and unjust, although much more favorable to the companies than if made upon the revenue basis.

(8) All things considered, the evidence shows the cost of doing the different classes of state business as between state and interstate apportioned upon the revenue basis with added extra cost brings a result in these findings stated which is fair and representative and just. The court finds, aside from the revenue basis, that the evidence shows the amount ascertained in each case as the expense and extra cost is fair, and justly represents the expense of doing each class of state business. The extra cost as to each complainant for doing the state business over interstate is more than 50 per cent. in case of freight, and more than 25 per cent. in case of passenger. This extra expense as thus found is considerably in excess of these figures, and the figures used are adopted as the minimum. The sum total of this extra cost, if ascertained according to the ton mile theory, would not be changed, because it is a question of multiplication, and one multiplier or another must be used accordingly as the theory is adopted. The findings herein made on all the evidence represent in dollars the fair cost and expense fixed at a minimum. There has also been considered and found in each case such sum as would equal the diminution of earnings upon the commodities covered by the freight rate statutes of 1905 and 1907, if the rates thus fixed had been charged, as there would have been but for the temporary injunctions herein issued.

(9) The evidence shows that each of complainants has regularly paid for many years' interest on its bonds. There is no evidence to show that any of the railroad property within the state of Missouri has an undue amount of bonds or is unfairly bonded, and the evidence does not show that any of the bonds provide for interest in any sum greater than such bonds should carry. It does show that most of the bonds are at the lowest rates of interest, and much less than the legal rate allowable in Missouri. In thus referring to interest, the St. Louis & Hannibal and Kansas City, Clinton & Springfield companies are excepted.

(10) After the adoption of the two-cent fare statute, there was no substantial increase in travel. For a few weeks there was a small increase largely brought about by interstate passengers buying tickets to state lines, and in part by the novelty. What, if any, increase of travel occurred by reason of said two-cent fare, would be a mere approximation. It has not been substantial, and there is no reason to believe that any such increase will be brought about in the future by a two-cent fare.

(11) The values of the railroad properties in the state of Missouri are found, in the cases tried, to be as follows:

	Miles.	Value.	Value Per Mile.
St. Louis & San Francisco.....	1638.89	\$61,238,414 70	\$36,259 00
Atchison, Topeka & Santa Fé.....	348.31	15,091,212 00	43,326 00
Chicago, Rock Island & Pacific.....	615.48	19,102,507 59	37,058 00
Kansas City Southern.....	174.48	8,039,084 40	46,075 00
St. Louis & Hannibal.....	120.61	1,143,077 02	9,477 00
Missouri, Kansas & Texas.....	506.21	20,894,229 93	41,276 00
Chicago, Burlington & Quincy.....	1136.34	53,172,907 83	46,793 00
Kan. City, Clinton & Springf'd.....	151.01	2,380,222 48	15,762 00
Chicago Great Western.....	84.43	3,605,236 38	42,701 00

With the exceptions hereinafter stated, the above valuations of the properties of said nine companies as fixed are in fact practically the same as those fixed by the state assessing board for the purpose of taxation. But aside and apart from the valuations thus fixed by the state board, these findings are that upon the whole evidence said properties are at least of the values above fixed. The evidence shows that included in such sums the state board, after making certain valuations under the heading of "All Other Property" fixed certain valuations, which when added give the totals as above. In argument

it was contended that "All Other Property" included franchise values. This is not deemed important, because it is difficult to see wherein steam railroad properties, like those involved, can have a franchise value. But waiving that, any franchise value that the state board could have considered was necessarily so small a per cent. of the total valuations fixed by the state board as to make no appreciable difference in the result of these cases, because, if altogether admitted, the remaining value is such that no road could obtain a return to which it is herein found to be entitled. But if the property has a franchise value for taxation, it also has such valuation as an earning power, or, rather, upon which returns should be made. In fixing the valuations above set forth, there have been considered the immense terminal values of most of the roads, the amount of stock and bonds outstanding, what it would cost to duplicate the properties both with and without terminals in the large cities, and all the evidence bearing on present values, and in fixing said valuations the sums found are the minimum valuations, the properties being worth at least the sums thus fixed.

The foregoing valuations are the same as fixed by the state assessing boards except as to the property of the St. Louis & Hannibal and of the Kansas City, Clinton & Springfield in the state, which are found to be worth 66% per cent. of the valuations of the state boards.

(12) The interest obligations, except as already stated, are just and reasonable, and should be paid in full, with some dividends to the stockholders in addition. However, and entirely aside from the question of interest, the rates and earnings should in any event be such as to produce a fair return upon the valuations hereinbefore fixed. And such earnings should be on the property within the state as would be equivalent to 6 per cent. per annum, that per cent. being a fair return upon such valuations.

(13) About the same time the two-cent fare statute became operative, passes and other forms of reduced and free transportation were abolished. Since that time they have not been given nor used except in cases of employes actually employed. The passenger earnings were thereby increased, but such increase was not more than approximately 1 per cent.

(14) After the arguments were concluded, at the request of the court, and with the consent of the parties, two experts upon each side, two selected by the railways and two by the defendants, worked with the court for something more than one week. These experts were the same gentlemen representing their respective sides who had done much of the work in preparing the cases for the respective sides for hearing. The court requested these experts to take the numerous tables and tabulate them already in evidence, and to confine themselves wholly to that which had been introduced in evidence in the cases, and to make therefrom a new table for each of the nine cases, showing the earnings and the expenses chargeable to each class of earnings according to the respective theories covered by counsel in the arguments. The court further requested said four experts, after preparing said new tables, that if they agreed, to affix their signatures thereto. This they did below a certificate reciting that the statement of earnings, operating expenses, etc., as to each particular road for the time therein given, correctly shows the results on the various assumptions set forth therein. Said nine statements were by order of this court, February 20, 1909, ordered filed and made of record in the cases. The said nine statements are now and here referred to, and are made part hereof. Each of said nine statements is found by the court to be correct upon the respective theories presented. But the theory entitled as the "state's basis" is rejected for the reason that said statement improperly divides miscellaneous earnings, placing an undue proportion to the benefit of the state. And said basis improperly makes a division of expense upon the ton mile and passenger mile basis, and does not allow a sufficient amount as extra cost of doing state business, and the same does not allow enough for the value of the property, in that it deducts all sums included "All Other Property" multiplied by three.

If the companies had been permitted to charge the amounts per passenger per mile which they did charge and receive prior to the two-cent passenger fare statute, they would have received, in addition to that which they did receive by reason of the statute, and by reason of the temporary injunction being denied, for earnings within the state for a period of 12 months last

preceding the submission of the cases, the following sums (interstate, however, not controlled by statute, but by changed conditions):

Name of Road.	State Passengers	Interstate Passengers.
St. L. & S. F. R. R.....	\$666,008 72	\$509,730 63
A., T. & S. F. R. R.....	30,885 52	66,271 03
C., R. I. & P. Ry. and St. L., K. C. & C. Ry.....	124,469 14	111,178 60
K. C. So. Ry.....	7,044 49	27,260 75
St. L. & H. Ry.....	37,275 38	145 23
M., K. & T. Ry.....	140,593 46	63,815 12
K. C., C. & S. Ry.....	14,654 57	10,846 91
C., B. & Q. R. R.....	394,878 77	261,556 41
C. G. W. Ry.....	49,459 47	34,621 62

In the case of the St. Louis & San Francisco, there were included in expenses sums paid as rentals under a lease given by the Kansas City, Fort Scott & Memphis Railway Company, whose common stock is owned by it, which operates the company under a lease requiring it to pay to the holders of preferred stock of the Fort Scott & Memphis Company, as a rental, a sum equal to 4 per cent. annual dividends. This lease has been in force several years and is a fair one, and such rental has been treated as an operating expense, and is not included in fixed charges. And the court finds that it is an operating expense. But even if it were a fixed charge, it is not material, as the result would not be changed even though the rentals were carried into the fixed charge account. This is so because the amounts carried into state-freight expense is only \$3,423.56, and interstate passenger expense, \$7,443.68.

(15) In the statements hereinbefore referred to made and signed by the four experts, while they correctly set forth the figures on both the revenue theory and the ton and passenger mile theory, the placing of the miscellaneous earnings of the passenger business is arbitrarily fixed, and does not at all proceed upon the passenger mile basis, but for that the revenue basis is taken and fixed. Such earnings are arbitrarily divided without reference to the facts, the result being the state earnings, and especially passenger, are fixed much higher than the actual earnings. Said division, instead of following defendants' theory of the ton mile and passenger mile basis, is upon the revenue basis, from which it is seen that this would be a splitting of theories. But from this and from all the evidence it is plain that even the ton and passenger mile basis theory cannot be worked out without showing a loss, to prevent which an arbitrary change of account must be made as to the miscellaneous business. Even in making this arbitrary change the revenue basis is used, and yet the revenue division of expenses insisted upon by complainants is said not to be recognized. This is utterly illogical and unfair, and does not represent the true facts as to whether such earnings are made at a loss, and there is no reliance whatever to be placed in such method of accounting. In so finding, no reflection whatever is made upon the experts for the state, because, as before found, they are men of the highest character and learning and highly skilled in accounting, and with a proper basis for such accounting their work is perfect. And from their own statements upon the basis adopted herein for making such accounting by the court, the freight business for the period mentioned would have been done at a loss if the statutory rates had been observed, and the passenger business was done at a loss under the two-cent fare statute.

(16) As to each of the nine companies whose cases have been submitted, the earnings and expenses and all other items are different in amount. So with the returns upon value to which the company is entitled. But in no event in any of the cases tried would the freight earnings, after making the deductions herein found, result in a return to any company of more than 3 per cent. With nearly every company an actual deficit is shown, if the 1907 statute had been in force. So under the two-cent fare statute—a deficit as to nearly all of the companies, and not more than 2 per cent. in case of any company. If the freight and passenger business should be combined with the miscellaneous of each class, there would be a deficit as to some, and not

to exceed 3 per cent. as to any of the others. In arriving at these conclusions, and in adopting the tabulations herein set forth, an account has been taken of all earnings, state and interstate, freight and passenger, and miscellaneous; the proportion which state and interstate freight and passenger, exclusive of miscellaneous, bear to all state and interstate, miscellaneous included, and that which they bear to all the earnings of the state; of miscellaneous freight and miscellaneous passenger earnings, undivided as between state and interstate, with the proportion they are of all earnings, freight and passenger; of all expenses divided as between all kinds of freight and passenger business, including miscellaneous, but not divided as between state and interstate; of the deductions to be made from all state freights, not including miscellaneous, of such proportion of expenses of all freight and passenger respectively as the freight and passenger earnings, exclusive of miscellaneous, bear to all earnings; of the deduction of the extra cost; of the diminution of freight earnings if the freight rate statute had been observed; of the value of that portion of the property assignable to the particular traffic. This value is found by taking, for each class of business of the entire value of the property in the state, such proportion as the earnings on that portion of the business bear to all the earnings in the state. A statement so made as to each of the companies whose cases have been submitted is as follows:

(17) The periods taken are representative taken by the experts upon both sides, and were for the months set forth in the column headed "Time." These tables do not follow the form taken by the experts in preparing exhibits to be introduced in evidence, nor do they follow the prepared form adopted by the four experts in making the nine statements hereinbefore referred to. An attempt has been made to abbreviate, but with the results the same as adopted by the experts. These are found to be correct as now to be set forth, and are adopted by the court. If any error has crept into them, the court will make proper correction upon his attention being called thereto after these findings have been filed, which can be readily done upon motion or suggestion. The tables adopted by the court now follow:

Interstate Freight.

Company	Time Mo.	Amount.	% of all Freight.	% of all Earnings.
St. L. & S. F. R. R.....	3	\$2,214,002 82	76 94	54 68
A. T. & S. F. R. R.....	6	1,872,915 00	90 05	67 72
C. R. I. & P. Ry.....	3	665,228 16	79 38	59 86
K. C. So. Ry.....	6	702,249 91	79 35	67 11
St. L. & H. Ry.....	12	51,735 05	36 25	24 61
M. K. & T. Ry.....	6	1,333,455 26	81 73	57 89
C. B. & Q. R. R.....	12	6,454,699 87	78 75	52 40
K. C. C. & S. Ry.....	12	116,893 60	68 27	41 04
C. G. W. Ry.....	6	224,169 53	86 02	57 39

State Freight.

Company	Amount.	% of all Freight.	% of all Earnings.
St. L. & S. F. R. R.....	\$ 577,192 84 ,	20 04	14 26
A. T. & S. F. R. R.....	141,133 00	6 79	5 10
C. R. I. & P. Ry.....	150,953 68	13 02	13 58
K. C. So. Ry.....	38,748 76	4 33	3 70
St. L. & H. Ry.....	87,941 99	61 62	41 84
M. K. & T. R. R.....	277,416 52	17 01	12 04
C. B. & Q. R. R.....	1,580,529 64	19 23	12 83
K. C. C. & S. Ry.....	45,003 15	26 29	15 80
C. G. W. Ry.....	29,129 36	11 18	7 45

Miscellaneous Freight.

Company	Amount.	% of all Freight.	% of all Earnings.
St. L. & S. F. R. R.....	\$ 86,814 57	3 02	2 14
A. T. & S. F. R. R.....	65,833 56	3 16	2 38
C. R. I. & P. Ry.....	21,815 70	2 60	1 96
K. C. So. Ry.....	144,046 62	16 27	13 77
St. L. & H. Ry.....	3,044 11	2 13	1 45
M. K. & T. Ry.....	20,603 37	1 26	0 89
C. B. & Q. Ry.....	161,579 41	1 97	1 31
K. C. C. & S. Ry.....	9,319 58	5 44	3 27
C. G. W. Ry.....	7,280 24	2 80	1 86

Interstate Passenger.

Company	Amount.	% of all Passenger	% of all Earnings.
St. L. & S. F. R. R.....	\$ 368,687 43	31 49	9 11
A. T. & S. F. R. R.....	355,318 12	51 81	12 85
C. R. I. & P. Ry.....	113,524 21	41 53	10 22
K. C. So. Ry.....	89,504 58	55 47	8 55
St. L. & H. Ry.....	198 19	0 29	0 09
M. K. & T. R. R.....	303,214 54	45 12	13 16
C. B. & Q. Ry.....	1,777,788 27	43 15	14 43
K. C. C. & S. Ry.....	41,145 00	36 22	14 45
C. G. W. Ry.....	72,360 87	55 62	18 53

State Passenger.

Company	Amount.	% of all Passenger	% of all Earnings.
St. L. & S. F. R. R.....	\$ 599,051 59	51 17	14 79
A. T. & S. F. R. R.....	104,370 19	15 22	3 77
C. R. I. & P. Ry.....	114,853 04	42 02	10 33
K. C. So. Ry.....	31,865 28	19 75	3 05
St. L. & H. Ry.....	52,667 38	78 04	25 05
M. K. & T. R. R.....	246,368 53	36 66	10 70
C. B. & Q. R. R.....	1,611,702 92	39 11	13 09
K. C. C. & S. Ry.....	47,646 80	41 95	16 73
C. G. W. Ry.....	38,105 03	29 28	9 75

Miscellaneous Passenger.

Company	Amount.	% of all Passenger	% of all Earnings.
St. L. & S. F. R. R.....	\$ 203,077 28	17 34	5 02
A. T. & S. F. R. R.....	226,080 00	32 97	8 13
C. R. I. & P. Ry.....	44,980 08	16 45	4 05
K. C. So. Ry.....	39,973 54	24 78	3 82
St. L. & H. Ry.....	14,619 99	21 67	6 96
M. K. & T. Ry.....	122,458 22	18 23	5 32
C. B. & Q. R. R.....	731,021 89	17 74	5 94
K. C. C. & S. Ry.....	24,797 39	21 83	8 71
C. G. W. Ry.....	19,643 99	15 10	6 03

(13) All Freight and Passenger Expenses, Including Miscellaneous, Less Taxes and Rentals, and Percentages to Earnings, Undivided as Between State and Interstate.

Company	Freight	Passenger	Taxes and Rentals, Freight	Taxes and Rentals, Passengers
St. L. & S. F. R.....	1,802,813.26	974,816.61	112,452.04	38,979.63
A. T. & S. F.....	1,382,738.65	572,167.20	32,361.50	10,854.04
C. R. I. & P.....	619,199.73	317,633.62	74,227.43	21,015.44
K. C. So.....	571,297.54	141,432.56	22,331.70	3,737.37
St. L. & H.....	117,908.81	68,343.04	5,994.07	2,273.61
M. K. & T.....	1,010,643.65	516,589.98	119,017.87	53,465.49
C. B. & Q.....	6,793,610.60	3,527,311.81	12,235.30 Cr.	6,152.58 Cr.
K. C. C. & S.....	98,988.29	138,334.77	9,182.36	5,749.38
C. G. W.....	198,887.69	126,355.83	12,294.18	11,312.16

Company	% of said expenses to earnings exclusive of taxes and rentals		Same, taxes and rentals.	
	Freight	Passenger	Freight	Passenger
St. L. & S. F. R. R.....	62.64	83.26	3.91	3.33
A. T. & S. F. R. R.....	66.48	83.43	1.55	1.58
C. R. I. & P. Ry.....	73.89	116.20	8.88	7.68
K. C. So. Ry.....	64.55	87.66	2.52	2.31
St. L. & H. Ry.....	82.61	101.27	4.19	3.37
M. K. & T. Ry.....	61.95	76.87	7.29	8.69
C. B. & Q. Ry.....	82.88	85.60	0.00	0.00
K. C. C. & S. Ry.....	57.81	121.83	5.36	5.06
C. G. W. Ry.....	76.33	97.11	4.71	8.68

The time of the foregoing tables is the same as in first table above.

(19) The following nine tables show the state earnings and expenses, valuation, return on value, and interest charge of the said nine roads respectively whose cases have been submitted. The other cases are to be covered by decrees by agreement the same as certain decrees of the nine cases, all of which is of record.

St. Louis & San Francisco Railroad Company.

Period, Three Months.

State Earnings and Expenses	Freight	Passenger
State earnings.....	577,192.84	599,051.59
State expenses.....	361,644.33	498,716.20
Leaving	215,548.51	100,335.39
Less taxes and rentals.....	22,760.29	20,097.90
Leaving	192,788.22	80,237.49
Extra cost of doing state business, freight 60%, passenger 25%.....	131,425.08	53,907.36
Leaving	61,363.14	26,330.13
Diminution in earnings if the state rates in question had been charged.....	11,339.27	
Leaving	49,973.87	26,330.13
Valuation	14.26%	14.79%
Assignable proportion of value for repre- sentative period, and 6% interest there- on is.....	130,938.97	135,857.42
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is.....	2.29%	1.16%
(b) Same without allowance for extra cost..	8.2%	8.5%
Interest Charge		
Actual interest charge paid on assignable properties	116,792.45	121,133.27

Atchison, Topeka & Santa Fé Railway Company.

Period, Six Months.

State Earnings and Expenses	Freight	Passenger
State earnings.....	141,133.00	104,370.19
State expenses.....	92,581.89	87,834.09
Leaving	48,551.11	16,536.10
Less taxes and rentals.....	3,503.41	901.74
Leaving	45,047.70	15,634.86
Extra cost of doing state business, freight 50%, passenger 25%.....	41,859.55	17,947.71
Leaving	3,188.15	2,313.35 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged.....	13,885.87	
Leaving	10,697.72 (Red Ink) (Deficit)	2,313.35 (Red Ink) (Deficit)
Valuation	5.10%	3.77%
Assignable proportion of value for repre- sentative period, and 6% interest thereon..	23,089.35	17,068.16
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is.....	Nothing	Nothing
(b) Same without allowance for extra cost..	8%	6.49%
Interest Charge		
Actual interest charge paid on assignable properties	17,934.56	13,257.51

The Chicago, Rock Island & Pacific Railway Company.

Period, Three Months.

State Earnings and Expenses	Freight	Passenger
State earnings	150,953.68	114,853.04
State expenses.....	111,579.80	133,469.65
Leaving	39,373.88	18,616.61 (Red Ink) (Deficit)
Less taxes and rentals.....	13,375.78	8,830.68
Leaving	25,998.10	27,447.29 (Red Ink) (Deficit)
Extra cost of doing state business, freight 50%, passenger 25%.....	41,919.82	17,501.61
Leaving	15,921.72 (Red Ink) (Deficit)	44,948.90 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged.....	9,989.43	
Leaving	25,911.15 (Red Ink) (Deficit)	44,948.90 (Red Ink) (Deficit)
Valuation	13.58%	10.33%
Assignable proportion of value for repre- sentative period and 6% interest thereon..	38,911.81	29,599.34
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is.....	Nothing	Nothing
(b) Same without allowance for extra cost..	2.47%	Nothing
Interest Charge		
Actual interest charge paid on assignable properties	24,907.02	18,946.21

The Kansas City Southern Railway Company.

Period, Six Months.

State Earnings and Expenses	Freight	Passenger
State earnings.....	33,748.76	31,865.23
State expenses.....	25,022.83	27,932.93
Leaving	13,725.93	3,992.35
Less taxes and rentals.....	978.13	738.13
Leaving	12,747.80	3,194.22
Extra cost of doing state business, freight 50%, passenger 25%.....	11,711.60	5,346.15
Leaving	1,036.20	2,151.95 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged.....	2,957.58	
Leaving	1,921.38 (Red Ink) (Deficit)	2,151.93 (Red Ink) (Deficit)
Valuation	3.70%	3.05%
Assignable proportion of value for represen- tative period, and 6% interest thereon....	8,923.33	7,355.76
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is....	Nothing 6.58%	Nothing 2.6%
(b) Same without allowance for extra cost..		
Interest Charge		
Actual interest charge paid on assignable properties	5,295.33	4,365.11

The St. Louis & Hannibal Railway Company.

Period, Twelve Months.

State Earnings and Expenses	Freight	Passenger
State earnings.....	87,941.99	52,667.38
State expenses.....	72,655.40	53,334.91
Leaving	15,286.59	667.53 (Red Ink) (Deficit)
Less taxes and rentals.....	3,693.55	1,774.32
Leaving	11,593.04	2,441.86 (Red Ink) (Deficit)
Extra cost of doing state business, freight 50%, passenger 25%.....	12,026.69	2,444.68
Leaving	433.65 (Red Ink) (Deficit)	4,886.53 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged.....	15,126.02	
Leaving.....	15,559.67 (Red Ink) (Deficit)	4,886.53 (Red Ink) (Deficit)
Valuation	41.84%	25.05%
Assignable proportion of value for represen- tative period, and 6% interest thereon....	28,694.06	17,179.40
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is....	Nothing	Nothing
(b) Same without allowance for extra cost..	Nothing	Nothing
Interest Charge		
Actual interest charge paid on assignable property	16,359.44	9,794.55

Missouri, Kansas & Texas Railway Company.

Period, Six Months.

State Earnings and Expenses	Freight	Passenger
State earnings.....	277,416.52	246,368.53
State expenses.....	171,910.48	189,381.89
Leaving.....	105,506.04	56,986.64
Less taxes and rentals.....	20,244.94	21,433.45
Leaving.....	85,261.10	35,553.19
Extra cost of doing state business, freight 50%, passenger 25%.....	66,696.09	27,482.59
Leaving.....	19,165.01	8,070.60
Diminution in earnings if the state rates in question had been charged.....	20,222.85	
Leaving.....	1,059.84 (Red Ink) (Deficit)	8,070.60
Valuation	13.04%	10.70%
Assignable proportion of value for represen- tative period, and 6% interest thereon....	75,469.96	67,070.48
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is....	Nothing	0.72%
(b) Same without allowance for extra cost..	5.18%	3.18%
Interest Charge		
Actual interest charge paid on assignable property.....	62,439.68	55,490.41

Chicago, Burlington & Quincy Railroad Company.

Period, Twelve Months.

State Earnings and Expenses	Freight	Passenger
State earnings.....	1,530,529.64	1,611,702.92
State expenses.....	1,324,453.83	1,489,746.71
Leaving.....	256,075.81	121,956.21
Less taxes and rentals.....	2,487.99 Cr.	2,798.50 Cr.
Leaving.....	258,563.80	124,754.71
Extra cost of doing state business, freight 50%, passenger 25%.....	484,129.29	158,205.70
Leaving.....	225,565.49 (Red Ink) (Deficit)	33,450.99 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged.....	112,533.71	
Leaving.....	333,099.20 (Red Ink) (Deficit)	33,450.99 (Red Ink) (Deficit)
Valuation	12.83%	13.09%
Assignable proportion of value for represen- tative period, and 6% interest thereon....	409,325.04	417,620.02
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is....	Nothing	Nothing
(b) Same without allowance for extra cost..	2.11%	1.79%
Interest Charge		
Actual interest charge paid on assignable property	132,735.02	185,424.89

Kansas City, Clinton & Springfield Railroad Company.

Period, Twelve Months.

State Earnings and Expenses	Freight	Passenger
State earnings.....	45,003.15	47,646.80
State expenses.....	26,024.02	58,052.41
Leaving.....	18,979.13	10,405.61 (Red Ink) (Deficit)
Less taxes and rentals.....	2,414.04	2,411.86
Leaving.....	16,565.09	12,817.47 (Red Ink) (Deficit)
Extra cost of doing state business, freight 50%, passenger 25%.....	8,483.30	7,625.00
Leaving.....	8,081.79	20,442.47 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged.....	2,970.21	
Leaving.....	5,111.53	20,442.47 (Red Ink) (Deficit)
Valuation	15.80%	16.73%
Assignable proportion of value for represen- tative period, and 6% interest thereon....	22,564.51	23,892.67
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is....	1.36%	Nothing
(b) Same without allowance for extra cost..	3.61%	Nothing
Interest Charge		
Actual interest charge paid on assignable property	23,831.73	25,238.43

Chicago Great Western Railway Company.

Period, Six Months.

State Earnings and Expenses	Freight	Passenger
State earnings.....	29,129.36	33,105.03
State expenses	22,235.64	36,996.98
Leaving.....	6,893.73	1,108.05
Less taxes and rentals.....	1,374.49	3,312.25
Leaving.....	5,519.23	2,204.20 (Red Ink) (Deficit)
Extra cost of doing state business, freight 50%, passenger 25%.....	9,347.72	6,090.35
Leaving.....	3,823.49 (Red Ink) (Deficit)	3,294.55 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged.....	1,893.41	
Leaving.....	5,721.90 (Red Ink) (Deficit)	3,294.55 (Red Ink) (Deficit)
Valuation	7.45%	9.75%
Assignable proportion of value for represen- tative period, and 6% interest thereon....	8,057.70	10,545.32
Return on Value		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is.....	Nothing	Nothing
(b) Same without allowance for extra cost..	2.69%	Nothing
Interest Charge		
Actual interest charge paid on assignable property	7,164.08	9,375.81

(20) The court believes that the foregoing findings are all that are material and all that are necessary to make. However, if any party believes that any material finding of fact has been omitted, upon application of such party the same will be considered and made if deemed advisable; and likewise if any of the foregoing computations or figures have been erroneously made. But such application, to be entertained, must be made within 30 days from this date.

And each, all, and every of the foregoing are made as the findings of the court, and are now and here in open court this March 8, 1909, ordered filed and made of record in said cases and all of them.

- Frank Hagerman, for complainants.
 W. F. Evans, for complainant St. Louis & S. F. R. Co.
 M. A. Low, for complainants Chicago, R. I. & P. Ry. Co. and St. Louis, K. C. & C. Ry. Co.
 O. M. Spencer, for complainant Chicago, B. & O. R. R. Co.
 J. G. Trimble, for complainant Quincy, O. & K. C. R. Co.
 Gardiner Lathrop, for complainant Atchison, T. & S. F. R. Co.
 S. W. Moore, for complainant Kansas City & S. Ry. Co.
 Geo. P. B. Jackson, for complainant Missouri, K. & T. R. Co.
 J. L. Minnis, for complainant Wabash R. Co.
 R. A. Brown, for complainant St. Joseph & G. I. Ry. Co.
 E. L. Scarritt, for complainant Chicago & A. R. Co.
 John H. Lucas, for complainant Kansas City, C. & S. Ry. Co.
 M. L. Clardy, for complainants Missouri Pac. R. Co. and St. Louis, I. M. & S. R. Co.
 J. D. Hostetter, for complainant St. Louis & H. Ry. Co.
 S. H. West, for complainant St. Louis Southwestern Ry. Co.
 A. G. Briggs, for complainant Chicago G. W. Ry. Co.
 Burton Hanson, for complainant Chicago, M. & St. P. Ry. Co.
 Herbert S. Hadley, Atty. Gen., John Kennish, Asst. Atty. Gen., S. B. Ladd, and Frederick W. Lehmann, for defendants.

SMITH McPHERSON, District Judge (after stating the facts as above). 1. Each of the 18 railroad companies is doing a general railroad business within the state of Missouri, all but one doing both a state and an interstate business. Under the general railroad statutes of the state, the railroads were classified under three classes, the one class being allowed to charge for passenger rates three cents per mile, and the other two classes, four cents per mile. Freights likewise were classified with certain maximum rates. The Railroad Commissioners of the state were authorized to fix and establish rates, not in excess, however, of these maximum rates fixed by statute.

In the year 1905 the Legislature of the state, by statute which took effect June 16, 1905, provided for certain maximum charges. On the day the statute took effect each of the railroad companies filed their bills of complaint herein against the Attorney General and Railroad Commissioners, asking that they be enjoined from enforcing the statute upon the ground that the rates thus fixed were not remunerative, resulting, as is alleged, in the taking of their property without compensation. A restraining order in each case was issued, and within a few days thereafter, upon notice and full hearing, a temporary writ of injunction as prayed was issued. Several months thereafter the cases were referred to a special master to take the evidence and make his findings of fact and report the same to the court.

In 1907 the Legislature of the state repealed the statute of 1905 and enacted a substitute therefor, which act was to take effect in June, 1907. On or about the day the statute was to take effect, each of the complainants filed its amended and supplemental bill, setting forth the pendency of the actions and the action theretofore taken by the court therein, and asking that the enforcement of the statutes, one of which fixes certain maximum freight rates, and the other passenger rates of two cents a mile, be enjoined on the ground that such rates were not remunerative, but confiscatory, and, if enforced,

would be taking the property of the railroad companies without compensation. At or about the same time the state officers instituted proceedings in certain state courts of Missouri against the railroad companies asking for an order that said two statutes of 1907 be enforced.

The Attorney General and his associates insisted that an entirely new situation was presented, and insisted that the proceedings were instituted in the state courts in advance of filing the supplemental bills herein, and insisted that the state courts had first acquired jurisdiction of the subject-matter, which would be to the exclusion of any action by this court. The railroad companies insisted that the general subject-matter was covered by the original bills of complaint and defendants' answers thereto, and that the statutes of 1907 should be carried forward by supplemental bill. It was likewise most earnestly contended that the actions in this court were in effect against the state of Missouri, in contravention of the eleventh amendment to the Constitution of the United States. But this court, after the fullest argument and consideration, adjudged that this court was not seeking to take jurisdiction against the state of Missouri as a state, and that the very office and nature of the supplemental bill, as recognized from time immemorial by the equity practice, required this court to take cognizance of the supplemental bills and proceed with the litigation. 161 Fed. 419.

In June last, by agreement of parties, the court revoked the previous order of reference to the special master, and directed him to return to this court the evidence he had already taken, and ordered that the case be tried upon oral testimony and such documentary evidence as the respective parties might offer. The evidence has been concluded, and the cases have been fully argued, and are now for final decree.

2. Many believe that the better and safer practice would be to confine all litigation to the state courts wherein is involved the validity of rates to be observed by railroads and other public utilities, when such rates are fixed by ordinances of a city or statutes of a state. It is insisted that this would be more deferential and more in a spirit of comity to first allow the state courts to pass upon such questions. It is urged that the decree of a state court could be carried to the Supreme Court of the United States for final decision.

This is plausible and convincing to men who have not thoroughly considered the question. It is plausible, because such a course can be followed. But every thoughtful and patriotic man well knows and believes in the proposition that the Supreme Court of the United States should ultimately pass upon all questions arising under the Constitution of the United States. And the question whether rates thus fixed by ordinance or statute are confiscatory or remunerative is one arising under the Constitution of the United States, and that question is wholly a question of fact, and is no longer an open question as to the law. This being so, the question cannot be passed upon by the Supreme Court of the United States on these questions of fact when there is a conflict in the testimony. Section 709 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 575) is the only authority for taking a case from the highest court of a

state to the Supreme Court of the United States, and the procedure thereby allowed is by writ of error. And the office of a writ of error is to authorize an appellate court to review questions of law, and not to review questions of fact. So that, when a case goes from the Supreme Court of a state to the Supreme Court of the United States, it can only go by writ of error, and the Supreme Court of the United States necessarily must take all questions of fact as being foreclosed by the state courts. Therefore, when the case is wholly dependent on controverted questions of fact, it is utterly useless to carry the case to the United States Supreme Court from the decision of the state courts, as an affirmance necessarily will be ordered, and the question as to whether the United States Constitution is being trampled down cannot be considered. There is no other method of reviewing the decision of the state court by the Supreme Court of the United States than by writ of error, and this is so in chancery cases as well as in actions at law. *State Corporation Com. of Va. v. Atlantic Coast Line Co.* (recently decided by the Supreme Court of the United States) 29 Sup. Ct. 67, 53 L. Ed. —; *Bement v. National Harrow Co.*, 186 U. S. 70, 83, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Dower v. Richards*, 151 U. S. 658, 666, 14 Sup. Ct. 452, 38 L. Ed. 305; *Egan v. Hart*, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680; *Adams v. Church*, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769; *Chrisman v. Miller*, 197 U. S. 313, 319, 25 Sup. Ct. 468, 49 L. Ed. 770.

It follows that all efforts to enforce the trial of such questions in state courts would result, if successful, in having the state court finally determine when the national Constitution, as the supreme law of the land, shall be applied. The Supreme Court of the United States is the tribunal to finally determine all questions, including those of fact, wherein the national Constitution is involved.

3. Upon their face, the statutes in question are with reference only to state commerce. But it is urged that they are void because in effect they directly have to do with interstate commerce. The facts are as follows:

Between Kansas City and the Joplin mining district there are three lines of railway. The Missouri Pacific between these points is wholly within the state, and the other two partly within and partly without the state, and therefore, between the two Missouri cities of Kansas City and Joplin, are doing an interstate business under the decision of *Hanley v. R. R.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333. The same situation exists between the cities of St. Joseph and Kansas City, two of the roads being wholly within the state between the two points, and two partly within and partly without. And between the cities of St. Joseph and St. Louis such situation is emphasized, the Burlington Road being wholly within the state between the two cities, and the Missouri Pacific a part of the distance being within the state of Kansas. The facts are that, when the Missouri statutes lowered the passenger rates on the roads wholly within the state between said points, the interstate roads between said points were compelled by competition to lower their rates to correspond with the state rates thus fixed by statute. By reason thereof the argument is that the Missouri statutory rates control the interstate rates

between the cities named, and therefore are void as being in conflict with the commerce clause of the national Constitution. During the period of railroad building, for a time the Western termini were at the Mississippi river. By reason thereof, and by reason of competition on account of river transportation, the railways fixed rates from the East to that river. After a time roads were completed to the Missouri river. Rates to points on that river were fixed on rates to the Mississippi river, plus rates between the two rivers. And for 30 years or more rates have been thus fixed. And, as the Missouri statutes lower the rates between the two rivers, the argument is that the statutes lower the interstate rates from the East to Missouri river points, and to points to the West.

This presents a great question, and one which is far-reaching, and in importance cannot be overstated. In the great case of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, decided but last year, the Supreme Court in its majority opinion, in speaking of this, said: "The question is not, at any rate, frivolous." But the point was not decided. But here the question is fairly and sharply presented for decision, with no precedents directly in point.

From the days of the Confederacy to the present time, there have been clashing between the national government and the states, owing, in part to the ever-changing trade and commerce, and in part to the different schools of belief as to our system of government. And the pendulum will ever move back and forth. Even those who most strongly denounce the Kentucky Resolutions and the doctrine of nullification are often the first to forget that they believe in not only the express but the implied powers of our government as taught by Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, and that this government is one of the whole people. Such as thus believe are often the first to advocate and rush through, in the form of state regulation, measures for their own state, regardless of the rights of the people of other states. Neither the Ohio river nor any other boundary has been the dividing line. Many of the cases in which state statutes have been declared void by the Supreme Court are statutes requiring a license to sell imported goods, imposing a tax on bills of lading for gold carried out of the state, imposing taxes on alien passengers, imposing taxes on passengers and merchandise carried into or out of the state, taxing drummers, regulating telegrams sent to other states, taxing those who use wharves, requiring inspection of animals for slaughter, and other like statutes in principle. All such statutes have gone down by reason of the commerce clause and the uniform holdings of the Supreme Court.

The commerce clause gives Congress the power to regulate commerce: (1) With foreign nations; (2) among the several states; (3) with the Indian tribes.

As to the first and last, no doubt Congress cannot only regulate, but can prohibit. It is another proposition whether commerce can be prohibited among the states.

One of the methods resorted to for the construction of constitutional provisions, as well as of statutes, is to ascertain the then exist-

ing evils. We find that New York and other seacoast states placed burdens on commerce from inland points to seacoast points and across such states for shipment by water. It was burdens on commerce that the inland localities complained of, and that such burdens should not be imposed, was the reason for adopting the commerce clause. If there had been no such burdens, it is likely that there would have been no commerce clause, and possibly no Constitution. I have searched diligently, but find no case decided by the Supreme Court declaring a state statute void that did not in some form and in some manner place a burden on, or in some way hamper or obstruct, commerce from or to another state.

The case of *Louisville & Nashville R. R. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416, comes more nearly sustaining the proposition that the statutes of Missouri impinge upon the commerce clause than any other case that I recall. There the state of Kentucky by its Constitution provided that more should not be charged for a short than a long haul. The company had rates in force from Nashville, Tenn., to Louisville, Ky., which were less than was being charged from points in Southern Kentucky to Louisville. This was held by the Court of Appeals of Kentucky to be in violation of the state Constitution. So that we have a case of a state law, with the decision of the state courts read into it, providing that more shall not be charged for a short haul wholly within the state than for a long haul partly without the state. This must be so, because the same provision of the Kentucky Constitution when applied to places all within the state was upheld by the Supreme Court, as will appear from the case of *Louisville & Nashville R. R. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298.

And the case of *Wabash, etc., R. R. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, was decided in like manner, because and for the only reason that the Supreme Court of Illinois had so ruled as to read into the statute the objectionable feature.

But the Missouri courts have not so construed these statutes of the state. When they do so decide, then the *Eubank* and *Illinois* cases will be the precedents to thwart such legislation as thus construed. In the meantime there is no belief that the Missouri courts will so decide.

The case of *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547, is cited by counsel for the railways. Louisiana had a statute requiring carriers to receive and carry passengers without distinction on account of race or color. The steamboat in question plied between New Orleans and Vicksburg, doing both a state and an interstate business. The vessel was duly enrolled and licensed for the coasting trade. The boat had an upper and a lower cabin, the upper for white people, and the lower for colored persons. The plaintiff, *De Cuir*, was a colored woman, and took passage at a landing in Louisiana for another landing in that state. Being refused admission to the upper cabin solely because she was colored, she was awarded damages in a state trial court, which judgment was affirmed by the state Supreme Court. The Supreme Court of the United States reversed the judgment. Two

reasons were given for the reversal, the one by Justice Clifford on the ground that navigation of the Mississippi river is wholly within the control of Congress. The other opinion was by the Chief Justice, who grounded his opinion upon the proposition that, with the objections of most people to associating and rooming with colored persons, to allow a colored woman to be carried in the first cabin, even though but for a ride within the state, would drive white passengers seeking an interstate ride from the boat. Or, as I have hereinbefore stated, the statute in effect placed a burden on the interstate business. After discussing the question and the many and great difficulties in applying the commerce clause, the Chief Justice said:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

The state statute, in order to be declared void, must by its terms and recitals interfere directly with commerce to or from another state, or the statute by construction given it by the highest court of the state must so operate in its results. But here we have no such recitals in the statute, and it has not been so declared to mean by the Missouri courts. And, while counsel for the railways do not in terms so insist, they in effect urge that the laws of political economy, custom, and convenience shall act as a substitute for Missouri statutes and the decrees of the Missouri Supreme Court. In other words, they in effect, and I believe in language, insist that the rules formulated a third of a century ago for making rates first to the one river, and then between the two rivers, and the laws of competition, shall be regarded as the equivalent of statutory law. I am mindful that it is believed by many that to not recognize these laws of trade will impair, if not destroy, the great cities like St. Joseph, Kansas City, and St. Louis. I am mindful of the fact that between the two rivers the distance by the Burlington is but 198 miles, with other roads 300 miles or more, and that the shorter road necessarily fixes the rates between all points on the rivers. But competition does that, and the statutes are silent. The statute may or may not be unfair. I am considering the commerce clause as to its bearing on statutory enactments, and am not forgetting that many valid statutes are unfair, and some even unrighteous.

I have believed heretofore that the rights and duties, powers and prerogatives of any one state are the same, neither more nor less, than those of any other state, and this is so whether we compare two or more of the original thirteen, or one of the older with one of the newer states. But in effect the argument of counsel for the railways is that this is not so. Missouri and Maine were admitted into the Union the same day by the same enactment. Maine has but its percentage of commerce into and out of the state, with no trans-state business by reason of its geographical position, and has no large city. Missouri is a central state, with large cities, one of which is third in importance as a wholesale center, and second to but few as a manufacturing place. St. Louis and Kansas City are the gateways for both commerce and passengers, surpassed only by one or

possibly two other places. These facts are of tremendous importance to those who legislate either for the state or the nation. That legislation can be harmful to these great interests, any thoughtful person can readily see. But that these facts, important as they are, can be used to give a construction to or coloring of the commerce clause, I do not believe. In my opinion it is much the wiser to contend for the strength and power of the nation, by insisting also upon the rights and powers of the states, as was intended they should have. For a third of a century it has been the recognized constitutional construction that the states have the power within defined limits to regulate charges by railways wholly within the state. And to now say that one state like Maine can regulate charges by a railway for transportation wholly within the state, and that Missouri cannot because flanked by two great rivers, and by a long-time custom in fixing rates, is to announce a rule not heretofore recognized, and in my opinion one entirely illogical.

It may or may not be true that it would be for the better to have all the interstate railways of the country, doing both a state and an interstate business, under one supervising authority, such as a commission, regulating both classes of business. But under the commerce clause can this be done? *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; *Wabash R. R. v. U. S.* (C. C. A., 7th Circuit) 168 Fed. 1; 9 *Columbia Law Review*, 38; *U. S. v. Colorado, etc., R. R. Co.* (8th Circuit), 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167.

Difficult as these problems are, they can and will be solved, and for the right. Pessimists discourage. However, their statements that everything is wrong, and will grow worse, must be heavily discounted. Because railway systems reach into many states, and are units, crossing state lines arbitrarily fixed, a hopeless condition is not thereby brought about. It is not true, as some say, that each state can lower the rates to confiscation, as all know who have read the decisions to any purpose. I believe as firmly as does anyone in the power and the rights of our general government, and, when the clashings come as to the power of the state and the general government, let the doubts be solved in favor of the government. But as to some matters there are no doubts, and two of these are that the Constitution is the supreme law of the land, and that as to all local matters the states are in control. All should insist upon both.

4. It is contended that the statutes are void because of the excessive penalties; reliance being based on the case of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. Until the decisions in the Minnesota cases (*Chicago, M. & St. P. R. Co. v. State of Minnesota*, 134 U. S. 418, and 467, 10 Sup. Ct. 462, 33 L. Ed. 970) it was an open question whether a review of rates fixed by a Legislature, or a commission acting under a legislative authority, could be had by the courts. The Minnesota statute authorized a commission to fix certain rates, which rates thus fixed should be final and conclusive. The Supreme Court of the state adjudged that such rates were not merely advisory, nor prima facie reasonable, but conclusive, and not subject to review by the courts. *State v.*

Chicago, M. & St. P. Ry. Co., 38 Minn. 281, 37 N. W. 782. But the United States Supreme Court reversed that decision, and notwithstanding the strong dissenting opinion by Justice Bradley, concurred in by Justices Gray and Lamar, and Justice Miller hesitating, the question is now at rest, and the courts not only can, but must, determine the question whether such rates are reasonable.

In time the Legislature of Minnesota believed it could in another way make its determination as to rates conclusive and beyond the powers of the courts to interfere. This was attempted by providing penalties for violations, to that which was equal for one week's business to life imprisonment for all officers and agents, and confiscation of all the railway property, if resistance by litigation was made, and such litigation failed. The decision in *Ex parte Young* followed, the Supreme Court failing to see the distinction between a statute providing that agents should become felons with life imprisonment pronounced, and all corporate property seized and confiscated, if an unsuccessful contest should be made in the courts.

The statute of Missouri of April 15, 1905 (Laws 1905, p. 102 [Ann. St. 1906, § 1194]), covered by the original bills herein, fixes the only penalty for violations by allowing treble damages and a reasonable attorney's fee. Citation of authorities need not be made to sustain such penalties. And in any event that statute has been repealed. The two-cent passenger rate statute of February 27, 1907 (Laws 1907, p. 170), provided for a penalty of not less than \$100 nor more than \$500. What shall be deemed a complete or separate offense is not defined. The freight rate statute of March 19, 1907 (Laws 1907, p. 171), provides for no minimum penalty, but the same shall be a fine not exceeding \$5,000. Imprisonment is not designated under either statute, unless by some general statute for the nonpayment of the fine; while under the Minnesota statute the penalty for each offense was fixed at a fine of not more than \$5,000, or imprisonment in the state prison for not more than five years, or both.

This objection to the Missouri statutes is without merit.

5. Evidence is before the court tending to show that a large number of men have been discharged from the service of the railroad companies by reason of the reduction of rates. And this fact is urged as one element that should be considered. It is true, before interest can be paid on the bonded debts, that operating expenses, including labor, and materials largely made up from labor, must be paid. And, as of course, all of these, including interest, must be paid before dividend checks are issued. The states should and usually do attempt to legislate in the interest of laboring men. And if the legislation under consideration is hostile to their interests, the Legislature, and not the courts, have the responsibility. I agree to all that was said in argument in their behalf. I agree that in sobriety, and intelligence, and faithfulness to duty they are surpassed by no other class of men. Their dangers are great, and the people owe them much. But if employes are reduced in number, or now or later on their compensation will be reduced, and if such results are by reason of legislation, then their remedy, if they have one, must be sought elsewhere than in the courts.

6. It is urged in argument that the reduction of rates will impair the service to the public. The charter of a railroad is an implied contract with the state. The company is given such right under such contract to perpetually operate its road. The state agrees that it shall be reasonably and sufficiently remunerated according to the business done. The company agrees to furnish reasonably efficient service. To furnish no service is a complete breach of the contract. To furnish a partial service is a partial breach. What is a reasonable service is a question of fact dependent upon the circumstances of each case.

Thus it is that the Supreme Court has held that in some instances state legislation is valid which requires through and interstate trains to stop at important towns to let off and take on passengers, state and interstate. *Mississippi v. R. R.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; *L. S. & M. S. Ry. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064. And in other cases such state legislation has been declared invalid. *R. R. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107; *R. R. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868; *R. R. v. Wharton, etc.*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230. All those cases turned on the facts, and the question of fact was as to the service the public should have.

Of course, the service rendered and the compensation received should have a proper relation. The expenses incident to, and that can be specifically located in connection with, a particular train, are not all the expenses to be accounted for, as will hereafter be discussed. But it is true that without reasonable compensation there cannot be reasonable service. It is common information that the public in many localities is demanding increased service. But this phase of the question is so indefinitely covered by the evidence, and is so general in the very nature of the question, that no decree can be rendered herein that will cover the proposition.

7. It is urged that these statutes are void because they are not enforceable as to some of the railway companies within the state, and the claim is that, being void as to some, they are void as to all. It is conceded in argument that as to two roads, the St. Louis & Hannibal, and the Kansas City, Clinton & Springfield, the rates fixed are not compensatory. The state's experts agree to this. Usually, statutes fixing rates for railroads to observe, classify the roads according to their earning power, and fix the highest rates for those earning the least. But this was not done, except that railroads of a length not greater than 45 miles, not owned nor leased nor controlled by a trunk line, may charge four cents per mile per passenger. The sole theory upon which rates are adjudged void can only be that the rates are not compensatory, and, to so decree, the court must have the complaint of each and every road making the claim. Complainants have recognized this by their counsel in bringing as many independent actions as there are railroads complaining: Whether there are any other railroads within the state than these 18 complainants, neither the allegations of the pleadings nor the evidence show. Perhaps the court should take judicial notice of whether there are other roads or not.

Be this as it may, the court is not advised. I assume there are no other roads within the state than these 18.

The record shows that two of the cases, those brought by the Rock Island and the St. Louis, Kansas City & Colorado, have been consolidated for trial purposes, the one road having become the owner of the other since the litigation commenced. The record further shows that nine cases were tried, and that the other eight cases were to be covered by decrees the same as decrees in some of the cases tried, the particular cases being designated by the record. All this shows to my mind that complainants' counsel rightly conceived the theory upon which these bills of complaint were presented. The record shows further that before the master there were many attempts for position on both sides as to what cases should be tried, the Attorney General and his associates desiring that the Burlington and two other strong roads having the short lines should be heard, and the others either continued, or that decrees in the other cases should follow the decrees in the cases of the strong roads. Counsel for the railroad companies were desirous of trying the cases brought by some of the other companies, or, at least, that the roads should be classified into three or four classes, but that the court should hear only one case of each class. This emphasizes the theory that was in counsel's minds all the way through this litigation.

In one respect, at least, it seems to me that these statutes should be declared valid or void as the facts may warrant, as has been frequently done with reference to ordinances of cities. The ordinances of cities regulating speed both for trains and teams are declared unreasonable, and therefore not enforceable as to some parts of the city, and valid and enforceable as to other parts of the city not so densely populated. These statutes are not void upon their face. The company which alleges that they are void must make a showing that the rates, considering all the facts and circumstances, are not compensatory as to that particular road, failing in which, the statute will be enforced, and successful in which, as to that particular road the statute will not be enforced.

The case of *R. R. v. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298, is not in point, because there the question was with reference to an order of the Secretary of Agriculture which was void in part and was not separable, it not being possible to eliminate the valid from the void features.

The *Cotting Case*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, was decided by reason of an entirely different principle. The statute in that case on its face shows that a company doing little business was not to be regulated, while the company doing much business was made subject to the statute. And by reason of that vice the statute was held void. That the *Cotting Case* is not in point, see *Consolidated Coal Co. v. Illinois*, 185 U. S. 207, 22 Sup. Ct. 616, 46 L. Ed. 872; *McLean v. Arkansas* (January 4, 1909) 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. —.

The *Connolly Case*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, was likewise decided, in part at least, because the statute did not ap-

ply to all classes of persons engaged in a like business, and that the statute was not separable, the valid from the invalid.

The case of *Ju Toy*, 189 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, the *Trade Mark Cases*, 100 U. S. 82, 25 L. Ed. 550, and the recent case of *Howard v. R. R.*, 28 Sup. Ct. 141, 207 U. S. 463, 52 L. Ed. 297, were decided by reason of this same principle, namely, as to whether the statute is separable or not.

Therefore the holding is that these statutes are not void upon their face, and cannot be declared void for the one reason that the evidence shows they are not enforceable as to two or more roads.

8. The state earnings are made known to a certainty, concerning which the experts on both sides agree. And whether in earning them the company gains a profit; or sustains a loss, is dependent upon the expense in making such earnings. Some of these expenses can be definitely specified, but others, like maintenance of way, salaries of all officers, including ticket agents, handlers of freight, terminal expenses, compensation of many laborers, and other things, are all occasioned for carrying both freights and passengers, state and interstate, and miscellaneous of each. And herein is the problem how to make the apportionment.

The track mile, or train or car mile, does not furnish the solution, because every one agrees that neither of those methods will do, and no one of the experts or counsel on either side asks for such a solution. Therefore there is and can be but one of two methods adopted. Neither can be relied upon if mathematical precision is demanded. But the one more nearly correct and satisfactory is the one to be adopted. And that is what is done in litigation concerning injuries and death; the age, earning power, loss of time, can be fixed, some with certainty. How many years the party had before him is fixed by mortality tables, wholly unreliable as to the individual, but fairly certain as to the average.

In taking property under the power of eminent domain, we know the assessed value, the amount of taxes, the rents, and maintenance. Some or all these elements are put in evidence, while all other is matter of opinion, concerning which witnesses and jurors differ. And so it is in most litigation.

9. The theory to now recognize must be either the proportion of earnings, state and interstate, or ton and passenger mile. That it costs more to carry either freight or passengers proportionately for a short than a long haul is undoubtedly true, although all the elements are not more expensive. Local trains generally have poorer and older and cheaper cars and locomotives. But their speed is greater between stations. There are many stops. They carry proportionately much greater dead weight. They do much switching, and there are many delays. Their crews are paid more proportionately to distance and what is carried. The trains are daylight trains only. With freight the car load and number of cars are much the less, and from station to station grows less, and is largely made up of single parcels, boxes, and individual shipments from as many consignors to as many consignees, first put in one station, and at the end of the trip into an-

other station by the company. Usually there are two terminals, comprising an enormous amount of the investments and expenses of the company. The local train is seldom loaded to the capacity of the engine, to the loss of much of the investment and expense. The clerk hire, selling tickets, issuing bills of lading, making expense accounts, and auditing and making records, are attended with like expense for the small and the large items. Many stations would be done away with but for local business.

In nearly every instance enumerated, as to the interstate, which includes transstate, the reverse is true, although much magnified in my opinion as to terminals, and particularly as to transstate, because in my judgment some of the interstate business has two terminal expenses within the state. The two gateways in Missouri through the one or the other of which a large percentage of business, both interstate and transstate, passes, are Kansas City and St. Louis. And at both of those places the investments are very large, and of course, whether owned or rented, the expense is practically the same. But these terminals are for both. And while I believe the terminal expenses at St. Joseph, Kansas City, and St. Louis as to transstate business are minimized, I do not agree with the experts who claimed that there are none of those expenses. Their cross-examination shows this to be a mistake.

But from the great weight of the testimony, it can well be said that the ton mile is not reliable, and the revenue is more nearly correct, as showing that it costs more by 25 per cent. to carry passengers, and 50 per cent. to carry freight locally, than it does when interstate. Generally speaking, this is undoubtedly true. There are exceptions, one of which is shown by the Burlington with its three roads from St. Joseph, the one to Villisca, Iowa, another to Creston, Iowa, and a third to Chariton, Iowa. They are all interstate roads, each with two terminals, but each operating only local and daylight trains. The Wabash illustrates this with roads across the arbitrary state line between Missouri and Iowa. And there are other illustrations, but less noticeable, in the testimony. But all these are exceptions, and the testimony establishes the rule as stated.

The Missouri Legislature has recognized the proposition in all of its rate statutes, and particularly in the statutes now assailed, that it costs more per mile for a short than a long haul. See act approved April 14, 1905 (Laws 1905, p. 104 [Ann. St. 1906, § 1194b]), and the act of April 15, 1905 (Laws 1905, p. 102 [Ann. St. 1906, § 1194]), covered by the original bills herein. The passenger rate statute under consideration fixes a two-cent fare for all trunk lines, and four cents per mile for a road less than 45 miles in length.

The freight rate statute under consideration, in every schedule recognizes the principle that proportionately there should be more charged for a short than a long haul. For instance, class D allows a charge of five cents per hundred for car load lots for the first 25 miles, and one-half cent for the second and additional 25 miles. And commencing with the statute of Pennsylvania of 1846, chartering the Pennsylvania Road, to the present time, every statute upon the subject fixing

freight rates, and many of them fixing passenger fares, recognize this principle. So that, while it is a legislative function to fix rates, we have innumerable legislative recognitions of the greater cost for weight per mile for a shorter than a longer haul, and in some instances as to passengers. And no state has so recognized this to a greater extent than has the Missouri Legislature. And the courts passing upon the question have invariably recognized this as being so, and that the revenue theory is the correct one as against the ton mile.

This was so recognized by the Supreme Court of Pennsylvania in the case of *Railroad v. Pennsylvania County*, 220 Pa. 100, 68 Atl. 677, 15 L. R. A. (N. S.) 108, but not discussed.

In *R. R. Co. v. Tomkins* (C. C.) 90 Fed. 363, Judge Carland, of the South Dakota district, in passing on the statutes of that state, said:

"This court believes that it is fair and just to first ascertain what per cent. of the total gross earnings in any one year the total local earnings are for that year, and, having ascertained that per cent., to take the same per cent. of the total value of the property as a fair value upon which to fix local earnings."

The decree was reversed, and, although an equity case, remanded because of a failure to make a material finding. *Chicago, M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417. The same case, under the title of *R. R. Co. v. Smith* (C. C.) 110 Fed. 473, on final hearing resulted in a decree enjoining the rates, and the question of expenses was arrived at by the extra cost and on the revenue theory.

The case of *R. R. Co. v. Keyes* (C. C.) 91 Fed. 47, is an opinion by District Judge Amidon, concurred in by Circuit Judge Thayer, enjoining North Dakota statutory rates. The argument of the opinion condemns the ton mile theory, and adopts the revenue theory. The criticism of the case is that conditions in sparsely settled North Dakota are not like those in this state. But the question of which theory was the more accurate for computation was fully covered, and the ton mile was condemned.

In *Re Arkansas R. R. Cases* (C. C.) 163 Fed. 141, decided but a few months since by Judge Van Devanter of this circuit, a temporary injunction was issued against the enforcement of the Arkansas statutory freight and two-cent passenger rates. And in most respects the state of Arkansas, with reference to rates, is like that of Missouri, especially the south half of Missouri. Judge Van Devanter, in discussing this question said:

"Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue."

And the proofs, including statistics and tables and some of the same expert witnesses on each side, were the same as in the cases at bar.

The great case from Nebraska of *Smyth v. Ames* was heard on the circuit by Justice Brewer on oral testimony, as the cases at bar have been heard. The entire discussion of the question by Justice

Brewer, in a lengthy opinion, is on the extra cost and revenue theory, entirely ignoring the ton mile theory. That case resulted in the state statutory freights being enjoined by Justice Brewer, District Judge Dundy concurring. The case was carried to the Supreme Court (169 U. S. 467, 18 Sup. Ct. 418, 42 L. Ed. 819), resulting in an affirmance of Justice Brewer's decree. The opinion of the Supreme Court by Justice Harlan is exhaustive, and the tables used by him to show the facts, and the entire argument is with reference to the extra cost and revenue theory, utterly ignoring the ton mile theory.

Recurring to the Tomkins Case, 90 Fed. 363, above alluded to, that case was reversed by the Supreme Court (176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417), and the question of fact was only discussed from the revenue theory. The reversal was only because the lower court recited that it was unable to ascertain what was the actual cost of earning the local earnings for certain years. But as the lower court on the first hearing proceeded on the extra cost and revenue theory, and as that was what was discussed by the Supreme Court, and under the mandate the case went to decree (110 Fed. 473) on the revenue theory, I am convinced that the Supreme Court for the guidance of trial courts has adopted the revenue theory as the one more just and equitable both to the patrons of the road and to the companies.

So that we have the Supreme Court in the two cases recognizing the revenue theory. Two Circuit Judges of this circuit have so held. And the same holdings have been made by at least three District Judges, and the Supreme Court of Pennsylvania impliedly, although the argument in that opinion is not strengthened by reason of a statement as to the measure of proof, concerning which the minority opinions without doubt are correct.

As an argument against the revenue theory, and for the ton mile theory, no court has spoken in so far as counsel on both sides and I are advised. In some phases this is a question of fact, or logic, or argument, or opinion, partaking of all. But so many eminent courts have thus spoken, even though not a question of law, and even though the traffic in the states differ, yet such opinions tend most strongly to create an undoubted belief that the cost for carrying both passengers and freight locally is greater proportionately than for doing a long or interstate business, and that the revenue theory is the only one to apportion the cost of each business.

The Wisconsin Railroad Commission made an exhaustive and thorough investigation of these questions two years since. Evidence of both sides was heard. Experts interested, and those not interested, testified. Many months of time were given to the hearing and in reaching conclusions. A valued report was the result. The findings and conclusions were: (1) The cost of carrying local and state freight is greater than for carrying interstate freight and passengers. (2) That this extra cost must be considered, and then take the gross earnings as the basis upon which to allot expenses between the state and interstate business. (3) That less than

2½ cents per mile for local or state passengers was not remunerative in the state of Wisconsin.

10. When the statutes in question were enacted, it was believed by many that by reducing the fare there would be much more travel. For a month or so this proved to be true. But with the novelty gone, the testimony shows that the increase has been less than 3 per cent., and more nearly 1 per cent. It was likewise believed by many that, with the abolition of passes and other forms of free transportation, expenses would be lessened and receipts increased. Ministers sometimes received free transportation, but generally at half rates. Many lawyers and doctors received passes under guise of retainers for services never performed. Bankers received them under the claim that it was compensation for signing bonds and cashing Chicago and St. Louis exchange. Politicians demanded, extorted, and received them for supposed influence. Officials received them as a courtesy. Many newspaper concerns received them, from the proprietor and editor in chief down to the typesetter (relatives included), under the pretense that it was an exercise of liberty of contract, for which the newspaper published the arrival and departure of trains, with an occasional local and sometimes abbreviated plate matter. To receive them was often followed by charges of corruption; and to refuse them, by charges of demagoguery. Every person conceded it to be a wrong system, and most people were advocates for its abolition, except as to the class to which he belonged. But it was abolished, and does not longer exist, and the evidence shows that as to state earnings the passenger revenue is increased by reason thereof less than 1 per cent.

11. This leaves but one question for decision, and that question largely one of fact. The question is whether the traffic wholly within the state of Missouri, generally referred to in the evidence as local traffic, can be carried under the freight rate statute of 1907 and the passenger fare statute of 1907 at such profit as will give a reasonable return after paying expenses upon the investment, or whether such traffic is carried at a loss, or less than such reasonable profit.

Thousands of pages of testimony, taking weeks of time, have been filed. This testimony was orally presented, part to the master, and part to the court, accompanied with volumes of statements, reports, schedules, and tables. Every phase of every question of both debit and credit has been worked out, tabulated, and filed. These exhibits are the result of something like one year of work by the expert accountants representing both sides, as a result of their examinations of train reports, waybills, auditors' books, and of the accounts of the passenger and traffic departments of the several roads. This work required not only much time, but energy, and patience, and learning, and great skill. But each side had accountants of the highest character, and possessing all of those qualifications. The four accountants, Mr. Peabody and Mr. Johnson representing the railway companies, and Mr. Taliaferro and Mr. Hamilton representing the state, impressed me, after hearing

them testify and being in consultation with them for 10 days after the cases were submitted, that the sole purpose of their work was to exhibit the truth, differing only as to extra cost, and that difference of extra cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. Aside from those two questions, there is not the slightest variance between the testimony of the experts upon the two sides. During the 10 days following the submission of the cases, they and the court being alone, at the request of the court they prepared a statement in each of the nine cases submitted, which have been ordered filed. To each of the nine statements is appended a certificate showing the time covered, and that such statement correctly shows the results of the various assumptions set forth therein, which certificates were signed by the four expert accountants. Seldom, if ever, is a court under greater obligations to expert accountants representing the two sides than the court and all parties, the railroads and the public, owe these four gentlemen. Usually experts representing different sides do not agree to anything. Here experts representing the different sides agree to everything pertaining to the accounting, the differences only arising as to the basis.

The court is likewise much indebted to counsel on both sides, who for four days argued these cases with a fairness, and wealth of learning, and eloquence seldom displayed at the bar. And now, after the fullest investigation of the record, the court has reached the conclusion that upon this question of fact the statutory rates fixed by either and both statutes are not remunerative. And it only remains for the court to give the reasons for such conclusion. And, in giving these reasons, clearness is added by eliminating those things so clearly established by the evidence, or so nearly conceded in matters of law as not to be debatable.

First. The unquestioned and undoubted rule is that there is a presumption both of fact and of law in favor of the validity of every legislative enactment. The railway companies have the burden of removing this presumption, and showing that the statute clearly, or as some courts say, palpably, and others say, beyond a reasonable doubt, that the statute is invalid. In these cases the court has recognized this rule. The authorities upon this question form a long and unbroken line, with the single exception of the majority opinion in the Pennsylvania case decided a year ago. 220 Pa. 100, 68 Atl. 676, 15 L. R. A. [N. S.] 108. And that one authority is not persuasive.

Second. All testimony and argument bearing upon the question as to what consideration the Legislature of Missouri gave to these enactments is utterly immaterial. Much was said in argument as to the message of Governor Hughes of New York two years ago in declining to approve the two-cent fare statute of that state. Governor Hughes had the moral courage to veto a measure of popular favor because, as he believed, the question had not been fully considered. But the relations of a governor to proposed legislation,

and those of a court to legislation consummated, are entirely different.

Third. Most of laymen and many lawyers believe that the question is whether the railway company as a system is earning sufficient revenue upon the value of the property of the system. They believe that if the Burlington, Santa Fé, Wabash, or any other railroad system is earning such money as will pay all charges and expenses, including taxes and interest, with reasonable dividends to the stockholders, that state rates for state business must stand. Of course, no one believes this who has given the slightest attention to the question. That precise question was before, and was decided by, Justice Brewer (*Ames v. Union P. Ry. Co.* [C. C.] 64 Fed. 165), and affirmed by the Supreme Court in the Nebraska case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. The only question is as to Missouri rates, less expenses properly charged against the same. And, if this balance does not leave sufficient to pay a reasonable return, the law is invalid. And if the railroad system of any company is earning more than a reasonable return by reason of interstate rates, which affect the people many times more than local rates, and if such interstate rates are too high, Congress, either acting alone or through a commission, must make the corrections.

The Supreme Court during the present year, in the case of *City of New York v. Consolidated Gas Company of New York*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. —, decided that 6 per cent. was fair and right to be given to the owners upon the true valuation. My opinion is that, while a gas plant is in some respects different from a railroad, a railroad property, properly built, and properly managed, should, over and above expenses, make a return of 6 per cent. per annum. And, considering all the evidence, the evidence fairly shows that all of these roads were properly and economically built and are being properly and economically managed, and that, after paying the expenses for maintenance and operation, there is less than 6 per cent. of returns, and not more than 3 per cent. upon any of them, and as to some of them a deficit, taking the property as above stated within the state of Missouri at its fair valuation. And this is so without reference to bonds, because in no case do the bonds bear 6 per cent. interest. But taking the bonds into consideration, there is still not to exceed 3 per cent. returns, and in many cases a deficit, after considering all debits and credits, upon the true valuation for the state business. There is no evidence that any of the existing bonds were improperly issued either as to amounts or rates of interest. In fixing the value the court has considered the evidence of witnesses as to the stocks and bonds outstanding, and the court has considered the evidence of the fact that the Missouri state board for taxing purposes has valued these properties. Of course those findings are not binding nor conclusive, but they are persuasive. But independently of stocks and bonds, and independently of what the state board has valued these properties for taxing purposes, the

evidence shows the valuations to be as recited in the findings of fact herewith filed, and to which reference will be made in the decrees.

It is absolutely necessary that many trains, both passenger and freight, do both a local and interstate business. Even the fast trains stopping at but few stations in the state carry state passengers between such stations. And the same is true as to freight trains carrying freight both in car load and less than car load lots.

The valuation of the roads has been fixed by the court as shown by the findings of fact. The entire state and interstate earnings of each of the roads within the state is known and fixed to a certainty. The expenses are known and fixed. To apportion these expenses, it must be done according to one of the two theories, and the correct theory is that according to revenue. One theory or the other must be applied to both freight and passenger expenses, and the court should not adopt the one theory as to part, and the other theory as to another. The one theory is helpful to the one side, and the other theory helpful to the other side; the one theory to the one side in freight, and the other theory to the other side in passenger. But an arbitrary splitting of theories is illogical and unfair, and cannot be recognized. The court has adopted the revenue theory because a great number of the best railroad experts of the country, against a very limited number to the contrary, have so testified. Every court that has ever had this question before it, in so far as I am advised by the briefs of counsel and my own independent investigation, has so held in the cases hereinbefore cited of the Supreme Court of the United States; in the two cases, by two Circuit Judges of this circuit; by three District Judges of this circuit; and by the Supreme Court of Florida, *State v. Atlantic Coast Line*, 48 Fla. 146, 37 South. 657. And Beale & Wyman on Railroad Rates Regulation, § 466, announces such as being the correct rule. The values of the property within the state have been fixed by the court. The entire earnings within the state, interstate and state, freight, passenger, and miscellaneous of each, have been fixed. The entire expense is known, including the extra cost of each. To ascertain whether the result is a profit, and if so what per cent., or a loss, is but a problem of primary arithmetic, as is shown by Judge Van Devanter in *Arkansas Rate Cases* (C. C.) 163 Fed. 141. There are other methods equally simple, the resultant figures of course being the same. These computations show, as to the commodities covered by the freight rate statute of 1907, that two roads, the Hannibal & St. Louis and the Burlington, allowing nothing for extra cost, there is a deficit, and with all other companies less than 2 per cent. But with the extra cost added, the deficit for the two companies is much greater, and the other companies show a deficit.

The passenger earnings under the two-cent fare law of 1907, allowing nothing for extra cost over interstate business, give no return whatever to the Rock Island, St. Louis & Hannibal, Kansas City, Clinton & Springfield, and the Great Western. The other companies will have the following: The St. Louis & San Francisco, between 3 and 4 per cent.; the Santa Fé, between 4 and 5 per cent.;

the Kansas City Southern, a small fraction over 2 per cent.; the M., K. & T., between 2 and 3 per cent.; the Burlington between 3 and 4 per cent. But all this is arrived at by allowing no extra cost of service. But to add the extra cost for freight and passenger, there are no earnings over expenses. This is confiscation under the Constitution.

It being a legislative act, and not a judicial one, this court cannot fix rates. If it could, 2½-cent passenger rates would be fixed for the stronger roads, and 3 for the others. But that is for the Legislature acting itself with experts, such as the state employed in these cases, or through a commission with like assistance.

In view of general equity rules prohibiting findings of fact and other matters from being inserted in decrees, this opinion has been extended. And to further show how the court has considered the cases, and the various questions of fact covered by the voluminous evidence, findings of fact have been made and signed, which will accompany this opinion.

Long and laborious as the work for the court has been, I am of the opinion that the cases have been expedited by hearing the oral testimony as provided by general equity rule 67. It gave the court a much better insight into the intricacies of the cases, and with a much better knowledge of the cases than could be gained by hearing exceptions to a master's report. And I am fully compensated by the belief that I have worked out the correct conclusions, and with the knowledge that if I am in error, either as to fact or law, the cases can be speedily heard *de novo* by the Supreme Court of the United States. Because I feel in all cases, and in these cases more than ever before, as Judge Sanborn said in *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 655, 68 C. C. A. 288, 293:

"Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice to him whom he deems it his duty to defeat."

The decrees will be for the complainants. Each party will pay the costs by such party made, except the compensation of the master and stenographer. The half of those will be paid by complainants, and the other half by respondents. The reservation clause usual in such cases will be in the decrees.

Supplemental Opinion.

These cases are pending on a motion to modify the decrees and opinion filed March 8, 1909.

1. The costs were taxed, the one-half to the railway companies, and the one-half to the state officers. The company being successful, it is contended that the taxable costs, aggregating about \$18,000, should all be adjudged against the state officers. In actions at law, in the absence of a tender or statutory offer to confess judgment, the costs follow the judgment. In equity cases, such is the general rule, but not

the invariable one. The award as to costs is discretionary. Two things influenced the court in dividing the costs herein:

First. Defendants are officials, and as officials are representatives. They have no personal interest in the litigation. This, of itself, is not enough to avoid the costs; but it is to be considered. It will be presumed that the Legislature will appropriate a sufficient amount to protect these officers. But this is not always done. The last Legislature appropriated \$40,000 for these cases, which was but two-thirds enough for the two years. The master in chancery and the lady stenographer gave a great deal of time, followed by very large, but justly owing, bills, the one half of which has been paid by the railways and by the state nothing, with the appropriation exhausted. Whether the other half is paid all depends upon what the Legislature does.

Second. The more sufficient reason for dividing the costs is because of the extravagantly enormous record made in the cases. The master gave many weeks to taking evidence, and many more weeks were given by the court in taking evidence. Both the master and the court were powerless to abbreviate the record, because the Supreme Court, in the Case of *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, and the Circuit Court of Appeals for this circuit, in case of *Shubert v. Woodward*, 167 Fed. 47, 52, have held that trial courts must receive in equity cases all evidence offered that is germane to the issues. I complained, and in effect gave warning, many times to the parties, but without avail, because of the prolixity of the record. Something like 15,000 pages of evidence were taken, when one-third would have been as strong a presentation of either side. Courts should impose penalties for this, and the only penalty is by way of costs. Both sides were at fault, and both sides should bear the burden. It does not follow that such a precedent will be one to plague. It is not a precedent to be followed, except in cases where it ought to be followed.

2. Complaint is made because of the recital in my opinion that:

"It being a legislative act, and not a judicial one, this court cannot fix rates. If it could, 2½-cent passenger rates would be fixed for the stronger roads, and 3 for the others. But that is for the Legislature, acting itself with experts, such as the state employed in these cases, or through a commission with like assistance."

My statement that "it being a legislative act, and not a judicial one, this court cannot fix rates," is not controverted by any one. This being so, as of course, what I said as above is obiter dictum; but because it is dictum is no reason whatever for not saying it, and still less a reason for now eliminating it from my opinion. The greater part of one of the greatest opinions ever written by the great Chief Justice (*Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60) was dictum. But, even if it were possible, who would dare to mutilate that opinion? But two years since there were published two very large volumes wholly covering dicta only of the United States Supreme Court. Those dicta were and are binding on no one, but they contain much of the cream of our jurisprudence. This dictum of mine is binding on no one. It is my opinion, and will stand as of value, or of no value, as the profession and informed laymen fix the value thereon. I believed it proper to say that the strong roads should have 2½ cents per passenger per mile

and the weaker roads 3 cents. I could have fairly stated that the St. Louis & Hannibal and the Kansas City, Clinton & Springfield Railroads should have 4 cents or more per passenger per mile.

I still adhere to those views, and, entertaining them, I know of no reason for not stating them, with reasons for believing it was my duty to state them. Passengers, like consumers, have rights. One of those rights is to have fares fixed reasonably low. But the term "reasonable" is a comparative one. It must be in proportion to what it is worth, and the better the service the more it is worth; and the public is entitled to have, with the right to demand, efficient service, provided, always, such is paid for. Much in argument was said by counsel on both sides as if an arbitrary flat rate is all that is involved, regardless of service, and regardless of all other things. Whether the trains are expensive or inexpensive, daylight or night trains, through or local trains, main line or branch trains, roads through the hills of central Missouri, or the Ozarks, or over the prairies, and whether the trains carry few or many passengers, are matters largely passed over as if of no importance. To me they seem of great importance. So it is as to the greatly increased cost of materials compared with 10 years ago. The average fare paid per year, aside from the low excursion rates, is less than \$6 per year, commercial travelers excepted. To reduce that to \$4, thereby saving \$2, is, of course, of importance. So are other matters of importance. Aside from having efficient service, to be paid for at remunerative rates, the laboring men, the employés, have rights. They have the right to be well paid for their work, in daytime and nighttime, sunshine and storm, during the excessive heat of the summer and the rigors of winter. Their hazardous and most dangerous service entitled them to remunerative compensation, which they cannot have with meager earnings of the roads. Evidences of humanity and kindly feeling for their fellow men need not be wholly displayed toward the men who pay \$6 per year for passenger fares. A kindlier disposition would suggest an equitable division of sympathy. Thousands and thousands of them have already been "let out" because of decreased earnings, and more are to follow, with diminished compensation for those from necessity retained. What is the truthful answer to make these men, and who is to make this answer? It is doubtful if the Legislature thought this out. I decline to modify my opinion as respects this.

3. It is contended that the court was in error in its original opinion, in that the penalties of the statutes render them void. Whether rates prescribed by statute are valid or invalid is a judicial question, and the Legislature cannot prohibit the courts from passing thereon. This was so stated in the Minnesota Milk Case, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; and this cannot be done indirectly, by imposing such penalties as to terrorize the company, its officers and agents, so that they do not dare to litigate the question. This was so held in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, but a year ago. This question received but little attention from any of the counsel or the court, and was but briefly discussed by the court in the opinion. In the Consolidated Gas Case (C. C.) 146 Fed. 150, Circuit Judge Lacombe held that a penalty of

\$1,000 for each charge for gas in excess of the statutory or commission rate was prohibitive, and a denial of the right to go into the courts; and on the final hearing of the same case in 157 Fed. 849, 881, a like holding is made; and in the same case on appeal the Supreme Court held a year ago that the penalties were so excessive as to be void. 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. —. The discussion by Justice Brewer, speaking for the court, in the case of *Cotting v. Kansas City Stock Yards*, 183 U. S. 79, 99, 22 Sup. Ct. 30, 46 L. Ed. 92, is to the same effect, although the question was not decided; and a like discussion, with a like putting the question aside without a decision, is found in the *Reagan Case*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. And in *Ex parte Young*, although the penalties were more severe than under the Missouri statutes, the question is at rest. The sole question is: Can a party be allowed to litigate a disputed question of fact as to property rights, without confiscation of all its property, and all of its agents being sent to jail, if the case is lost? Surely he can. Upon reflection, and with much additional consideration, the holding now is that the section imposing penalties is void. But this is largely an academic question, for the reason that the penalty section is easily separated from the main features of the statute; and I need not discuss the proposition that, when separable, the void section does not render the entire statute void.

4. These cases as to freight were brought four years ago. Two years ago supplemental bills were filed, bringing forward the new freight rate statute and the passenger rate statute. Upon a hearing, by agreement of counsel on both sides, a temporary injunction was issued against the enforcement of the freight rate statute. The railways asked for a temporary injunction against the enforcement of the passenger rate statute. The Attorney General and his associates contested this, and were successful to the extent that the court ordered an observance of the statute for some months, until information from actual tests could be made; so that, from the very inception of the case, it has been contended on the one side that the statute is invalid and on the other side that the statute is valid. It therefore follows that this court has had jurisdiction for four years over all the parties and over the entire subject-matter of state earnings.

It is clear that this court, having such jurisdiction, should retain it over all the parties, and the subject-matter, to the end that the decrees hereafter may be enlarged, or modified, as varying circumstances and the acts of the parties may require. Therefore the decrees should be so changed as to recite such reservations.

FRIES-BRESLIN CO. v. BERGEN et al.

(Circuit Court, E. D. Pennsylvania. March 4, 1909.)

No. 314.

1. COURTS (§ 354*)—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

The Pennsylvania practice act of April 22, 1905 (P. L. 286), provides that "whenever upon the trial of any issue a point requesting binding instructions has been reserved or declined the party presenting the point may * * * move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial to so certify the evidence and to enter such judgment as should have been entered upon that evidence." As construed by the Supreme Court of the state, such statute does not infringe upon the province of the jury, but merely gives the court the same power after verdict that it had before to direct a verdict for either party upon the whole evidence. *Held*, that such practice was adaptable to the federal courts, and one which the Circuit Courts within the state were required to follow by Rev. St. § 914 (U. S. Comp. St. 1901, p. 684).

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 354.*

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. INSURANCE (§ 103*)—AGENTS—LIABILITIES TO PRINCIPAL—ACTION FOR NEGLIGENCE.

Plaintiff, a manufacturing company, employed defendants, who were insurance brokers, to secure good insurance on its property at the best rates they could get, and they acted under such employment for several years. While so employed the president of plaintiff called on defendants and stated that the company had given a mortgage on its "place" or "property" or "entire plant," and he desired some of the policies to deliver to the mortgagee as collateral. They were taken to the mortgagee's attorney, who accepted the same, and they were duly transferred. Later the president again told defendants that the company had made another mortgage of the "same kind." The policies contained a provision that they should be void if the subject of insurance was personal property and it should be or become incumbered by a chattel mortgage. *Held*, that there was nothing in plaintiff's communication which advised defendants that the mortgages covered personalty so as to affect the validity of the policies, especially in view of the fact that they were accepted without objection by the mortgagee's attorney, nor were defendants required to examine the records, and that they were not chargeable with negligence in permitting the policies to stand or in renewing the same when they expired.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 103.*]

On Motions for Judgment Non Obstante Veredicto and for a New Trial.

Graham C. Woodward and Roger Foster, for plaintiff.

Frank R. Shattuck and Alex. Simpson, Jr., for defendants.

HOLLAND, District Judge. The Fries-Breslin Company brings this suit against the defendants to recover the sum of \$110,723.92, together with interest from the 4th day of October, 1904, because of the alleged negligent performance of their duties as the plaintiff's insurance agents or brokers in placing insurance upon plaintiff's property.

At the close of the trial, the defendants requested the court to charge

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the jury that "the verdict must be for the defendants." This was refused by the court, and in due time the defendants filed the following motions:

"And now, January 4, 1909, defendants, upon the trial of the above case, having presented a point requesting binding instructions in their favor, which point was refused by the trial judge, now move the court to have all the evidence taken upon the trial duly certified and filed so as to become a part of the record, and for judgment non obstante veredicto upon the whole record."

. This motion accords with the requirements of the Pennsylvania practice act of April 22, 1905 (P. L. 286), which provides:

"That whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the supreme or superior court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

This act has been before the appellate courts of the state of Pennsylvania and carefully examined by Chief Justice Mitchell, of the Supreme Court, and Judge Orlady, of the superior court. The former, on May 24, 1906, in the case of *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559, in construing the act, said:

"The act being so recent, it is important that it should be examined closely, and its proper construction settled. * * * This statute makes no radical innovation on the settled line of distinction between the powers of the court and the jury. It shows no intention to infringe, even if it could constitutionally do so, the province of the jury to pass upon the credibility of witnesses and the weight of the oral testimony. The court has long had authority to direct a verdict for defendant when it was of opinion that the plaintiff, even if all his evidence be believed, has failed to make out his case. But this had to be done offhand at the trial, and a mistake of the judge either way resulted in delay and expense. If he directed for defendant, but on more deliberate examination or consideration came to the view that there was some evidence for the jury to pass upon, a new trial was the only remedy; while, on the other hand, if he refused a binding direction, but later found that it should have been given, the same result followed, for after a question has been submitted to a jury and the fact found by them the power of the court to enter a contrary judgment on the ground that the evidence was insufficient is gone. * * * The authority to reserve questions of law for the consideration of the court in banc was first conferred by the act of March 1, 1825 (P. L. 41), upon the judges of the district court of Philadelphia, continued in the same court by the act of March 28, 1835 (P. L. 88), and extended to the courts of the commonwealth generally by the act of April 22, 1863 (P. L. 554), together with the power, also first conferred on the district court of Philadelphia by the act of March 11, 1836 (P. L. 76), to enter a compulsory nonsuit if the plaintiff's evidence is not sufficient to maintain his action.

"The act of 1905 is another step in the same direction. It broadens the power of the judge in this respect, that whereas heretofore the verdict was required to be for the plaintiff and the reservation to be of leave to enter judgment for the defendant non obstante, now what is reserved is a request for binding instructions to the jury, and may be for either plaintiff or defendant.

But though thus enlarged so as to include both parties, the power of the judge is the same as it was before. He is 'to enter such judgment as should have been entered upon that evidence,' or, in other words, to treat the motion for judgment as if it was a motion for binding directions at the trial, and to enter judgment as if such direction had been given and a verdict rendered in accordance. What the judge may do is still the same in substance, but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence. If upon such consideration it shall appear that a binding direction for either party would have been proper at the close of the trial, the court may enter judgment later with the same effect. But, on the other hand, if it should appear that there was conflict of evidence on a material fact, or any reason why there could not have been a binding direction, then there can be no judgment against the verdict now."

And Judge Orlady, in *Ackley v. Bradford Township*, 32 Pa. Super. Ct. 487, following the view of the Chief Justice as to the effect of the enactment, lays down the further rule that in passing upon the question, at the close of the trial, whether there was a conflict of evidence on a material fact, "the plaintiff's right to recover depended upon not only his own testimony, but the inferences to be drawn from the facts and circumstances adduced by other witnesses"; that is, all the witnesses, whether called by the plaintiff or defendant.

From Chief Justice Mitchell's clear and careful definition of the scope of the act, we see that while heretofore, at the trial of a case in the Pennsylvania state courts on reserved questions of law for the consideration of the court in banc, it was required that the verdict should be for the plaintiff, and the reservation to be of leave to enter judgment for the defendant non obstante veredicto, that now this power of the judge is enlarged by the act of 1905 by reserving a request for binding instructions to the jury, and may be for either plaintiff or defendant, but his action is of the same kind; though it may be exercised for either party, the power is the same.

A motion to enter a compulsory nonsuit under the act of March 11, 1875, P. L. 6 (13th Ed.) Purdon, 3320, supplying the provisions of the act of March 11, 1836 (P. L. 76), was required to be made by defendant and acted upon by the presiding judge at the close of the plaintiff's evidence, and was in effect a demurrer to the sufficiency of the evidence to maintain the action.

On this motion, it was necessary for the judge to act at once, and it was extremely difficult to accurately recall all the evidence and the inferences arising therefrom in favor of the plaintiff's case, especially when it was of a circumstantial nature and voluminous. The objection to this practice is its failure to afford the judge time for proper deliberation and examination as to the plaintiff's evidence in support of the matters at issue. Now, if there be any doubt about defendant's right to a nonsuit under the old practice, the court can overrule the motion, if one be made, and upon a motion for binding instructions under the act of 1905, at the close of the trial, what the judge may do is still the same in substance, but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence, and he may enter the judgment for either plaintiff or defendant.

It is urged by plaintiff that the act is not adaptable to the federal court practice, and cannot be followed. The highest tribunals in the

state have held the act is no attempt to infringe upon the province of a jury to pass upon the credibility of the witnesses and the weight of the oral testimony, but simply broadens the power of the judge in the matter of practice in the state in entering judgment non obstante on reserved questions of law, and the only difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is one "rather of matter of form than of substance." *Oscanyan v. Arms Co.*, 103 U. S. 264, 26 L. Ed. 539; *Central Transp. Co. v. Pullman Co.*, 139 U. S. 39, 11 Sup. Ct 478, 35 L. Ed. 55.

In the latter case, to wit, *Central Transp. Co. v. Pullman Co.*, the court held that the Pennsylvania act of March 11, 1875, authorizing "the presiding judge at the trial to order a judgment of nonsuit to be entered if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action," is a matter of practice required to be followed under Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), in the Circuit Court of the United States held within the state. Under the state act the motion for a nonsuit is made at the close of the plaintiff's evidence, and must be then refused or allowed by the presiding judge on the plaintiff's evidence alone; but a motion to direct a verdict is made at the close of the case after both plaintiff and defendant have produced the evidence on both sides, and the judge must then refuse or allow the motion upon the whole evidence; and the act of 1905 changes the time when the judge must finally act on the motion for judgment on the whole evidence by enabling him to do so after the verdict, and this is a matter of practice or procedure which the federal courts are required to follow by Rev. St. § 914. Whether a defendant in an action of law, by a demurrer to the evidence, or by a motion to order a nonsuit, or by a motion to direct a verdict for the defendant, may present the defense that the plaintiff upon his own case shows no cause of action, is a question of "practice, pleadings and forms and modes of proceeding," as to which the courts of the United States are now required by act of Congress of June 1, 1872, c. 255, § 5, 17 Stat. 197, re-enacted in section 914, Rev. St. (U. S. Comp. St. 1901, p. 684), to conform "as near as may be" to those existing in the courts of the state within which the trial is had. *Central Transp. Co. v. Pullman Co.*, supra. The enlargement of the power of the judge so that at a different time he may pass either upon the defense that the plaintiff upon the whole evidence has not made a case, or that upon the whole record the defendant has produced no evidence in support of his defense, makes the enactment no less a question of "practice, pleadings and forms and modes of proceeding" which the federal courts are required to follow, and the objection that the act cannot be followed because it directs that an appeal shall be taken to the "supreme or superior court," which are state courts, cannot be seriously regarded. Section 914 requires the federal court to follow, "as near as may be," so that, where in state practice the act authorized an appeal to the state supreme or superior court, in federal practice the appeal would be to the Circuit Court of Appeals. This seemed to be the view of Justice Gray in *Central Transp. Co. v. Pullman Co.*, supra. While the question was not raised there, the act of March 11, 1875, contained the same provision for a writ of error to the Supreme Court.

The qualifying clause, "as near as may be," must be construed as allowing the necessary variations from state methods, growing out of the different organization of courts and other similar matters. *Lewis v. Gould*, 13 Blatchf. 216, 15 Fed. Cas. 483. It is a "practice" or "mode of proceeding" well fitted for expediting the work of jury trials in the Circuit Court, and section 914, Rev. St. requires us to follow it.

We shall, therefore, proceed to the consideration of the defendants' motion for judgment in their favor notwithstanding the verdict. It is founded upon two grounds: (a) There was no evidence that any of the insurance companies could have paid more than they did in fact pay; (b) under the facts testified to there was no proof of negligence. The latter will be first considered.

It must be remembered, in the consideration of this motion upon the ground of "no proof of negligence," that, "where there is a conflict of evidence on a material fact or any reason why there could not have been a binding direction," judgment cannot be entered. *Delmas v. Kemble*, supra. In the examination of the question as to whether there is a conflict of evidence on a material fact, it will be necessary to ascertain whether or not the whole evidence tends to establish any negligence on the part of the defendants as insurance agents or brokers of the plaintiff. This is the material fact in the case, and if there be any conflict of evidence on that pivotal point, then the verdict of the jury must stand in so far as this objection goes.

In order that it may clearly appear what the issue is, as set forth by the plaintiff in its declaration, I copy the following:

"The defendants were insurance agents or brokers for the plaintiff from the year 1893 to and including the year 1904, and as such brokers were employed by the plaintiff to procure policies of insurance against loss by fire upon its property, to wit, its mill or factory and other buildings, its machinery, fixtures, and stable contents, its merchandise, designs, and supplies, in the sum of three hundred thousand dollars (\$300,000), and to keep the same at all times so insured by good and valid insurance policies, by the terms of which in case of loss by fire the amount of such loss would be payable to the plaintiff, and as such agents or brokers the defendants entered upon their duties and essayed to keep the property aforesaid insured as aforesaid.

"The plaintiff avers that at the time of such employment it informed the defendants that the said property was incumbered by a mortgage which included in its lien all the real and personal property of the plaintiff, and that subsequently, when a second mortgage was negotiated, it informed the defendants that the said property was incumbered by two mortgages which included in their lien all the real and personal property of the plaintiff, to wit, one mortgage to Wilson Fitzgerald in the sum of \$50,000, and one to John J. Burleigh in the sum of \$60,000, and the defendants well knew that the said mortgages were outstanding and valid liens against all the real and personal property of the plaintiff company, and were chattel mortgages as well as mortgages of the realty. It then and there became and was the duty of the defendants to procure policies of assurance against loss by fire on the said mill or factory and other buildings, machinery, fixtures, stable contents, merchandise, designs, and supplies of the plaintiff in the sum of \$300,000 by good and valid insurance policies, by the terms of which, in case of loss by fire, the said loss would be payable to plaintiff notwithstanding the existence of the two chattel mortgages hereinabove mentioned, policies of which character were issued by good and responsible insurance companies, and could and should have been obtained by the defendants. Nevertheless the plaintiff avers that the defendants carelessly and negligently did procure insurance policies, a schedule of those which were outstanding at the time of the fire being annexed hereto, marked 'Exhibit A' and made part hereof, under and by the terms of which it was pro-

vided that said policies should each and all be void if the subject of the insurance be personal property and be or become incumbered by a chattel mortgage, and which said policies were wholly useless and did not by their terms insure the plaintiff against any loss by fire whatever, but were all wholly void and of no effect, as the defendants then and there well knew. The plaintiff, moreover, avers that it had no knowledge of the terms and conditions of the said insurance policies, but acted on the sole advice of the said defendants, who were acting as its skilled insurance agents or brokers."

It will be noted that the claim of the plaintiff is that the defendants were negligent in that (1) they had been informed by the plaintiff that two mortgages were placed upon "all the real and personal property of the plaintiff company, and were chattel mortgages as well as mortgages of the realty," and notwithstanding their instructions and legal obligation, under the circumstances of this case, to secure good and valid insurance, the defendants procured policies containing a clause making the insurance void in case of the existence of chattel mortgages; and (2) that these chattel mortgages were placed upon the property by the plaintiff company, which "acted on the sole advice of the said defendants, who were acting as its skilled insurance agents or brokers," and without any knowledge of the existence of the terms and conditions of the insurance policies which were in force at the time of the creation of the mortgages, and which were the same in terms as those in force at the time of the loss caused by the fire, to wit, October 3, 1904. Or, to state the whole issue in another form: The plaintiff claims that its agent (the defendants) permitted it (the plaintiff), acting under their advice, to execute a chattel mortgage on its personal property in violation of a provision in the then existing policies, and that, further, after being informed by the plaintiff of the existence of the chattel mortgages, the policies were renewed by the defendants as agents of the plaintiff, containing the same clause against chattel mortgages, making all the policies void. It may be conceded that if the chattel mortgages were placed upon the property by the advice of the defendants, who were afterward informed of their existence by plaintiff, and they (the defendants), in face of this knowledge, secured policies containing the prohibition against chattel mortgages resulting in avoiding all the insurance, the defendants would be liable. Was there, then, any evidence offered in support of this alleged negligence? The evidence of the defendants' actions in securing the insurance and their information as to the existence of the chattel mortgages at the time is contained in the testimony of John M. Carroll president of plaintiff company, and the two defendants. The former testified as follows:

"Q. And did you employ them on behalf of that corporation? A. Yes, sir. Q. The Fries-Breslin Company? A. Yes, sir. Q. To do what? A. To secure insurance for the company. Q. What did you say to them on the subject? A. I came to them and told them that I wanted them to get the insurance; or, rather, they came to me to get it. Q. They came to you to solicit the business? A. Yes, sir. Q. And they persuaded you to allow them to take charge— (Objected to as leading). Q. Did you give them charge of it? A. Yes, sir. Q. What did you tell them about the insurance you wished? A. To get us good insurance, and at the best rate they could get. Q. What, if anything, did you say to the defendants, or either of them, as regards these chattel mortgages at the time of that increase? A. I came and told them we had placed a mortgage on the place. I came and told them at their office that we had placed

a mortgage of \$50,000 on the entire plant. A. What, if anything, did you say after the second mortgage was made? A. Nothing whatever. Q. To either of those gentlemen? A. Nothing, only told them we had placed another mortgage the same as the first one, but that the mortgagee did not want any policy. They said that was all right."

Cross-examination :

"Q. You told us of a time when you spoke to Mr. Bergan, or Mr. Snyder, or both of them, about this Fitzgerald mortgage. You remember telling that, do you not? A. I do, well. Q. At that time you came and got these policies, did you not? A. No, sir, I did not. I came to get them, but did not get them. Q. Did not you get those policies, and take them over to the attorney for Mr. Fitzgerald? A. Mr. Bergan and Snyder sent them to them. Q. Do you mean to say it was not with your consent a certain number of them were set apart as collateral for his mortgage and retained by him? A. It was with my consent. Q. It was with your consent? A. Yes, sir. Q. Who brought the balance of the policies back to Bergan and Snyder? A. I do not know. Are you speaking now before the fire or after?"

John A. Snyder, one of the defendants, testified on this point as follows:

"Q. You are one of the defendants in this case? A. Yes, sir. Q. And you were the brokers who placed directly or indirectly insurance upon the Fries-Breslin property? A. Yes, sir. Q. What knowledge had you of the character of the Wilson Fitzgerald mortgage which has been here referred to? A. The statement of Mr. Carroll that he placed a mortgage of \$50,000 on the property at Camden. Q. Did he state what was the character of the mortgage? A. No, sir. Q. When did you first learn that the Wilson Fitzgerald mortgage covered other than the buildings and machinery in the buildings? A. At a meeting of the adjusters after the fire. Q. And from whom did you learn that? A. I cannot say. One of the adjusters. Q. You know how long after the fire it was? A. It was at the first meeting of the adjusters, a week or two after the fire. Q. When did you first learn of the existence of the Burleigh mortgage? A. After the fire. Q. Who informed you of it after the fire? A. It was simply hearsay. Q. When the Fitzgerald mortgage was first created and certain policies were made payable to Fitzgerald, who had those policies of insurance at that time? A. We had. Q. What was done with them? A. Mr. Carroll came to our office and stated that a mortgage had been placed on the property, and he wanted the policies to take over to the attorney's office representing the mortgagee. Q. Did he get them? A. He got them. Q. And took them over himself, did he? A. Yes, sir. Q. How many policies did he take—part of them, or all of them? A. All of them. Q. Did any of them afterwards come back to you? A. Yes, sir. Q. Who brought them back? A. Mr. Carroll. Q. Those policies, what became of them after that? A. A number of them were made loss if any payable according to an indorsement furnished to us by Mr. Carroll, and the others were kept by us, and they were sent to Mr. Wilson Fitzgerald or his representative. Q. The ones that had the indorsement, loss, if any, payable to Wilson Fitzgerald, were sent to him or his attorney? A. Yes, sir. Q. By whom? A. By us. Q. And the others, that were brought back by Mr. Carroll, that did not have that indorsement on, what was done with them? A. They were kept by us. Q. When policies, which were thus made payable to Wilson Fitzgerald, the mortgagee, in the way that has been stated, were renewed, what would be done with those renewed policies? A. We sent them to Mr. Fitzgerald, or his nephew, I believe."

And the testimony of the other defendant, William Bergan, was the following:

"Q. When did you first learn of the existence of the Wilson Fitzgerald mortgage? A. About the time, or shortly after it was created, or spoken of. I do not know how long ago that was, but about the time. Q. From whom did you learn it? A. I think it was through Mr. Carroll, who told us that such a mortgage was created, and it was necessary to have the policies so indorsed

Through Mr. Carroll. Q. Did he say what that mortgage covered? A. I cannot positively say. I presumed at the time it was on the buildings and machinery. Q. Did you know of the sending of the policies over to Mr. Fitzgerald, or his counsel, for the purpose of having the indorsement of the loss payable on them? A. Yes, sir, Mr. Snyder attended to that. Q. Were you present when Mr. Carroll called in regard to that? A. Yes, sir. Q. Who took the policies away? A. Mr. Carroll. Q. Were you present when they were brought back—the ones that were not kept by Mr. Fitzgerald, I mean? Were you present when they were brought back? A. I cannot say. Q. Do you have personal knowledge as to who brought them back? A. Mr. Carroll."

These policies do not prohibit the usual real estate mortgage; they only forbid a chattel mortgage. John M. Carroll had informed them that he had placed a mortgage on the "place" or on the "entire plant" or on "the property" at Camden. Contrary to the allegation contained in the statement that plaintiff was acting "on the sole advice of the defendants" (in support of which averment there is no evidence whatever), it appears from the testimony of the three witnesses above set out that the plaintiff created the mortgage and then gave the defendants the information that it placed a mortgage on the "place" or on the "entire plant" or on the "property" at Camden. The agents were not present at the creation of the mortgage, and knew nothing of it until Carroll called on them to get the policies to have them delivered to the mortgagee as collateral security, and at that time he informed them the first mortgage had been executed. A number of these policies were subsequently sent to the attorney of Wilson Fitzgerald, and when returned Carroll requested defendants to indorse some of them, "Loss or damage if any on buildings and machinery under this policy shall be payable to Wilson Fitzgerald, mortgagee, as interest may appear," etc. The defendants retained those which were not so indorsed, and sent the indorsed policies to Fitzgerald's attorney. Subsequently, the defendants were informed by Carroll that a second mortgage, "same as the first," had been placed, and that the "mortgagee did not want any policies." Thus it will be seen that what Carroll told the defendants when he called for the policies, and what they could learn from the circumstances of their indorsement and acceptance as collateral by a mortgagee and his attorney, was the only information they had as to the existence and kind of mortgage, and it is urged this is sufficient to warrant the inference that the defendants were fully informed they were chattel mortgages within the prohibition of the policies, and, being so informed, it was their duty, when renewing these policies, to have obtained the permission of the insurance companies to continue the existence of the chattel mortgage.

As I now view the testimony of Carroll and the circumstances of his informing the defendants of the existence of the mortgages, they were warranted in concluding that a renewal of the policies, in the form theretofore secured, would be a compliance with their duty as agents under their instructions. Carroll did not call on them for information, or to know what he might do under the policies. He called to get the policies for his purpose, about which he had not consulted the defendants, and merely told them what he wanted to do with the policies; that is, he wanted them for collateral for a mortgage he had

placed on the plant, and the mortgagee and his attorney, who created the mortgage, accepted and had them so indorsed. To what other conclusion would insurance brokers—not lawyers—come than that nothing had been done by the plaintiff in the transaction contrary to the requirement of the policies? The policies permitted the execution of a mortgage, and the man who loaned \$50,000, together with his attorney, took the policies as collateral security. All this was done without consulting the agent, and after the mortgage was created they were simply told that a mortgage had been executed on the "place," on the "entire plant," or on the "property," and this information was simply given for the purpose of requiring them to produce the policies as collateral, which they did, and found that they had been accepted by the mortgagee's lawyer. Could there be any other combination of facts and circumstances which would have more forcibly induced the defendants to believe that the plaintiff was acting well within his rights under the policies? They naturally would feel safe in renewing the insurance, in the same form, and to have them indorsed, as theretofore, as collateral for the Wilson Fitzgerald mortgage. The renewed policies were accepted by the mortgagee, thereby a second time indicating his confidence in the policies as collateral security for his mortgage, which subsequently turned out to be a chattel mortgage.

The most plaintiff can claim is that the words "place," "plant," and "property" have several meanings, and that the defendants might have learned the exact kind of mortgages placed upon the property if they had gone to the records in Camden and made an examination. But was it not rather the duty of the plaintiff to properly inform the defendants as to the nature of the mortgages it executed? It was no more the defendants' duty to go to Camden and examine the records as to the condition and kind of mortgages than it would have been their duty to go to the plant and examine minutely whether any one of the other numerous conditions had been violated, and, in view of the fact that subsequently the attorneys in the litigation differed as to whether the mortgages were chattel mortgages or not, it would appear that the defendants would have obtained very little useful information by an examination of the record of the mortgage. But they were not required to do so. What was done by the plaintiff in regard to the mortgages cannot be tortured into information that a chattel mortgage had been placed upon the property, and in the absence of such information, with the knowledge that the former policies of the same kind were accepted and approved as valid by the mortgagee and his attorney, they had a right to assume that the plaintiff was acting within his right in this regard. The defendants were not informed otherwise, and they proceeded with due diligence in law to secure "good insurance and at the best rate they could get." All these policies are standard policies, used by all first-class companies, insuring property in the states of New York, Pennsylvania, and New Jersey, and the clause against chattel mortgages appears in all of them. It follows, then, that as the defendants were not informed by the plaintiff of the existence of a chattel mortgage, or any other fact tending to invalidate the policies, they (the defendants) were

justified in assuming that the same condition as to the property existed at the time of the renewal, and that the acceptance of standard policies in the renewal, of a similar kind, would be entirely proper. They were acting, in our judgment, in accordance with the requirements of faithful and careful brokers in thus renewing this insurance, unless, in law, they were required to go farther and inquire for themselves whether or not the insured had done anything which would make a renewal of the insurance, in the form as theretofore, invalid, and to post the insured as to the conditions in the policies, whether requested to do so or not. The duty of the agent is correctly stated in 22 Cyc. p. 1448:

"As between the insured and his own agent or broker authorized by him to procure insurance, there is the usual obligation on the part of the latter to carry out the instructions given him and faithfully discharge the trust imposed in him, and he may become liable in damages for breach of duty. If he is instructed to procure specific insurance and fails to do so, he is liable to his principal for the damage suffered by reason of the want of such insurance; and a general undertaking to keep the property of the principal insured will render the agent liable for negligence in not securing or renewing insurance on the property. In either case the liability of the agent with respect to a loss is that which would have fallen upon the company had the insurance been effected as contemplated; any negligence or wrongful act of the agent defeating in whole or in part the insurance which he is directed to secure or maintain will render him liable to his principal for resulting loss, and such agent is also liable if he places the insurance in companies not authorized by law to do business in the state, the policies being void on that account."

This summary of the law as to the responsibility of the broker to his principal, so far as it goes, is fully sustained by the cases cited, and they go no further than to require that the agent shall carry out the instructions given him and faithfully discharge the trust imposed in him, and, if he be instructed to procure specific insurance, he must do so, or, where there has been a general undertaking to keep the property of the principal insured, the agent will be held liable if he neglects to renew the insurance on the property. The defendants here had been the agents of the plaintiff since 1893, and had therefore assumed a general responsibility to keep the property of the principal insured by securing a renewal of the insurance from time to time; but there is nothing in the above statement of the law which would indicate that the agent was to do other than faithfully carry out the instructions given him, which if done in accordance therewith, in securing and renewing the insurance, he has done his whole duty, and if the insured leaves his agent in ignorance and fails to keep him properly informed as to the condition and use of the property and permits him to secure a renewal of insurance, which may be afterwards avoided by reason of some act of the insured, of which he fails to inform his agent, he cannot afterwards hold the agent responsible. Of course, if the agent fails to carry out the instructions given him by his principal in any particular, or if he secures insurance in companies which subsequently turn out to be insolvent, or if the agent be put in possession of the necessary information and yet negligently secures invalid policies, or if the agent, either voluntarily or upon request made by the insured, erroneously informs the insured of the conditions of the policies, he will be held in law to be negligent in the performance

of his duty as agent, and responsible for any loss that may result to the insured by reason of the invalidity of the insurance.

No case has been brought to the attention of the court in which the agent has been held responsible for a failure to collect on policies procured by the latter in obedience to instructions, but in all of them there was something more in order to make the agent liable—some wrongful act on his part. In *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 432, the agent secured insurance in an insolvent company. In *Baxter v. Jones*, 6 Ontario Law R. 360, the agent undertook to have additional policies placed on the plaintiff's property, and to notify the companies already holding policies of this additional insurance, and failed to give the notice. In *Landusky v. Bierne*, 80 App. Div. (N. Y.) 272, 80 N. Y. Supp. 238, the agent was instructed to secure a "good policy in a very good company," enforceable in New York or Pennsylvania, which the agent failed to do. In *Park v. Hamond*, 4 Campbell, 344, there was a failure to follow instructions and secure insurance from Malaga and Gibraltar to Dublin, the agent having only secured it from Gibraltar to Dublin. He was held liable for his failure to cover the goods loaded at Malaga. In *French v. Reed*, 6 Bin. (Pa.) 308, the agent was to secure insurance from Philadelphia to Santiago and two ports on the island, and secured the insurance to one port only. In *Milliken v. Woodward*, 64 N. J. Law, 444, 45 Atl. 796, the agent informed of all the facts misstated the ownership, and was held liable. In *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718, the broker was held liable where he erroneously told the insured that the conditions in the policies forbidding the keeping of kerosene oil applied only to more than one barrel. And so through all the cases where the question has arisen, the agent or broker has been held liable only where he has either omitted to follow out the instructions of his principal, or assumed to inform his principal, either voluntarily or by request, of the conditions in the policy, and misled the principal by giving him erroneous instructions.

The defendants had undertaken generally to keep the property of the plaintiff insured, and they had done so from 1893, the time when they had assumed this responsibility. Before the final renewal the principal had directed the defendants to secure "good insurance and at the very best rate they could get." No further or different directions were given them, and these were faithfully carried out. They were not informed of any facts or circumstances existing at the time of the final renewal which would require insurance containing different conditions than those contained in the policies preceding, but, upon the other hand, the actions of the president of the plaintiff company, the facts and circumstances surrounding the mortgage transaction, all tended, so far as that matter was concerned, to persuade the defendants to believe that nothing had been done to require a different form of policy, and they were therefore justified in acting as they did.

We conclude that the case was submitted to the jury on the erroneous statement of the duty of the agent to the principal, and that there was no evidence offered to establish the alleged negligence on

the part of the defendants. Judgment must therefore be entered in their favor. The order of the court, therefore, is that judgment be entered, on the defendants' motion, in their favor, notwithstanding the verdict.

THE PAWNEE.

THE EDGAR F. LUCKENBACH.

(District Court, S. D. New York. March 16, 1909.)

COLLISION (§§ 7, 93*)—BETWEEN TUG AND STEAMER—STARBOARD HAND RULE.

A tug bound from Jersey City to Atlantic avenue, Brooklyn, was struck on her port side by a steamer bound to sea from her pier on the Manhattan side of the East River. The vessels were on crossing courses, the tug being the privileged and the steamer the burdened vessel. The steamer sought to excuse herself (1) because she had a right to expect that the tug would turn into the East River, and (2) because she was entitled under inspectors' rule 9 to adopt a two-whistle course and pass ahead. Both contentions rejected, the first because a starboard hand situation existed which was not changed by signals, and the second because the rule was invalid as being repugnant to the starboard hand rule.

[Ed. Note.—For other cases, see Collision, Dec. Dig. §§ 7, 93.*

Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.]

(Syllabus by the Judge.)

Wallace, Butler & Brown and Peter S. Carter (Archibald G. Thacher, Advocate), for the Luckenbach.

Wheeler, Cortis & Haight (Charles S. Haight and John W. Griffin, Advocates), for the Pawnee.

ADAMS, District Judge. The first of the above entitled actions was brought by Edgar F. Luckenbach et al., as owners, etc., of the steamtug Edgar F. Luckenbach against the steamship Pawnee to recover the damages, said to be \$50,000, sustained through a collision of those vessels in the waters between Governor's Island and the Battery, on the 28th of January, 1908. The libel alleges that the Luckenbach was proceeding from Port Liberty, in the vicinity of Communipaw, New Jersey, about 7:15 P. M., bound for Atlantic Basin, and when the tug was off the entrance to the channel between the said places, the green light and the masthead light of the Pawnee were about a point and a half off the port bow of the tug and approaching her on a crossing course, about half a mile distant, while the tug was exhibiting her red side light and masthead light to the steamer; that thereupon the tug blew a single blast, to indicate that she would continue as the privileged vessel across the course of the steamer and to aid in the said manœuvre, the wheel of the tug was ported somewhat in order to direct her course further to starboard; that no reply was received and the master of the tug was about to give a second blast when a cross signal of two whistles was given by the Pawnee; that immediately upon receiving this cross signal, the master of the tug gave bells to the engine room to stop and reverse her engines at full speed and at the same time she gave a signal of three

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

blasts to inform the Pawnee that her engines were reversing; that no further whistles were received by the tug until the collision occurred, when the steamer Pawnee blew danger blasts; that in spite of the tug's signals the Pawnee did not slacken her speed or keep out of the way, but kept on, with the result that her stem struck the port side of the tug about 15 feet from her bow, swinging the bow of the tug around to the westward, causing her to sink in a few minutes and drown one of the members of her crew; that the collision occurred about 7:30 P. M.; that the night was clear, the tide about high water and there was a light wind. The libellants further allege that the collision was solely caused by faults of the Pawnee and that she, although having the tug on her own starboard side, did not keep out of the way as she should have done by passing under the stern of the tug; in that the Pawnee did not keep out of the way by slacking her speed or stopping and reversing in time to avoid the collision; in that the Pawnee did not answer the tug's signal of one blast but on the contrary crossed said signal by blowing two whistles; in that the Pawnee did not maintain a sufficient lookout; in that the Pawnee starboarded her helm and directed her course to port across the course of the tug before receiving an assent to her said cross signal; in that the Pawnee attempted to cross the course of the tug before obtaining the latter's consent to such manœuvre; in that the Pawnee proceeded at an excessive and dangerous rate of speed; in that the Pawnee did not sufficiently port her helm and pass the tug port to port, and, if necessary, for the safe accomplishment of such manœuvre slow, stop or reverse her engines.

The answer of the Pawnee admits the collision at about the time stated in the libel, denies many of the other allegations and alleges the true facts thereof to have been that about 7:20 P. M. the Pawnee left pier 22 East River bound for sea on a regular voyage to Philadelphia, having her captain, first officer and a quarter master in the pilot house and a competent lookout stationed forward; that the tide was ebb, the night dark and a light breeze was blowing; that the Pawnee proceeded slowly down the East River and then ported to pass between the Battery and Governor's Island and when in the vicinity of South Ferry and on a course about W. by S., the Pawnee sighted on her starboard bow, a red light which afterwards proved to belong to one of the Brooklyn Annex ferry boats of the Pennsylvania Railroad; that said ferry boat rounded the Battery under a starboard hand wheel, opened up her green light and passed the Pawnee starboard to starboard; that about the time the ferry boat passed, those in charge of the Pawnee sighted a red light and a white mast-head light, which afterwards proved to belong to the tug Edgar F. Luckenbach; that said lights when sighted were on the starboard bow of the Pawnee, and about a half of a mile distant; that the master of the Pawnee believing he had room to cross the tug's bow without involving risk of collision, promptly blew a signal of two whistles to the Luckenbach, to which signal, however, no answer was returned; that not considering it wise to proceed without receiving an answering signal from the tug, the master of the Pawnee stopped and backed

her engines and blew a signal of three whistles to indicate that her engines were going astern; that when sighted from the Pawnee, the Luckenbach was going ahead and she continued to approach with no apparent change of course or speed; that when the vessels were in dangerous proximity, the Luckenbach blew a signal of two whistles, followed by a single faint and short blast, but she continued to come ahead, and her stem had crossed the stem of the Pawnee about twenty feet when the vessels came together; that under her reversed engines, the speed of the Pawnee had been reduced to about two knots an hour, but the force of the blow was sufficient to open a hole in the port side of the Luckenbach as a result of which she shortly sank. It is further alleged that the collision was not due to any fault or lack of precaution on the part of the Pawnee but was wholly due to the fault or negligence on the part of the Luckenbach in that she did not answer or act upon the Pawnee's signal of two whistles; in that she did not indicate her own course to the Pawnee; in that she did not slow, stop or back in time to avoid collision; in that she did not recognize that the Pawnee was bound for sea and navigate accordingly; in that she did not starboard her helm and pass the Pawnee starboard to starboard; in that she did not port her helm after the Pawnee blew her signal of three whistles indicating that she was backing, and in that she had no proper lookout.

The second action was brought by the owner of the Pawnee to recover the damages suffered by her in the collision, said to amount to \$6,000. In the pleadings, the statements of fact respecting the proceedings of the two vessels and the allegations of fault are practically the same as the foregoing.

The Luckenbach was a steel tug about 120 feet long and the Pawnee was a coastwise freighter about 265 feet long. The weather was clear. It was high water slack in the North River and the first of the ebb in the East River. There was very little current at the point of collision.

The testimony is quite voluminous and, in effect, sustains the different allegations of each party. Apart from some minor details, the controversy of fact is not great, excepting with respect to signals which will be discussed hereafter. The vessels were proceeding as respectively alleged and collision occurred a little more than half way from the eastern end of the Battery wall toward Castle William and about on a line between those places, by the Pawnee striking the Luckenbach as the latter claims. The Pawnee bound to sea, doubtless expected that the Luckenbach was going into the East River and, acting on that theory, attempted to pass her starboard to starboard, but the Luckenbach was not bound into the East River but going to a point on the Brooklyn shore which rendered a course on her part such as would necessitate a passing port to port.

The tug was apparently the privileged vessel under the starboard hand rule, and can not be considered, in the absence of signals indicating an intention to pass starboard to starboard, as governed by the rule which often applies when vessels are turning a bend and necessarily showing lights and bearings which indicate different courses

from those actually pursued. The Victory & The Plymothian, 168 U. S. 410, 418, 18 Sup. Ct. 149, 42 L. Ed. 519. Here was undoubtedly a starboard hand situation (see The New York Central No. 2 [D. C.] 132 Fed. 167), because while there was a turn, there was ample room for ordinary navigation and no signals indicating another method of navigation were given. The Pawnee sought to establish a two whistle course, but nothing of the kind was contemplated by the tug. On the contrary, her theory was that she was the privileged vessel and entitled to the right of way. Her signals were in conformity with such theory, and while there is some conflict about the time of giving of signals, there is no contention on the part of the Pawnee that the tug agreed to navigate starboard to starboard. In the absence of an agreement to deviate from the ordinary method of passing, the Pawnee seeks to establish such a right on her part by the provisions of Rule 9 of the Board of United States Supervising Inspectors, made February 13, 1907, and approved by the Secretary of Commerce and Labor, February 25, 1907. That rule provides:

"Rule IX. When two steamers are approaching each other at right angles or obliquely, other than when one steamer is overtaking another, so that the steamer having the other on her own starboard hand side may cross the bow of the other without involving risk of collision, the steamer having the other on her own starboard side may cross the bow of the other. If the steamers are within half a mile of each other the steamer having the other on her own starboard side shall give, as a signal of her intention to cross the bow of the other, two short and distinct blasts of her whistle, which, if assented to, the other steamer shall promptly answer by two similar blasts of her whistle, when the steamer having the other on her own starboard bow may cross the bow of the other, in which case the steamer having the other on her own port side shall keep out of the way of the other. If, however, the steamer having the other on her own port side deems it dangerous for the other steamer to cross her bow, she shall sound the danger signal, in which case both steamers shall be stopped, and backed if necessary, until signals for passing with safety are made, answered, and understood."

It will be seen that this rule has a very serious effect upon the provisions of the starboard hand rule which provide:

"Art. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

The accompanying rules are:

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

The starboard hand rule is not to be lightly set aside. In *The John King*, 49 Fed. 469, 473, 1 C. C. A. 319, 322, having the rule under consideration, the Court of Appeals said:

"* * * The inspectors can not lawfully require the other steamer to assent to a departure from the statute in cases covered by the rules of navigation as enacted by congress, and the inspectors' rules are not to be construed as meaning to do so."

In *The George S. Schultz*, 84 Fed. 508, 28 C. C. A. 476, the same court said:

“ * * * That is true enough, but she is in fault if she does not navigate in accordance with the regulations governing the movements of vessels thus placed. Rule 19 of section 4233 of the United States Revised Statutes (U. S. Comp. St. p. 2898) provides: ‘If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.’ That rule has since its first enactment been in full force in harbors, rivers, and inland waters. The acts of March 3, 1885 (24 Stat. 441, c. 354), and August 19, 1890 (26 Stat. 320, c. 802 [U. S. Comp. St. 1901, p. 2863]), did not affect its application in such locality; and the act of February 19, 1895 (28 Stat. 672, c. 102 [U. S. Comp. St. 1901, p. 2899]), expressly re-enacted it. Rule 23 of the same section (section 4233 [p. 2899]), equally applicable, provides that ‘where, by rule * * * 19, * * * one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24,’ which provides for special circumstances. It might be supposed that, after all the years which have elapsed since their passage, the application of these two rules would be the very A B C of practical navigation. The burdened vessel is to ‘keep out of the way.’ How it shall do so is not prescribed. It may, of course, turn to starboard sufficiently to allow the privileged vessel to pass, and then proceed under the stern of that vessel. This is the path of safety. It may ‘keep out of the way’ by crossing the bows of the privileged vessel, but, in undertaking this maneuver, it is chargeable with the knowledge that the other vessel is by express rule required to keep her course. Unless, then, the burdened vessel has time and space thus to cross in safety without the help of the privileged vessel, prudent navigation would forbid her making such attempt. If she make the attempt and thereby brings about collision, she is in fault for not keeping out of the way of the privileged vessel. The inspectors’ rules give her the opportunity of agreeing with the privileged vessel that this usually risky maneuver shall be attempted, and that the privileged vessel will cooperate to that end. Such agreement would constitute a special circumstance, within the meaning of rule 24. This agreement is effected when the burdened vessel’s signal indicating an intention to cross in front of the privileged vessel is accepted by a corresponding signal from the privileged vessel. But the burdened vessel which without such agreement undertakes to navigate as if she had the privilege, and the other the burden, assumes all responsibility for the consequences resulting from such failure to conform to regulations. All this has been explained in the opinions of the courts over and over again. It is sufficient here to refer to the decision of this court in *The John King*, 1 C. C. A. 319, 49 Fed. 469.”

The question was again discussed by the same court in *The Cygnus*, 142 Fed. 85, 87, 73 C. C. A. 309, 311, where it was said:

“Undoubtedly the unfortunate provision in the inspectors’ rules about ‘not crossing signals,’ which—even before its formal enactment in the amendment of 1899 (where it is restricted to vessels meeting end on)—was generally accepted by pilots as what the board required, has within the experience of this court, been prolific of disaster. It operated to produce a belief among those pilots that by giving the first signal they could relieve themselves of the burden which the rules of navigation imposed upon them. But it is, indeed, surprising to find that, in this harbor, 11 years after the decision in *The John King*, 49 Fed. 469, 1 C. C. A. 319, and four years after the decision in *The George S. Schultz*, 84 Fed. 508, 28 C. C. A. 476, an excursion boat, carrying sometimes thousands of people, is intrusted to the command of a man who does not know that the starboard-hand rule requires him to keep out of the way of the privileged vessel (which is itself to keep course and speed), unless both vessels have by timely interchange of signals effected an agreement to undertake to navigate otherwise than as the rule provides. The fault of the *Cygnus* was gross, and was undoubtedly the cause of the collision.”

The supervising inspectors have no power to change in any way the rules made by congress. The provisions of the act of June 7, 1897, authorized the inspectors to establish rules "not inconsistent with the provisions of this act" (Act June 7, 1897, c. 4, art. 31, § 2, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]; 2 Supp. Rev. St. U. S. p. 626). The supervising inspectors were transferred to the Department of Commerce and Labor by Act Feb. 14, 1903, 32 Stat. 825, c. 552 (U. S. Comp. St. Supp. 1907, p. 84), but I find nothing that would give them any powers which they did not possess under the act of June 7, 1897, and previous acts.

The Pawnee's brief states in this connection:

"The old starboard-hand rule, which admitted of no exception, was often inconvenient, and at times dangerous. In navigating New York harbor it was not always feasible for a vessel to pass under the stern of another which was on her starboard hand. It was for the manifest purpose of overcoming this precise difficulty that rule 9 was introduced, and by that rule a vessel having another on her starboard hand was given the absolute right to blow a signal of two whistles, indicating her intention to cross the other's bow, under circumstances which, previously, would not have allowed such a signal. The new rule required that the vessel which previously had an absolute privilege must upon receiving such a signal, do one of two things promptly—either assent to the signal and take prompt measures to act in accordance with it, or immediately stop and reverse and blow danger whistles."

Thus while the navigation was actually conducted upon the theory that the tug was bound, and would turn, into the East River, it is necessary to consider what the Pawnee's rights were under rule 9.

It is there provided that the burdened steamer may cross the other's bow if it can be done without risk of collision. There is nothing new in that, because the old rule has been practically construed to permit such a crossing when not attended with risk.

Within a half a mile of each other in nearly all cases there is risk, as in this case, and the rule then provides that if the other agrees, the privileged vessel shall keep out of the way, and if she deems the crossing dangerous, she shall sound the danger signals and both shall stop and back if necessary. Thus a new element is brought into the starboard hand situation at the option of the burdened vessel, entirely changing the method of navigating.

Inspectors' Rule 8 provided:

"Rule VIII. When two steamers are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steamer is overtaking another, the steamer which has the other on her own port side shall hold her course and speed; and the steamer which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer, or, if necessary to do so, slacken her speed or stop or reverse. The steamer having the other on her own port bow shall blow one blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered by the other steamer by one short blast of her whistle as a signal of her intention to direct her course to starboard so as to cross the stern of the other steamer or otherwise keep clear.

If from any cause whatever the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steamers shall be stopped, and backed if necessary, until signals for passing with safety are made and understood."

This rule outlines the proper method of navigating in the starboard hand situation and any rule which is inconsistent with it, is of doubtful utility and apparently invalid.

The starboard hand rule was recently (April 3, 1906) considered and applied in *The John H. Starin* (D. C.) 145 Fed. 723, affirmed (May 21, 1908, C. C. A.) 162 Fed. 146. In the affirming opinion, it was said:

"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 mid river, 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 blast whistles which she blew, indicating thereby a wish to navigate otherwise than in accord with article 22 (*The George S. Schultz*, 84 Fed. 510, 28 C. C. A. 476; *The New York*, 86 Fed. 814, 30 C. C. A. 62S), 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."

Rule 9 had not been promulgated at the time of the collision there involved and the case may be taken as the latest exposition in this district of the law under the old rules.

After careful consideration, and some hesitation, I conclude that rule 9 so far as it is in conflict with the starboard hand rule, as previously construed and applied by the courts, is invalid. The situation involved here is therefore governed by the old rule which made the tug the privileged vessel, and the Pawnee the burdened one. It was the latter's duty to avoid an attempt to cross ahead of the tug and the making of such an attempt was a fault on the Pawnee's part to which the collision was due without doubt.

There was evidence of other faults on the part of the Pawnee but in view of the foregoing determination, it is unnecessary to pursue them.

Many faults, apart from the failure to observe rule 9, have been urged against the tug, to which some attention should be given. There is an irreconcilable conflict in the testimony with respect to the signals. I think the preponderance shows that the tug gave the first signal, a single blast, and that 20 or 30 seconds later, the Pawnee blew a signal of two blasts, upon hearing which the Luckenbach immediately stopped and reversed her engines and blew a signal of three blasts. The engine movements of the tug had the effect of practically stopping

her headway. The Pawnee also stopped and reversed her engines before the collision and about the time, possibly, gave a signal of three blasts, but she did not succeed in stopping her headway as is demonstrated by the wound in the side of the tug. There was a disinterested witness of the collision in the person of a Norwegian ship master, who happened to be on the Battery. This witness had had some practical experience in navigation as quarter master and boatswain in lines out of New York and a little as chief officer and master abroad. He seemed to be intelligent and impartial. He heard the tug blow her one whistle signal and said it sounded well. He heard no answer until about 15 seconds later when he heard a signal of two from the Pawnee. He saw the collision and he thought the steamer was going at the rate of at least 3 or 4 miles, while if the tug was making any headway, it did not exceed a knot. His testimony to some extent corroborates that of those on the tug and has some weight in determining the controversy on the disputed facts. The tug was not required to answer the Pawnee's signal of two blasts with a similar signal. Her navigation was properly based upon the starboard hand rule and she correctly indicated her course thereunder. She stopped and backed as soon as she could reasonably be expected to. She was not required to conform her navigation to that of the Pawnee.

There is some difficulty with respect to the tug's lookout. She had one stationed in the pilot house. That was not a proper place for him but it appears that the absence of one from the deck forward was not a cause of, or contributory to, the collision. The case is similar to *The New York Central No. 22* (D. C.) 124 Fed. 750, where a master in the wheel house was held a sufficient lookout as he was performing the duties of one, not being engaged in steering the vessel, in view of the culpable negligence of the other vessel. This was affirmed on appeal. 135 Fed. 1021, 68 C. C. A. 661.

It is also charged against the tug that she was in fault for not carrying a range light. It does not appear how this would have affected the matter. In any event, carrying such a light is optional upon sea going vessels—article 2 (e)—which the tug was.

The collision can be fully accounted for by the attempt of the Pawnee to cross the bow of the tug and if I am correct in holding that rule 9 did not give her any right to make that effort, she should be held for the consequences of the collision.

Decree for Luckenbach et al., with an order of reference. Libel of Clyde Steamship Company dismissed.

J. M. GUFFEY PETROLEUM CO. v. COASTWISE TRANSPORTATION CO.

COASTWISE TRANSPORTATION CO. v. J. M. GUFFEY PETROLEUM CO.

(District Court, S. D. New York. December 8, 1908.)

SHIPPING (§ 56*)—BREACH OF CHARTER—LIABILITIES.

The schooner William L. Douglas was chartered by the Coastwise Transportation Company to the Unique Shipping Company and the charter assigned by the latter to the J. M. Guffey Company. The fittings for carrying oil in bulk were to be furnished by the Shipping Company. *Held* that the proper fittings were not furnished by the charterer and that it was liable for the loss resulting from the vessel being taken from the Guffey Company by the owner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 126; Dec. Dig. § 56.*]

(Syllabus by the Judge.)

Wing, Putnam & Burlingham, for the Guffey Company.

Blodgett, Jones & Burnham and J. Parker Kirlin, for the Coastwise Company.

ADAMS, District Judge. The first of the above entitled actions was brought by the J. M. Guffey Company to recover from the Coastwise Transportation Company the damages, said to amount to \$80,000, caused by an alleged breach of charter of the schooner William L. Douglas, owned by the Coastwise Company, on August 23, 1907, in withdrawing the vessel from the service of the libellant. The cross action is to recover the damages caused the Coastwise Company by an alleged breach of the contract in refusing to continue the employment of the vessel and pay charter hire, amounting, it is alleged, to \$100,000.

The charter in question was as follows:

“New York, May 16th. 1906.

It is this day mutually agreed between the Coastwise Transportation Company, a corporation organized under the laws of the State of New Jersey, Owner of the Schooner ‘William L. Douglas,’ of about 3470 tons net register, hereinafter called Owner, and the Unique Shipping Company, a corporation organized under the laws of the state of New Jersey, hereinafter called Charterer:

That the said Owner agrees to let and said Charterer agrees to hire the said schooner for the term of six months, commencing at noon on April 30th. Upon the expiration of the Charter the vessel is to be re-delivered by the Charterer (unless lost) at New York.

The vessel is to be employed in carrying bulk oil from Port Arthur, Texas, or Sabine Pass, Texas, or any other safe port in the Gulf of Mexico, to New York, Philadelphia, Boston, or Baltimore, as Charterer may elect. Charterer is to fit out the vessel with wooden bulkheads so as to enable her to carry the cargo, and make any other alterations necessary to fit the vessel for the trade.

The Charterer is allowed to use the piping now in the vessel for loading and discharging cargo with the understanding that additions must be made to it at Charterer's expense. Charterer may use the two ballast pumps now in the vessel for pumping oil, but must fit them for this purpose and leave them in as good condition as when vessel was delivered, all ordinary wear and tear excepted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Owner is to provide and pay for all provisions, wages, shipping and discharging fees of the captain and crew, pay for the insurance of the vessel, also all cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state (with the exception of the cargo arrangements) during the service.

The Charterer is to provide and pay for all coal, water, oil, port charges, pilotages and towages.

The vessel is intended to be towed by a steamship or tugboat, Charterer supplying necessary hawser, Charterer has privilege to use as much of the vessel's chains as he desires as a spring for the hawser. The chain to be made fast in the same manner as when the vessel is at anchor.

The Charterer shall pay for the use and hire of the said vessel Five thousand (\$5,000.00) dollars per calendar month, commencing from the day of her delivery as aforesaid, and to continue until her redelivery to the Owner (unless lost). Payment of the said hire to be made in cash, in New York, at the end of each month, and in default of such payment or payments as herein specified, the Owner has the privilege of withdrawing the said vessel from the service of the Charterer.

The Owner agrees to remove the topmasts, all unnecessary sails and all other weight which can be dispensed with, Charterer to pay Three hundred (\$300.00) dollars for this work. It is understood that the Owner need not carry as large a crew as when the vessel is sailing, but he agrees to carry whatever engineer crew is required to properly handle the cargo. Cargo to be loaded and discharged day and night.

The captain shall hoist sails whenever they can be used to advantage and render all possible assistance to the Charterer. If the Charterer shall have reason to be dissatisfied with the conduct of the captain, officers or crew the Owner shall, on receiving particulars of the complaint, promptly investigate the same and if necessary, make a change in the appointments.

The Charterer has permission to appoint a super cargo if desired. He is to be furnished, free of charge, with cabin fare and accommodations.

In the event of loss of time from deficiency of men or stores, breakdowns, stranding, fire, or damage, preventing the working of the vessel for more than 24 running hours the payment of hire shall cease until she be again in efficient state to resume her service, but if the loss of time is due to breakdown of pumps or other oil fittings, or vessel should go aground in harbor or rivers, through no fault of the vessel, the loss of time shall be at Charterer's expense. Should the vessel be driven into port or to anchor by stress of weather, said loss of time shall be at Charterer's risk and expense.

At the expiration of six months the Charterer shall have the privilege of renewing this charter for the period of four years, all the terms and conditions to be the same except that the Charterer shall have the right to terminate said charter at any time upon giving thirty days notice of its intention so to do.

When the charter has expired, the Charterer agrees to remove all bulkheads, piping, and other things he has added to the vessel, and properly clean the holds before re-delivering her.

The acts of God, fire, all dangers and accidents of seas, throughout this Charter Party, to be always mutually excepted.

The Owner shall have a lien upon the cargo and all sub-freights for any amounts due under this Charter.

The Charterer has the option of carrying general cargo in either direction if he so desires. It is understood that the vessel may be loaded to 26 feet draught, but not deeper. Owner states that as now rigged she carries 6000 tons of coal on this draught.

This Charter Party is to take the place of the Charter Party dated April 14th, 1906, between the Coastwise Transportation Company and F. H. Weeks, Agent.

This Charter Party shall be binding upon the Coastwise Transportation Company, its successors and assigns and upon the Unique Shipping Company, its successors and assigns.

Unique Shipping Co.

by F. H. Weeks, President.

Coastwise Transportation Co.

J. G. Crowley, Gen. Mag."

[Seal]
Attest I. W. Millard, Secretary

[Seal]

The charter was to continue in force until August 30, 1910, subject to a right on the part of the charterer to cancel at any time, upon giving 30 days' notice to the owner. The contract was assigned by the Unique Shipping Company to H. A. Phillips and by him to the Guffey Company.

On August 23, 1907, the Guffey Company had the privilege of continuing the use of the vessel for about two months over three years and it is upon such claim and one for the value of the fittings placed in the Douglas by the libellant, or its assignors, said to amount to \$30,000, that the Guffey Company's demands for damages are based. The Coastwise Company's claim for damages is based upon the Guffey Company's breaches of the charter.

The original charter of the vessel was not with the Guffey Company directly but that Company had the benefit of it and was using the vessel for its purposes.

The Douglas was a six masted schooner, all of steel, excepting her top masts, booms and gaffs. She was 266 feet long, on the water line, 48 feet wide and had 30 feet depth of hold. When built she had a collision bulkhead forward and one aft, and in her center a deep tank, for carrying ballast, with a bulkhead at each end of it, and a center line bulkhead through her. She was built in Quincy, Massachusetts, and at first used for carrying coal and had a twenty year A1. rating. This rating she subsequently lost through the defective oil carrying arrangements which were placed in the vessel.

Under the charter in suit, the vessel was delivered to the Unique Shipping Company, represented by F. H. Weeks, at the Morse Iron Works in Brooklyn, where wooden bulkheads were put in her and other interior arrangements made for the transportation of oil in bulk. After these fittings were installed, she proceeded to Port Arthur for a cargo of oil. Shortly after arrival there water was admitted to her through the sea valves and she was thus tested with water to ascertain the efficiency of the fittings. It was then found that the fittings were not tight but permitted the water to run from the side of the vessel into which it had entered to the other side, notwithstanding the center bulkhead, causing her to list so badly that it was necessary to pump it out in order to straighten her up; then they washed her bulkheads with a water hose, giving them a thorough wetting down, then they pumped the water out and the next day started to load the cargo of oil. The bulkheads, however, leaked quite badly, the oil running from one tank to another, all of the various new bulkheads leaking but they finally succeeded in getting her loaded and she proceeded to sea, arriving in New York in due course. Some repairs were then made on the bulkheads at the Morse dock by caulking and the use of cement and she returned to Texas for another load, which she took notwithstanding that the leaks continued, but not to the same extent as on the previous loading. The vessel was arranged with expansion tanks built over the main tanks for the purposes of feeding and keeping them full. These tanks, as well as the between decks leaked somewhat but not as badly as on the previous voyage. The vessel met with a hurricane going north in December, during

which her fittings generally leaked very badly, the expansion tanks so that they would not hold the oil but allowed it to run into the between decks, causing danger of the vessel capsizing if the pumps should for any reason cease to work. Upon reaching New York after this experience, she was taken to Shooter's Island and the fittings were again overhauled and repaired as far as possible in the limited time available. The vessel then went to sea and acted in practically the same manner as to her oil fittings. This time on her return she went to Philadelphia, and during the voyage she leaked so that upon arrival she had about a foot in depth on her between decks, notwithstanding the continual working of her pumps. It was said that the suction pipes were too small which served to account for the failure of the pumps to keep her free and larger suction pipes were put in. After that in fine weather they were able to keep the between decks free but had great difficulty in bad weather. Then the leakage came from the expansion tank and the sides of the vessel's fittings. Up to this time the vessel was not managed directly by the Guffey Company but its agent, Mr. Taber, the manager of the company's marine department, had been on hand upon her return from Texas each time and the master had talked with him about the condition of the fittings and he went aboard of the vessel and saw its interior condition. The master told him that he did not consider the vessel fit to go to sea in her condition, considering either the safety of the vessel herself or the lives of those on board. Mr. Taber recognized the situation and said to the master that if she was permitted to remain in that condition, he should refuse to load her again at Port Arthur. She was, however, loaded again at that place and took another cargo on board, notwithstanding she was in practically the same condition as before, the oil running from the tank in which it was pumped into another not then intended to be filled, in sufficient quantities to be heard plainly. The expansion tanks continued to be in a leaky condition and were filled to the depth of five feet, in conformity with orders, but the oil leaked out almost immediately.

A Mr. Foley, at one time superintendent of the marine department of the Guffey Company, but not in its employ at the time of testifying, said that he knew the Douglas and had instructions from Pittsburgh, the home of the company, in December, 1906, that she had been taken over and received directions from Mr. Taber "to get her fixed up, the bulkheads tightened and to fix her in good condition"; that he went and inspected the vessel thoroughly with the captain and found "her generally bad all over * * * several feet of oil in the between decks" and in response to a question about her expansion tank, said "she was leaking all over, just like a sieve, all over"; that he told Mr. Taber "there was no use to spend money on her, to just plug along and do the best he could."

The master testified that Mr. Foley "came down on New Year's Day and spent about all day on the ship and went all over her" and he, the master, told Mr. Foley:

"I would recommend the expansion to be fixed entirely different from what they were, that I didn't think they were so you could keep oil in them at all;

and the wooden bulkheads to be made tight or to put in steel ones—it didn't make any difference to me, only to make the ship seaworthy."

The master remained on the vessel until the 30th of June, 1907, and said that the repairs which were considered necessary were not made while he was on her, though some things, as putting in an oil pump, changing the smoke stack, putting rubber gaskets on No. 4 tank, were done, without any good effect, that "it was just as bad after it was done, if anything, worse" excepting the leak in the top of No. 4 tank was stopped. He further said that the No. 4 tank was the only one that was helped, that tank being absolutely tight as far as the top was concerned, but the other tanks were the same as before, and when loading they could hear oil running from one to the other; that the longer he was in her the "worse they got, they got so you couldn't keep oil in them at all" and the bulkheads "gradually got worse all the time"; that on her last trip the braces had fallen down and he had them hoisted out and thrown overboard. He further said that nothing was done to repair the wooden part of the vessel after the Guffey Company took charge of her. He left her on the 30th day of June and at that time did not consider her safe to carry bulk oil and said to Mr. Connolly, the New York Superintendent of the Guffey Company, that he considered her very unsafe, "in fact I didn't think she was fit to go to sea. I said if she ever goes to sea and gets in a bad gale of wind we are going to lose the vessel and drown everybody aboard," which was his judgment. He further said that he stopped going in her, for one reason, that he had a fever but "mostly on account of the condition of the ship, I didn't never intend to go back on the ship as long as she was in the condition she was in, until she was repaired and made seaworthy I wasn't going into her."

Captain McLean was succeeded in the command of the Douglas by Captain Arey, who had had a long sea experience and had master's papers. He had acted as mate of the Douglas under Captain McLean after September, 1906. He joined just after she had been through the hurricane and found her in a very dilapidated condition from the effects of that storm. She was then taken to Shooter's Island and the storm damage repaired and some work was done on the oil fittings but the leaks were not fully stopped and she leaked considerably on the ensuing trip. Arey continued as mate up to the 1st of July, 1907. He said that some cement was put in the bulkheads and that they all leaked, as did the expansion tanks. All leaks grew worse as time went along. He further testified that she continued to become worse in condition until he finally concluded that he would not care to continue on the vessel unless her condition should be so improved that she would be actually seaworthy.

Other members of the crew came to the same conclusion as the officers and I think there can be no doubt that when, on August 23, 1907, the Coastwise Company declined to continue her in the Guffey service, she could not be sent to sea without great hazard. From the first, it was found that the wooden bulkheads were not acting well and their defects increased with the passage of time, so that it was only a question as to when she would be lost in consequence of her

condition with respect to the oil fittings or be retired from service, unless they should be properly refitted with iron or steel bulkheads and the necessary appurtenances. This had been recognized for some time by the officers of the Coastwise Company, and they had persistently urged the Guffey Company to make the change, which the latter refused to do, saying that the owner had chartered the vessel to the Unique Company "as a wooden bulkhead proposition" and the Guffey Company had so taken it and would not think of replacing the wooden bulkheads with steel ones.

When the Coastwise Company was considering the question of withdrawing the vessel from the Guffey service, it called a survey upon the vessel, which resulted in the following report:

"New York, August 23rd, 1907.

Ref: 6-m. Schr: 'William L. Douglas'
3718-3470 tons, of Boston (Mass.)

This is to certify that we, the undersigned Marine Surveyors did, on this date, at the request of Capt. A. Crowley, acting for and on behalf of the Owners, attend the above named vessel while lying afloat and moored at the J. M. Guffey Co.'s Pier, Bayonne (N. J.), to ascertain and report upon her fitness to proceed to sea and continue in the service of transporting oil in bulk without risk or danger to herself.

That, after examination, the undersigned are of opinion that the wooden bulkheads and expansion trunks at present fitted in said vessel are inefficient owing to the fact that it has been found impracticable to insure oil-tightness when fitting wooden bulkheads in direct contact with the sides of a vessel of those dimensions; that the liquid cargo cannot therefore be controlled on account of the free passage it has from one compartment to another; and that, to place her in a safe and seaworthy condition, suitable steel bulkheads, expansion trunks &c., should be fitted, the deck strengthened and the vessel otherwise made oil-tight to enable her to continue in the particular trade in which she is now engaged.

In view of the foregoing, the undersigned would recommend that said Schr: 'Wm. L. Douglas' be not allowed to proceed to sea with a liquid cargo until the above recommendations have been satisfactorily carried out.

Louis L. Berwind
Chs. Niehen
H. Wilkinson
per J. J. Jones."

It will be seen that the question of the suitability of wooden bulkheads was directly presented and the board found that the vessel was not fit to go to sea with bulkheads of that material but held that steel bulkheads should be substituted, thus presenting the very subject of dispute between the parties and determining in favor of the contention of the Coastwise Company. Of course the determination is not in any way binding but while it is not so, it is somewhat persuasive, although the Guffey Company was not represented in the proceedings. It could, however, have had the matter presented to another board of survey, at which it could have had an opportunity of presenting its side of the question, if it deemed it advisable.

The question presented then is what were the obligations of the parties to the contract quoted above. It is not questioned that the Guffey people, through their connection with the matter, the Unique Company having been in effect their agents throughout, controlled the matter from the beginning.

The vessel was originally designed for and employed in carrying coal. In this contract there occurs the provision that the charterer is to employ the vessel in carrying bulk oil, and for the purpose, "is to fit out the vessel with wooden bulkheads so as to enable her to carry the cargo, and to make any other alterations to fit the vessel for the trade." It was provided also that the charterer should be allowed to use the piping already in the vessel for the trade she was to be engaged in with the understanding that additions should be made at its expense and all fitted for oil carrying but should leave them at the expiration of the contract in as good condition as when delivered, ordinary wear and tear excepted.

If the contract provided for steel instead of wooden bulkheads, taking the condition of the vessel into consideration, there can be no doubt that the attitude of the Coastwise Company would have been correct. To what extent does the fact that the contract provides that the charterer should fit the vessel with wooden bulkheads change that conclusion? It does not appear that the situation which subsequently developed was in consideration by the parties when the agreement was made. I think it may be fairly assumed that they both thought that wooden bulkheads would answer the purpose.

Mr. Weeks, called as a witness by the Coastwise Company, said that he negotiated the charter with the vessel's owners on behalf of himself and others, who subsequently became the Unique Shipping Company. This charter is the one quoted above. Mr. Weeks drew the contract, in which there were some changes made at the request of Mr. Crowley, who represented the Coastwise Company. The Unique Company, through Mr. Weeks, or under his direction, designed the wooden bulkheads. He said, on cross examination:

"Q. You in fact intended these bulkheads to be absolutely oiltight, did you not? A. I didn't expect them to be absolutely tight, no.

Q. For the purpose of carrying oil with safety it is not necessary that they should be strictly oiltight, is it? A. That is a matter of opinion. Most people say it is necessary to have them absolutely tight. I specified in my contract with the shipbuilder that he should make them absolutely tight.

Q. Did you intend when this contract was made to have them absolutely oiltight? A. Which contract?

Q. The contract you made with the Coastwise Company, both the original one and the one of May 16th? A. I intended to have them practically tight.

Q. What was meant by 'practically tight'? A. That is a pretty hard thing to tell.

Q. You did not mean to have them actually tight? A. I intended to have them so there would be very little leakage.

Q. That is, that the leakage would not be so great as to endanger the safety of the ship or to seriously impair the purpose for which she was designed? A. I didn't say that.

Q. I ask you that? A. No. I intended to have them much better than that.

Q. How tight did you intend to have them? A. I intended to have them almost absolutely tight.

Q. What do you mean by 'almost'? A. That is pretty hard to tell. Some people would say a teacupful leaking through the bulkhead would come within that definition; others would say a barrel.

Q. What did you mean? A. I didn't go into the subject with such great detail.

There can be no doubt, I think, that the Unique Company was bound to put in the vessel such fittings, including bulkheads, as would enable her to carry bulk oil safely. The wooden bulkheads, while never entirely satisfactory, and always suggesting the necessity for steel ones, were kept for a time in such order that the vessel was able to carry the oil. After she was turned over formally by the Unique Company to the Guffey Company, very little was done to preserve her seaworthiness as to the fittings. The latter professed to have always been willing to make such repairs as the Coastwise Company should properly require. The latter was always complaining of the condition of the fittings and suggesting steel bulkheads, which the Guffey people declined to consider, but at the same time allowed the wooden fittings to decline for want of repairs, so that eventually, the vessel did become unseaworthy in the sense that she was in an unsafe condition to navigate when loaded. It seems to me that that state of affairs arose entirely through the neglect of the Guffey people. While perhaps they were not required to go to the expense of new bulkheads of steel, they were required, if they did not deem that expedient, to keep the wooden ones in better condition. The Unique Company was able to do this for a time and probably the Guffey Company could and it should have done so, or attempted to, even if increasingly expensive. The attempt to use wooden bulkheads arose from its mistake, or that of its predecessor, in which the Coastwise Company did not participate beyond acquiescing. The Guffey Company was bound to keep the vessel in condition in the respects mentioned and instead of doing so evinced a disposition to continue her use while in a dangerous condition. All the Coastwise Company asked at the end was that the vessel should be put in a safe condition and in the absence of a fulfillment of this condition by the Guffey Company, the Coastwise Company was justified in refusing to take the further risk and in withdrawing her from the service.

The libel of the Guffey Company will be dismissed and a decree entered for the Coastwise Company, with an order of reference.

THE TORONTO.

(District Court, S. D. New York. November 24, 1908.)

SHIPPING (§ 141*)—DELAY IN DISCHARGING CARGO—LIABILITY OF VESSEL.

Delay in discharging cargo and consequent damage. A general strike of longshoremen in New York prevented the timely discharge of a shipment of onions from Hull, England. A strike clause in the bill of lading provided that the ship should not be responsible for strikes and stoppage of labor. *Held* that the clause constituted a defense.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 141.*]

(Syllabus by the Judge.)

Charles Caldwell, for libellants.

Wing, Putnam & Burlingham, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ADAMS, District Judge. This action was brought by W. N. White & Company against the steamship Toronto and the Wilson Steamship Company to recover the damages, said to amount to \$2,600, caused by delay in the delivery in New York of 4,000 bags of onions, shipped from Hull, England, by John Seeds & Sons, on the said steamer on or about May 10, 1907, for delivery to the libellants, who were the owners and consignees thereof. The libel alleges, in substance, that when the onions were loaded on the steamer they were in a sound condition; that the bill of lading called for the delivery thereof in equally good order to the libellants in Boston or New York, according to the option of the libellants, who notified the steamship to deliver them in New York; that the steamer arrived in Boston on or about May 20, 1907, and instead of remaining there the usual time of three days, she remained upwards of eight days and there was no cause or necessity requiring her to remain there beyond the usual time; that the steamer failed to proceed with due speed upon her voyage to New York and arrived late and instead of landing the onions at the regular and proper place, she proceeded to the Phoenix Pier in Hoboken and remained there for upwards of four days and that when she came to her usual place of discharge, the Wilson Line Pier at New York City, to land the onions, they had been damaged by the unusual and unnecessary length of time they had remained on the steamer, the usual voyage being sixteen days, and upwards of thirty days elapsed between the first sailing and delivery, whereby the alleged damages were caused.

The answer admits the shipment and the notice with respect to delivery in New York; that the steamer arrived in Boston May 25, 1907, and sailed thence to New York June 5, 1907, and proceeded to the Phoenix Line Pier at the foot of 7th Street, Hoboken, N. J., where she arrived June 6, 1907, and where she discharged most of her cargo and was ready and willing to discharge the onions in question and would have done so had the libellants not demanded that they should be discharged in the Borough of Manhattan in the City of New York. The answer admits that after discharging cargo in Hoboken she proceeded to pier 50, North River, Manhattan, where she discharged the onions and delivered them to the libellants who accepted the same and paid freight thereon. After some formal admissions and denials, the answer stated:

"Seventh. Further answering, the claimant alleges as follows:

It is a British corporation, having its principal office in Hull, and is the owner of the steamship Toronto, which it employs in regular freight and passenger service between Hull and Boston and New York. The Toronto is a steel screw steamship 3949 tons net register, built in 1900, and hails from Hull. At the times mentioned in the libel, and particularly when she received on board the merchandise mentioned in the libel, she was tight, staunch, and seaworthy, and in all respects well manned, equipped, supplied and fitted for the business in which she was engaged.

In the month of May 1907, said steamship, then lying in the port of Hull and bound for Boston and New York, loaded a general cargo, including 4000 bags of onions shipped by John Seeds & Sons. Bills of lading were duly issued for said onions, to which the claimant begs leave to refer and make a part of this its answer. By said bills of lading it was, among other things, agreed that said bags of onions should be delivered at the port of Boston, consignees to have the option of taking delivery in New York on giving no-

tice to steamer's agents before steamer's arrival at Boston. Said bills of lading contained, among other clauses, the following:

'Ship not responsible for defective marks on bags or condition of contents.'

'Riots, strikes, tumults, lookouts, stoppage of labour from whatever cause and consequent delays and loss or damage by force or otherwise * * * excepted.'

'Weights, measures, contents, number, quantity, quality, and value unknown. Ship free of * * * breakage, corruption, decay, rain, spray, sweating, loss or damage from stowage or contact with or smell or evaporation from any other goods.'

'With liberty in the event of the steamer putting back to port of loading, or into any other port or place, or otherwise being prevented (temporarily or otherwise), from any cause, from commencing or proceeding or continuing in the ordinary course of her voyage, to proceed under sail, or in tow of any other vessel, or in any other manner which the shipowner or those in charge of the ship shall think fit; and to ship and tranship the goods into any other vessel for any purpose.'

The Toronto sailed from Hull with said merchandise on board and proceeded to Boston, where she arrived on or about Saturday, May 25th, 1907. Before her arrival in Boston her agents were notified by the libellants that they would take delivery of their consignments of onions in New York. On June 5th, 1907, the Toronto sailed from Boston to New York, where she arrived on June 6th. At that time there was a strike of stevedores and longshoremen in the port of New York and all steamships had been generally delayed in discharging and loading their cargoes and all steamship piers were full of cargo. Owing to the strike the Toronto was unable to proceed to her usual pier, No. 50, North River, all berths at such pier being occupied and the pier itself being full of cargo. Accordingly, she proceeded to the Phoenix Line Pier at the foot of 7th Street, Hoboken, and began the discharge of her New York cargo there. Due notice was given to the libellants by the agents of the Toronto, and the steamship was ready and willing to discharge their consignments at the Phoenix Line Pier and make delivery of her cargo there, but the libellants refused to accept the cargo there, although Hoboken is within the port of New York, and insisted that their consignments of onions should be delivered in the Borough of Manhattan, New York City. Accordingly as soon as it was possible for the Toronto to discharge the rest of her New York cargo in Hoboken and a berth could be obtained in New York City, the Toronto proceeded from Hoboken to Pier 50, North River, and there discharged the libellants' onions and delivered the same in the like order and condition in which they were received to the libellants or their assigns, who received and accepted the same, giving clean receipts therefor, with the exception of certain minor notations, and paid freight thereon.

It the libellants' onions were damaged at any time, which the claimant denies, such damage was not due to any negligence on the part of the Toronto or this claimant which performed all the terms and conditions of the contract of shipment."

The first serious dispute of fact is whether there was any delay in Boston.

The libellants claim that the Toronto remained in Boston 6 to 8 days longer than necessary and that she then deviated from her course and went to Hoboken where she remained 5 days more during which time the damage to the onions was done. It was abundantly proved that the onions were seriously damaged when delivered in New York but it does not seem that such damage was attributable to the Boston (so called) delay. It was shown that the average time the steamer usually spends in Boston is about a week, sometimes the discharging and reloading there occupy 10 or 11 days. On this occasion she was there from May 25th to June 5th early in the morning. One of these days, May 30th, was a holiday, and it was not usual to work on Sun-

days. The period she remained there covered not only the holiday but two Sundays, May 26th and June 2nd. May 25th was occupied in preparing for discharge, in rigging tackle etc.; the next day was a Sunday. She worked, discharging and loading, May 27th, 28th, 29th and 31st. On June 1st it was raining and the stevedores would not work. June 4th she worked till midnight. Therefore there were six working days while she was in port, during which time she was reasonably occupied. According to the Custom House records she often used less time in Boston than she did on this occasion but that fact does not impose liability on the vessel for damage to perishable cargo by delay, especially where it is shown that no time was unduly lost by the steamer. The libellants have practically admitted that no loss was suffered by reason of any delay in Boston. On the 14th of June, they wrote to the steamer's agents:

"Had they (the onions) been landed last week, they would have been cleared ere this without any loss to anyone. I fear now there will be a serious loss to someone."

On the 5th of June, at 4 A. M., the Toronto sailed from Boston and arrived at the Phoenix pier in Hoboken June 6th at 11 A. M. She remained there until June 11th at 10 A. M., when she proceeded to pier 50 North River, the regular Wilson Line pier, where the onions were duly delivered. In the ordinary course, the steamer would have proceeded to and discharged at the New York pier. The reason she did not do so on this occasion was that there were labor troubles existing at the time and the New York pier, in consequence, was congested with merchandise and vessels, hence it became necessary for her to go to Hoboken.

The libellants contend that going to Hoboken was a deviation from the voyage contemplated by the bill of lading. It is contended by the claimant that Hoboken is legally within the port of New York, which receives some countenance from the language of the libel as follows:

"I. That the libellants above named, W. N. White & Company purchased from John Seed & Son of Hull, England, 4000 bags of onions, which were shipped from * * * to be carried, transported and delivered to libellants, who are the owners and consignees of said onions, at the port of New York or Boston, at libellants' option, and when the said onions were placed aboard the said Steamship; * * * and under the contract which is the bill of lading under which said onions were shipped, the said onions were to be delivered in like good condition and order to the libellants at New York or Boston, according to the option of the libellants; and the libellants notified the said Steamship to deliver the same at the Port of New York."

It was testified by Mr. Von Schuckman, of the Hamburg-American Line:

"By Mr. Burlingham: Q. (repeated). Are you able to state what is included, as a matter of usage, among merchants within the port of New York; how extensive that is, in other words what it includes? A. All places within the jurisdiction of the port of New York; that includes Hoboken, Jersey City, Brooklyn, of course."

This is confirmed by the testimony of the resident manager of the Holland America Line and by Mr. Pentz, one of the claimant's firm.

Mr. White, one of the libellants, admitted that such was the case "for federal purposes."

The federal statutes provide (Rev. St. U. S. p. 498 [U. S. Comp. St. 1901, p. 1730]) :

"Section 2535. There shall be in the State of New York ten collection-districts, as follows:

* * * * *

Second. The district of the City of New York; to comprise all the waters and shores of the State of New York, and of the counties of Hudson and Bergen in the State of New Jersey, not included in other districts; in which New York shall be the port of entry. * * *

The limits of the port for delivery purposes have been discussed in *Devato v. 823 Barrels of Plumbago* (D. C.) 20 Fed. 510, where it was held that the legal limits of the port are such as are fixed by the United States and it is clearly recognized thereby that Brooklyn, for example, is a place for the proper delivery of New York cargoes as a part of that port.

The conclusion to be derived from the foregoing is that the claimant's contention is at least plausible but the contract provided:

"Consignees to have the option of taking delivery in New York on giving notice to steamer's agents, before steamer's arrival at Boston."

Such notice was given and it seems that the libellants were entitled to require delivery in New York, especially as the market for onions existed there and not in Hoboken. The case, however, does not depend upon this question for the determination of the controversy involved, which really turns upon the question of a strike.

Very full testimony was given by both sides upon that question, principally from railroad and steamship agents. The agent of the New York Central and Hudson River Railroad Company said he knew its men were dissatisfied with the rate of wages they were receiving; the agent of the Old Dominion Steamship Company said there were labor difficulties but that his company had in the neighborhood of 300 long-shoremen in its employ in May and June; the agent of the Pennsylvania Railroad Company said that their men went out on a strike May 6th and it was May 11th "before we were normal"; the agent of the Ocean Steamship Company said that there was a general strike among steamship and coast lines in May and June; the Assistant Superintendent of the Atlantic Transport Line said they suffered from the labor troubles during May and until the middle of June and they were on account of it obliged to send their steamers away practically empty. The foregoing witnesses were called by the libellants; then the claimant called a number of witnesses on its behalf. The New York Manager of the Holland America Line said there was a general strike on from May 3rd up to June 15th of such a character that, referring to Hoboken, all that they could do was to discharge the inward cargoes. "We were not able to load any outward cargo at all because we did not have the proper men working, our regular men being out on a strike;" that as a rule they discharged their ships in about 2½ days and it took them all the time they were in port, about 7 or 8 days, and the condition was the same with the North German Lloyd and Hamburg-American Line,

that the strike was a general one also affecting New York; the agent of the Hamburg-American Line said the strike lasted 5 weeks and during that time they sent their ships back light; the Superintendent of the Anchor Line said there was a strike in May and June lasting from the 2nd or 3rd of May up to the 18th or 20th of June, during which they had to pick up strangers, and send their ships back light, owing to intimidation and threats notwithstanding police protection. Other witnesses testified to the same effect.

When the Toronto came into port it was found that she could not go to her regular pier because it was occupied by another vessel, detained there by the strike. The pier was congested with freight for the same reason. The Wilson Line endeavored to get men to do work at the pier by advertising and otherwise but without success. There can be no doubt that a very serious strike existed, which was delaying the loading and discharging of all ocean steamers, and that the incidents of the strike constituted sufficient reason for sending the steamer upon arrival in the port of New York to Hoboken for discharge. The strike was also affecting that place; whether it would have prevented a discharge there does not appear because the libellants insisted upon having the steamer bring their goods to New York City. Assuming that some damage was caused by going to Hoboken, the question is presented whether the strike was a sufficient excuse for the steamer's action.

The contract of shipment, evidenced by the bill of lading, contained the following:

"Ships not responsible for * * * strikes, * * * stoppage of labor from whatever cause and consequent delays. * * *"

The libellants urge that there was no strike but merely labor troubles, which could have been avoided by some increase in the pay of the stevedores. There was, however, a decided strike, that is, the stevedores refused to work at the old wages. No doubt, experienced stevedores could have been employed at the rate of wages they were striking for but even if it could be expected that vessel-owners should yield to the demands of workmen under the circumstances which prevailed here, the language of the contract goes farther and seeks to exempt them from the effects of the stoppage of labor and consequent delays. That there was a stoppage of labor is beyond question. It appears that the great majority, if not all, the experienced stevedores refused to work at the old wages. Some of the transportation companies yielded to the demands, or compromised with the men, so that to them the inconvenience incident to the stoppage was but temporary. Others, however, refused to yield and the strike continued for the greater part of the two months. The provisions of the contract, quoted above, were undoubtedly designed to cover a case of this kind and I am unable to see any reason why the vessel was not entitled to resort to the provision for a defense.

The libellants complain that the provision was printed in very small type, which is true. Agate was the size of this type and it was difficult to decipher. It did not stand out boldly as would be proper when a defense of the kind is relied upon, nevertheless it was there and with a fair amount of care could be seen. It is not like the case

of *The Minnetonka* (D. C.) 132 Fed. 52, affirmed 146 Fed. 509, 77 C. C. A. 217, where a provision in a passenger's ticket exempting the vessel from liability for the loss of a passenger's effects by theft of the shipowner's servants, printed in the same kind of type, was declared invalid, it being shown there that it had not been read by the passenger. No such proof was made in this case. Whether, if it had appeared here that the provision had not been read by the consignees, or their agents abroad, the same disposition would have been made of the matter, it is not necessary to determine. The presumption here is that the provision was read and understood.

It is also urged by the libellants that the Wilson Line did not fulfil its duties under the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), which provided that it shall not be lawful for a transporting vessel to insert in the bill of lading any clause whereby it—

"shall be relieved from liability from loss or damage arising from negligence, fault, or failure in properly loading, stowage, * * * care, or proper delivery of any and all lawful merchandise committed to its * * * charge. Any and all words or clauses of such import inserted in bills of lading * * * shall be null and void and of no effect."

No authority has been called to my attention which would prevent a vessel from including the above quoted clause relating to strikes and labor troubles in and among its lawful exceptions. The Harter Act has no effect upon the situation presented here. This is not a case of negligence.

The case of *Blackstock v. The New York and Erie Railroad Company*, 20 N. Y. 48, 75 Am. Dec. 372, is cited by the libellants in support of their contention that the strike clause was without effect and the carrier was responsible for the damages caused by a delay in transporting property which resulted from a strike. But it does not appear that there was any strike clause in that case. It was decided on the ground that the delay was caused by the action of the employes in suddenly and wrongfully refusing to work. The same is in effect true of other New York cases, where similar results were reached.

A decision more in point is *Aktieselskabet Shakespeare v. Ekman & Co.*, 18 Times L. R. 605, decided by the English Court of Appeal in May, 1902. In that case there was a general strike of lightermen engaged in discharging vessels carrying the kind of cargo which the plaintiff's ship carried and such strike prevented the discharge. The report of the case is as follows:

"Decision of Bigham, J. (17 Times L. R. 330), affirmed.

This was an appeal by the plaintiffs from the judgment of Mr. Justice Bigham, reported in 17 Times L. R. 330. The claim was for demurrage of the plaintiffs' ship the *Shakespeare* against the defendants, the charterers. By the charter-party, which was dated July 20, 1900, the ship was to load in the Skelleftea district a cargo of deals, battens, and firewood, and proceed therewith to one of the usual wood-docks in the River Thames as ordered on arrival at Gravesend. The cargo was to be discharged at the rate of not less than 18 fathoms per day of ordinary working days (Sundays and holidays excepted), ten days on demurrage over and above the lay-days at £8 per day; the lay-days to commence the day after the vessel was in a

berth in dock and ready to discharge. The charter-party provided that general strike of stevedores, lightermen, or dock labourers that might prevent the discharge of the cargo were always mutually excepted. The vessel was ordered to the Regent's Canal Dock, where she was berthed and ready to discharge on October 14. The lay-days began on October 15. The cargo consisted of 256 fathoms, which at the rate of 18 fathoms per day gave 15 lay-days. The discharge was finished on November 9, and the plaintiffs claimed eight days' demurrage. The defence was that the discharge was prevented by a 'general strike' of lightermen, and that the defendants were, by reason of the clause in the charter-party, not liable for demurrage. The question was whether on the facts there was a 'general strike' of lightermen which prevented the discharge within the meaning of the charter-party. The plaintiffs alleged that there was only a partial strike of lightermen. Mr. Justice Bigham came to the conclusion that there was a general strike of the lightermen who would in the ordinary course be employed in the discharge of such a cargo as that carried by the vessel, and that this strike prevented the discharge. He, therefore, gave judgment for the defendants.

Mr. D. C. Leck (Mr. J. A. Hamilton, K. C., with him) appeared for the plaintiffs: Mr. W. S. Robson, K. C., and Mr. Loehnis, for the defendants, were not called upon.

The court dismissed the appeal.

Lord Justice Vaughan Williams said that the first question was whether there was a 'general strike' within the clause of the charter-party. He did not think that 'general' was used in opposition to 'partial,' and, therefore, he did not think that it could be said that there was not a general strike merely because some as distinguished from all of the men were on strike. He thought that a strike was a general strike if it was not what he would call a particular strike. By a particular strike he understood a strike either by an individual workman or by a particular body of workmen working for a particular master. But if there was a strike against all the masters, and if that strike was taken part in by the workmen irrespective of the masters for whom they were working, that amounted to a general strike. He did not intend to lay down any hard-and-fast definition of a general strike. It was enough in the present case to say that on the evidence here it was plain that there was a general strike among the lightermen in the port of London, and these particular men were called out in consequence of that strike. It was quite true that the strike was not a strike of all the lightermen. There was no strike amongst the coal lightermen. There was, however, a strike of all the lightermen who were engaged in this particular class of lightering—namely, timber lightering, and in consequence of that general strike these men went out on strike, and the union would not allow other men to take their places. There was, therefore, a general strike. He also agreed that the strike prevented the discharge.

Lord Justice Romer concurred, and said that the question was simply one of fact, and there was no question of principle involved.

Lord Justice Mathew concurred."

I conclude, not without some hesitation, that the strike and labor clause here constituted a defense and that the libel should be dismissed.

THE LITTLE.

THE MARS.

(District Court, S. D. New York. December 2, 1908.)

COLLISION (§ 61*)—ADMIRALTY (§ 34*)—EVIDENCE—LACHES.

Collision in the Providence River, Rhode Island, between the tows of the tug Little and the tug Mars in 1902. The Little exonerated and the Mars held because she was not navigating on the starboard side of the channel. The defence of laches not sustained as the purchaser of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mars received a warranty bill of sale of the vessel and it appearing that the vendors were of financial responsibility, and further that they were in fact defending the vessel in this action.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 61;* Admiralty, Cent. Dig. §§ 316-321; Dec. Dig. § 34.*]

(Syllabus by the Judge.)

James J. Macklin, for libellants.
Carpenter, Park & Symmers, for the Little.
Alexander & Ash, for the Mars.

ADAMS, District Judge. This action was brought by Clinton Robinson and others, as owners of the barge I. Townsend Burden, against the steamtugs Little and Mars to recover the damages alleged to have been sustained by them through a collision between the Burden, in tow of the Little, with 3 other light barges on hawsers tandem, and the barge Forest Belle in tow on the port side of the tug Mars, about 8 o'clock P. M., on the 23d of March, 1902, in the Providence River, near Conimicut Point. The Little was going down the river, bound from Providence to New York, and the Mars was going up the river, proceeding to Providence. The libel alleges that the leading barge in the Little's tow was made fast to her by a hawser running from the Little, the Burden being the third barge in the tow; that the tugs exchanged signals of one whistle each before meeting and they attempted to pass so close to each other on the port side that the Forest Belle struck the port bow of the barge Emma, thus bringing the Burden onto the second barge, the Tice, and the Emma, doing serious damage, estimated at \$900, to the Burden. The allegations of fault against the Little are: (1) in that she failed to keep a proper lookout, (2) in that she did not give sufficient space in passing, (3) in that she did not sound alarm whistles; and the Mars was in fault: (1) in not keeping a proper lookout, (2) in not sounding alarm whistles, (3) in not keeping on the right hand side of the channel, (4) in not porting sufficiently, (5) in crowding the Little and her tow, and (6) in not reducing her speed, or stopping and backing before the collision.

The Little, after some admissions and denials, alleged:

"Seventh: Further answering, upon information and belief the claimants allege that on or about 5:30 P. M. on the 23d day of March, 1902, the steamtug 'R. B. Little,' well manned and equipped, left the port of Providence, R. I. having in tow the barge 'Emma,' 'George S. Tice,' 'I. Townsend Burden' and 'William H. McClave' bound for New York, all light. The barges were made up in tandem fashion in the order above named. The barges were all upon short hawsers and the regulation lights of the steamtug and all the barges were in their proper places and brightly burning. At about 7:30 P. M. a few minutes after passing Conimicut Point Light, a steamtug was observed bound up towards Providence a little on the port bow of the 'Little.' At this time the steamtug 'Little' was in the western half of the channel and gave a signal of one blast to the approaching steamtug and received a reply of one blast of the approaching steamtug's whistle. The helm of the 'Little' was put to port, bringing her well over upon the right hand or westerly side of the channel. The weather was clear, there was a light breeze from the southeast, tide about full flood. The master of the 'Little' was in charge of her navigation; first a red light was observed upon the 'Mars' and three staff lights; afterwards two red lights and a green light of the tug and also a green light of a barge

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were observed. Those in charge of the navigation of the 'Little' had at first supposed that the approaching steamtug's tow was behind on a hawser until the steamtugs were close by each other. The 'Mars' and her tow made fast to her port side passed the 'Little' and her tow port to port a safe distance away. The 'Mars' kept on apparently without any change of course. The port bow of the 'Forest Belle' came in collision with the port side of the 'Emma,' the 'Forest Belle's' port anchor catching the port rail of the 'Emma,' the anchor chain upon the barge paying out, holding the 'Emma' fast. The 'Forest Belle' likewise with her port bow also struck the port side of the barge 'George S. Tice,' and upon information and belief the stem of the barge 'I. Townsend Burden' struck the stern of the 'Tice,' the barge immediately ahead of her. That the collision occurred to the westward of the middle line of the channel. After anchoring the 'Tice,' the 'I. Townsend Burden' and the 'McClave,' the 'Emma' was towed back to Providence by the 'Little,' and the 'Little' subsequently towed the three other barges to New York."

It was further alleged by the Little that the collision was not produced by any fault on her part but was due to the faults of the Mars: (1) In that the Mars was showing three staff lights while having the Forest Belle upon her own port side and no other vessels in tow; (2) in that the Mars failed to port her wheel after the exchange of the signals of one whistle; (3) in that the Mars failed to keep on the right hand side of the channel; (4) in that the Mars failed to maintain a proper lookout, and (5) in that the Mars failed to stop and reverse.

The Mars, after some denials and admissions, alleged:

"Sixth: On the 23d day of March, 1902, the tug 'Mars' with the barge 'Forest Belle,' deeply laden with a cargo of coal, in tow, was bound for Providence, Rhode Island. On the evening of said day, after the tug and tow had entered Narragansett Bay, the 'Mars' picked up her tow, made the 'Forest Belle' fast alongside on the tug's port side, and with her tow thus adjusted continued on said voyage. The weather at the time was clear, wind light, tide flood, and the said tug and tow had their regulation lights all set and brightly burning. The tug had a competent master in command, a good and sufficient lookout, properly stationed, attending to duty, and was in every respect carefully and skillfully navigated.

Seventh: As the 'Mars' was proceeding on her voyage as aforesaid, a tug, which afterward proved to be the 'R. B. Little,' with four light barges in tow on a hawser was made out off the starboard bow of the 'Mars,' showing her green and mast head lights, coming in the opposite direction. The 'Mars' and tow were then on the easterly or starboard side of the channel. Owing to the draft of the 'Forest Belle,' she and the tug were restricted in their navigation to the deep water in the channel, whereas the tow of the tug 'Little,' being light had sufficient water for safe navigation beyond the limits of the channel. Some time after the 'Little' and tow had been observed by those in charge of the 'Mars,' she blew a signal of one whistle to the 'Mars,' which the latter immediately answered with a signal of one whistle. Thereupon the wheels of the 'Mars' and her tow were put to port and said tug and tow thereby sheered to starboard. As the 'Little' did not sheer sufficiently to port, the 'Mars' blew an alarm whistle and stopped and reversed and continued backing under full power until the vessels came together as hereinafter set forth.

No reply was given by the 'Little' to the alarm whistles of the 'Mars,' and the tug 'Little' continuing at a high rate of speed, ran the first barge of her tow into collision with the 'Forest Belle,' striking the latter on her port bow and catching her anchor and also causing the second barge in her tow to strike the port bow of the 'Forest Belle.' At the time of the contact, the 'Mars,' under the influence of her reversed engine, was lying at rest in the water as near to the easterly or starboard side of the channel as was safe and prudent, in view of the draft of herself and tow."

The Mars further alleged that the collision was solely caused by faults on the part of the Little and the Burden. As to the Little: (1)

In that she did not have a competent master in command, attending to duty; (2) in that she did not have a competent lookout; (3) in that she had her tow on too long a hawser; (4) in that she did not blow a signal of two whistles to the Mars and pass her starboard to starboard; (5) in that she blew a signal of one whistle to the Mars and attempted to cross the bows of the latter; (6) in that after giving a signal of one whistle to the Mars and receiving an answering signal of one whistle she did not port her wheel promptly and sufficiently; (7) in that she attempted to pass too close to the Mars, without necessity; (8) in that she did not keep away from the Mars and tow; (9) in that she did not answer the alarm whistles of the Mars and stop and back in time to avoid collision, and (10) in that although her tow was over 600 feet in length, she exhibited only 2 mast head lights. As to the Burden: (1) In that she did not maintain a lookout; (2) in that she did not port her wheel and sheer to starboard in conformity with the signals of the tugs; (3) in that she did not cast off her hawser when she saw the port barge was coming into collision with the Forest Belle, and (4) in that she did not cast off her hawser and anchor.

The testimony discloses no fault on the part of the Burden. She properly followed the tug in conformity with the signals. It is possible that the tow in rounding Conimicut Point was somewhat to the eastward of the Little, but the barge was not in fault for that, she followed as closely as she could, and being under the control of the tug, no blame can be imputed to her.

The real question in the case is whether one or the other of the tugs or both, are responsible for the collision. It appears that prior to rounding the point, 200 or 300 feet off, the master of the Little saw the Mars coming up, and when the Little rounded, he blew a signal of one blast to the Mars, which the latter answered with a similar signal. Both ported but the trouble was that the Mars was then too far to the westward and was not able to obtain her proper position on the starboard side of the channel, hence while the tugs passed safely, the tows collided, causing the damage to the Burden. The real cause of the collision was the original attempt of the Mars to navigate on the port side of the channel, which she only relinquished when the Little announced her intention of following the rule. The Mars then tried to follow it also but it was too late. If she had been where the law required her to be, there would have been no trouble. The channel was about a quarter of a mile wide at the Point and broadened considerably below. The Mars' attempt to pass to the starboard of the Little carried her well to the westerly side of the channel and the collision took place there, a short distance above a point opposite buoy No. 7. It seems that the collision was entirely due to this fault of the Mars and the other allegations may be disregarded.

Another question in the case is whether the libellants were guilty of such laches in their proceedings as to bar a recovery from the Mars. It appears that she was owned in Philadelphia and was engaged in towing, principally between that place and points east. On her trips she stopped occasionally in New York Harbor. The libellants brought the action here, secured service of the libel upon the Little and declined

to go elsewhere to proceed against the Mars, but waited until they could seize her in the waters of this district, so that the action against both tugs could be tried together. They were alert for the purpose of getting the Mars, at one time finding her fastened to a wharf in Jersey City, where she could not be seized and from where she escaped. They made many attempts without success and did not catch her in this jurisdiction until April, 1907. During the lapse of these years several of the witnesses disappeared and the details of the collision had faded from the memory of others, but it does not appear that there were any ill results therefrom which the claimant is entitled to urge. Enough knowledge of the facts remained to definitely place the fault, as above determined. The claimant of the tug urges that he was a bona fide purchaser without notice. If this were established, though doubtful, it might aid him but it appears that when the purchase was made he received a warranty bill of sale by which he is entitled to recover from the vendors anything he may be obliged to pay to protect the vessel in this action. The vendors were shown to be able to respond for claims established against the tug existing prior to his purchase. It appears that they were called upon by him when the tug was seized and that they have in fact been obtaining witnesses and defending the action. There are certainly no equitable circumstances in this case which could prevent the injured parties from recovering their damages.

There will be a decree for the libellants against the Mars, with an order of reference. The libel is dismissed as to the Little.

FLANNERY v. NEW ENGLAND TRANSP. CO. et al.

(District Court, S. D. New York. December 23, 1908.)

BROKERS (§ 106*)—COSTS (§ 40*)—CONTRACT—COMPENSATION—OFFER OF JUDGMENT.

On a conflict of testimony, *held* that the libellant was entitled to recover in the first instance from Kellam with a right of recovery over on his part from the New England Company of a portion of the amount decreed to be due. Costs allowed notwithstanding an offer of judgment because the offer did not definitely state to whom the amount was due.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 149; Dec. Dig. § 106; * Costs, Cent. Dig. § 105; Dec. Dig. § 40.*]

(Syllabus by the Judge.)

Martin A. Ryan, for libellant.

Robinson, Biddle, & Benedict, for New England Transp. Co.

Benjamin F. Einbigler, for Kellam.

ADAMS, District Judge. This action was brought by John H. Flannery against The New England Transportation Company to recover \$364.36 for the transportation of a cargo of coal from Port Reading to New London, Connecticut, on his boat, the Essie Flannery, on or about the 10th of May, 1907. The answer admits the due delivery of the coal but states that the cargo was shipped under a stipulation that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the boat should be towed by the boats of the respondent at an agreed towage of 18 cents per ton for the round trip, which condition was not carried out by the respondent to its damage in the sum of \$151.92, and further that the respondent admits that there is due from the respondent to the libellant the sum of \$212.44, for which amount it offers to allow a judgment to be taken, with costs to the date of the answer, the 6th day of April, 1908. On the same day, the respondent filed a petition alleging that the petitioner entered into an agreement on or about the 2d day of May with George W. Kellam, whereby the petitioner agreed to transport the coal in question on the said boat but at the rate of 50 cents per ton, with the understanding that the boat should be towed by the respondent's steam tugs at the rate of 18 cents per ton for the round trip. The respondent further alleges that the said Kellam in making an arrangement for the transportation of the coal failed to provide that the respondent's tugs should do the towing, whereby it lost the towage amounting to \$151.92. Further the respondent averred that it filed with the petition—

"a bond with good and sufficient security to pay the libellant, or any party herein under the process asked herewith, all costs and damages and expenses which may be awarded against the petitioner. * * *"

It then prayed that if a decree should be granted, it would be only for the sum of \$212.44 and that the balance of the claim should be assessed against the said Kellam. The answer of Kellam to the libel admitted all of its allegations and in answering the petition denied all of its allegations tending to impose liability upon him. The New England Company subsequently filed an amended petition repeating many of its former allegations. It then repeated, in substance, its allegations relating to the transportation of the coal by Kellam but changes them so that it averred that it was understood and agreed that the boat when loaded should be towed by the tugs of the petitioner and that thereafter Kellam hired the Flannery but not on the terms he was authorized to charter her in that he failed and neglected to make an agreement with the libellant that the tugs of the respondent should do the towing and permitted her to be towed by other tugs and that there was lost to the petitioner the towage amounting to the said sum of \$151.92. The petitioner further avers that the condition that the boat should be towed by its tugs was an essential part of the contract to carry the coal, without which it would not have made the contract. An answer was filed by Kellam to the amended petition in which he denied the alleged agreement.

Upon the pleadings thus amended, the case went to trial and the libellant examined Kellam, who testified that he was a shipping broker, had been in that business for 21 years and was so engaged at the time when he made arrangements with the Transportation Company with regard to a cargo of coal on May 2, 1907, in a conversation with Mr. Lester and Mr. McGuire of the Transportation Company. He said that Mr. McGuire met him down stairs in the company's building, No. 1 Broadway, and asked him if he could get him some boats. The latter said he would let him know, that boats were very scarce and at a premium; that later he was in the company's office and Mr. Lester,

Manager of the Company, also asked him if he could get some boats; that he was in a bad way to fill their contracts because he could not get barges; that he then left the office and met a Mr. Netter, a broker, whom he asked if he had any boats light; that Mr. Netter replied that he had a boat of about 900 tons capacity if that would fit the order, and he (Kellam) then went and asked if they could use a boat of 900 tons; that Mr. Lester said that he had 750 tons to go to New London and they were to pay extra towing to the New England Company and for him to go down and see what he could do; that he went to Mr. Netter who he said would not entertain a 750 tons charter but if Kellam could get 900 tons at 55 cents he would take it; that he returned to the New England Company and told them that he could secure a boat at 55 cents for 900 tons and they said they would not pay 55 cents but to secure 900 tons for 50 cents; that he went down to Mr. Netter and after 20 minutes or half an hour got him to take the order; that he then returned to Mr. Lester and he said, "Go ahead, close and send to Port Reading," and he told Mr. Netter it was all right, to send the boat down there; that up to that time nothing had been said about towing; that about a half of an hour afterwards he dropped in to the New England Company's office and told them to send the boat down; that Mr. Lester said he would give a confirmation of the order and he wrote a letter naming the rate of freight and at the bottom it was said the boat is to tow with the New England Company; the witness said in connection with this provision, "I dont know anything about that." That letter, which would have been of some use in the matter, was missing, having been given to Mr. Netter who was said to be dead at the time of the trial. What was said to be a copy was produced by the New England Company but was not recognized by the witness; he said, however, that it contained the provision, "the boat is to tow with us at 18 cents a ton;" that the witness then said to Mr. Lester that "I would do the best I could to have Mr. Netter tow with their line, that I had already completed my charter with him and considered it closed but would do what I could to have the boat tow with him"; that he then tried to find Mr. Netter but was unable to do so for several hours, when he handed him the letter and Mr. Netter said, "the boat was on her way, she had been reported already and the charter had been completed." The witness further stated that his business was that of a broker, securing boats for other people, for the transportation of coal and heavy freights and that it was not customary to incorporate in an order for carrying a cargo of coal an agreement with regard to towing and that this was the first time he had ever been asked to do it.

On cross examination, the witness said that throughout this matter, he had been acting as agent for the New England Company; that at the time Mr. Lester gave him the letter, Mr. Lester said: "I want to have that boat tow with us" and "if she don't we will have a loss, we are paying ten cents over the contract price;" that the only other letter he had from the New England Company excepting when the check was sent to him, which he refused because he "had no right to it"; that he received a telephone message from the New England Company that

they understood the Flannery had towed with the Keeler Transportation Company and they would not pay anything over the freight less the towage; that he received from the New England Company a bill with a check less the towing and a subsequent letter, dated June 8th, enclosing the check again, which he also returned. This letter was as follows:

"143 Liberty Street, New York, June 8th, 1907.

New England Transportation Co., 1 Broadway, City.

Gentlemen: I herewith return your check to cover freight on boat Essie Flannery. Mr. John Flannery, owner of the boat, refuses to accept same on account of the deduction of 18 cents per ton for towing which you deduct from his bill. Mr. Flannery says this boat was towed by the Keeler Transportation Co. and not your Company.

Yours very truly,

[Signed] George W. Kellam."

He further said, on redirect examination, that he did not work for any particular house but received his commission from the boat owner.

Mr. Flannery testified that Mr. Netter was his outside man and, before his death, secured loads for the libellant's boats; that he paid 20 cents per ton for this towing with the Keeler Company; that the New England Company being his friends, he would naturally call them up first but on this occasion could find no one in their office; that he sent a bill for his freight to the New England Company but they sent it back and told him he had to settle with Mr. Kellam; that he had had a lot of business for that company and it was sometimes the case that an agreement would be made that they should do the towing, but it was not the uniform practice; that the boat was chartered to Mr. Kellam through his (the libellant's) outside man who made an arrangement with Mr. Kellam with regard to the hire of the boat; that his outside man told him that Mr. Kellam had the charter, but he did not mean that Mr. Kellam was the charterer, (Mr. Kellam) was the one who did the chartering; that he (the libellant) did not understand that he had a claim against Mr. Kellam but supposed he would advise the libellant later who the shipper was and the libellant would bill accordingly; that Mr. Kellam hired boats on his own account, but the witness could not find out on this occasion until after the boat had gone with the cargo; that he had never chartered a boat to Mr. Kellam, therefore he did not know that Mr. Kellam had ever chartered a boat for his own use; that he knew Mr. Kellam chartered them for other people acting as a middle man, sometimes as broker and sometimes as agent for other people; that he had known Mr. Kellam for 30 years and all that time Mr. Kellam had been a broker; that he expected Mr. Kellam to direct him to whom he was to get his money from but did not expect that he would pay it himself; that he sent a bill to the New England people when he found out the boat was loaded for them; that he rendered a bill for this work to the New England Company shortly after it was done and they returned it stating they did not recognize him as the party with whom they were dealing; that he did not pay Mr. Kellam a commission on this business but did pay Mr. Netter but could not say to whom the latter paid it.

The respondent then called Mr. Lester as a witness who testified that he was the agent in New York of the New England Company:

that his recollection of this transaction was that Mr. McGuire went out to look for such boats as the company needed; that Mr. Kellam came in and told the witness that he had a boat and asked the particulars regarding freight, demurrage and other conditions; that he explained to Mr. Kellam, "the amount of freight, amount of demurrage and rate of towing charged on his boat"; that Mr. Kellam then went out and was gone some time, then came back and accepted the charter, telling the name of the boat; that the boat went down to Port Reading that night, loaded the next day and came back the night of the day of loading; that he told Mr. Kellam they insisted upon having the towing of the boat; that Mr. Kellam was not their agent, that he understood Mr. Kellam was representing himself in the transaction; that he (the witness) did not know to whom the boat belonged until after the acceptance of the charter when Mr. Kellam came back and gave him the name of the boat; that a confirmation was sent to him by mailing it that afternoon, May 2d, as follows:

"Dear Sir: Agreeable to conversation to-day. We have given you order, full cargo for boat Essie Flannery, Port Reading loading to alongside Allyn's Point, Connecticut. Freight at the rate of fifty cents per ton alongside. Demurrage if any to be billed at \$8 per day after reporting and six lay days. It is understood that this boat when loaded will report to us at Packer Dock, Jersey City, for tow at 18 cents per ton for this round trip."

Later, May 6th, the following letter was also sent by the New England Company to Mr. Kellam:

"Dear Sir: Referring to charter of boat Essie Flannery. This morning we learned that this boat went forward on Saturday in tow of Keelers Transportation Line Tug, contrary to the terms of our charter. This will notify you that in paying this charter, we will deduct the round trip towing in accordance with our letter of May 2d."

A bill was sent to Mr. Kellam May 23d, of which the following is a copy:

New England Transportation Company, to George Kellam Dr.	
To freighting 844 tons of coal, Port Reading, New Jersey to New London, Connecticut, per boat Essie Flannery, at 50¢ per ton.....	\$422.00
Less advances on bill of lading.....	57.64
	<hr/>
	\$364.36
Sound towing at 18 cents per ton.....	151.92
	<hr/>
	\$212.44

The witness further testified that the letter of May 2d did not contain anything that was not said in the conversation and that Mr. Kellam did not object to the letter; that he did not learn that the boat had been towed by the Keeler Towing Company until the following Monday morning and that he then immediately notified Mr. Kellam about it by the above letter of May 6th, to which he received no reply but Mr. Kellam came in and explained that it was no fault of his that the agreement was not carried out and "I told him we knew nobody else in the transaction except him."

Further testimony was given, particularly by the respondent, the New England Company, but nothing of much importance beyond tending to show by subsequent attitudes that the views entertained by the

parties were adhered to by them. The controversy must be determined by what took place between the agent of the respondent, Mr. Lester, and Mr. Kellam.

The burden was of course upon the respondent and it offered nothing directly bearing upon the dispute beyond the testimony of Mr. Lester, which is denied by Mr. Kellam. Mr. Lester's testimony was apparently credible and is supported, to a certain extent, by his subsequent actions. The same with respect to subsequent actions may be said of Mr. Kellam's testimony. He was undoubtedly a broker, but it is possible that he engaged in transactions on his own account and it is strenuously urged by the respondent that on this occasion he did so. The contention that he understood that the respondent was to have an allowance for the towage charge is supported by a portion of his own testimony, where he said:

"By Mr. Ryan: Q. Whom did you see in their office? A. I saw Mr. Lester. He said he had 750 tons to go to New London or Allen's Point, at their option, and they were to pay extra towing to the New England Transportation Company. * * *"

Of course that there was any such understanding is denied in his subsequent testimony, but in a close case of this kind, it is proper that full effect should be given to such significant language, occurring in the examination of a party where the dispute is directly connected with the words of the witness. Why he should have mentioned "extra towing" to the respondent unless it was in contemplation of the parties as contended by the respondent does not appear. In one part of the libellant's testimony it is shown that Mr. Kellam was in the habit of occasionally chartering on his own account. In another part thereof that is denied but I think it may be safely concluded that this was one of the occasions where he was acting as principal instead of being merely a broker.

That the respondent's proctors made a mistake in originally taking the position that Kellam was an agent of the respondent is frankly admitted by them and should not be prejudicial. The correct attitude was assumed when the facts were made clear to them.

There will be a decree for the libellant against Kellam for \$364.36 with interest, Kellam to recover over against the New England Company \$212.44. The decree will provide that in the event of failure to recover from Kellam the whole amount due the libellant shall be payable by the New England Company.

It is urged by the respondent that there should be no costs allowed after the filing of the answer because an offer of judgment was made therein. The offer was it—

"admits that there is due for the freight of the said 844 tons of coal, less towage as above mentioned, the sum of two hundred twelve and 44/100 dollars (\$212.44), for which amount it hereby offers to allow a decree to be taken against it by any one who is entitled thereto, with costs to date."

This, however, was too indefinite to permit any one to take advantage of at the time. It could only be determined at the conclusion of the trial, who was entitled to the benefit of the offer. The costs of the action will follow the decree as usual.

LUCKENBACH et al. v. PIERSON et al.

(District Court, S. D. New York. January 8, 1909.)

SHIPPING (§§ 52, 58*)—CHARTER—FORFEITURE—NONPAYMENT OF HIRE.

A claim of a right to forfeit a charter of the steamer Harry Luckenbach, for nonpayment of hire, decided adversely to the libellants upon the ground that before there was an actual withdrawal of the steamer, the hire in arrears was tendered. Also *held* that as the withdrawal was wrongful, the respondents should offset the damages they suffered thereby against the hire due.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. §§ 52, 58.*

Cancellation, surrender, or rescission of charter of vessel, see note to *McNear v. Leblond*, 61 C. C. A. 569.]

(Syllabus by the Judge.)

Peter S. Carter, for libellants.

James J. Macklin and Harold R. Small, for respondents.

ADAMS, District Judge. This action was brought by Edgar F. Luckenbach and the Kings County Trust Company as executors of the estate of Lewis Luckenbach, deceased, and others interested in the matter, against Ralph Pierson & Company of St. Louis, Missouri, to recover the charter hire of the steamer Harry Luckenbach from June 11, 1906, to July 18, 1906, at the rate of \$5,500 per month, amounting to \$6,600, or more correctly to \$6,741.95. The owners were, on the expiration of the contract, to pay for coal left in the bunkers at the current market rate at the place of redelivery, which according to the libel, entitled the charterers to a credit of \$207.90 for 66 tons of coal, and a further credit of \$37.92 for disbursements made by them amounting altogether to the sum of \$245.82. The whole amount claimed to be due on the trial was 6, instead of 7, days' hire, from July 12th to July 18th, reducing the claim in that respect from \$1,241.93 to \$1,064.51, leaving a total claim, including interest, of \$6,318.69, which the libellants insisted they were entitled to recover.

The controversy arose out of the construction of a contract between the parties, dated the 9th of November, 1905, for the charter of the steamer, for a period of ten months. This contract contained the following provisions:

"4. That the charterer shall pay for the use and hire of said vessel \$5500.00 per calendar month, commencing on and from the date of her delivery as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the owner (unless lost) at New York, or Baltimore, Md."

"Payment of said hire to be made in cash semi-monthly in advance, or as agreed."

"And in default of such payment the owners shall have the faculty of withdrawing said steamer from the service of the charterer, without prejudice to any claim they (the owners) may otherwise have on the charterers in pursuance of this Charter."

"It is understood that \$5500 is to be deposited in the German-American Bank of New York on December 20, 1905, and monthly thereafter to the joint account of Lewis Luckenbach and Lind & Co."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The libel alleges, and such allegations are admitted by the answer, as follows:

"That said \$5500.00 was deposited, but thereafter, on or about the 28th day of March, 1906, an agreement was executed by Lewis Luckenbach, on behalf of the libellants, and by Ralph Pierson & Co., on behalf of the respondents, amending the former agreement as to the deposit of \$5500, and substituting in the place and stead of said deposit one hundred (100) shares of common stock of the Pennsylvania Railroad Company, to be held subject to the terms and conditions mentioned in said Charter Party. That said shares of common stock were to be held as a continuing and permanent security or deposit until the termination or cancellation of the said Charter Party. * * *"

The libel further alleged, in the 6th paragraph, as follows:

"That the respondents as charterers, failed, and refused on the request of the owners of the steamer, the libellants herein, to make the semi-monthly payments in advance when due, and on account of the non-payment of the charter hire the owners of the steamer, in accordance with the conditions above quoted, elected to cancel the said charter party, which they did by giving notice to the respondents on or about the 27th day of June, 1906. That the said steamer, at the time of cancelling said Charter Party, was on a voyage under said charter, but she was immediately withdrawn when unloaded, and her time is figured up to the time she arrived in New York, in accordance with the terms of Section 4 above quoted."

The respondents' answer to the last allegations was as follows:

"* * * And allege with respect to the balance of said Sixth article of the libel, that the libellants or their representatives without authority, arbitrarily withdrew the steamer mentioned in said libel from the said respondents, although the libellants were amply secured for any charter hire or indebtedness if any, of the said respondents, to the libellants as hereinafter alleged."

The respondents for a further answer alleged as follows:

"Fourteenth: And for further answer to said libel, respondents aver, that in addition to the security hereinbefore mentioned, of the Common Stock of the Pennsylvania Railroad Company as substituted for the deposit of Fifty-five hundred dollars, these respondents, on or about the 5th day of July, 1906 forwarded a certified check to the said libellants for Fifty-five hundred dollars which would be to cover all hire of the steamer to July 12th, leaving intact the said stock of the Pennsylvania Railroad Company, but that said libellants, insisted upon the withdrawal of said steamer from said respondents, and refused to accept the said check, unless the said respondents would consent to a termination or cancellation of said charter of said steamer, and that said check has always been held at the command and order of the said libellants. That also on July 12th, 1906, a certified check was sent to the said libellants by the respondents for the charter hire of said vessel, covering a period from July 11th to July 27th amounting to Twenty-seven hundred and fifty dollars, which the said libellants would only accept, if said respondents would agree, as before mentioned, to the termination and cancellation of the said charter party.

Respondents further allege that on or about the 16th day of July, 1906, and when the said steamer was at Frenchman's Bay, Maine, the said libellants withdrew the said vessel from the said respondents and refused to continue the said charter until its termination, although the said respondents were ready and willing to amply secure them, which they did, and that on account of the premises the said respondents have been put to a great expense in the transportation of cargoes that said respondents had agreed to carry, and which would have been carried by the said chartered steamer during the charter term: and they have sustained serious loss on account of outstanding contracts then existing during the term of the said charter and

before its unwarranted cancellation by the said libellants, and that they are still suffering loss and damage because of their inability to perform their said contracts; and respondents allege that up to the present time their said loss amounts to a sum in excess of the amount claimed by the libellants herein, and all as a result of the withdrawal of the said steamer from the service of the said respondents by the said libellants, and that said respondents claim that they are entitled to off-set and recoup their said losses against the said alleged claim of the said respondents."

November 13, 1905, Lind & Co. of New York were appointed agents of the respondents by the following letter to Mr. Luckenbach:

"With reference to chartering of Steamship 'Harry Luckenbach.' This will advise that Messrs. Lind & Co., No. 1 Broadway, New York will act as agents for us in the handling and disbursement and will pay all hire and transact all other charterers business for our account."

It appears that \$5500 were duly deposited in the German American Bank in New York to the joint account of said Lind & Co. and Edgar F. Luckenbach in conformity with the terms of the charter party and that subsequently, in accordance with an agreement made on the 28th day of March, 1906, 100 shares of the common stock of the Pennsylvania Railroad Company were substituted therefor to be held on the terms and conditions mentioned in the last quoted provision of the charter party.

The steamer duly went into the possession of the charterers and payments were made for the hire, in some instances, by consent, from the deposited funds, excepting for the time commencing June 11th at 6 P. M. On the 9th of June, a bill was rendered for the hire to June 27th, \$2750. This bill was not paid and on the 27th of June the agent of the libellants wrote to the respondents as follows:

"If I do not receive a check for \$2750 for hire of the Steamer 'Harry Luckenbach,' from June 11th to June 27th, due June 11th, and \$2750 for the hire of said Steamer from June 27th to July 11th, by four o'clock this afternoon, I will withdraw said steamer from your service as per clause #6 of charter party dated New York, November 9th, 1905."

On the 30th of June the libellants again wrote to the respondents as follows:

"Please take notice that the Master of above Steamer, sailed from Lambert's Point for Frenchman's Bay, with a cargo of Coal, without signing bills of lading, owing to Messrs. Castner, Curran & Bullitt not allowing the Master to insert a clause, whereby we would be protected in our claim for freight.

We are willing to sign bills of lading upon receipt of charter hire for which you are in arrears.

We shall withdraw steamer soon as present trip is completed as per ours of 27th inst."

On the 5th of July the respondents replied to these letters as follows:

"Your favors June 27th and 30th received, contents noted.

We cannot understand your determination to withdraw this Steamer from Charter dated, New York, November 9th, 1905, inasmuch as your Hire Money is guaranteed by the Deposit of Pennsylvania Railroad Stock in the German American Bank to Joint account.

We beg to enclose our Certified Check, value Fifty-five Hundred (\$5500) Dollars, in settlement of Hire to July 12th, also our Bill for Commission on same, amounting to One Hundred Thirty-seven Dollars, Fifty (\$137.50) cents,

from which you will note we have deducted interest at the rate of 6% on the hire due as per agreement.

Kindly receipt enclosed Bills, and return to us in due course."

To this letter the libellants' agent replied, July 6th, as follows:

"If you are willing to pay me \$5500.00, I will apply same to cover the defaulted charter hire of the Steamer 'Harry Luckenbach.' But in accepting same it does not, in any way, reinstate said Steamer under charter party heretofore cancelled.

This vessel is open for charter. If you have any freight to offer, I will be pleased to hear from you."

The notice of June 27th did not amount to an actual withdrawal of the vessel. It simply said if the owner did not receive, by 4 o'clock of that day, a check for the hire from June 11th to June 27th and for the further sum due in advance from June 27th to July 11th, they would withdraw the steamer from the respondents' service. On the 30th of June the libellants gave a notice that they would withdraw the steamer as soon as the trip then being made should be completed. She was then on her way to Frenchman's Bay, Maine, with a cargo of coal, and arrived there July 2nd. On the 5th of July, the respondents sent the libellants a certified check for \$5500 in settlement of the hire to July 12th. This was refused by the libellants, upon the claim that the vessel had been withdrawn by the letter of June 27th. The vessel remained at Frenchman's Bay until July 16th, when she proceeded to New York. There is nothing to indicate any actual resumption of possession by the owners until after the vessel's arrival in Frenchman's Bay, from where they ordered her to New York.

In view of these facts, I think that while the owners may have been entitled to withdraw the vessel before the charterers tendered the payment of July 5th, they failed to exercise the right, merely giving notice of an intention to withdraw in the future, which had the effect of causing the respondents to tender the payments due. Subsequent tenders were made of hire thereafter becoming due. While the respondents were undoubtedly in default on several occasions, no actual attempt was made by the owners to take advantage of such fact until they resumed possession in July, at which time all payments due had been made or tendered. The owners were at all times amply secured.

Courts of admiralty will enforce existing legal rights, but where there is a claim of a forfeiture, it must clearly and definitely be made to appear that the claiming party is entitled to the severe remedy sought. It had not been so made to appear here.

There should be a decree for the libellants for the hire from June 11th to July 18th, less certain credits. From the whole amount there will be deducted the damages suffered by the respondents by reason of the withdrawal of the steamer. The matter will be referred to a commissioner to ascertain and report the amount due.

THE WM. J. QUILLAN.

(District Court, S. D. New York. January 29, 1909.)

SHIPPING (§ 193*)—GENERAL AVERAGE.

Spontaneous combustion of cargo of garbage tankage due to the inherent vice or quality thereof. It having been decided by the House of Lords of Great Britain that the owner of cargo of that description is entitled to contribution from the shipowner in such a case, in the absence of a contrary decision in this country, *held* that an exception to an answer alleging such a cause of loss should be sustained.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 193.*

General average, see notes to Pacific Mail Steamship Co. v. New York, H. & R. Mining Co., 20 C. C. A. 357; The Santa Ana, 84 C. C. A. 316.]

(Syllabus by the Judge.)

Carter, Ledyard & Milburn, for libellant.
Horace L. Cheyney, for claimant.

ADAMS, District Judge. The libel herein was filed on behalf of the Atlantic Mutual Insurance Company to recover from the schooner Wm. J. Quillan the amount of a general average contribution, alleged to be due from the schooner by reason of a payment of \$6,321.01, the insured value of a cargo of garbage tankage destroyed by fire in January, 1906, while the vessel was on a voyage from Barren Island, port of New York, to Savannah, Georgia. The libel alleges that the sound value of the tankage was \$6,157.07 and that it was damaged by water used in extinguishing the fire, so that the net proceeds of a sale of the tankage did not exceed \$443, and that the damage thereto and the amount of value sacrificed exceeded \$5,714.07. The loss was thus made and the vessel saved, hence it is claimed that a general average contribution became due from the vessel, amounting to about \$4,750.

The answer admits the main facts alleged in the libel, the fire in the tankage constituting the vessel's cargo, which it is alleged was the result of spontaneous combustion due to the inherent vice or quality thereof but denies that a case for contribution in general average arose. The answer further alleges that the schooner was considerably damaged by the fire and the measures resorted to for the purpose of extinguishing it, as a result of which the schooner and owners have sustained damages amounting to \$4,888.41 for repairs, demurrage, etc., which it claims as a set-off against the libellant's claim.

The libellant excepted to the answer as follows:

"The libellant, the Atlantic Mutual Insurance Company, excepts to the said answer and to the whole thereof, on the ground that the respondent has not set forth in his said answer a valid and legal defense on the part of the schooner 'Wm. J. Quillan' to the libellant's claim for a general average contribution, inasmuch as the only matter alleged as a defense on the part of the said schooner is that the fire which gave rise to the claim was the result of spontaneous combustion, and the fact that the fire that gave rise to the claim was the result of spontaneous combustion does not affect the right of the owner thereof to recover a general average contribution on account of the value thereof sacrificed to save the vessel, freight and cargo from destruction threatened by such fire."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The question to be decided therefore is whether damage caused by spontaneous combustion of cargo due to inherent vice of the goods, is a proper subject for general average contribution.

There is no decision in this country bearing directly upon the point but it has been decided in the case of *Greenshields v. Stephens* [1908] App. Cas. 431, 10 Mar. Law Cases (N. S.) 597, affirmed by the House of Lords [1908] L. R. App. Cas. 431, that the mere fact of a cargo of coal being naturally liable to spontaneous combustion does not deprive the shippers of their rights to a general average contribution, unless guilty of wrongful or negligent shipment.

The respondent urges that while this decision is entitled to respect and consideration, it should only be followed if correct and it is not correct because not consistent with the principles governing general average.

It is claimed that the ship owner can not recover in general average if the producing peril is due to the negligence of himself or crew and in illustration of the contention, mentions a case of latent unseaworthiness of the vessel and it is argued that the owner can not be guilty of negligence for his failure to discover such defect and yet he would not be entitled to recover in general average. The cases are apparently not analogous. The unseaworthiness of a vessel may be latent, nevertheless it would still exist and go to the root of any question of liability of the vessel, where that feature is in any way involved. The danger from the nature of this cargo always exists, of course, and, though remote, is known to all concerned. There are many kinds of cargo, coal, cotton, hemp and explosives of various kinds, for example, which possess attributes of danger and are liable to create peril to the carrying vessel under conditions which may arise. It can scarcely be deemed that the condition of a vessel having a latent defect is similar to those mentioned, which are well known articles of commerce and constantly being carried, the danger being recognized by the shipper and carrier. A cargo owner does not warrant his cargo against the operation of qualities inherent in their nature, while the ship owner does warrant that his vessel is seaworthy. Instead, therefore, of a situation involving mutual ignorance of the facts, as in the case of the unseaworthiness of a ship through latent defects, there is doubtless a mutual knowledge of the facts concerning the qualities of a cargo to be carried. There is no obligation on the part of the owner of such cargo to warrant against the operation of qualities inherent in its nature, which are probably as well known to one as the other.

Doubtless the owner of a cargo causing fire could not recover directly from the ship owner damage caused by the nature of his cargo, because that is directly covered by Rev. St. U. S. § 4282 (U. S. Comp. St. 1901, p. 2943) which provides:

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

But it does not follow that because one remedy is taken from the cargo owner by statute, that he is thereby deprived of a right of quite

a different character, that of a right to resort to general average, for example. *The Roanoke*, 59 Fed. 161, 8 C. C. A. 67.

It has been urged that the exclusion of deck loads from general average contribution has a bearing upon this matter, but it is not persuasive. It is based upon the peculiar situation of deck loads, which are held not to be entitled to participate by reason of their liability to be jettisoned, partly because, presumptively, they were carried at a lower rate of freight and subjected to greater risk from perils, but Lord Bramwell said (*Wright v. Marwood*, 4 Mar. Law Cases [N. S.] 453):

"The reason or principle is perhaps not important. Such is the law."

It is obvious, moreover, that deck loads, if sacrificed, should not participate equally with other interests, not subject to the same degree of peril.

It is also argued that the loss being due to an internal cause, there is not the same right to recover, as where something external has been the producing cause, but it is established that the peril may arise from an internal cause and general average contribution still be required. *The Whitecross Wire Co. v. Savill*, 4 Mar. Cas. 531; *The Rapid Transit (D. C.)* 52 Fed. 320; *The Roanoke*, supra.

In the *Greenshields Case*, supra, the decision of the lower court was based, by Channell, J. (see report of case on appeal), upon the *York-Antwerp Rule*, providing:

"Rule 3. Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire."

The higher courts, however, placed their decision upon broader grounds. Lord Alverstone, in the Court of Appeals, after reviewing the authorities, said (10 Mar. Law Cases [N. S.] 600):

"I therefore come to the conclusion in this case that, the loss having occurred without any negligence on the part of the cargo-owners, their claim to general average is not answered or cannot be resisted by the shipowners merely on the ground of the cargo of coal having ignited spontaneously."

Buckley, L. J., concurred in the opinion of Lord Alverstone, but Kennedy, L. J., discussed the case more fully on the aspect particularly applicable here. He said (page 601):

"Why is it fair or reasonable that because this coal has suffered from spontaneous combustion, and produced the fire, that therefore so much of that coal as has been damaged should not be a subject of general average contribution? It seems to me that when you use the word unfair or unreasonable, you must look at some grounds for finding it fair or reasonable to deprive him of it. Now, on what equitable or moral grounds can it be said that the cargo-owners ought not to have contribution? As between themselves and the shipowners they shipped that which the shipowners knew was liable to spontaneous combustion. So, too, every other shipper of coal on this vessel chose to ship it in a vessel which he might, on inquiry, have found would carry coal, the nature of which is obviously possibly combustible. I cannot see the shippers of this bulk of the cargo were in such a position that anybody could say that in fairness they ought not to receive a general average contribution. Everybody knows what is the nature of coal. It is conceded in this case that there was in fact neither wrongful conduct in a more posi-

tive form, nor wrongful conduct in the form of want of care or negligence on the part of the shipper of that coal in regard to the cargo. We go back, as it seems to me, to the reasoning of Crompton, J., in *Brass v. Maitland*, 6 E. & B. 470, in which he pointed out very clearly a long time ago the position that might arise if it should be held, or if it ought to be held, that a shipper was liable to another shipper because he shipped hay or cotton apparently in a fit state—not dangerous to the knowledge of shippers or shipowners, but in fact in a dangerous state, as such cargoes may be in to the knowledge of the whole mercantile world that ship goods. He there incidentally says that the true remedy ought not to be found, in his judgment, in the right of one shipper against another, where the hay or cotton has taken fire, but the real remedy is in each person against his underwriters, who ought to be the persons to suffer from such an unexpected occurrence. In my opinion, in a case where there is neither negligence nor positive active wrong on the part of the shipper whose goods caught fire and set fire to others, there is nothing unfair, unreasonable, or inequitable in his retaining his rights with others to general average contribution in respect of such goods as have been sacrificed for the safety of the general average.”

Upon the affirmance of this case in the House of Lords, the Earl of Halsbury said (App. Cas. 436):

“I confess myself unable to see any novelty in this case. It is not denied that there was a common adventure or that there was a common danger, that there was a sacrifice voluntarily made for the common advantage of all, and that the circumstances show nothing which should exempt either party from the obligation to make good the sacrifices made for the common advantage of both. In the argument in *Johnson v. Chapman*, 35 L. J. C. P. 23, 19 C. B. (N. S.) 563, 577, where the judgment was delivered by Willes, J., it was urged that no one can maintain an action for a wrong where he has assented to, or contributed to, the act that occasioned his loss. Here the facts do not raise that question at all; the shipowner is a party to taking in his ship the coal, which it is assumed both parties are equally familiar with, and its liability to spontaneous combustion, and all the other circumstances, climate and quantity and depth of holds, and the peculiarities of the river Hooghly, are equally known to both.

“I am therefore of opinion that this appeal ought to be dismissed, with the usual result as to costs.”

The question presented is a novel one in this country and while, upon general principles, it might be doubted if the underwriter of a party who loads upon a vessel cargo of such a nature that an explosion or ignition therefrom occurs, should be entitled to recover contribution from the vessel because of damages due to the nature of his cargo, still, without going to the foundation of the matter, it appearing that the cargo here was sacrificed for the benefit of the vessel, in view of the decision in the *Greenshields Case*, where the question received the consideration of the learned judges of the highest English courts, I think it should be held that the libellant is entitled to succeed.

The exception is sustained.

O'FLAHERTY v. HAMBURG-AMERICAN PACKET CO.

(District Court, S. D. New York. January 21, 1909.)

1. ATTORNEY AND CLIENT (§ 189*)—LIEN OF ATTORNEY—SETTLEMENT OF SUIT—ACTION IN FORMA PAUPERIS.

A proctor, representing a libellant in a suit in admiralty for a personal injury brought in forma pauperis, on a settlement by his client, is not entitled to have a decree entered in favor of himself for the part of the recovery which he was to receive by agreement as a fee, under Code Civ. Proc. N. Y. § 66, giving attorneys a lien on the cause of action of their client, not to be affected by any settlement; such statute not being applicable to actions in forma pauperis.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 189.*

Compensation of attorney on premature termination of employment. see note to Du Bois v. Mayor, etc., of City of New York, 69 C. C. A. 113.]

2. ADMIRALTY (§ 124*)—COSTS—DOCKET FEE.

A docket fee is not taxable in favor of a libellant in admiralty, unless the court has in some way passed on the merits of the controversy involved in the suit.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 841; Dec. Dig. § 124.*]

In Admiralty.

Wilford H. Smith, for libellant.

Percy S. Dudley, for Hamburg-American Co.

ADAMS, District Judge. The libel herein was filed on the 5th of November, 1908, to recover damages for personal injuries suffered by the libellant through an accident occurring on the 1st of October, 1908, while he was engaged as a longshoreman assisting in the discharge at New York of the respondent's steamer Siberia. The libellant had employed on the 28th of October, Wilford H. Smith, Esq., a proctor of this court, to represent him in a suit for damages, alleged to be \$5,000, to be brought against the Packet Company, giving the said proctor full charge of the action, with authority to pursue the same to judgment or to compromise as to him should seem best, but without authority to compromise until the libellant should give his consent. For his services in the matter the proctor was to receive fifty (50) per cent. of whatever sum should be recovered, no matter whether the action should be tried in court or compromised out of court. The agreement also provided that the proctor should be entitled to all costs that might be awarded by the court. It was further provided in the event of nothing being recovered that the said proctor should receive nothing for his services. On the 29th of October, Mr. Smith wrote to the respondent advising it of the accident and that the notice was given under chapter 600, p. 1748, of the Laws of 1902 of the State of New York, known as the "Employer's Liability Act," and that an action would be brought against the respondent in this court, but in the event of the respondent wishing to take up the question of settlement, he was authorized to treat with it. On the 31st of October this letter was answered by the respondent,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which stated it would investigate the matter and communicate with him again in a few days. Mr. Smith replied to this letter on the 5th of November, stating that so many cases had been settled over his head that he had made it a rule to bring actions in all cases immediately in order to protect his lien as attorney and he would do so in this case but without prejudice to the question of settlement. On the 16th of November, the last letter was answered by the proctor now appearing for the respondent, who stated that immediately after the report of the accident at the office, the pier superintendent was instructed to settle the case for a small amount; that the libel sent by Mr. Smith was received by the cashier on the morning of November 6th, during the absence from the office of the official in charge, and that, therefore, the order to make a settlement was not countermanded until late in the afternoon, at which time the said official was informed that a settlement had been effected about noon of that day by a payment to the libellant of \$150. It was further said in that letter:

"Inasmuch as no process was issued out of the District Court in the case and served upon the defendant, it would seem that the settlement, although made after the actual receipt of a copy of the libel, was apparently proper and that you are not entitled to any costs in the matter."

It appears that with the libel, an affidavit of poverty was filed, entitling the libellant to proceed in forma pauperis and that the action was so commenced. Process was duly issued and served but on the return of process, no appearance was made for the respondent and its default was entered. Subsequently, upon the consent of Mr. Smith, the default was opened and the respondent entered its appearance by its present proctor, incurring some expense for disbursements. Then the respondent filed the following exception to the libel:

"The exception of the defendant, the Hamburg-American Packet Company, to the libel of Dennis O'Flaherty, libellant, alleges upon information and belief that on the 6th day of November, 1908, the said libellant, in consideration of one hundred and fifty dollars to him paid, released the said defendant from the cause of action set forth in the said libel; and therefore, the said defendant is not bound further to answer the same; and it further alleges that on or about the 16th day of November, 1908, and more than two weeks before the issuance of a citation herein out of this Court, the proctor for the libellant was duly informed that a settlement of said cause of action had been made by the libellant; and the defendant therefore prays that the said libel may be dismissed."

Thereafter Mr. Smith, in the name of the libellant, filed a petition by way of amendment to the libel, setting forth the foregoing facts and asking for an order determining his lien and compelling payment by the respondent "out of the sum paid by it to the libellant in settlement of this cause."

The questions to be determined are:

(1) Is Mr. Smith entitled to the relief he seeks, either as to his compensation or costs? and (2) should the libel be dismissed?

1. Mr. Smith relies upon section 66 of the New York Code of Civil Procedure. That provision is as follows:

"The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer

containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien."

In *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75, an action to recover for personal injuries, it was held that a party having a cause of action, in its nature not assignable, can not by any agreement before judgment or a verdict, give his attorney any interest therein. There an attempt was made, after settlement with the plaintiff in person, to proceed with the action for the purpose of securing a contingent fee agreed upon between the plaintiff and his attorney. The referee found that the settlement was a bar to the action and that the attorney had no right to go on with it. This was reversed at the General Term but an appeal was taken to the Court of Appeals. There Judge Earl, in writing the opinion for the court, after speaking of the practice of courts to intervene to protect attorneys against settlements made to cheat them out of their costs and allow the suits to be continued for the purpose of collecting them, upon the theory that the services and skill of the attorney have procured the judgment therefor, said:

"A person owning a judgment for the recovery of money may give his attorney, or any other person, by agreement, rights and equitable interests therein, which the defendant therein charged with notice must respect. So if the cause of action before judgment be in its nature assignable, the owner of it may assign and, by agreement, create legal and equitable interests therein, and such agreements may now be made with his attorneys as well as with other persons, and when such interests have been created and notice given of them they must be respected. But what I maintain is, that before judgment, in the absence of any agreement, the attorney has not now and never had any lien upon, or interest in, the cause of action; and when the cause of action is like this, such as by its nature is not assignable, the party owning it cannot by any agreement give his attorney or other person any interest therein. In *People v. Tioga C. P.*, 19 Wend. (N. Y.) 73, Cowen, J., said: 'Assignments of personal injuries must still be regarded as mere covenants or promises which we cannot directly protect against the interference of the immediate party, though the defendant have full notice of the effort to assign. If the person professing to assign will do prejudice to the right by extinguishing or impairing it, the party with whom he deals must be left to his action for damages according to the nature of the undertaking.' Mere personal torts of this kind cannot be separated from the person upon whom they are inflicted, and they die with him.

Here there was not even any agreement by plaintiff to assign any portion of the claim to his attorneys. The agreement executed did not purport to give them any present interest in the cause of the action. It was simply an executory agreement that the attorneys should share in the damages recovered, the cause of action remaining intact in the plaintiff. Still an agreement to divide the recovery in such a case would attach itself to the judgment when recovered, and give the attorney an equitable interest therein.

It is, therefore, beyond dispute that the plaintiff's attorneys had neither a legal nor equitable interest by way of any assignment or lien on the cause of action. The defendant was not asking any favor of the court. It was in court simply insisting upon its settlement with the plaintiff as a defense to his cause of action. Therefore, if the attorneys are entitled to the protection they now seek, it is only by the exercise of the extraordinary power of the

court to which I have first above alluded, and I am prepared to say that such power should not be exercised in a case like this. It has not been conferred upon the courts by statute, usage or common law."

The action of the referee was found to be right and his judgment was affirmed.

The courts have been careful to protect attorneys in the collection of their legitimate compensation and the Code as it existed at the time of the foregoing decision was amended until it appeared in the form it now stands and is quoted above. It has since been held that an attorney's lien thereunder attaches to a fund which is created by a settlement, so that a party who with actual or constructive notice of the lien pays the fund over to the other, does so at his peril and is liable to the attorney for the amount of his lien where he is unable to collect it from his client on account of his financial irresponsibility. *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 402, 66 N. E. 395. And see *Sullivan v. McCann*, 124 App. Div. 126, 108 N. Y. Supp. 909.

It is urged by the respondent, however, that no matter how the right of an attorney in a state court might be determined, it is clear that this court, sitting in admiralty, has no jurisdiction to enforce a lien of this character, either against the libellant or against the respondent, even assuming that such a lien can be said to exist in a case like this, because it is growing out of a contract which could not by any stretching be said to be a maritime contract or one made under or pursuant to maritime law. It is further urged that the payment of money in settlement of a cause of action, which by its nature is purely personal and not assignable, is always made to the person owning such cause of action.

Passing these questions, it seems that the attorney of one who is suing as a poor person, especially in a personal injury case, is not entitled to the same protection as in ordinary cases, when costs and disbursements, in the event of non-success, are recoverable from the plaintiff. It is provided in section 460 of the N. Y. Code that when prosecution of a poor person is allowed, the attorney must act without compensation. He is allowed to recover costs (section 467) but otherwise is not entitled to any part of the recovery. And in the United States Statutes, it is provided (Act July 20, 1892, c. 209, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706]) that when one is allowed to sue as a poor person, the court may request any attorney of the court to represent such person. I think that the fact of this action being in forma pauperis is sufficient to exclude the proctor here from availing himself of the provision of section 66 of the Code, assuming that the other questions in the case should be answered in his favor.

It follows that there can be no allowance of Mr. Smith's claim for a judgment against the respondent for a portion of the amount of the settlement.

2. The recovery of the docket fee claimed can not be allowed because, in any event, it was not earned. It is now settled here that a docket fee is only recoverable where the court has in some way passed

upon the merits of the controversy involved in the action. *Swan v. Wiley, Harker & Camp Co.* (D. C.) 161 Fed. 236.

There is no further action of the court necessary in the matter and as the respondent's exception should be sustained, the libel is dismissed.

NEALL v. P. DOUGHERTY CO.

THE SOMMERS N. SMITH.

(District Court, S. D. New York. February 18, 1909.)

TOWAGE (§§ 6, 8*)—NEGLIGENCE OF TUG—EVIDENCE—SERVICES.

Towing services of the tug Sommers N. Smith to the Dougherty Company near Assateague, Va. The claim of the Dougherty Company that the tug was negligent in performing her contract *held* to be without merit, and that the owner of the Smith was entitled to recover for her services.

[Ed. Note.—For other cases, see *Towage*, Dec. Dig. §§ 6, 8.*]

(Syllabus by the Judge.)

Robinson, Biddle & Benedict, for Neall and the Sommers N. Smith.
James J. Macklin and De Lagnel Berier, for the Dougherty Co.

ADAMS, District Judge. The first of the above entitled actions was brought by Frank L. Neall, Trustee, owner of the tug Sommers N. Smith, against the P. Dougherty Company to recover \$500 for towing the barges Norfolk and Annie E. Embrey from a point off Assateague, Virginia, to Tom's Cove, near by, on the 28th of March, 1906.

The libel alleged that on the 25th of March, 1906, the master of the Smith was informed by the respondent that its tug Margaret was lying stranded at Assateague and that three barges, which had been in her tow were lying there at a safe anchorage but needed towing to Norfolk; that the respondent requested the master of the Smith to go down to Assateague and agreed to pay him \$500 for towing the three barges forming the tow to Norfolk, or if he succeeded in floating the Margaret as well as in towing the barges, \$700, or the same sum if the Margaret after being floated towed the barges to Norfolk; that the Smith left the Breakwater in a storm at 12.05 a. m. on the 26th, and on arriving at Assateague at 7.30 a. m., found the barges, instead of being at a safe anchorage, to be lying in the breakers so that the tug could not get within 600 fathoms of them; that the master tried, without success, to get a small tug to take a running line from the Smith to the barges and he thereupon went ashore and, by telephone, called up the master of the Margaret, then at Wollop's Beach Life Saving Station, who said a light draft boat, belonging to the respondent, was coming down from Norfolk for the barges and requested the master of the Smith to get the life savers from Assateague to run a light line from the barges, so as to heave in on the tug's hawser and then pull them out of danger; that the master of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Smith immediately consulted with the life savers, who did not think it was a safe place to go to at that time; that on the morning of the next day (the 27th) the life savers came off to the Smith, which took them to the barges, when it was found that one of them had gone ashore the evening before; that the life savers thereupon went aboard of the Norfolk, with the tug's running line and hauled in 400 fathoms of her hawser, and made it fast to the bitts of the barge, whereupon the Smith towed the Norfolk and the Embrey, which was hanging to her stern, and laboring hard in the breakers, to a safe anchorage in Tom's Cove; that thereafter the tug Defiance, having come from Norfolk, the respondent directed the master of the Smith to turn the barges over to the Defiance and return to the Breakwater, and await instructions, which he did. It was further alleged that the service rendered to the respondent was in the nature of extraordinary towage for which \$500 was a reasonable compensation.

The respondent denied many of the allegations of the libel and further stated as follows:

"Eighth: Respondent further answering alleges upon information and belief; that on or about the 23d day of March, 1906 the Steamtug Margaret owned by the libellant herein left the harbor of New York at about 12.15 p. m. having in tow the said barge Dendron which was loaded with cargo, and the barges Norfolk and Annie E. Embrey, which latter barges were light, the said tug and tow being bound for Norfolk, Virginia, the said Barge Dendron was next to the said steamtug on a hawser astern, the Norfolk following and the Annie E. Embrey being the hind barge. That on said trip aforesaid and on the day following at about 7.45 p. m. the said tug and tow, during the prevalence of a Northeast gale and heavy snow storm, endeavored to get into Tom's Cove, Virginia, and while said tug was attempting to make said cove, the captain of the said tug stopped the engines thereof and blew whistles for the barges to anchor, which they did, but that the hawser run from said steamtug to the said Barge Dendron fouled the said tug's propeller wheel, which made the said tug helpless, causing her to drift on to the beach, the said barges remaining at anchor and afloat.

That on the 25th day of March, the wind having moderated, the libellant made a contract with the representatives of the Steamtug Sommers N. Smith in consideration of the payment of Five hundred Dollars to tow the said three barges from where they were at anchor to Norfolk, and to receive the sum of Seven hundred Dollars if said tug Smith succeeded in safely rescuing the said Steamtug Margaret with said barges, the said tug Smith to be dispatched immediately to the scene where said barges were afloat and the said Steamtug Margaret on the beach, and to take said barges in tow, and if practicable to rescue the said Steamtug Margaret.

That said Steamtug Smith arrived in the vicinity of said barges on the morning of March 26th the day being clear on the morning she arrived, sea calm and said barges still afloat, and having manoeuvred about without communicating with those in charge of said barges, at about noon proceeded into Assateague Harbor and remained therein without making any effort to take any of said barges in tow, which she could easily have done. That those in charge of said barges did not know the mission of the said steamtug Smith on said day; that said barges remained afloat until 8 o'clock p. m. of the said 26th day of March, when the chain on the said barge Dendron was slipped, and she also brought up on the beach. That on the next day, to-wit the 27th day of March, the said tug Smith came out of Assateague Harbor and then took the two remaining barges in tow and proceeded into said Assateague Harbor with them where said barges safely anchored.

Respondent alleges that as a result of said Barge Dendron taking the beach as aforesaid, serious damage followed her as a consequence.

Ninth: Respondent charges that said steamtug Sommers N. Smith was

gully of fault because of said Barge Dendron being damaged; (1) In not taking the said barge in tow on Monday, the 26th day of March, as it was her duty to do, and tow her with the other barges, which she could easily have done into Assateague Harbor, (2) In not informing those in charge of said barge through her master that she had been sent to care for said barges and tow them into Assateague Harbor, (3) That those in charge of her navigation should have known that the leaving of said barges where they were, would make them liable to such an accident as actually did befall the Dendron, (4) In that the said barge Dendron being loaded, should have been towed by said steamtug into Assateague Harbor on March 26th where she could have anchored in perfect safety."

The respondent then filed a libel against the Smith to recover \$7,500, which after, in substance, repeating the foregoing allegations of its answer with the charges of fault, charged further neglect as follows:

"Fifth: The libellant has sustained damages on account of the premises in the cost of repairs to said barge, recovering the said barge, surveyor's fees, tug hire, towages loss of freight, loss of time while said barge was undergoing repairs, and in recovering her from said beach in the sum of about Fifty five hundred dollars, and that said barge has depreciated in value because of her non-repairable condition in the sum of about Two thousand dollars, making in all about Seventy five hundred dollars."

The libellant, as respondent, denied the allegations of the Dougherty libel, alleged the truth of the substance of its own libel, and stated as follows:

"And claimant further avers that at all times on the said 26th day of March it was impossible for the said steamtug 'Sommers N. Smith' to tow or render any assistance whatever to the said barge 'Dendron' without danger of destruction to herself, which danger she was not, under the terms of her contract with the libellant, called upon to assume."

The testimony shows that the Margaret, 112 feet long, and drawing about 14 feet, was towing the three barges, tandem, from New York to Norfolk. The leading barge, the Dendron, was on a hawser of about 225 fathoms; she was followed by the Norfolk, on a hawser of about 200 fathoms, and the latter was followed by the Embrey, on a hawser of about 175 fathoms. When a little below a point off Brigantine Beach, New Jersey, a light snow storm commenced, which gradually became thicker and later it came on to blow at the rate of about 25 miles an hour from the northeast. When reaching Assateague, the master concluded to go in for the safety of the barges and having found water of less depth, he blew to the barges to anchor and stopped the tug. She drifted back and got her hawser in the wheel and subsequently went on the beach from the effect of the wind and tide. A blinding snow storm prevailed at the time. This was Saturday, March 24th. On the following morning, the master found that the tug was on Wollop's Beach $\frac{1}{2}$ to $\frac{3}{4}$ of a mile from the shore, in about 12 $\frac{1}{2}$ feet of water. She went there at high water.

News of the disaster was telegraphed to the owners of the Margaret on the 25th instant. They communicated with the tug Smith, at the Delaware Breakwater, which was informed that the Margaret was stranded at Assateague but that the barges were lying there at a safe anchorage, needing, however, to be towed to Norfolk. The

master of the Smith had heard of the disaster before and made arrangements to proceed to the scene with a wrecking crew of 8 or 9 men. After starting, the tug was recalled by her agent at the entrance to the Breakwater, by means of a signal, and being then advised of the situation and that the Dougherty Company wanted to make a bargain with the tug rather than have salvage services, the master discharged the wrecking crew and made the arrangement for compensation described above. During this day the wind shifted to the eastward. On the 26th, at 12.05 a. m., the Smith left the Breakwater and proceeded, in rough weather, to Assateague, reaching there at about 7.30 a. m. Instead of finding the barges safely anchored, as had been represented to her, she found that they were lying in or near the breakers so that they could not be approached by the Smith within a half a mile or more. She tried to get a line to them without success, striking the bottom several times in the attempt. There were two small boats there of light draft, one of them using steam and the other naphtha power. The master of the Smith endeavored to get the former, the more powerful of the two, to take a line to the Dendron, which was then said to be in a dangerous situation, but the master of the small boat could not be induced to perform that service, even if he was able to in view of the existing conditions, saying he would not do it for \$500. The two small boats went into the inlet, but the Smith remained in the vicinity of the barges for some time trying to do something for them, the master at times looking through his glasses for the life savers at Wollop's Beach, without seeing them. He then left the scene and went up into Assateague Harbor. About 1 o'clock he went ashore in a small boat to the Life Saving Station on Assateague Island and endeavored to induce the men there to go to the assistance of the barges, in the way of running a line. They objected, however, saying the work belonged to the Wollop's Beach Station. The master of the crew, however, connected him by telephone with that station, where the master of the Margaret responded, and said he had hired the two small boats to tow the barges out to where the Smith could reach them, but the work was too heavy for them; he also said Mr. Dougherty was on the way from Norfolk with a light draft boat and was due there some time that night, and when she came they would be able to reach the barges. As the tide was falling and the sea high, it was not deemed suitable to attempt the towing that afternoon and it was abandoned for the day. Afterwards, however, the master of the Smith talked to the master of the Assateague Life Saving Station, with a view to some action, but without result.

It appears that during the 25th, the wind was strong from the northeast, with a high sea. On the 26th, it was fresh to light from the northeast and through to south, with a high sea. On the 27th, it was light to fresh from the south, with a moderate sea. There is some evidence to the contrary respecting the earlier days, the master of the Dendron stating, for example, that there was a moderate breeze but his testimony showed that while his barge was lying at anchor in about 12 feet of water, she was drawing only 8½ feet and yet she

pounded, which of course, must have been caused by the sea, due to a wind of some force. I think there can be no reasonable doubt that the above shows the state of the weather with substantial correctness on the respective days.

The manager of the Dougherty Company in Baltimore, evidently considered that the barges were in no especial danger, when he declined to have the Smith go to their rescue, without an agreement for a fixed compensation, preferring that the contract should be for a definite sum rather than that the work should be done on a salvage basis, as was at first contemplated by those negotiating for the Smith. And the amount to which it was limited, \$500, also showed that no immediate danger was apprehended by him, and that the Smith did not expect to perform other than a towage service appears by the fact that she put her wrecking crew ashore. She did not have facilities for running lines through rough water and she evidently did not expect to be called upon to do such work under the contract. Having reason to believe that the barges would be easily accessible to her and finding that they were not so complaint could not justly have been made against her, if when finding the barges were not in such a situation as she was entitled to expect, she had abandoned the matter, and resorted to the contract for her compensation. That it was not expected she would run the lines is also shown by the fact that the two small power boats had been engaged by the master of the Margaret for the purpose, doubtless under instructions from his principal, with whom he was in telephonic communication.

With reference to the claim against the Smith for the loss of the Dendron, two acts of negligence have been charged against her, first, that after her employment she did not start immediately, and, second, that she did not get a line to her on Monday and then haul her out of danger.

The first charge of fault does not require very much consideration. If the information that all of the barges were safely anchored in 14 feet of water was true, there was no reason why the Smith should go out in the storm that was raging on the 25th, and in any event nothing could have been gained by an earlier departure from the Breakwater than midnight, as it was evident that she could not work at night on the coast. She arrived at the scene of operations about 7 a. m. of the 26th, about an hour and a half before high water, which was the best time for her work.

It was not practicable for the Smith to get a line to the Dendron on Monday, the 26th. The sea was high and breaking out to, and doubtless somewhat beyond, the barges. The beach was flat with a rise of the tide of about 3 feet only, so that the barges could not be approached by a tug of the Smith's draft within $\frac{1}{2}$ or $\frac{3}{4}$ of a mile. This necessitated the handling and running of a long hawser, a difficult and dangerous operation, requiring skilled services. The crew of the Smith was not of enough strength to accomplish the work. The small tug, the Gladys, would not attempt it. The master of the other small boat was also not disposed to do so. Moreover, if the line had been run, it could not have been handled on the barge with her small crew, as it finally took the life saving crew, about 10 men, to put the line aboard

of the Norfolk the next day, when the wind had moderated and the sea had calmed down somewhat, and when the Smith was able to approach more closely and use a hawser of 400 fathoms. It is urged that the Smith should have employed the Wollop's Beach crew on Monday as she did on Tuesday, but even assuming that they would have been willing to try it Monday, it is not the fault of the Smith that they were not then used. She did endeavor to get them on Monday but her telephone inquiry was answered by the master of the Margaret who was at the station, and it does not appear that he made any effort in that direction, probably because either those life savers would not go or the master of the Margaret knew that a line could not be run from the Smith on that day.

I think there can be no doubt that the master of the Smith did even more than could reasonably have been expected of him in taking his tug into danger for the purpose of performing the contract on her part.

The libellant Neall should recover for the services of the Smith but as the amount is not determinable here, it is necessary that the matter should go to a commissioner to ascertain the value of her services under the circumstances.

There does not appear to have been any neglect on the part of the Smith which led to the stranding of the Dendron and the libel of the Dougherty Company is dismissed.

SMELTZER v. ST. LOUIS & S. F. R. CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. February 24, 1909.)

COURTS (§ 489*)—CONCURRENT JURISDICTION—STATE AND FEDERAL COURT—INTERSTATE COMMERCE ACT—ACTION FOR LOSS OF GOODS.

Section 20 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]), which requires the initial carrier on receiving an interstate shipment to give a through bill of lading therefor, and gives a right of action against the carrier issuing it for any loss or damage to the property caused by such carrier or any connecting carrier, does not limit jurisdiction of such an action to the federal courts, and, where the amount involved exceeds \$2,000, such courts and the state courts have concurrent jurisdiction under the general provisions of the federal judiciary act, but where the amount involved is less a state court alone has jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 489.*]

At Law. On demurrer to complaint.

Sam Chew, for plaintiff.

B. R. Davidson, for defendant.

ROGERS, District Judge. This case is before me again. This time on demurrer to the complaint. The only ground of demurrer pressed in the argument is want of jurisdiction in the court.

The case is here on removal from the circuit court of Crawford county, Ark. The contention is that under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154),

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and amendments thereto (Act June 29, 1906, c. 3591, 34 Stat. 384 [U. S. Comp. St. Supp. 1907, p. 892]), exclusive jurisdiction is conferred on the District and Circuit Courts of the United States, or upon the Interstate Commerce Commission, and therefore the state court had no jurisdiction of the case when brought, and this court acquired none by removal.

In the opinion of the court the contention is without merit. The following cases are cited to support the demurrer: *Haracovic v. Standard Oil Co.* (C. C.) 105 Fed. 785; *Kalispell Lumber Co. v. Great Northern Ry. Co.* (C. C.) 157 Fed. 845; *Van Patten v. Chicago, M. & St. P. R. Co.* (C. C.) 74 Fed. 981; *United States v. Mooney*, 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550; *United States v. Atchison, T. & S. F. Ry. Co.* (C. C.) 142 Fed. 187; *Central Stock Yards Co. v. Louisville & N. R. Co.* (C. C.) 112 Fed. 823; *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n* (C. C. A.) 165 Fed. 1. I do not think any of these cases in point. They relate to actions brought under sections 8 and 9 of the act of February 4, 1887, known as the "Interstate Commerce Act." When that act went into effect no such suit as the one now under consideration was authorized under then existing laws. This suit was brought under section 7 of the act of June 29, 1906, known as the "Hepburn Act." 34 Stat. 584, c. 3591 (U. S. Comp. St. Supp. 1907, p. 892). That section, it is true, is an amendment of section 20 of the act of February 4, 1887, but the section as it stood in the original act contained no provision such as that under which this suit is brought. The provision under which this suit is brought is as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

That paragraph relates solely to suits to be brought by shippers over interstate lines for loss or damage to their goods. No provision is made by the section as to what courts the suits shall be brought in, for losses or injuries so sustained. The contention is that the provisions found in sections 8 and 9 of the act of February 4, 1887, and the provision found in the previous part of the section from which the above quotation is taken, applies to this class of actions. I am clearly of the opinion that this contention is unsound. The provision found in section 7 of the act of June 29, 1906, confers jurisdiction on the Circuit and District Courts upon the application of the At-

torney General of the United States, at the request of the Interstate Commerce Commission, to compel, by mandamus, railroad companies to comply with the provisions of the Interstate Commerce act and its amendments; but that is all that it does; it has no application to this class of cases.

Sections 8 and 9 of the original interstate commerce act of February 4, 1887, must be considered with reference to the provisions of the act as it stood when enacted, and to the purpose and scope of the act. There was not the remotest reference in that act to the liability of an initial carrier for losses on its connecting lines, nor any provision requiring a railroad engaged in interstate commerce to give a through bill of lading, or withdrawing its power to limit, by rule, regulation, or contract, its liability to losses occurring on its own line. Sections 8 and 9 of the act of February 4, 1887, therefore, when enacted, could not have had any application to such an action as the one at bar, because no such action then existed. The very language used makes it clear that those sections have no application to such an action as this. Those sections are as follows:

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Manifestly they relate to the right of any one who has been injured to recover such damages as he may have suffered by the failure of the carrier to do what the act required, or for doing the things the act forbids.

But this suit is not brought because the carrier did something it was forbidden by the act to do, or neglected to do anything that the act commanded. All the cases cited above are of the character indicated, and have no application to a case like the one at bar. This is simply a suit for damages for breach of a contract, either entered into voluntarily, without reference to the act, or in pursuance of, or in conformity to, it. In either event, it does not fall under the sec-

tions above quoted, and hence is not required to be brought in a District or Circuit Court of the United States, or before the Interstate Commerce Commission.

The question then arises, if Congress creates a new cause of action, and, by the act creating it, designates no court in which the suit shall be brought, what courts have jurisdiction? This question was before the Supreme Court in *Norwich Company v. Wright*, 13 Wall. 104, 20 L. Ed. 585. An examination of the act under which that suit was brought will show that it creates a new cause of action which under the general law belonged to the admiralty jurisdiction. It related wholly to losses and damages sustained on the high seas. That act did not designate any court in which cases created by the act might be tried, but did say, "the owner or owners of the ship or vessel, or any of them, may take the appropriate proceeding in any court," for certain purposes provided. The act differs from the one under consideration in that respect only, for the latter makes no reference to courts in which the shipper may institute suits for the relief provided. The Supreme Court in that case said, on the question of jurisdiction:

"The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take 'the appropriate proceedings in any court, for the purpose of apportioning the sum for which,' etc. Now, no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, is brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition to present and substantiate their respective claims; and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding."

This decision was followed in *Elwell v. Geibel and Another* (C. C.) 33 Fed. 71, and was also approved by the Supreme Court in *Providence & N. Y. Steamship Company v. Manufacturing Company*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038. The statute under which those suits were brought ousted the jurisdiction of all courts, state and federal, except the District Courts of the United States, because the subject-matter was maritime, and the general jurisdiction of the federal courts in all admiralty matters (with certain specified exceptions) is conferred by general statutes of the United States on the United States District Courts (see jurisdiction of District Courts, in judiciary act). These cases, I think, decide the principle involved here.

We must look, then, to the judiciary act to see what courts, under the general law, have jurisdiction in like cases, otherwise we should have the anomaly spoken of in *Norwich Company v. Wright*, "that the Legislature has passed a law which is incapable of execution,"

which the court, in that case, said "is never to be done if it can be avoided." By Act March 3, 1875, c. 137, 18 Stat. 470, as amended by the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), it is provided:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," etc.

By this statute it is plain that the jurisdiction is concurrent in the Circuit Courts of the United States and the state courts in all common-law cases where the amount in dispute, exclusive of interest and costs, exceeds the sum of \$2,000, if the suit is between citizens of different states or arises under the Constitution and laws of the United States. This case was removed here on the ground of diversity of citizenship, and, I think, might also have been removed on the additional ground that it was a suit arising under the Constitution and laws of the United States. It might have been originally brought here on either ground, and was therefore removable under the act of March 3, 1887, as corrected by the act of August 3, 1888; and suits for \$2,000 and less must be brought in the state courts, otherwise jurisdiction obtains in no court, state or federal, for that class of cases, and the act of Congress, to that extent, is unenforceable. Any other conclusion would not only nullify the twentieth section of the Hepburn act, under consideration, but many other acts of deep concern to the country, among others, Act May 30, 1908, c. 225, 35 Stat. 476, "to promote the safety of employees on railroads," Act April 22, 1908, c. 149, 35 Stat. 65, known as the "Employer's Liability Act," Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the "Act to prevent cruelty to animals while in transit," and others which might be cited.

The demurrer must be overruled, and it is so ordered.

THE AMERICA.

(District Court, D. New Jersey. March 6, 1909.)

SHIPPING (§ 87*)—LIEN FOR DAMAGES—PRIORITIES BETWEEN CLAIMANTS.

Claims against a vessel for damages resulting from collisions occurring on different dates are entitled to priority in the inverse order of such dates, upon the theory that the first claimant by virtue of his lien acquires a proprietary interest in the vessel, which is subject to the risks of her subsequent navigation, including liability for subsequent torts.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 340; Dec. Dig. § 87.*]

In Admiralty.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles Thaddeus Terry (Edward Ward McMahon, of counsel), for libelant Henry Steers, Inc.

Foley & Martin (Frank A. Spencer, Jr., on the brief), for libelant Miller.

Convers & Kirlin (Russell T. Mount, of counsel), for libelant Morgan.

CROSS, District Judge. The steam tug America was sold August 20, 1907, under process issued out of this court, and the proceeds of sale, amounting to \$4,201.49, are now in the registry of the court. The various claims against the tug were referred to a commissioner, who has reported the several amounts due thereon, and his report has not been excepted to. All of the above libels were filed for damage for collisions, the first of which occurred April 4, 1907, and upon a libel filed therefor, June 29, 1907, by John D. Miller and another, a decree was entered in their favor for the sum of \$594.57. Henry Steers, Inc., on August 3, 1907, filed a libel for damages for a collision which occurred May 28, 1907, upon which libel a decree has been entered in its favor for \$905.76. Another libel was filed July 23, 1907, by Henry Steers, Inc., for a collision which occurred June 28, 1907; and a libel was also filed July 13, 1907, by Josiah Morgan, master, etc., for a collision occurring June 28, 1907. Upon these last-mentioned libels decrees have been entered as follows: In favor of Henry Steers, Inc., for \$5,042.28; and in favor of Josiah Morgan, for \$900.40.

All of the foregoing decrees were entered upon tort claims, and, there being insufficient funds in the registry to pay them in full, the question presented for decision is as to the order of priority to be observed in their payment. On behalf of the libelants Miller et al. it is claimed that the decrees should be satisfied, so far as the fund in court will permit, in the order in which the several collisions giving rise to the claims occurred; while on behalf of the other libelants it is claimed that they should be paid in the inverse order of the dates of their creation. Whichever of these contentions is allowed, it is admitted that the claims of Henry Steers, Inc., and Josiah D. Morgan, master, arising out of the collisions occurring on the 28th day of June, 1907, are of equal rank and should be paid pro rata, since the collisions giving rise to them occurred, to all intents and purposes, simultaneously.

In *The John G. Stevens*, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969, it is settled that maritime liens for collisions are to be preferred in admiralty to liens for previous supplies; but the question of the priority of liens for collisions occurring at different times, although mooted, was not decided by that case. However, in *The America*, Fed. Cas. No. 288, it appeared that a collision claimant libeled the America for damages done July 12, 1852. A second claimant filed a libel against the fund in court for damages caused by a collision which occurred July 11th, one day earlier than the happening of the collision by which the original libelant suffered damage. Other libels were likewise filed against the fund in court. Whereupon the court, after directing that liens for wages should be first paid, and also the liens of certain materialmen who had repaired the vessel after the last collision, held that the lien arising from the last collision was prior to the other remain-

ing liens, including that arising under the earlier collision. In the course of his opinion Judge Hall says:

"The last lien should be preferred, whether it attaches by reason of salvage services or a collision. If a collision claimant does not enforce his lien until the vessel is wrecked, or in danger of loss, and she is saved by the efforts of salvors, those salvors should certainly have the preferable claim; and if, after salvage services are effected, the vessel causes damages before the salvor's lien is enforced, the right of the salvors, like any other lien or proprietary interest, must be subject to the claims of the injured party. In short, all parties, except seamen, holding ordinary maritime liens upon a vessel, are to some extent treated as though they had a proprietary interest in the ship; and their interests, whatever they may be, are subject to all liens which the necessities of the ship, or a collision caused by the carelessness or misconduct of those in charge, may subsequently impose."

This case was followed in *The Frank G. Fowler* (D. C.) 8 Fed. 331, where the question now presented was again fully and carefully considered by Judge Choate, who reached the conclusion that collision claims were to be paid in the inverse order of their occurrence. In the course of his opinion he says:

"A lien or tacit hypothecation is at once created and vested in the damaged party, subject to be defeated only by unreasonable laches in bringing the proceeding in rem, by which alone it can be enforced. A party who has already suffered such a damage has such a lien of hypothecation of the vessel. He is to that extent in the position of an owner. He has a quasi proprietary interest in the vessel. It is true he cannot, as an owner, control her employment, or prevent her departure on another voyage, except by the exercise of his right or power to arrest her for the injury to himself, and in some cases the second injury may be done before he has an opportunity to arrest her. Yet if her continued employment is not his own voluntary act, nor with his own consent, it is his misfortune that the vessel in which he has an interest is used in a manner to subject herself to all the perils of navigation. This use, unless he intervenes to libel and arrest her, is perfectly lawful as against him. If she is lost by shipwreck, of course, his lien becomes valueless, and I think his interest is not exempted from this other peril to which the vessel is liable, namely, that she may become bound to any party injured through the torts of the masters and mariners. The principle as to marine torts is that the ship is regarded as the offending party. She is liable in solido for the wrong done. The interests of all parties in her are equally bound by this lien or hypothecation, whether the master and mariners are their agents or not. * * * I think the same principle is applicable to a prior lienholder, who, by the tort of the master and mariners, has become, so to speak, a part owner in the vessel. His property, the vessel, though not by his own voluntary act, has been used in commerce. That use was not tortious as to him. It is subject in that use to all ordinary marine perils. One of those marine perils is that it may become liable to respond to another party, injured by the negligence of the master and mariners. No exception to the liability of the vessel, exempting the interests of parties interested in the ship, has been established by authority. To create such exceptions would greatly impair and weaken the security against negligent navigation, which the rule of liability of the vessel is at least partly designed to promote."

The case last referred to was, however, reversed by Judge Blatchford, sitting in the Circuit Court. 17 Fed. 653. I have not been referred to, nor have I found, any later case in which the question has been directly decided. In my judgment, however, the opinion of Judge Choate is the more logical of the two, and the better supported by principle. Judge Blatchford's reasoning was in effect that, since the second collision did not benefit the vessel, it was not entitled to priority over

the lien created by the first collision, thereby seemingly adopting the rule that a subsequent lien is entitled to priority of payment only when it has benefited or increased the value of the vessel out of which all liens are to be satisfied. It is manifest, however, that priorities between collision liens cannot be determined on the theory of benefit to the offending vessel. No collision, be it the first, the second, or the third, can or does benefit the vessel. The *John G. Stevens*, *supra*, moreover, expressly held that a tort lien, although it did not benefit the vessel, nevertheless had priority over an earlier lien for supplies, which presumably did. There is no apparent reason why the rule in cases of collision should be different than it is in the matter of successive liens for repairs or supplies, which are ordinarily paid in their inverse order. The proprietary interest created in the vessel in favor of the party injured by the first collision is subject, like all other proprietary interests in her, to subsequent marine perils, including collisions. That a maritime lien created by collision gives a proprietary interest in the res to the injured party is laid down in many cases, among them *The John G. Stevens*, *supra*, in which the court said, at page 120 of 170 U. S., at page 547 of 18 Sup. Ct. (42 L. Ed. 969):

"The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text-writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England. Henry on Admiralty, 75, note; Marsden on Collisions (3d Ed.) 93."

With this principle established, it logically follows that such proprietary interest may be lost, not only by laches, but by the establishment of a subsequent proprietary interest of the same character. The party first injured has the right to arrest the vessel and establish his lien. Failing to do so, he submits his proprietary interest in the vessel to all of the ordinary perils of navigation; and, since marine torts are chargeable to the vessel as the offending party, one of the perils of navigation to which the party first injured thereby submits his interest is the liability of the vessel to commit further torts. The true theory is that if the party first injured, and who has thereby acquired a proprietary interest in the vessel, permits it to continue in navigation, and the vessel commits a subsequent tort, he in a sense becomes a party to the subsequent tort, and hence his interest is subject thereto and liable therefor. The conclusion arrived at in this case is in accord with the views of the author of *Hughes on Admiralty*, where, at pages 348-351, after referring to the variant decisions in *The Frank G. Fowler*, and making an extensive citation from the opinion of Judge Choate, he says:

"If the principles laid down by the Supreme Court in *The John G. Stevens* are to be the guide, it would seem that the District Judge was the one who should be followed. When we once settle the doctrine that a maritime lien is a *jus in re*, or a proprietary interest in the ship, it would seem to follow necessarily that the owner of that interest, even if not guilty of laches, and even if having no control over the master in charge, impliedly takes the risks of subsequent accidents, and holds the ship out to the world as a thing of life, liable to make contracts and commit torts, and that he should not be heard to dis-

pute the claims of others who have been brought into relations with her upon this basis."

Logically I can see no other possible conclusion. Consequently an order directing the payment of the collision claims in the inverse order of the dates of their creation will be entered.

Other libels for repairs and supplies were filed, but the proctors of such libelants did not appear at the argument, although duly notified thereof, and hence may be taken as acquiescing in the rule laid down in *The John G. Stevens*, *supra*, which, of course, would bind this court in any event.

BOUKER CONTRACTING CO. v. PROCEEDS OF SALE OF DREDGING MACHINE (MORRISON DREDGING CO., Claimant).

(District Court, D. New Jersey. March 4, 1909.)

1. MARITIME LIENS (§ 69*)—POWER OF COURT—DISPOSITION OF PROCEEDS OF VESSEL SOLD.

Where a court of admiralty has seized and sold a vessel in proceedings *in rem*, any surplus proceeds remaining after lien claims have been paid belongs to the owner of the vessel, and the court has no power to distribute the same to general creditors having no liens.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 107; Dec. Dig. § 69.*]

2. MARITIME LIENS (§ 9*)—MARITIME CONTRACT—HIRING OF SCOW.

A hired scow, on which a dredge was temporarily mounted while being used to unload material from boats and deposit the same in the space behind a private bulkhead, which was being filled in, was not employed in a maritime service, nor was the contract of hiring maritime; and the owner, in the absence of a contract therefor, has no lien upon the dredge or its proceeds for the hire.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 13; Dec. Dig. § 9.*]

In Admiralty. On petition for proceeds.

Linsly Rowe, for petitioner.

Foley & Martin, for claimant.

CROSS, District Judge. The petition sets forth that the petitioner intervenes for its interests in the proceeds of a dredging machine now in the registry of this court; that the petitioner is a corporation of the state of New Jersey, engaged in maritime contract work in and about the bay of New York; that the dredging machine above mentioned was owned by the Morrison Dredging Company, a corporation of New York, which was engaged in the business of dredging out or filling in of channels or other water ways in and about the harbor of New York and adjacent waters; that in the month of December, 1906, the Morrison Dredging Company hired from the petitioner one of its scows, known as "No. 22," took possession of the same on December 16, 1906, subsequently erected and placed thereon said dredging machine, and agreed to pay a reasonable price for the rental and charter of said scow while it was used by said dredging company; that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

scow was in the possession of said dredging company, with the dredging machine on board, and was used and employed by said dredging company in its business, from December 16, 1906, until February 20, 1907, inclusive (Sundays not being charged for), a period of 58 days; that the reasonable price and value for the use and charter thereof was \$7 per day, and that the total amount due the petitioner for the hire of said scow, was \$406, no part of which sum had been paid, although payment thereon had been demanded; that on February 20, 1907, both the scow and dredging machine were attached by the United States marshal for this district, under a monition issued out of this court upon a libel for contract filed by the Merritt & Chapman Derrick & Wrecking Company; that such proceedings were had under said libel and others subsequently filed; that the said dredging machine and scow were separately sold by the marshal April 19, 1907, under a writ of venditioni exponas issued out of this court; that the proceeds of sale of said dredging machine amounted to \$1,725, which sum was duly paid into the registry of this court, where it remains undistributed; that the contract for the hiring and charter of said scow was a maritime contract; that the petitioner is entitled to have the amount due thereunder paid out of the proceeds of the sale of the said dredging machine, and that all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

The claimant by its answer, among other things, sets up that the petitioner has no lien against the proceeds of sale of the dredging machine by virtue of any of the matters or things set forth in its petition. The foundation of the petitioner's claim has already been stated. The claimant denies that it hired the scow, and, on the contrary, says that it came into possession of it under a contract of sale, by the terms of which the title was to remain in the petitioner until the purchase price was fully paid, during which time, however, the claimant was to have possession, subject to the right of the petitioner to keep a man on board of the scow at the expense of the claimant. If a conditional sale were made, as the claimant alleges, the petitioner is manifestly not entitled to hire for the use of the scow; but it is unnecessary, in my judgment, to consider that aspect of the case, because under the evidence, and accepting the petitioner's view that the scow was chartered, I have reached the conclusion that the petitioner is not entitled to a decree. I am unable to perceive any lien or right of lien that the petitioner had or has upon the dredge, or the proceeds of sale thereof. It is nowhere claimed that such right exists by reason of any contract. The petition is silent upon the question. It neither asserts the existence of such a lien, nor sets up facts from which one might be inferred. The petitioner merely asks to be paid its claim out of the proceeds of sale of the dredge in the registry of the court, as if to ask were to receive.

Beyond question the petitioner cannot obtain any of the moneys it seeks unless its claim constituted a maritime lien, capable of enforcement by a proceeding in rem against the dredge. The petitioner seems to have proceeded upon the theory that as a general creditor of the Morrison Dredging Company, in the absence of creditors having liens, it had the right to have its claim for the hire of the scow paid out of

the proceeds of sale of the dredge. The authorities, however, do not support, but are absolutely opposed to, that view; for instance, in *The Lottawanna*, 87 U. S. 201, 221, 22 L. Ed. 259, the court says:

"Beyond doubt, maritime liens upon the property sold by the order of the admiralty court follow the proceeds; but the proceeds arising from such a sale, if the title of the owner is unincumbered and not subject to any maritime lien of any kind, belong to the owner, as the admiralty courts are not courts of bankruptcy or of insolvency, nor are they invested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors. Such proceeds, if unaffected by any lien, when all legal claims upon the fund are discharged, become by operation of law the absolute property of the owner. * * * Decided cases may be found which afford some support to the proposition that the proceeds in the registry of the court, if the lien claims are all discharged, may be distributed equitably among the intervening creditors of the owners; but the court is of the opinion that the rule that the proceeds in that state of the case belong to the owner is correct in principle, and that the weight of authority is in its favor, notwithstanding those cases, of which *The John*, 3 Robinson, 290, is the one most frequently cited."

Other cases from the many holding the same doctrine are *The Wyoming* (D. C.) 37 Fed. 543; *The Willamette Valley* (D. C.) 76 Fed. 838; *The Balize* (C. C.) 52 Fed. 414; *The Lydia A. Harvey* (D. C.) 84 Fed. 1000. In *The Balize*, supra, the facts were that a tug had been sold to satisfy certain maritime liens, which having been discharged, there remained in court a surplus which was claimed by both the former owner and his creditors. The creditors, who petitioned that the fund be paid to them, were of two classes—those claiming for supplies furnished to boats other than the tug, for which suits in personam were pending, and those claiming for services rendered as master of the tug and of other boats, for which judgments in personam had been obtained and executions returned nulla bona. Jackson, Circuit Judge, on appeal from the District Court, held that the suits and judgments in personam conferred no vested right on the master of the tug, or other petitioning creditors, to a specific interest in the surplus such as the forty-third admiralty rule contemplates, and that therefore the District Court had no jurisdiction in admiralty to create liens on the surplus as against the former owner. In the course of its opinion the court said:

"Neither the master of the *Balize* nor any of the other petitioning creditors had any specific lien upon the *Balize* or its proceeds, either by statute or by contract. The District Court, as an admiralty court, has no jurisdiction to create liens on this surplus as against the owner. It can only assert and enforce against the owner prior specific liens which the owner or the law have previously created or established. The judgments which the several masters have obtained against the *Detroit Tug & Transit Company* (the former owner of the tug) in personam, the issuance of executions, and returns of nulla bona thereon, created no lien on said surplus. The suits and judgments in personam conferred no vested right to a specific interest in said surplus, such as the forty-third admiralty rule contemplates. The creditor who claims satisfaction out of surplus proceeds in such cases must come into court with an existing specific lien. He cannot invoke the aid of a court of admiralty to create such lien by attaching or impounding the fund. The admiralty court can only enforce or give effect to subsisting liens created by statute or contract as against the owner of surplus proceeds. It may be, and doubtless is, inequitable for the owner to assert its right to this surplus, and leave bona fide

debts unpaid; but a court of admiralty has no such equitable jurisdiction as will enable it to correct such a wrong. The claim of the master of the *Baltze* cannot be distinguished from that of the other creditors, and the decree of the District Court allowing and directing its payment is reversed."

The law, however, is summarized in a single paragraph in *The Edith*, 94 U. S. 518, at page 523, 24 L. Ed. 167, where Mr. Justice Strong, speaking for the court says:

"It need hardly be added that, though a proceeding *in rem* and a petition for payment of a claim out of proceeds of a sale remaining in the registry are distinct things—the former proceeding on the ground of a lien—yet no one except an owner is entitled to payment out of the registry, unless he has a lien upon the fund therein. The court can marshal the fund only between lienholders and owners."

The evidence shows that scow 22 came into the possession of the claimant on or about the 16th day of December, 1906, loaded with dirt; that the claimant had been in the habit of receiving from the petitioner scows thus loaded, and of unloading them and using the material with which they were laden, in the execution of a contract which it had with the New York Central Railroad for the filling in of some property lying back of a bulkhead at Kingsbridge, on the Harlem river, near 192d street, in the upper part of the city of New York. The dredge referred to, which consisted of an A frame, boom, and engines, with a house over it, had been up to that time, and was for about two weeks thereafter, used as a land dredge; that is to say, it was located on the land and used for unloading scows into the depression which was being filled. Mr. Bouker, the chief witness for the petitioner, speaking of the business of the Morrison Dredging Company, the claimant says that so far as he knew "the only business they were engaged in was the filling in of some property at Kingsbridge with dirt and ashes," etc., and his testimony upon the point is in harmony with all of the other testimony in the case, which, briefly summarized, is to the effect that the claimant during November and December, 1906, and January, 1907, was engaged in the work of constructing the bulkhead above mentioned and filling in the space back of it with earth and other material, and that the scow was hired to be used, and was used, on that work. It has already been stated that the dredge was used upon the land for unloading scows until January 1st, when it was transferred to scow 22. The work of transfer and of installation upon the scow occupied about three days, and after the dredge was thus installed it so remained until it was seized by the marshal. Still it was not in use throughout the entire intervening period, for the reason that on January 28th the barge and the dredge both sank, to the extent that they were partially submerged. They were raised, however, on February 9th by the Merritt & Chapman Dredging Company, and towed to Hoboken for repairs, where on February 20th they were seized by the marshal and subsequently sold as above stated.

From what has been said, it appears that the dredge was in actual use on the scow at the most but for 24 or 25 days, and it may be added that the character of its use during that period was, as above indicated, and not otherwise. There is no evidence of any agreement for a lien upon the dredge. The dredge and the scow were separate

entities, had different owners, were sold separately, and are treated separately in the petition. The one was never permanently affixed to the other. The dredge was no part of the tackle, furniture, or freight of the scow, if, indeed, that be material under the circumstances. It never became a part of the scow. It was used on the scow for a short period, but not at any time in a maritime service. Its use while afloat was not different than it had been while on the land. In both cases it aided in unloading material for filling in a depression behind a bulkhead. It could doubtless be moved more readily while afloat, but the area of its movement was at all times circumscribed by the bulkhead. Neither it nor the scow was, during the charter, engaged in maritime work. There is no evidence that the scow or the dredge were either of them ever outside of the bulkhead after the scow was chartered, except when they were taken away for repairs, after they had been sunken and raised. The construction of the bulkhead was apparently a private matter, and there is nothing in the case from which it might be inferred that in any sense or to any extent it was an aid to commerce or navigation.

In re Hydraulic Steam Dredge, No. 1, 80 Fed. 545, 25 C. C. A. 628, is to some extent illustrative of the case at bar. At page 556 et seq. of 80 Fed., and page 639 et seq. of 25 C. C. A., Judge Jenkins, speaking for the Seventh Circuit Court of Appeals, said:

"Upon the assumption that the structure in question is a ship or vessel, and within the admiralty jurisdiction, that jurisdiction will not be asserted to enforce a contract touching the ship, unless such contract is maritime in its nature. *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90. The admiralty deals alone with things pertaining to the sea. We declared in *The Richard Winslow*, 34 U. S. App. 542, 18 C. C. A. 344, 71 Fed. 426, that 'a maritime contract must therefore concern transportation by sea. It must be one of navigation, and commerce on navigable waters.' It was there pointed out that not every contract having reference to a ship is within the admiralty jurisdiction, but only such as relate to maritime employment, such as pertain to the navigation of a ship or assist the vessel in the discharge of a maritime obligation. It is not enough that the service is to be done upon the sea or with respect to the ship. It must relate to trade and commerce upon navigable waters. The coals furnished by libellant were supplied to the dredge while it was engaged in its work for the Illinois Central Railroad Company, and to enable it to perform that work, which was 'to fill in earth for its railroad purposes behind a line of piling on its grounds on the lake front in Chicago.' By means of its cutting apparatus, the earth on the bed of the lake was dug up, loosened, and disintegrated, and, with the adjacent water, sucked up into and through a centrifugal pump, and thence discharged through a continuous line of adjustable pipes to the place of deposit upon the adjacent shore. This is not a maritime employment. The fact that the dredge floated upon navigable waters is not controlling. The dredge in the performance of that contract was not engaged in navigation, nor even in the marine transportation of the earth dug from the bed of the lake. To the contrary, a peculiar mechanism dispensed with the necessity of marine transportation. The employment related solely to the land—to the creation of an embankment upon the land for the use of a railway upon the land. The only possible relation to the sea in this employment was in this: That for the purpose of obtaining the earth, and as a necessary incident thereto, the bed of the lake was dug out, and thereby the channel was deepened. That was not, however, for the purposes of navigation. It is not suggested that vessels engaged in navigation frequented the place, that wharves were constructed or designed, or that the excavation was for the purpose of or in aid of navigation. The work was done in and for the construction of an embankment upon the land, and for railroad purposes."

In the case of Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co., 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, it appears that a libel was filed in the court below upon a claim for damages caused by a vessel to a bridge or dock in navigable waters. The libel was excepted to. Upon the hearing the District Court sustained the exception, and dismissed the libel, "on the ground that although the property injured by said disaster, said dock, said center pier, and said protection piling work, stood in the navigable water of said river, yet it does not appear, from the allegations of the libel, that any part of said property so injured was either an instrument of or an aid to navigation, for which reason there is no authority for sustaining the jurisdiction of a court of admiralty over the wrong complained of, and the cause of action set forth in the libel." The decree below was affirmed by the Supreme Court. See, also, *The Pile Driver*, E. O. A. (D. C.) 69 Fed. 1005; *The Pennsylvania*, 154 Fed. 9, 12, 83 C. C. A. 139.

Because, therefore, the petitioner had no lien or right of lien against the dredge, it has no claim to the moneys in the registry of the court.

The petition will be dismissed, with costs.

EQUITABLE TRUST CO. v. ÆTNA INDEMNITY CO.

(Circuit Court, E. D. Pennsylvania. February 10, 1909.)

No. 250.

1. PRINCIPAL AND SURETY (§ 82*) — CONSTRUCTION AND OPERATION — SCOPE OF OBLIGATION.

Plaintiff contracted to insure the title of mortgagees who furnished money to be used by a builder in building 62 houses on land owned by him, and of purchasers of such houses, to protect them from defaults of the owner in the building operation and from liens. The owner, with defendant as surety, executed a bond to plaintiff to indemnify it against loss on any policies it might issue, including any sums it might advance for material and labor for the completion of the buildings and improvements. Defendant knew that plaintiff was to handle and pay out the fund used in the entire building operations, and that subcontracts had been let for parts of the work covering all of the houses. *Held*, that defendant's liability was not restricted to losses incurred by plaintiff on the particular houses on which it had actually issued policies, but extended to the entire operation, which it had contracted to see completed.

[Ed. Note.—For other cases, see *Principal and Surety*, Dec. Dig. § 82.*]

2. PRINCIPAL AND SURETY (§ 100*)—CONSTRUCTION AND OPERATION—LIABILITY OF SURETY.

Overpayments made to subcontractors on vouchers indorsed by defendant's principal in the bond, or changes in the plans made by him, did not release it from liability; the purpose of the bond having been to indemnify plaintiff from loss by reason of its insuring against his defaults.

[Ed. Note.—For other cases, see *Principal and Surety*, Dec. Dig. § 100.*]

Discharge of surety by alteration of instrument, see note to *Zeigler v. Hallahan*, 66 C. C. A. 6.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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3. PRINCIPAL AND SURETY (§ 109*)—CONSTRUCTION AND OPERATION—LIABILITY OF SURETY.

Additional security, taken by plaintiff in the way of bonds from subcontractors, were matters outside of the contract of defendant, and the failure to collect on such bonds did not affect its liability.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 109.*]

At Law. On motions for judgment non obstante veredicto and for new trial.

Loughlin & Bracken, for plaintiff.

Gustavus Remak, Jr., for defendant.

HOLLAND, District Judge. This suit was instituted to recover on a bond executed July 2, 1906, by William H. Morrison, of Philadelphia, a builder, and the Ætna Indemnity Company, in favor of the plaintiff, for the sum of \$20,000. Its purpose generally was to indemnify the plaintiff against any loss arising from causes therein specified, to the extent of \$20,000, on account of an operation in which Morrison was engaged in the building of 62 houses in the city of Philadelphia. The case was tried before a jury in this district, and a verdict rendered in favor of the plaintiff for the full amount of the bond, together with interest from October 19, 1907. Points to charge the jury were submitted to the court by the defendant to the number of 21, all of which were refused. Exceptions were taken to the refusal and to some portions of the charge of the court, upon which the defendant has predicated 24 reasons for a new trial; the first 3 reasons being merely formal. He also filed a motion for judgment non obstante veredicto under the Pennsylvania practice act of April 22, 1905 (P. L. 286), authorizing such a motion where a request for binding instructions has been submitted and refused by the court.

The first 3 reasons for a new trial are: (1) The verdict was against the law; (2) was against the evidence; and (3) was against the weight of the evidence—none of which can be sustained in this case. The remaining 24 reasons for a new trial are based either upon an alleged erroneous charge of the court or a refusal to instruct the jury affirmatively on points submitted by the defendant. If the defendant be right in the contention, either as to the error committed by the court in its charge to the jury or its refusal to affirm the points submitted, then there would be no liability whatever on the part of the defendant, and it would be entitled to judgment non obstante veredicto. This, therefore, is the only question that need be considered, and all the alleged errors entitling the defendant to judgment raise three questions, the consideration of which will dispose of the whole case.

1. The defendant is not liable on the bond, because it applied only to losses suffered by the plaintiff by reason of the policies of title insurance issued by it during the construction of the said buildings or municipal improvements, or within the lawful time allowed for filing claims on account of such constructions, and title policies were not issued on the whole operation, to wit, the 62 houses to be built, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

that policies were only issued by the plaintiff company on 41 houses; and, second, that the declaration was for expenditures on 41 houses, and, evidence being permitted of expenditures on 62 houses, there was a fatal variance between the declaration and the proofs.

William H. Morrison had secured the ownership of a tract of land "on the west side of Fifty-Seventh street, in Philadelphia, extending from Spruce street to Pine street, and extending of that width westward 240 feet, upon which he was about to erect houses." He applied to the plaintiff company for the purpose of having it issue policies of insurance, insuring the title to the property, and insuring holders of mortgages on the same against loss by reason of any claims or failure to complete the buildings. As one of the inducements for the plaintiff company to issue its policies, Morrison, the contractor, and the Ætina Indemnity Company, executed a bond to it, obligating themselves in the sum of \$20,000 to indemnify the plaintiff company against any loss set forth in the recital of the defendant's bond on the policies issued by the plaintiff company during the construction of the said buildings or municipal improvements, or within the lawful time allowed for filing claims on account of said construction. Following the recitals the conditions of the bond covered all claims insured against in the plaintiff's policies issued to mortgagees, "including all such sums of money as may be advanced and paid by said company for materials and labor for the construction and completion of said buildings or municipal improvements," etc. This, it was held at the trial, was not restricted to sums of money advanced for material and labor for construction and completion of buildings only, upon which the plaintiff company had issued its policies of insurance, but also comprehended all expenditures for labor and material in the completion of the whole operation, upon which it had obligated itself to issue policies and for which it had been paid.

The fund for carrying out the operation was raised by borrowing part of the money from the Hamilton Trust Company and part from an individual by the name of William Conway, and the balance was loaned by the plaintiff company, amounting to a total of \$135,000. The subcontractors each bid for the whole of his line of work upon the entire operation, and agreed to accept a pro rata share of the fund raised, and the balance in deferred payments in the shape of liens on the buildings after the mortgages given to raise the cash fund. The total cash fund raised was held by the plaintiff company as a further guaranty for the completion of the work on the part of Morrison. The defendant was present when the arrangement was made and the contracts entered into, and it knew how the fund was being raised and the mode of conducting the operation. It knew that in case of Morrison's default there could be no separation of the fund or the work for the purpose of completing the houses upon which policies might have been issued alone; nor was there any such contemplation, as the plaintiff company had been paid in advance the consideration for the issuing of all the policies on the whole of the 62 houses, and there is no doubt but that the defendant company executed this bond with the understanding that the clause which provides for an

indemnity "for all such sums of money as may be advanced and paid by the said company for materials and labor for the construction and completion of said building or municipal improvements," etc., included such expenditures as well for the houses in the operation upon which the policies had not been actually issued and signed by the plaintiff company as upon those upon which the policies were issued and in the hands of holders of the mortgages.

2. We think that proof was properly admitted showing the expenditure of the plaintiff company for the completion of the 62 houses, under the averments in the plaintiff's statement. It claims, as set forth in the statement:

"That all said payments represent loss and damage sustained by plaintiff as the insurer on its said policies, and were the direct result and consequence of the default hereinbefore averred on the part of the said Morrison in the erection of the said buildings within the time stipulated in the said policies."

The allegations here set forth not only include whatever expenditures to which the plaintiff was put by reason of the issuing of the policy, but also included the moneys expended by reason of the failure of Morrison to complete the operation; and it was not necessary, as claimed by the defendant, for the plaintiff to amend its statement in order to enable it to produce evidence of cost of completion of the houses upon which policies had not been issued.

3. The defendant was entitled to binding instructions, because material departures were shown (by undisputed evidence of officers and witnesses of the plaintiff) from the agreement for completing the operation, to which defendant's bond related, participated in and made possible only by the consent of the plaintiff, without the knowledge or consent of the defendant.

The plaintiff company, for the purpose of further securing itself against a possible failure of Morrison to complete the operation, secured title to the land upon which the operation was being conducted, and it further required Morrison to permit it to hold the fund raised for the purpose of building the houses, and also had assigned to it the subcontractors' bonds given to the contractor; guaranteeing the faithful performance of the work of the subcontractors in accordance with plans and specifications. The subcontractors were paid upon vouchers indorsed by Morrison and approved by a representative of the plaintiff company. It appeared, in the course of the construction of the work, that some of the subcontractors, through Morrison, which was approved by the representative of the plaintiff company, secured overpayments. It further appeared that Morrison had altered the plans as to one house, and erected a three-story building, instead of one of two stories, as required by the original plans and specifications, and there was another change, in that an iron fence, more expensive than that called for by the specifications, was erected as the operation was finally completed; and it further appeared that, after Morrison abandoned the operation, some of the subcontractors failed in the performance of their contract, and in order to complete the work it was necessary for the plaintiff company to pay a greater sum for the completion of the particular work in which the subcontractor failed.

It further appeared, upon the failure of the subcontractors to carry out their contract in accordance with the plans and specifications, that the plaintiff company employed a lawyer for the purpose of suing out the subcontractors' bonds. One of the most prominent members of the Philadelphia bar was employed for that purpose, and the suits are now pending in the court of common pleas of Philadelphia county. It is claimed, however, that the plaintiff company, through its attorney, failed to bring the suits in proper time to enable it to recover.

It was contended by the defendant that it was not liable on its bond because (1) of these overpayments to the subcontractors; (2) because of the change of plan in adding a third story to one house and changing the kind of fence around the operation; (3) in paying advance sums to subcontractors for the completion of the work; and (4) for a failure to promptly collect on the bonds of the delinquent subcontractors.

Any overpayments to subcontractors made by Morrison might affect the bonds given him to guarantee the performance of the work undertaken by these subcontractors. Morrison had control and management of the subcontractors and their work. The plaintiff had secured possession of the fund, in order that it might be assured of its being properly used for the completion of the operation, and any payment Morrison might direct in carrying out the work could not affect defendant's liability on its bond to the plaintiff, because there was nothing in the bond binding the plaintiff to any particular course of supervision over Morrison's actions with regard to the disbursement of the fund.

All the plaintiff company did in the way of securing title to the real estate, handling the fund for the payment of the subcontractors as they progressed with the operation, and having the bonds of the subcontractors assigned to it, was for the purpose of further insuring the completion of the operation by Morrison; and while it did not at all alter or touch any stipulation in the defendant's indemnity bond to the plaintiff, yet they were all calculated to insure the performance of the agreement on the part of Morrison, and directly and materially lessened the hazard which the defendant assumed in executing its bond to the plaintiff. And as to the adding of a third story to one house and changing the fencing, which was done by Morrison himself, the plaintiff is not responsible. If a violation at all, it was the act of Morrison, whose faithful performance the defendant company had guaranteed by the execution of its bond.

As to the failure of the plaintiff company to collect on the subcontractors' bonds, we do not see that the defendant has any right to complain, because it is a matter entirely outside of the bond of indemnity upon which the plaintiff is suing the defendant. It is simply an additional security taken by the plaintiff company to further protect it against any failure on the part of Morrison, to which no reference is made by the defendant in its bond to the plaintiff, and, again, it does not yet appear that the plaintiff will not succeed in collecting the amount specified in the subcontractors' bonds; but at any rate the evidence showed that the plaintiff employed one of the leading members of the Philadelphia bar, now dead, and placed in his hands

the bonds, with direction to collect the same, and he proceeded on the bonds, which have not yet been prosecuted to judgment. The defendant executed a bond to indemnify plaintiff against Morrison's failures, and it cannot now be relieved of its liability on that bond because plaintiff did not prevent Morrison from failing through the additional security which it had taken.

We do not think there is any other question that need be considered, with the exception of the question of interest. It is conceded by the plaintiff that there was error in the claim for interest from October 19, 1907, when it should have been only from the date when suit was brought, to wit, June 28, 1908. Accordingly the verdict should be reduced in the sum of \$830, which would be interest on the amount for which the defendant would be liable from October 19, 1907, to June 28, 1908.

It is therefore hereby ordered that, if the plaintiff file a remittitur for this amount within 10 days, a new trial will be overruled, and the motion for judgment non obstante veredicto refused; otherwise, a new trial will be granted.

UNITED STATES v. WOOD.

(District Court, D. New Jersey. March 4, 1909.)

1. INDICTMENT AND INFORMATION (§ 108*)—SUFFICIENCY—STATUTORY OFFENSES—REFERENCE TO STATUTE.

An indictment charging an offense against the United States will be upheld if there is any act of Congress in force which can sustain it, whether or not such act is specifically mentioned.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 284; Dec. Dig. § 108.*]

2. ALIENS (§ 21*)—CHINESE EXCLUSION ACTS—REPEAL BY IMPLICATION OF PROVISIONS OF PRIOR ACT.

Sections 2 and 3 of the Chinese exclusion act of May 6, 1882, c. 126, 22 Stat. 59, as amended in 1884 (Act July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1306]), which make it a misdemeanor for the master of any vessel to knowingly bring within the United States on such vessel and land or attempt to land any Chinese laborer from any foreign port, etc., were repealed by implication by sections 9 and 10 of Act Sept. 13, 1888, c. 1015, 25 Stat. 478 (U. S. Comp. St. 1901, p. 1316), which cover the same offense but provide a different punishment.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 21.*]

3. INDICTMENT AND INFORMATION (§ 111*)—OFFENSES AGAINST CHINESE EXCLUSION ACT—INDICTMENT OF MASTER OF VESSEL LANDING CHINESE.

An indictment under the Chinese exclusion act of September 13, 1888, c. 1015, § 9, 25 Stat. 478 (U. S. Comp. St. 1901, p. 1316), which makes it a misdemeanor for the master of any vessel to knowingly bring within the United States on such vessel and land or attempt to land or permit to be landed any Chinese laborer or other Chinese person "in contravention of the provisions of this act," must negative the exceptions stated in section 10 of the act.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

On Demurrer to Indictment.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. P. Lindabury, Asst. U. S. Atty.
Convers & Kirlin (John M. Woolsey and Charles T. Cowenhoven,
Jr., of counsel), for defendant.

CROSS, District Judge. There are in the indictment before the court two counts, both of which have been demurred to. Each of them charges in effect that the defendant on the 20th day of August, 1906, at the port of Constable Hook, within this district, and the jurisdiction of this court, then and there being the master of the steamship Highland Monarch, plying between the kingdom of Great Britain and the state of New Jersey, and then and there owned by a corporation known as the "Monarch Steamship Company," did then and there knowingly bring within the United States, on such vessel, to the port of Constable Hook, from a foreign port, to wit, Newcastle, in the kingdom of Great Britain, a certain Chinese laborer (giving his name), and did then and there knowingly land, and permit to land, within the said United States as aforesaid, the said Chinese laborer (again naming him), contrary to the form of the statute, etc.

An indorsement on the indictment was undoubtedly intended to point out the acts of Congress upon which the indictment was founded. Such indorsement, however, did not in any wise conclude the government. The indictment will be upheld if there is any act in force which can sustain it, whether or not such act be specifically mentioned. *Williams v. United States*, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509. A demurrer to an indictment charging the defendant herein with the same or a like offense was sustained in *United States v. Wood* (D. C.) 159 Fed. 187. The indictment in that case was found under the act of September 13, 1888, c. 1015, § 9, 25 Stat. 478 (U. S. Comp. St. 1901, p. 1316), which is not among those referred to in the indorsement upon the back of the present indictment. It is manifest, however, upon examination, that the indictment now under consideration is insufficient under that act, for the reasons set forth in *United States v. Wood*, supra. It was therein held that section 9 of the act of 1888 does not in and of itself define a crime, and that a valid indictment under that section must negative the exceptions contained in section 10. It was the intention of the pleader in the present case, as appears by his indorsement on the indictment, to rest it upon the provisions of the act of May 6, 1882, c. 126, 22 Stat. 58, as amended by the act of July 5, 1884, c. 220, 23 Stat. 115 (U. S. Comp. St. 1901, p. 1305), but, aside from such indorsement, it is quite plain that, if the indictment can be sustained, it must be sustained under sections 2 and 3 of that act.

It is claimed, however, on behalf of the defendant, that those sections were impliedly repealed by the act of September 13, 1888. The question for decision, therefore, is, whether sections 2 and 3 of the act of 1882, as amended, were repealed, by implication, by sections 9 and 10 of the act of 1888. Sections 2 and 3 of the act of May 6, 1882, as amended, are as follows:

"Sec. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer, from any foreign port or place, shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year.

"Sec. 3. That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, nor shall said sections apply to Chinese laborers, who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned; nor shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place: Provided: that all Chinese laborers brought on such vessel, shall not be permitted to land except in case of absolute necessity, and must depart with the vessel on leaving port."

For the sake of convenience, sections 9 and 10 of the act of 1888 are also set forth at length. They read as follows:

"Sec. 9. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer or other Chinese person, in contravention of the provisions of this act, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished with a fine of not less than five hundred dollars nor more than one thousand dollars, in the discretion of the court, for every Chinese laborer or other Chinese person so brought, and may also be imprisoned for a term of not less than one year, nor more than five years, in the discretion of the court.

"Sec. 10. That the foregoing section shall not apply to the case of any master whose vessel shall come within the jurisdiction of the United States in distress or under stress of weather, or touching at any port of the United States on its voyage to any foreign port or place. But Chinese laborers or persons on such vessel shall not be permitted to land, except in case of necessity, and must depart with the vessel on leaving port."

Section 15 of the act of 1888 provided:

"That the act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved May sixth, eighteen hundred and eighty-two, and an act to amend said act approved July fifth, eighteen hundred and eighty-four, are hereby repealed to take effect upon the ratification of the pending treaty as provided in section one of this act."

The treaty referred to in section 15, however, was not ratified, hence the acts of 1882 and 1884 were not affected by the repealing clause, and they are in force unless they have been repealed by implication. Notwithstanding the repealing clause of the act of 1888, just quoted, failed to take effect because the treaty therein referred to was not ratified, the act itself became operative, except as to certain sections whose subject-matter plainly presupposed the ratification of the treaty. *United States v. Long Hop* (D. C.) 55 Fed. 58; *United States v. Yong Yew* (D. C.) 83 Fed. 832, 835.

Furthermore, on April 29, 1902, Congress passed an act (Act April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1907, p. 414]), by section 1 of which sections 5, 6, 7, 8, 9, 10, 11, 13, and 14 of the act of September 13, 1888, were expressly re-enacted. Again, on April

27, 1904, Congress passed still another act (Act April 27, 1904, c. 1630, 33 Stat. 428 [U. S. Comp. St. Supp. 1907, p. 414]), by the fifth section of which section 1 of the act of April 29, 1902, was amended so as in part to read as follows:

"All laws in force on the twenty-ninth day of April, nineteen hundred and two, regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, and the residence of such persons therein, including sections five, six, seven, eight, nine, ten, eleven, thirteen, and fourteen, of the act entitled 'An Act to prohibit the coming of Chinese laborers into the United States,' approved September thirteenth, eighteen hundred and eighty-eight be, and the same are hereby, re-enacted, extended, and continued, without modification, limitation, or condition."

The purpose of the last two acts is defined in *Hong Wing v. United States*, 142 Fed. 128, 73 C. C. A. 346. By them sections 9 and 10, among others, of the act of September 13, 1888, were expressly re-enacted. That those sections are consequently in full force and effect, there can be no doubt. But since by the act of April 27, 1904, Congress re-enacted not only the sections of the act of 1888 above enumerated, but also all of the Chinese exclusion acts which were then in force, the question still remains whether or not the act of 1882 was one of the acts then in force. In this connection it should be noted that much of the matter contained in section 3 of that act was in effect repealed by section 1 of the act of October 1, 1888, c. 1064, 25 Stat. 504 [U. S. Comp. St. 1901, p. 1318], which enacted:

"That from and after the passage of this act, it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in the United States."

After the passage of that act, it will be seen that all of the provisions of sections 2 and 3 of the act of 1882 which remain and are material to the crime alleged in this indictment are covered by sections 9 and 10 of the act of 1888. Under the circumstances, therefore, the later act must be taken as the final statement of the law in respect of the crime thus alleged. The elements which constitute the crime are the same in both acts, but the punishment is different. By the earlier act the punishment which might be imposed thereunder was limited to a fine of not more than \$500 for each and every Chinese laborer brought into the United States, and imprisonment for a term not exceeding one year. By the later act a fine might be imposed of not less than \$500, or more than \$1,000, in the discretion of the court, and imprisonment for a term of not less than one year or more than five years, in the discretion of the court. Had the treaty referred to in the act of September 13, 1888, been ratified, the law of 1882, as amended, would have been expressly repealed by section 15 of the act of 1888, and that act would have been the only operative law upon the subject. Congress having, therefore, expressly provided that, in the event of the ratification of the treaty, the act of 1888 should stand as the final and only exposition of the law upon the subject, it may be argued with no little force that, by expressly re-enacting in terms certain sections of that law, after the treaty had failed, it was thereby intended that those specific sections thus re-enacted should occupy the

same position and have the same effect that they would have occupied and had if the treaty had been ratified. But, however that may be, sections 9 and 10 of the act of 1888 so fully cover all that was not repealed of sections 2 and 3 of the act of 1882 that the later act, with its altered penalties, must be accepted as the only one in force pertaining to the crime alleged in the indictment under consideration. It is true that repealers by implication are not favored; still where, as in this case, the elements of the crime are the same, but the punishment which may be imposed therefor is different, the authorities not only warrant but require the conclusion that the later act is intended to supersede the earlier. In *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153, Mr. Justice Field, in holding that a later statute repealed a former statute dealing with the same subject, said, at page 92 of 11 Wall.:

"There is no express repeal of the thirteenth section of the act of March 3, 1813, c. 42, 2 Stat. 811, declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

Again, in *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320, Mr. Justice Gray said, at page 685 of 175 U. S., at page 294 of 20 Sup. Ct.:

"And it is a well-settled rule in the construction of statutes, often affirmed and applied by this court, that, 'even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act'"—citing cases.

In *Murphy v. Utter*, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070, the court, dealing with territorial and congressional legislation, at page 105 of 186 U. S., at page 780 of 22 Sup. Ct., says:

"Both acts are complete in themselves, and each is, upon its face, independent of the other. It is impossible to say that, if the territorial act were repealed, the act of Congress passed three years later would also fall in consequence thereof, because the latter is not only the later, but the paramount, act. They must either stand together as two independent pieces of legislation, or the general, and perhaps the sounder, rule stated in *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153, be applied, that where there are two acts on the same subject, and the later act embraces all the provisions of the first, and also new provisions, and impose different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first."

In *Collector v. Richards*, 23 Wall. 246, 23 L. Ed. 95, Mr. Justice Bradley, at page 257 of 23 Wall., said:

"The court below decided that the case was to be governed by the act of 1846, and that the act of 1873 did not cover or embrace it. The correctness of this decision is now before us for review. Of course, the act last in date must prevail if it covers the case."

So, too, in *United States v. Clafin*, 97 U. S. 546, 21 L. Ed. 1082, Mr. Justice Strong, in rendering the opinion of the court, at page 551 of 97 U. S., cited with approval certain cases as follows:

"In *Michell v. Brown* (1 El. & El. 267), it was ruled in the Court of Queen's Bench that, if a later statute again describes an offense created by a former statute, and affixes a different punishment to it, varying the procedure, etc., the later operates by way of substitution, not cumulatively, and the former statute is repealed. A similar rule was asserted by Baron Bramwell in *Ex parte Baker*, 2 H. & N. 219. So in *Barry v. Croydon Gas Co.* (15 C. B., n. s. 568), an act imposing a penalty of £200 upon the undertaker of any gasworks for fouling any stream, etc., to be recovered by the person into whose water the foul substance should be conveyed, was held to repeal by implication a former act describing the same offense and imposing the same penalty, to be sued for by any common informer. The two penalties were held not to be cumulative. The principle of these rulings has been frequently recognized by courts in this country."

"In *Norris v. Crocker et al.*, 13 How. 429, 14 L. Ed. 210, it was said by this court: 'As a general rule, it is not open to controversy that, where a new statute covers the whole subject-matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, the former is repealed by implication, as the provisions of both cannot stand together.' That was a case in most points much like the present. The older statute had imposed a penalty for certain offenses, namely, obstructing a claimant in arresting a fugitive from labor, rescuing the fugitive after his arrest, or harboring and concealing him with knowledge that he was a fugitive; and the statute had enacted that the claimant might recover the penalty for his own benefit, and also reserved to him a right of action in damages for the actual injuries he might have sustained, be they more or less. The later statute imposed a greater penalty, and added imprisonment for the same offenses, gave no right to the claimant to recover the penalty, but gave him a right to recover by way of damages the sum of \$1,000 for each fugitive lost by reason of the offenses. This court held that the two statutes were in conflict, and consequently that the earlier was repealed."

Among a multitude of other cases holding similarly are: *District of Columbia v. Hutton*, 143 U. S. 18, 26, 12 Sup. Ct. 369, 36 L. Ed. 60; *King v. Cornell*, 106 U. S. 395, 396, 1 Sup. Ct. 312, 27 L. Ed. 60; *National Bank v. United States*, 107 U. S. 445, 451, 2 Sup. Ct. 561, 27 L. Ed. 537.

In my judgment, the only act in force defining and punishing the crime alleged in the indictment under consideration is that of 1888, and, since both of its counts are defective under that act for the reason already given, it must be quashed. My conclusion, moreover, is, to some extent at least, supported by the fact that I have not found or been referred to any reported case where an indictment has been found under the act of 1882, since the act of 1888 has been in force; since that time they have all been framed under the later act. The result just announced would have been reached more reluctantly if the United States did not have, under the act of 1888, a full, complete, and adequate remedy in the premises.

The demurrer will be sustained.

In re POMERANTZ & HOPKINS.

(District Court, E. D. Pennsylvania. February 25, 1909.)

No. 2,895.

BANKRUPTCY (§ 409*)—GROUNDS FOR REFUSAL OF DISCHARGE—FAILURE TO KEEP BOOKS OF ACCOUNT.

That a partnership conducting a retail store made no entry in the books of the business of indebtedness for money borrowed from various persons, mostly relatives of the partners, aggregating about \$3,000, a record of which loans was kept only in a private memorandum book carried by one of the partners, and the result being that a statement furnished to a mercantile agency as a basis for credit, made up by the bookkeeper from the books, did not disclose such indebtedness, justified a finding that the partners, "with intent to conceal their financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained," and a denial of their discharge under Bankr. Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 409.*]

In Bankruptcy. On certificate of referee recommending refusal of discharge.

The following is the report of Edward F. Hoffman, referee, on objections to the discharge of the bankrupts:

To the Honorable the Judges of the District Court:

I respectfully report that the specifications of objections to the bankrupts' discharge are brought under clauses 2 and 3, § 14, par. 3, of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), which provides for a discharge unless the bankrupt, "(2) with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; (3) or obtained property on credit from any person upon a materially false statement in writing, made to such person for the purpose of obtaining such property on credit."

Before entering into details, I will state briefly that the statement upon which a credit was obtained was a financial statement made to Dun's Agency, and by said agency transmitted to the American Woolen Company, the objecting creditor.

It appears from the examination of the bankrupts that they had a loan account with various individuals aggregating some \$3,000, which did not appear upon the regular books of the firm in the custody of the bookkeeper, a memorandum of the said loans being kept in a small book carried on the person of Harris Pomerantz, one of the bankrupts.

From this it results that the statement prepared for the mercantile agency by the bookkeeper, and signed by the firm through one of the partners, did not truthfully disclose the loan account of the bankrupts, and that the books of the bankrupts as kept by the bookkeeper did not show these loans, giving rise to the second exception, under which it is contended that the small memorandum book cannot be treated as a firm book.

As the objection first urged was that of having obtained credit by means of a false statement, I will consider this first, and find upon the facts as well as the law.

A full copy of the financial statement is to be found on page 251 of the testimony. The falsity of the statement is in the item of loan account. The statement places loans due others than bank \$598, whereas in point of fact

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there were loans aggregating some \$3,000, due some eight or more people, relatives or connections of the bankrupts, in the following amounts:

H. Rudnick,	page 2.	October 24,	1907.....	\$650 00
Barney Davis,	" 4.	" 24,	"	680 00
A. Elstein,	" 3.	" 28,	"	150 00
Victor Clements,	" 4.	" 28,	"	250 00
L. Sassman,	" 4.	" 28,	"	401 55
Samuel Tolchinsky,	" 5.	" 28,	"	350 00
William Hopkins,	" 6.	" 28,	"	375 00
Samuel Goldberg,	" 3.	" 1,	"	400 00

It cannot be disputed that this statement was materially false, as the bankrupt himself testified that all the amounts mentioned above were debts due by the firm, and the said amounts were duly proven against the bankrupts' estate after a contest.

The statement is signed "Pomerantz & Hopkins, by Harris Pomerantz." The existence of the firm is admitted, also the signature, and I do not think it can be questioned that both partners are bound by the signature of a copartner to this statement, both having received the benefit derived therefrom. In re A. F. Hardie & Co. (D. C.) 16 Am. Bankr. Rep. 313, 143 Fed. 607.

It appears from the testimony that Pomerantz & Hopkins were in the tailoring business, and had for some years prior to the bankruptcy been customers of the American Woolen Company, the objecting creditor. They were also subscribers to Dun's Agency, and had made several statements to Dun's Agency prior to the statement in question made in January, 1907.

It appears from the testimony of Mr. Charles V. Winder (page 250), one of the credit men of Dun's Agency, that he visited Pomerantz & Hopkins in Philadelphia, and on the 10th of January, 1907, procured the financial statement in question. He also testified that this report was made to establish a rating of credit in reference to inquiries from their New York office.

Edward R. MacElrath, credit man for the American Woolen Company, testified (page 259) that he procured this statement in question from Dun's Agency, and on the strength of the statement, on or about February 5, 1907, within a few days after receiving it, made a line of credit and delivered goods to the bankrupts.

From the foregoing I summarize my findings of fact as follows:

I find that the American Woolen Company, a creditor, procured from Pomerantz & Hopkins, the bankrupts, through R. G. Dun & Co., mercantile agency, a financial statement of said firm of Pomerantz & Hopkins, duly signed by the said firm, in which said statement was materially false in the item of loan account, in amount approximating \$3,000. This statement was procured at the instance of the American Woolen Company on or about the 10th of January, 1907, and received by them on or before the 5th of February, 1907, and on or about that date acted upon by them in the way of allowing credit and delivering goods on the strength of said statement; that, at the time of making the statement to the mercantile agency, Pomerantz & Hopkins were subscribers to Dun's Agency and must have known the purposes for which statements were procured, but had no knowledge that the statement was procured at the instance of the American Woolen Company, the objecting creditor.

It would appear, therefore, that the falsity of the statement is material, and that it was promptly acted upon in the way of allowance of credit and delivery of goods by the objecting creditor.

The only defense that can be considered is that the statement was not made by the bankrupts directly to the party from whom the goods were obtained, or with knowledge that it was to be transmitted to any particular person at any particular time.

It raises a question that has never been squarely decided, whether a false financial statement made to a mercantile agency, and promptly acted upon in the way of allowing credit and delivering goods by a person receiving a statement from the agency, enables the person who received the statement to file objections to the discharge in bankruptcy of the person who makes it to the agency, under the provisions of section 3 of the bankruptcy act, the subject of this specification of objection.

While there is no direct decision on the question, I am of opinion that the dicta of the judges in the cases I have found on the subject establish that where the report of the mercantile agency is obtained at the instance of the creditor who delivers goods on the strength of it, and is promptly acted upon, it comes within the provisions of section 3.

In the case of *In re A. B. Carton & Co. (D. C.)* 17 Am. Bankr. Rep. 353, 148 Fed. 63, the question of a false report to Dun's Agency was before the consideration of the court. It appears that Faulkner & Co., creditors, alleged that they had delivered goods on the strength of a false statement made by the bankrupts to Dun's Agency and transmitted to them. The master dismissed this specification of objection, but allowed the same objecting creditors to prove delivery of goods by another creditor under a false statement made by the bankrupts directly to said creditor.

As far as the decision of the master in this case is concerned, it is directly adverse to the contention of the objecting creditor in the case in hand, but in commenting on the decision of the master on review, Judge Hough says:

"The question raised by the first of the above-noted findings of the commissioner is interesting, but it appears to me (in this case) wholly academic. It has never been decided whether under any circumstances a false statement contained in a report to a commercial agency can be made the ground of successful objection to discharge. The considerations advanced in *Re Dresser & Co. (D. C.)* 13 Am. Bankr. Rep. 619, 620, 144 Fed. 318, are entitled to great weight, and, in my opinion, show that the usual commercial agency report obtained by an agency in order that it may give the new merchant a 'rating,' and for general distribution among its customers, cannot be made the basis of successful action by an objecting creditor.

"If, however, such a report as is here shown be obtained from a merchant by a commercial agency at the request, disclosed or undisclosed, of one or more of the agency's customers, it seems to me incredible that the merchant furnishing such report can be supposed to have given it for any other purpose than of enlightening those persons who habitually deal with him on credit as to his true financial condition. The custom of trade is so well known that, when an agency applies to a merchant for a specially signed report on his condition, he must know that such report is for the special purpose of enabling those who usually send him goods to decide upon his financial responsibility.

"The testimony in this case leaves me in doubt whether the report produced by Faulkner, Page & Co. was a 'special report' or not, or whether it was obtained at the instance or request of Faulkner, Page & Co. or any other creditor or customer of the bankrupts. If the report were obtained upon special request, I fail to see why the doctrine of *Mills v. Brill*, 105 App. Div. 389, 94 N. Y. Supp. 163, cited in 16 Am. Bankr. Rep. 740, note, and *Eaton v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389, should not apply. It cannot be that a merchant may in bankruptcy avoid the consequences of making false statements by always making them to a commercial agency, even though such agency specially request him to tell the truth for a special purpose.

"This specification the commissioner has overruled, but inasmuch as he has refused the discharge on other grounds, the discussion, though interesting, is not at present material."

On this dictum it would appear as if Judge Hough would sustain objections to the discharge where the report of the commercial agency was obtained at the request of the creditor obtaining it.

In the case referred to it is held: "A person furnishing information to such agency in relation to his own circumstances, means, and pecuniary responsibility can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged extend a credit to him, there is no reason why his liability to any party defrauded by those

means should not be the same as if he had made the false representation directly to the party injured."

On behalf of the bankrupts, it is urged that the textbooks cast doubt as to the applicability of this section to financial statements made to agencies, and cite the original clause of the "Ray Amendment," showing that portions of the original clause that would clearly include statements to a commercial agency were struck out on amendment, thus reasoning that the intention of the Legislature was to so word the clause in question that it would not include statements made to commercial agencies. This appears to me to be a dangerous method of construing legislation. Penal acts must be considered strictly, and principles of law applied to the language actually used in the act, without going into questions as to what was intended by the Legislature on account of changes made in the language of the act in passing the legislation.

I would remark, however, that there is sufficient left to support the dictum of Judge Hough, and the clauses struck out in amendment were so inclusive that many statements of financial condition outside of such statements made to commercial agencies would have come within the provision of the clause before it was amended by Congress. A statement made to a credit agency is for the purpose of divulging the same to any person interested in procuring it, and the party giving the statement must be presumed to know it is for this purpose, and to have constituted the agency as his agent for the purpose of giving this information to those asking for it, and the offense of making a false statement for general communication is really greater than that of making it directly to one person. The dictum of Judge Hough appears to be a judicial construction of the act, and I do not find an adverse decision. Of course, a statement procured from a mercantile agency must be scrutinized closely, and is subject to defenses that would not apply to a statement made directly from the purchaser to the vendor; but where the purchaser is a subscriber to the agency, and the statement is materially false, and procured by a creditor for the purpose of passing upon credit, and promptly acted upon, I am of opinion that the transaction comes within the terms of clause "(3) obtaining property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

For these reasons, this specification of objection is sustained.

The second exception is that the bankrupts, "with intent to conceal their financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained."

In my finding upon the first exception I have enumerated the accounts that were not entered in the books of the firm, kept by the bookkeeper, with the exception of a small portion of the money received from said loans that was left with the bookkeeper, hereinafter alluded to.

The fact that this statement signed by the firm and transmitted to Dun's Agency, which only stated a small fraction of the amount covered by the loans, reveals the motive for keeping these accounts from the office books of the firm and the knowledge of the bookkeeper.

As is well stated by the master, and affirmed by the judges, in the case of *In re Brener*, 20 Am. Bankr. Rep. 645, 166 Fed. 930: "It is a notorious fact, of which I think the court may take judicial cognizance, that intending vendors of merchandise are peculiarly sensitive to debts for borrowed money; they are apt to look into them with a microscopic eye; they induce suspicion of themselves, and very justly so; for it is a matter of common knowledge that such liabilities are earliest discharged if the creditors are relatives by blood or marriage, when doubt arises as to ability to pay all creditors."

I have carefully read and considered all the testimony in the case, and it is evident to my mind that the loans obtained from relatives and connections—some eight in number—were purposely not communicated to the bookkeeper and not entered on the office books of the firm. If it had come to the knowledge of the houses from whom they made their purchases that such transactions had taken place, their credit would have instantly been stopped.

The vest pocket book that contained these items of the loan account was not produced or mentioned until the examination of the bankrupts on behalf

of the trustee in bankruptcy. It is first referred to on page 13 of the testimony:

"Q. How much do you owe Mr. Rudnick now? A. I do not know until I refer to my book. Q. What book do you have to refer to? A. Book that I marked in taking the money. I have a little book here. Q. At the time you took the money for your business you made an entry in that little book? A. Yes. Q. Have you that little book with you? A. Yes, sir. (Book produced and marked 'Exhibit A.')

Q. (page 14). In making up your statement for the mercantile agency, did you include this \$650 owed by you? A. No, sir. Q. You did not? Then when you stated you owed \$9,982.84 on the 8th day of January, 1907, you did not include this \$650? A. I do not know, because this was loaned temporarily."

Next, as to the loan of Barney Davis, he testifies:

"Q. Now, this \$380 of this money was loaned to you before January 8, 1907, was it not? A. Yes, sir. Q. They were owed by you on that day? A. Yes. Q. Did you, in counting up your loans of indebtedness, include this \$380? A. I did not. Q. You did not? A. No. Q. Did this entry appear upon any of your other books? A. I do not know. Q. Do you know whether or not you told the bookkeeper of any of these loans? A. I do not know just what appeared in the books. Q. Your bookkeeper made a statement from the books? A. Yes. Q. Then your bookkeeper would not have had any record from which to get this \$380? A. I do not know. Some money was taken, and I told the bookkeeper I just borrowed it for a short time."

On page 17 it appears from the testimony of Mr. Hopkins that he knew Pomerantz was borrowing money, and that the financial statement had been made by the bookkeeper to the mercantile agency.

On page 17 Pomerantz was examined as to the Rudnick loan, and it was shown that \$200 of the loan appeared in the ledger. He is asked the question:

"Q. Will you tell us why in making up that book in January, 1907, when that book was started, you did not put in the entry of the \$450 loan? A. Because he had my note for it. Q. Will you please state why this \$450 is not on the book? A. I took it for only a short time. Q. Why did you put the \$200 in the book and not the \$450? A. The \$450 was taken for a short-time loan."

On page 24 Pomerantz is asked the following question by the referee:

"Q. Where was that little book kept? A. In my purse in my pocket."

On page 33 Pomerantz was asked why a loan of \$300 had been put on his books. He made answer: "Because it was brought to the place and given to the bookkeeper." He was asked the question:

"Q. And don't your books show the payment of every dollar of expenses you had at that time? A. The books show whenever I told the bookkeeper about it. I did not tell the bookkeeper sometimes."

The testimony shows that of the people who made these loans Rudnick is the second or third cousin of Pomerantz, Barney Davis is a brother-in-law, Samuel Goldberg is a brother-in-law of Hopkins, Einstein a cousin, V. C. Clements a cousin, Hopkins, of Hopkins & Milgraum, a brother, and L. Sassman a brother-in-law. All these loans appear to have been in cash, without interest, and the facts attending the loan were so unusual that a contest was made of each claim, and a large amount of the record hereto attached is taken up of testimony with reference to these claims, which, being sustained by the testimony of the bankrupts and the claimants, could not be resisted.

The testimony of the bankrupts is very evasive, and the whole record full of "I don't know" and "I don't remember" answers.

On page 53 it appears from the testimony of Pomerantz that there was still another little book, and that the entries in the little book he produced were some of them transferred from another little book:

"Q. All these entries were made the day you borrowed the money? Were they not? A. In this book? Q. In the little book? A. It was entered in another book, and I transferred to this book. Q. Then this is not the book in which you first made the entries of the loans? A. Some is. I had another memorandum book and entered them there. Q. Will you please tell me how it happened on the same page you got, 'H. Davis, November 14th, 1906, \$300,' and under that you got, 'Jacob Davis, October 16, 1906, \$300'? A. It is a different entry. Borrowed of J. Davis and paid him. Q. How is it you got

entry of H. Davis before J. Davis, when J. Davis' loan was a month earlier?
A. I do not understand your question."

On page 54 he testifies that, when he started the little book he was testifying from, he destroyed the former little book.

On page 57, when his attention is called to the fact that the loans were not entered in chronological order in the little book, he was asked the question:

"Q. Is it not a fact you have entered A. Eisenstein, February 20, 1906, \$500? Then you have a loan, L. Epstein, November 25, 1906, \$150. Now, when that entry of Epstein was put here, you owed Eisenstein \$500 or \$650? A. I do not know. Q. Look at your book and see. A. Mr. Mayer, I do not know about the months. I forget. I do not know when September comes first, or when it comes exactly. Q. You do not mean to tell us you do not know whether November or May is earlier in the year? A. That I could not say."

On page 78 I cite the following from the examination:

By the referee:

"Q. As I understand it, you borrowed about \$4,000 for which you gave your notes. That is about right on these loans? A. Yes. Q. These loans were made to you by some ten different people? A. Yes. Q. Did they give you money in bank notes, or checks, and in what figures did they give you the money? A. Cash, paper money, and bank bills."

A full account of the method of making the loan is given on pages 78 to 80. On page 85 it appears that some of the holders of notes received goods from the store that were not charged, in view of interest; that Eisenstein got some suits, and Sassman got some suits. It does not seem necessary to cite further from the testimony.

I am of opinion that the vest pocket book, which in fact seems to have been copied from another vest pocket book, destroyed, which was not produced until the bankrupt was produced for examination before the referee, cannot be considered as a book of the firm. The transactions contained in this little book are of a very questionable character, and the motive for concealing these demand loans from any person who might possibly divulge them to the trade is obvious.

Since the Ray amendment, the word "fraudulent" having been struck out from the clause in question, it is only necessary to show an intent to conceal.

The conclusion is irresistible from the fact of these loans being omitted from the financial statement and from the regular books that they were secret transactions and intended to be withheld from the parties from whom they purchased, and therefore, the specifications of objection under clause 2, that the bankrupt, "with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained," is sustained.

Charles H. Edmunds, for bankrupts.

Clinton O. Mayer and Irwin L. Sessler, for objecting creditor.

J. B. McPHERSON, District Judge. It is not necessary to consider the question whether a materially false statement made by a debtor to a mercantile agency should be regarded as made to his creditors in general or to a specified creditor in particular, so as to fall within the class of false statements described in section 14b (3) of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), since in my opinion, the discharge was properly refused upon the other ground referred to in the specifications of objection. I have read and considered the voluminous testimony taken by the referee, and agree that the facts found by him are well supported by the evidence, and that the discharge should be refused on the ground set forth in section 14b (2) namely, that the bankrupts,

“with intent to conceal (their) financial condition, destroyed, concealed, or failed to keep, books of account of records from which such condition might be ascertained.”

For this reason the discharge is refused.

O. G. HEMPSTEAD & SON v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. March 8, 1909.)

No. 80 (1,979).

CUSTOMS DUTIES (§ 27*)—CLASSIFICATION—“FURNITURE OF WOOD.”

In Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208. 30 Stat. 168 (U. S. Comp. St. 1901, p. 1647), providing for “furniture of wood, * * * and manufactures of wood, or of which wood is the component material of chief value,” the last clause as to chief value does not relate to the provision for furniture; and furniture whose framework and principal bulk are of wood is furniture “of wood,” within the meaning of the paragraph, though decorative metal may be the component of chief value.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 27.*]

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 6,626 (T. D. 28,255), in which the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of Philadelphia. Note Woodruff v. U. S. (C. C.) 168 Fed. 452.

Comstock & Washburn (George J. Puckhafer, of counsel), for importers.

Jasper Yeates Brinton, Asst. U. S. Atty.

J. B. McPHERSON, District Judge. It is agreed by counsel that the merchandise in question (which is known in the trade as “Buhl furniture”) is fairly represented by a sample that was produced in court at the argument. This sample is undoubtedly a piece of house or cabinet furniture. It is a table, somewhat ornate in design, whose framework and principal bulk are of wood, while its decoration consists partly of paint, and partly of brass work either inlaid or affixed. The importers conceded that the brass work was the component material of chief value; and, apparently giving controlling weight to this concession, the Board of General Appraisers classified the merchandise under paragraph 193 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]), as an article “composed wholly or in part of * * * metal, whether partly or wholly manufactured,” and assessed the duty at 45 per cent. ad valorem. Undoubtedly the language just quoted is broad enough to include the table; but the paragraph contains a limiting phrase that needs preliminary attention before the merchandise can be safely assigned to its proper group. No article can be classified under paragraph 193—which is a catch-all provision—unless it is merchandise “not specially provided for in this act,” and the importers contend

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that paragraph 208 (Schedule D, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]) does specially provide for the furniture now in question, and imposes duty thereon at the rate of 35 per cent. ad valorem. This paragraph reads as follows:

"House or cabinet furniture of wood, wholly or partly finished, and manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act."

The merchandise under consideration is not specially provided for elsewhere, and is clearly included in "house or cabinet furniture of wood, wholly or partly finished," unless the generality of this phrase is restricted by the words that appear later in the paragraph, namely, "or of which wood is the component material of chief value." In my opinion, the phrase referred to is not so restricted. As it seems to me, paragraph 208 describes at least three, and perhaps four, classes of articles. Of these the first is house or cabinet furniture of wood, and the second is other manufactures of wood. If we pause there for a moment, it is clear, both from the testimony and from the evidence afforded by one's senses, that, if the paragraph described only one of these two classes, the table might be properly assigned to either. It is certainly an article of house or cabinet furniture, and with equal certainty it is also a manufacture of wood; but, as both these classes are used in the paragraph, upon familiar principles the merchandise is to be put into the more specific class, "house or cabinet furniture," rather than into the wider and vaguer class, "manufactures of wood." But what is to be done with the phrase "or of which wood is the component material of chief value"? Two constructions are possible: Either this phrase adds another to each of the first and second classes of paragraph 208, or it adds only to the class "manufactures of wood." If it adds to the latter class only, the result is that "manufactures of wood" means such articles strictly so called, while a new class is formed which is broad enough to include articles in which other materials may be also used, if wood continues to be the component material of chief value. Upon this construction the first class of the paragraph is "house or cabinet furniture of wood, wholly or partially finished," and into this class the table would unquestionably fall; the other two classes of the paragraph relating to "manufactures of wood." Upon the other construction—that the first class is also added to by the phrase "or of which wood is the component material of chief value"—the result is that the class comprising the articles commonly and commercially known as "house or cabinet furniture of wood" is left just as it was, but a new class is added there also, namely, house or cabinet furniture, which perhaps may not be described with precision as "of wood," because other materials have been also used in its manufacture, but in which wood is still the component material of chief value. If this construction is correct, the table continues to fall within the class "house or cabinet furniture of wood," but is not included within the additional class, "house or cabinet furniture of which wood is the component material of chief value."

The question is narrow, and is conceded to be of the first impression. There are, perhaps, some analogous decisions, and reference may be

made to *United States v. Dudley*, 174 U. S. 670, 19 Sup. Ct. 801, 43 L. Ed. 1129, and *Gallenkamp v. Rachman* (C. C.) 147 Fed. 769. But, in my opinion, if mere inspection does not lead to the conclusion that in common speech the table in question belongs to the class "house or cabinet furniture of wood"—a conclusion which is fortified by the testimony that was offered on behalf of the importers concerning its commercial designation—neither citation nor further argument is likely to be effective.

The decision of the Board of General Appraisers must be reversed.

A. J. WOODRUFF & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 15, 1909.)

No. 5,276.

1. CUSTOMS DUTIES (§ 27*)—CLASSIFICATION—"FURNITURE OF WOOD."

In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 (*U. S. Comp. St. 1901*, p. 1647), relating to "furniture of wood, * * * and manufactures of wood, or of which wood is the component material of chief value," the furniture provision is not modified by the chief value clause; and upholstered furniture, whose frames are of wood, is dutiable under that provision, though wood is not the most valuable component.

[Ed. Note.—For other cases, see *Customs Duties*, Cent. Dig. § 63; Dec. Dig. § 27.*]

2. CUSTOMS DUTIES (§ 35*)—MANUFACTURES OF SILK AND WOOL—PROVISO.

The proviso in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule L, par. 391, 30 Stat. 187 (*U. S. Comp. St. 1901*, p. 1670), that manufactures in which wool is a component shall be classified as manufactures of wool, is restricted at least to said schedule, and possibly to the paragraph in which it is found. Therefore the provision for furniture in another schedule is not subject to this proviso, though in part of wool.

[Ed. Note.—For other cases, see *Customs Duties*, Cent. Dig. § 100; Dec. Dig. § 35.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York.

B. A. Levett, for importers.

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

LACOMBE, Circuit Judge. The merchandise in question consists of a sofa and a set of chairs, the frames of which are composed of wood, upholstered with Aubusson tapestry. Said tapestry is composed of silk and wool, silk being the component material of chief value. Silk is also of chief value in the entire combination of wood, wool, silk, metal, etc. The appraiser classified it under paragraph 366 of the tariff act of 1897 (*Act July 24, 1897*, c. 11, § 1, Schedule K, 30 Stat. 184 [*U. S. Comp. St. 1901*, p. 1666]), as being within the enumeration:

"Cloths, knit fabrics, and all manufactures of every description made wholly or in part of wool, not specially provided for in this act."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

If this furniture is more specifically provided for in some other paragraph, it is manifestly not within paragraph 366. It is provided for in paragraph 208 (Schedule D, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]), which reads:

"House or cabinet furniture, of wood, wholly or partly finished, and manufactures of wood, or of which wood is the component material of chief value."

—unless the chief value clause qualifies the category "house or cabinet furniture of wood." This is a close question; but, on the whole I am inclined to concur with Judge McPherson (*Hempstead v. United States*, 168 Fed. 450) in the conclusion that it does not.

The government also relies on the last clause of paragraph 391, in the schedule of "Silk and Silk Goods" (Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), which reads:

"Provided, that all manufactures, of which wool is a component material, shall be classified and assessed for duty as manufactures of wool."

If this clause were in the wool schedule, the argument that it is of universal application would be more persuasive. Placed as it is, the more natural construction would restrict its application to the articles enumerated in the paragraph in which it appears, or possibly even to those enumerated in the silk schedule.

The decision is reversed, with instructions to classify under paragraph 208.

THE PATRICK MCGUIRL

(District Court, S. D. New York. November 12, 1908.)

TOWAGE (§ 15*)—SINKING OF TOW—NEGLIGENCE.

Sinking of a lighter when in tow of a tug on a hawser. *Held* that there was no contract, as alleged, to take especial care of the lighter. Viewed from the point of negligent towage, no sufficient proof of negligence was given to establish liability on the tug's part.

[Ed. Note.—For other cases, see *Towage*, Dec. Dig. § 15.*]

(Syllabus by the Judge.)

Wray & Callaghan, for libellant.
James J. Macklin, for claimant.

ADAMS, District Judge. This action was brought by Lester W. Beasley, the owner of the lighter *Lizzie D. Beasley*, against the tug *Patrick McGuirl*, and her owner, to recover the damages, said to amount to \$2,400, sustained through the sinking of the *Beasley* and cargo of glue stock and lumber in the East River on the 25th of May, 1907, while in tow of the tug on a hawser of about 50 feet. It is alleged that the tug was sent by *Patrick McGuirl*, her owner, to perform a contract for the towage of the *Beasley* from pier 38, North River, to the foot of 92nd Street, East River. It is further alleged that the contract between the parties provided that *McGuirl* should furnish for the purpose a small tug and would not employ in the service one of his sea-going tugs for the reason that the lighter was a small one

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and McGuirl agreed that he would not furnish a tug that would tow the lighter under water. It is further alleged that the lighter took on board certain glue stock and lumber and about 3:30 P. M. the tug started to tow the lighter to her destination; that before starting the master of the lighter cautioned the master of the tug not to tow the lighter fast, as she was a small vessel and the tug was a large one, not suitable for the service; that the tug proceeded with her tow down the North River around the Battery and up the East River, and off pier 12, North River those on the lighter hailed the tug and signalled to warn her that the lighter was in danger on account of the speed of the tug; that there was no lookout on the tug and those in the pilot house were so negligent that they did not see those on the lighter but continued on with unabated speed; that when the tug had reached a point off the foot of pier 10, East River, those on the lighter again hailed and signalled to the tug, but those on board were so negligent that they did not see nor hear nor heed the hails and signals, which were given by the lighter, but continued on with unabated speed; that when the tug had reached a point off the foot of 10th Street, East River, those on the lighter again hailed and signalled to the tug but no attention was paid by it and she kept on at the same speed; that at the time the last signal was given the lighter was down by the stern and listed to port with the water over her port rail, which condition was caused by the negligent towing of the tug and as she continued, the lighter listed so far to port that she lost a portion of her deck load and soon thereafter sank, leaving her cargo of lumber floating in the water, causing the damages complained of.

After various admissions and denials, the claimant further averred as follows:

"* * * And at or about the time mentioned in said libel the said lighter Lizzie D. Beasley laden with a cargo was taken in tow by the said Steamtug Patrick McGuirl at Pier 38, North River, the lighter being made fast to the said steamtug by a short hawser astern of the said steamtug. That said steamtug proceeded with said lighter in tow down the North River, the tide being the first of the flood, going at a very slow speed, rounded the Battery and proceeded up the East River still going at a very slow gait, and whilst so proceeding and about abreast of North Second Street, Borough of Brooklyn, New York, the said lighter listed and turned over on her port side, dumping her cargo which capsizing occurred about 4:30 of the day mentioned in said lighter; that the weather conditions were favorable and the water comparatively smooth, and there was no indication of any kind, previous to her capsizing that the same would happen nor any warning nor signal of any kind given by those on board said lighter to those in charge of the said steamtug of there being anything the matter with the said lighter; and claimant and respondent believes that the capsizing of said lighter was owing to her unseaworthy condition or improper stowing and loading of her cargo, or the unfitness of the said lighter to withstand the ordinary vicissitudes of navigation, with the cargo she had laden on board on the trip she had undertaken; or that she was leaking and her pumps not properly attended to which brought about her capsizing."

The testimony shows that the lighter did turn over and capsize and cause considerable damage. It appears that the tug was a small one of about 67 feet long, and suitable for towing the lighter in question. There is a direct contradiction in the testimony as to any warnings or signals given by the lighter before or after starting on the trip and

though the witnesses on the lighter may have given signals on the voyage, they were not of such a character as the tug heard or could be expected to hear. It is claimed that a deck man stood on the cargo of lumber and shouted, but if it is true that the shouting took place, it was not loud enough to attract the attention of those on the tug, although there was a competent man in the wheelhouse, the windows of which were mostly open and the door leading into the pilot house from aft was also open.

The master of the tug, in the wheel house, observed the tow in proceeding down the North River, where the flood tide prevailed. She was there towed at the rate of about 4 miles an hour over the land, and she seemed to act all right. In going around the Battery in the vicinity of the Wall Street ferry in the East River, she was still observed and seemed to be proceeding properly, also until she reached the vicinity of the Houston Street ferry on the Brooklyn side where she was observed to be careening and shortly went over. She had encountered the swells which prevail in the rivers but nothing out of the ordinary nor sufficient to indicate that especial care was required. Off pier 1, North River, the master of the tug observed that the lighter was sheering somewhat and reduced the speed and then proceeded at about the rate of 3 miles an hour, as aided by the tide.

The testimony of the master was confirmed by the engineer of the tug and her deck hand. The engineer, who was working the engine, looked at the tow occasionally, and said that after she turned to go around the Battery, she seemed to follow all right. When nearing pier 1 she was slowed down to one-half speed and he was instructed by another bell to go slower still, all of which he obeyed. He said in going up the East River "she would dive once in a while" but there was nothing unusual in it. He saw her go over but shortly before that she seemed to be coming after the tug. He then saw her go down stern first. The deck hand said he was on the stern of the tug in going down the North River and remained there until after they passed the Battery, during which time there was no hail from the lighter and she proceeded all right; that he then went into the pilot house but heard no hails until the lighter was turning over; that in the East River he looked out occasionally and she was proceeding the same as any lighter would. Other witnesses for the tug were examined and there was no material variance from the testimony above outlined.

There is no such preponderance of proof on the libellant's part as would establish any special agreement for care of the lighter or necessity therefor, and the case resolves itself into a question of whether there was negligence on the tug's part which would condemn her under an ordinary towage contract. The evidence in this regard is not, in my judgment, sufficient to establish any lack of care on the part of the tug. There are some matters in the case which might create doubt but it is well settled that that is not sufficient to establish a right of recovery.

The libel is dismissed.

In re POIROT.

(District Court, S. D. New York. January 27, 1909.)

ALIENS (§ 68*)—NATURALIZATION—DECLARATION.

An alien applying under the present law for citizenship, must, irrespective of age, at least two years prior to his admission, declare his intention to become a citizen and renounce allegiance to any foreign prince, etc., generally, and particularly to the one of whom he may at the time of application be a subject, or a country of which he may be a citizen. A declaration of such nature is not sufficient unless it is by the alien himself in conformity with the law at the time it is made.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 139; Dec. Dig. § 68.*]

(Syllabus by the Judge.)

James H. Hickey, for petitioner.

Henry L. Stimson, U. S. Atty., and Hugh Govern, Jr., Asst. U. S. Atty., opposed.

ADAMS, District Judge. Camille M. Poirot, of full age, applies to become a citizen of the United States, because, on the 10th of November, 1905, he filed a petition of which the following is a copy:

"To the Supreme Court of the State of New York:

Your petitioner respectfully shows to this Court:

That his full name is Camille Poirot and that he is 22 years of age, having been born at Belford in France, on the 5th day of September 1883 that he arrived in the United States at the Port of New York on the 6th day of June 1899; that he claims the right to be naturalized because of the fact that at the time of his arrival in the United States he was a minor, being of the age of 15 years; that he has resided ever since continuously in the United States, and in the State of New York for 6 years last past, that he is a bookkeeper by occupation; that he resides at No. 231 West 16th Street in the City of New York; that he intends to summon Katharine Murray who resides at No. 178 Waverly Place in the City of New York, as a witness as to his qualifications for citizenship."

Annexed to the petition was the affidavit of Katharine Murray, sworn to on the same day, as follows:

"State of New York, City and County of New York,

Katharine Murray being duly sworn, says that she resides at No. 178 Waverly Place in the City of New York; and that she is a housekeeper by occupation, and is a citizen of the United States; that she is personally well acquainted with the above-named petitioner and has known him since the —— day of April 1900; that the said petitioner has resided in the United States for three years next preceding his arrival at the age of twenty-one years; and that he has continued to reside therein to the present time; that said petitioner has resided five years within the United States, including three years of his minority, and in the State of New York one year, at least immediately preceding the return day of this application; and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same; and deponent verily believes that for two years next preceding this application it has been bona fide the intention of the within-named petitioner to become a citizen of the United States; that the grounds of deponent's belief are that she has repeatedly heard petitioner within and before said period of two years so declare and express himself."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petition is opposed by the Government on the ground that the applicant has not shown that he is legally qualified.

The form used in the application to the New York Court was evidently designed for use under section 2167, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1332), now repealed. Even thereunder, an applicant, in this court, was required to declare that he arrived in this country before he became 18 years of age, and that for at least two years prior it had been his intention to become a citizen, and to renounce forever all foreign allegiance, etc.

Under the present law (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 420]), it is required as follows:

"Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. * * * Provided, however, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration."

The petitioner does not in form or substance, comply with the existing law. His application, addressed to the New York Court, simply claims the right to be naturalized, and it was never heard or disposed of. The applicant did not announce (1) his intention of becoming a citizen, nor (2) renounce allegiance to any foreign prince, etc., of whom he might be a subject, nor to the country of which he was or might have been a citizen, either generally or by name. The petition filed in the state court does not contain such a declaration of intention to become a citizen as is contemplated by section 4 of the present law.

The petition is denied.

THE BULGARIA.

(District Court, S. D. New York. February 10, 1909.)

COLLISION (§ 43*)—SAILING VESSEL AND STEAMER—EVIDENCE.

Collision between a steamer and a schooner in the western end of Gedney's Channel; both bound into New York. The schooner held her course across the channel but the steamer kept on and struck her near the stern. *Held*, that it was an ordinary case of collision between a steamer and a sailing vessel and the usual rule requiring the former to avoid the latter should be applied.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 43.*]

(Syllabus by the Judge.)

Convers & Kirlin, for libellant.

Wheeler, Cortis & Haight, for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ADAMS, District Judge. On the 16th day of December, 1907, the steamship Bulgaria and the five masted schooner Hudson, 266 feet long, collided in the western end of Gedney Channel at about 12:30 o'clock P. M. The day was clear with a strong W. N. W. wind. The tide was ebb. The schooner was tacking up the bay, in ballast, bound to New York, for the purpose of caulking her decks. She had been trying all the morning to get in by Sandy Hook with a head wind, and an adverse tide, but being light her progress over the ground in the direction she wished to go was not great. Her course, prior to the collision, was about N. by W., which she had been on for about $2\frac{1}{4}$ miles from the Black Buoy, marked "S 3," near the Oil Spot off Sandy Hook, at a rate of 6 or 7 miles per hour.

The Bulgaria, a twin screw steamship, about 500 feet long, bound from Naples, Italy, to New York, after reaching the vicinity of the entrance to the bay was proceeding into the Gedney Channel at about the rate of 9 or 10 knots, on a course of W. by N. or W. N. W., when she observed the schooner, at that time several miles away, on her port bow and heading as stated.

Both vessels kept their courses, which gradually brought them together.

The schooner Carib II, a smaller vessel than the Hudson, was also sailing into New York, and was in danger of collision with the Bulgaria, when she changed her course and went under the Bulgaria's stern, about the time of the collision between the latter and the Hudson.

The Hudson claims that the Bulgaria was solely in fault for the collision and that the Bulgaria has failed to establish an alleged defense that the former changed her course.

The Bulgaria claims that she was at a practical standstill at the time of the collision; that the vessels were brought into dangerous proximity by an excusable mistake made by both, the schooner expecting to clear the steamer's bow and the latter expecting to pass under the schooner's stern by a safe margin and that the collision resulted from under estimates of the leeway, particularly on the part of the Bulgaria, to which the leeway appeared greater the closer she approached the Hudson, so much so that as the schooner was sliding down to leeward, it seemed that she was keeping off. It is urged in this connection that it should have been apparent to the Hudson, as it was finally to the Bulgaria, that it was necessary to do something to prevent the vessels coming together; that as the Bulgaria, with her deep draught, was confined to a narrow channel, the only thing she could do was to stop and reverse her engines, and that therefore the schooner should have kept out of the channel, and in the emergency she should have been put about instead of keeping on her course. It is further urged by the steamer that she was stopped in the water at the time of the collision; that the damage was done by the schooner's movement and that there would have been no collision if the schooner had not persisted in crossing the channel.

It seems to be clear that the schooner did not change her course and that the collision was due to the Bulgaria keeping up her headway too long. She did stop and reverse before the collision and changed

her course somewhat to the port, not enough however to go astern of the schooner. She still had enough headway at the time of the blow to seriously damage the schooner by striking her, with some force, a short distance from the stern on her starboard side, causing damage, claimed to have amounted to \$26,000.

There does not seem to have been any adequate excuse for the Bulgaria's fault in this respect. It is, however, urged very strongly that the schooner was in fault in the respects mentioned and two authorities are cited in support thereof, viz.: *The Gladys*, 144 Fed. 653, 75 C. C. A. 455, and *Horton v. The Aries and The Valentine* (decided by Judge Holt November 16, 1908) 165 Fed. 514. The former case was a Circuit Court of Appeals decision, reversing a decision of this court, holding the *Gladys*, a towing tug, solely in fault for a collision between a schooner and the tow, and deciding that the schooner was also in fault for failing to keep clear of the tow when it became apparent that otherwise there would be a collision. It was held here that the schooner's failure to keep clear, if an error at all, was one in extremis for which the schooner should not be held under the circumstances, but a majority of the court on appeal held that the schooner was also in fault. The court said (144 Fed. 657, 658, 75 C. C. A. 459, 460):

"The next question presented is whether the schooner was herself in fault. As a privileged vessel, she was bound to maintain her course so long as it was possible for the burdened vessel to avoid her, at least in the absence of some distinct indication that the burdened vessel was about to fall in her duty. We are of the opinion that the schooner had notice of the intention of the tug to hold her course, and thus create a situation where disaster was inevitable unless the schooner gave way, at a time when there was ample opportunity to have avoided a collision had she acted promptly and with ordinary skill and prudence. It was a clear night with the moon shining brightly. The schooner had seen the tug and tow for an hour and a half before the collision. Every fact necessary for her to know as to the make-up and course of the tug and tow was apparent during all this time. She knew, if both vessels held their course and speed, that a collision was certain unless she succeeded in crossing ahead of the tug. That the tug with her tow, four-fifths of a mile in length, could cross ahead of her was, of course, an impossibility. The tug gave no indication of changing her course, and the situation was one calling for the utmost caution on the part of the schooner.

* * * * *

"Her initial fault was in waiting until she got in this perilous position. If, the moment she saw the tug cross her course, she had gone off to starboard she would certainly have escaped, and she probably would have done so by coming up into the wind and going off on the other tack. Her hesitation at the crucial time was inexcusable. She had plenty of time to prevent a collision after it was evident that she alone could prevent it, and for her fatal procrastination she must be held in fault and bear her share of the loss."

There is nothing in that case which will help this steamer. It is apparent here that the schooner was entitled to rely upon the steamer keeping clear until it became obvious that she could not, or would not, perform her duty. There was nothing effective that the schooner could do in the extremity created by the steamer's manifest fault.

The *Horton Case* was one of collision between a schooner and a long tow. The tow was practically stationary and unable to manoeuvre. It was therefore held that the schooner was partly to blame for the collision. It does not apply here.

The schooner was justified in using the channel and the steamer was required to avoid her. She should have noticed and provided for the schooner's leeway. I see nothing in the case to take it out of the ordinary rules.

There will be a decree for the libellant, with an order of reference.

GANS et al. v. AUCHINCLOSS et al.

(District Court, S. D. New York. January 29, 1909.)

ADMIRALTY (§ 60*)—PLEADING.

Where a libel which originally sought to excuse the performance of a condition of a contract by alleging impossibility was held defective and it was amended so that a waiver by the respondents of the performance was alleged and an estoppel by their conduct to avail themselves of the breach of the condition pleaded, *held* the amendment overcame the defect and the libel was good.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 487; Dec. Dig. § 60.*]

(Syllabus by the Judge.)

In Admiralty.

See, also, 166 Fed. 991.

Wheeler, Cortis & Haight, for libellants.

Miller, King, Lane & Trafford (Benjamin A. Morton, and William S. Montgomery, of counsel), for respondents.

ADAMS, District Judge. On the 25th of November, 1908, exceptions to the libel herein were sustained and it was provided that the libel should be dismissed unless properly amended within 20 days. The ground of the decision then was based upon an allegation in the libel that it was impossible to communicate with the master of the vessel involved, the steamship Finland. It was there held that an alleged impossibility of performing the conditions of a contract does not suffice to relieve the shipowners from the fulfilment of a provision requiring the collection of demurrage or an endorsement on the bill of lading before sailing.

Thereafter an amended libel was filed as follows:

"Second. On or about the 20th day of June, 1905, a charter party in writing was entered into between the libellants and respondents whereby the respondents agreed to load in bulk on board a steamship to be thereafter named by the libellants, a cargo of not less than 2,000 tons, nor more than 2,200 tons, of phosphate at Port Inglis anchorage, West coast of Florida, United States, off mouth of Withlacoochee River for transportation to Hamburg, Germany, by the libellants on the said steamship. For the transportation of said cargo respondents agreed to pay to the libellants the sum of Thirteen shillings per ton delivered.

It was further agreed by the respondents in said charter party that the vessel should be loaded at Port Inglis as aforesaid 'at the average rate of 400 tons per weather working day (Sundays and holidays excluded),' commencing 24 hours after vessel was ready to receive cargo and written notice to that effect given to charterers' agents, and should be discharged at Ham-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

burg 'at the rate of 450 tons per weather working day (Sundays and holidays excluded),' and that in case the vessel was longer detained by the charterers demurrage should be paid by them at the rate of eight cents per net registered ton per day for every day the vessel was so detained. Said charter party is hereby referred to and made part of this libel.

Third. Said charter party further contained the following common printed clause:

'All liability of Charterers shall cease on completion of loading, the Captain or owners having an absolute lien on the cargo for all Freight, Dead Freight, Demurrage, &c., due to the vessel under the Charter-Party, but all Demurrage incurred at Port of Loading must be settled before sailing therefrom or endorsed on Bills of Lading, or there shall be no lien or claim for the same.'

Fourth. Pursuant to said charter party the libelants thereafter duly named the steamship Finland, of 1441 tons net register, as the steamship to carry the said cargo, and the said steamship thereafter proceeded to said Port Inglis anchorage, arrived there on September 12th, 1905, at 11 A. M., and was duly entered and tendered to respondents, and written notice that said steamship was ready to receive cargo was given to their agents on September 12th, 1905, at 5 P. M. Lay days began to run pursuant to said charter on September 13th, 1905, at 5 P. M.

Fifth. Thereafter said steamship loaded a cargo of 1900 tons of phosphate, supplied by respondents, which, according to said charter party should have been supplied in four and three-quarter days at the rate of four hundred tons per day, Sundays and holidays excepted, and should, therefore, have been supplied by the 19th day of September, 1905, at 11 A. M., the 17th of September being a Sunday, and no holidays having intervened, at which time lay days began to run. Had said cargo been supplied as required by charter, libelants would have loaded the same on or before September 19th, at 11 A. M., and said vessel would have sailed, but owing to respondents' failure to supply said cargo promptly, as aforesaid, said steamship was detained until the 26th day of September, at 8 A. M., or six days and twenty one hours, for which period libelants became entitled to receive on said 26th day of September, 1905, demurrage at the rate of eight cents per net registered ton for every day said vessel was so detained, which demurrage amounted to \$706.09.

Sixth. It proved to be very difficult for the libelants to communicate with the master of the steamship Finland at Port Inglis, owing to the position of said steamship and the inadequacy of the facilities there, and therefore libelants could not, by making reasonable efforts, fully instruct the master of said steamship regarding the indorsement of claims on the bills of lading for demurrage as provided in said charter party. Libelants therefore took up the settlement of the demurrage directly with respondents, before said steamship should sail, so that it might be adjusted without the necessity of indorsing the demurrage on the bill of lading. On or about the 19th day of September, 1905, lay days of the steamer having expired and the loading of said cargo not being begun, the libelants notified the respondents that the steamship was on demurrage from and including that day until said loading should be completed, at the rate provided by said charter party, and that libelants would hold the respondents for said demurrage, although, owing to the difficulty of communicating with the master as aforesaid, said bills of lading might not be indorsed with claims for demurrage, and further notified the respondents that all rights for demurrage were reserved. The said notice was repeated on the 20th day of September, 1905, while the said steamer was still on demurrage. Said notices are annexed hereto and marked Schedules A and B.

The respondents received said notices without objection, made no intimation whatever that they did not assent to the settlement of the demurrage directly by the parties to the charter party without indorsement on the bill of lading, though such notice could easily have been given had respondents so desired, for libelants and respondents were both in New York City. Respondents made no suggestion that they would rely upon the libelants' omission to indorse the demurrage on the bill of lading. Meantime, the loading of said steamship was begun and after several days was completed, and on September 26th, 1905, said steamship sailed, and it thus became impossible for libelants to send a special agent to said vessel and attend to the indorsement of said

demurrage on said bills of lading. By the course of conduct of the respondents, libelants were led honestly to believe that the respondents assented to the waiver of the condition that the demurrage be indorsed on the bills of lading, and respondents by their conduct waived such condition, and are estopped to set up as a defense to this libel that said indorsement on the bills of lading was not made. If respondents had notified libelants when said notices were received that they would insist on such indorsement on the bills of lading, and had objected to a direct settlement of the demurrage by the parties, libelants could and would have taken means to have made such an indorsement on the bills of lading.

Seventh. By the respondents' failure to carry out its contract, as aforesaid, the respondents became liable to pay to libelants the sum of \$706.09, with interest thereon from September 26, 1905. Payment of said sum has been demanded but the respondents have refused and still refuse to pay the same, or any part thereof, and said sum is still due and owing from the respondents to the libelants."

Exceptions were filed subsequently to the amended libel as follows:

"The said respondents, John W. Auchincloss and Hugh D. Auchincloss, except to the libel of John H. Gans and Henry Wehner filed herein on the ground that said libel does not state facts sufficient to constitute a cause of action."

The matter has again been elaborately argued by the respective parties. At the time of the first decision the question was, in substance, whether the libellants could excuse themselves for not fulfilling a condition of their contract by alleging that performance was impossible, and it was held that the mere allegation was insufficient and that parties could not be permitted to make a new contract by such an allegation. In the amended libel, however, the libellants allege that by the conduct of the respondents, the libellants were led to believe that the respondents assented to the non-performance of the condition that demurrage be inserted in the bill of lading and waived that condition of the contract and are estopped from setting up as a defense to the libel that the endorsement on the bill of lading was not made.

Instead, therefore, of there being a defect in the libel as was shown at first by the pleading of impossibility of performance, which I thought did not amount to a legal excuse for the failure of the performance of a stipulated condition, now a case is presented of a waiver by the parties entitled to it of the performance of the condition and of an estoppel on their part to avail themselves of the condition.

As it now stands, the libel seems to be good and the exception is overruled.

JAMES P. SMITH & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 16, 1909.)

No. 5,192.

1. CUSTOMS DUTIES (§ 30*)—CLASSIFICATION—"MEAT PREPARED OR PRESERVED"
—PÂTÉ DE FOIE GRAS.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 275, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), the provision for "meats of all kinds, prepared or preserved," is broad enough to include, not only the cooked meat

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of poultry and game, in tins, but also goose livers prepared as *pâté de foie gras*.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 76; Dec. Dig. § 30.*]

2. CUSTOMS DUTIES (§ 30*)—"DRESSED POULTRY."

The cooked meat of poultry and game, in tins, and goose livers prepared as *pâté de foie gras*, are not dutiable, either directly or by similitude, as "poultry * * * dressed," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 76; Dec. Dig. § 30.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York. The material in dispute was found by the Board of General Appraisers to consist (1) of *pâté de foie gras*, being goose livers reduced by boiling to a thick mass, flavored with spices and truffles, and put up in jars of various sizes, and (2) of the meat of quail, lark, and young chickens, prepared by cooking and packed in air-tight tins for preservation. The collector imposed on these commodities the duty provided for "meats of all kinds, prepared or preserved, not specially provided for," by Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 275, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652). The importers contended for classification, either directly or by similitude, under paragraph 278, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), as "poultry * * * dressed," or under section 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), relating to unenumerated manufactured articles. The board overruled these contentions in an opinion reading in part as follows:

"WAITE, General Appraiser. * * * We think it is established that the term 'poultry' has a definite and well-understood meaning at the present time, and under the definition given by the board heretofore the commodities in question cannot be classified as poultry, either directly or by similitude. In our understanding the word 'poultry' is applied to the barnyard or domestic fowl, either when it is alive or when it is dressed; the dressing consisting of plucking, or, in some localities, perhaps, plucking and drawing. Note G. A. 5,574 (T. D. 24,989). We do not think the term is intended to apply to anything but the whole, or nearly whole, fowl, and certainly not to poultry products elaborately prepared in any manner.

"We are not disposed to give to paragraph 275 the narrow construction contended for by the importers; but we think a comprehensiveness broad enough to cover all prepared or preserved meats should attach to it. The language of the paragraph is 'meats of all kinds.' If the term 'meats' were so narrow as that contended for by the importer, it would hardly have been necessary to add the comprehensive phrase 'of all kinds.' The commodities involved in these protests have undergone elaborate preparation and preservation. Not only are they changed in form by boiling and cooking, but are highly seasoned and put up in hermetically sealed receptacles.

"We think the finding of the collector was correct in each instance, and therefore overrule the protests."

B. A. Levett, for importers.
D. Frank Lloyd, Asst. U. S. Atty.

LACOMBE, Circuit Judge. I concur with the Board of General Appraisers in the conclusion that the phrase "meats of all kinds" is broad enough to cover, not only the quail, lark, and young chickens put up in tins as described, but also the livers of chickens and geese,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as well as those of steers, and that the phrase "prepared or preserved" covers them when compounded as in *pâté de foie gras*.

The decision of the board is affirmed.

HERMANN BOKER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 2, 1909.)

No. 4,472.

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—"COATED WIRE."

The provision for "coated wire" in *Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1639)*, is not limited to a process of covering by galvanizing dipping, or other similar method; and wire, made by inserting an iron wire in a hollow tube of nickel and then drawing the whole wire down until the nickel covering becomes welded to and a part of the iron core, is "coated," within the meaning of the law.

[Ed. Note.—For other cases, see *Customs Duties, Cent. Dig. § 59; Dec. Dig. § 26.**]

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see *G. A. 6,414 (T. D. 27,544)*.

Walden & Webster (Howard T. Walden, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

HOLT, District Judge. The question in this case is whether the wire in controversy is coated with nickel. It is made by inserting an iron wire in a hollow tube of nickel, and then drawing the whole wire down until the nickel covering becomes welded to and a part of the iron core. This wire was for many years assessed under the last paragraph of paragraph 137 of the tariff act of 1897 (*Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639]*), providing for a duty "on iron or steel wire coated with zinc, tin or any other metal." But about 1904 the collector assessed it under an earlier provision of paragraph 137, providing that iron, steel, "or other wire not specially provided for" in said act should be assessed at 45 per cent. ad valorem. The General Appraisers held, in substance, that the term "coating" as used in the act was a process of covering metals by galvanizing, dipping, or some similar method. But I do not see why the definition should be so restricted, or why, when the final result is accomplished, this is not an iron wire coated with nickel, and therefore the kind of wire specially provided for in the act. The cases cited in the opinion of the General Appraisers, holding that the process of welding one sheet of metal upon another is not a coating, within the meaning of the act, seem to me inapplicable.

My conclusion is that the decision of the General Appraisers should be reversed, and the wire in question assessed for duty under the last clause of paragraph 137.

*For other cases see same topic & § NUMBER in *Dec. & Am. Digs. 1907 to date, & Rep'r Indexes*

CANTON ROLL & MACHINE CO. et al. v. ROLLING MILL CO. OF AMERICA et al. STURGISS et al. v. CORBIN et al. FARMERS' DEPOSIT NAT. BANK OF PITTSBURGH, PA., et al. v. LOGAN et al.

(Circuit Court of Appeals, Fourth Circuit. January 12, 1909.)

. Nos. 780, 762, 781.

1. MECHANICS' LIENS (§ 32*)—RIGHT TO LIEN UNDER WEST VIRGINIA STATUTE—MACHINERY FOR MILL.

Code W. Va. 1906, § 3111, which gives the right to a mechanic's lien to any person "who shall * * * furnish any material or machinery for constructing * * * any mill, manufactory, * * * or other structure," gives a lien for machinery furnished as a necessary part of the equipment of a mill, although it is not intended to be permanently attached to the freehold; and such lien covers the price of spare rolls furnished with a tin plate mill, and shown to be an essential part of the equipment of such a mill.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 37; Dec. Dig. § 32.*]

2. MECHANICS' LIENS (§ 132*)—MACHINERY—TIME FOR FILING CLAIM—COMPLETION OF CONTRACT.

Complainant contracted with a tin plate company to furnish machinery for the equipment of a new tin plate mill, for which it was entitled under the statute to a mechanic's lien if filed within 60 days after it ceased to furnish the machinery. The contract included a number of extra rolls to be delivered with the other machinery, which were made at about the same time; but on request of the purchaser to withhold shipment until further notice, some of them were not shipped. *Held*, that complainant had the right to ship them a year later without further orders, and to file its statement for a lien for the price of the entire machinery within 60 days thereafter.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190-207; Dec. Dig. § 132.*]

3. MECHANICS' LIENS (§ 159*)—RIGHT TO LIEN—EFFECT OF FILING CLAIM—ESTOPPEL.

The filing of a claim for a mechanic's lien which is afterward abandoned does not estop the claimant to file another including the same indebtedness, where the second claim is filed within the time allowed by the statute.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 188, 189; Dec. Dig. § 159.*]

4. CORPORATIONS (§ 312*)—OFFICERS—RIGHTS AS PURCHASERS OF BONDS OF CORPORATION.

The president of a corporation pledged \$100,000 of its bonds to secure a loan of \$21,500 obtained for it from a trust company of which he was also an officer. After demand for payment and his statement that the corporation could not pay, on short notice which the president did not communicate to some of the directors, the bonds were sold at auction. The president sent the secretary, who was also a director and attorney for the corporation, to the sale, and by his direction the bonds were bought by a broker, in the name of a former president and director, for \$22,500, and were charged by the broker to his account and delivered to him. Two years afterward, when the corporation had become a bankrupt, a brother of the nominal purchaser of the bonds appeared and claimed to be the owner and to have been the real purchaser. The secretary testified that he acted for claimant at the sale, and that he had a joint interest in the purchase. There was other evidence strongly tending to show that the purchase was in fact made for the secretary, the president, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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certain other directors of the corporation. *Held* that, even conceding claimant to have been the purchaser, he was affected by the fiduciary relation in which his partner in the purchase stood to the corporation, and that neither could derive any benefit from the purchase at the expense of the corporation, but could at most recover only the amount paid with interest.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1383-1391; Dec. Dig. § 312.*]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of West Virginia, at Parkersburg.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg.

For opinion below, see 155 Fed. 321.

The three above-entitled causes were, by consent of parties, heard together in this court, as they all relate to the same subject-matter, that is to say, the property and estate of the Morgantown Tin Plate Company, bankrupt, and involve the questions of how and to whom the same shall be distributed. The last-named cause, No. 781, is an appeal from a decree of the United States District Court entered on the 23d day of August, 1907, in the bankruptcy cause proper, decreeing payment to one Frank J. Logan of the sum of \$100,000, with interest at 6 per cent. per annum from the 1st day of January, 1903, being in full of 200 first mortgage bonds of the par value of \$500 each of the bankrupt, claimed to be owned by said Logan. The second cause, No. 762, is a petition asking for the supervision and revision by this court, in matter of law, of the decree entered in the bankruptcy cause in favor of Frank J. Logan; and the first-named cause, No. 780, is an appeal from a decree of the United States Circuit Court in equity, entered on the 23d day of August, 1907, dismissing complainant's bill.

In the equity cause, the complainant, the Canton Roll & Machine Company, sought to enforce a certain mechanic's lien against the Rolling Mill Company of America, and the bankrupt, the Morgantown Tin Plate Company (successor to the Rolling Mill Company of America), for an indebtedness of \$14,889.98, with interest from the 23d day of March, 1904; and the same was instituted upon the theory that the assets of the Rolling Mill Company of America had been collusively absorbed by the owners and officers of the Morgantown Tin Plate Company, in derogation of the rights of the creditors of the Rolling Mill Company of America, and that said Morgantown Tin Plate Company had incumbered its own property, and the property and estate acquired by it from the Rolling Mill Company of America, by a mortgage for \$150,000, and that \$100,000 of the bonds (being the same bonds referred to in the bankruptcy decree appealed from) had been hypothecated for a debt of \$21,500, and subsequently, upon sale of the collateral, that the bonds had been acquired by some unknown person in the interest of certain officers and directors of the Morgantown Tin Plate Company, all of which was charged to be in fraud of the rights of the complainant and other creditors alike of the Rolling Mill Company of America and said Morgantown Tin Plate Company.

Although this suit in equity was filed on the 20th day of June, 1904, some two months or more after the adjudication in bankruptcy of the Morgantown Tin Plate Company, the contests over the indebtedness of the Morgantown Tin Plate Company, especially as to the debt due the Canton Rolling Mill Company, the plaintiff in the equity suit, and the amount due by reason of the sale of the hypothecated bonds as aforesaid, seems, without objection, to have been litigated in the equity cause, in which the bankrupt's trustee interposed, and joined particularly in the contest respecting the ownership of the bonds, and the right of the holder of the same to recover more than the amount for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which they were hypothecated. At a later date, the Farmers' Deposit National Bank of Pittsburgh, Pa., and George C. Sturgiss intervened in the same cause, by petition, also attacking the validity of the sale of the bonds so deposited as collateral, and asked to be allowed to set up certain claims held by the bank as assignee of said Sturgiss, including that of the Canton Roll & Machine Company, the complainant aforesaid. The contest was an unusually bitter one, as appears alike from the proceedings in bankruptcy, and the equity case aforesaid, and resulted in the Circuit Court entering the decree appealed from, which is as follows:

"This cause having come on for final hearing and decision at the May term of this court, and having been duly argued and submitted by counsel, and this court having carefully considered all the pleadings, evidence, and exhibits heretofore taken and filed herein, and orders and decrees heretofore made, together with the briefs of counsel for the respective parties, and having on the 2d day of August, 1907, rendered and filed its opinion in writing upon the controversies submitted to it, which is now incorporated in and made part of this decree, this court doth now declare, order, adjudge, and decree that the bill of the plaintiff in the above-entitled action and of the interveners therein, to wit, the Farmers' Deposit National Bank and George C. Sturgiss, is insufficient in law and must be and is hereby dismissed upon the merits, and that the defendants in this action and each of them, to wit, Rolling Mill Company of America, Morgantown Tin Plate Company, Hector M. Hitchings, Melvin J. Palliser, W. J. Logan, Jacob Meurer, Dick S. Ramsey, and Andrew Meurer, recover of the plaintiff and the petitioners in this action their costs in that behalf sustained, to be taxed by the clerk of this court; and it is further ordered, adjudged, and decreed that a duly authenticated copy of this judgment and decree be remitted by the clerk of this court to the clerk of the United States District Court for the Northern District of West Virginia for the appropriate consideration and action of that court.

"And all the pleadings, proceedings, depositions, exhibits and evidence, and orders in this cause are hereby remitted to the aforesaid District Court for the consideration and appropriate action of the District Judge in the decision of a petition now pending in said court for the payment over to Frank J. Logan out of the funds received from a sale in bankruptcy of the assets and property of Morgantown Tin Plate Company of the sum of \$100, and interest." (Entered 23d August, 1907.)

On the same day of the entry of this decree in the Circuit Court, the decree appealed from was entered in the bankruptcy cause, in favor of Frank J. Logan, the alleged holder of the 200 bonds of \$500 each as aforesaid, pursuant to his petition in such bankruptcy proceedings filed on the 24th day of September, 1906, in which he claimed to own said bonds, and which decree in favor of Logan for the face value of the bonds and interest was based upon the above decree entered by the Circuit Court, together with the pleadings, exhibits, and testimony taken in said cause, as contemplated by the order of the Circuit Court dismissing the cause as hereinbefore recited. The decision of the lower court is found in 155 Fed. 321, to which reference is made for a full statement of the facts in these causes.

B. M. Ambler and A. Leo Weil (C. M. Thorp, on the brief), for appellants.

Hector M. Hitchings, for appellees..

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

WADDILL, District Judge (after stating the facts as above). A number of assignments of error are presented for the consideration of the court, but they may be reduced substantially to three propositions: (1) The correctness of the order of the court dismissing the bill as to the complainant, the Canton Roll & Machine Company. (2) In dismissing the bill and awarding costs in favor of the defendants

named in the decree against the complainant; and subsequently, upon the decree of the Circuit Court, and the pleadings and testimony taken therein, ordering in the bankruptcy cause the payment to Frank J. Logan of \$100,000, with interest and costs. (3) In dismissing the petition of the Farmers' Deposit National Bank and George C. Sturgiss in said Circuit Court.

We will consider the questions presented in the order named, and remark in passing that in the view we take of the cause, assuming that the decree of dismissal by the Circuit Court should have been entered at all, it should have been without prejudice to the several parties to seek relief in some other appropriate action if the same could not be afforded them in the equity cause.

1. While the point as to the validity of complainant's mechanic's lien which was subsequently assigned to Sturgiss is admittedly a nice one, we find ourselves, after the most careful consideration that we have been able to give to the question, unable to agree with the trial court as to the invalidity of the lien. The seventh and thirteenth paragraphs of the bill read:

"Among other contracts so made, said Rolling Mill Company of America entered into a written contract with your orator on December 5, 1901, for the purchase from your orator of six hot tin mills, complete, six stands of cold mills, complete, and certain other machinery and appliances, for which the said Rolling Mill Company of America agreed to pay your orator the sum of \$35,000; a copy of said contract being hereto attached, marked 'Exhibit A.' Your orator has fully performed said contract by furnishing said mills, rolls, and machinery in accordance therewith, said machinery and materials having been furnished for and about the construction of said mill and manufactory, and the buildings, appurtenances, and fixtures therewith connected, and said rolls, machinery, and material thereby became, and have since been, and now are a part of said tin plate plant and property. The said Rolling Mill Company of America has paid or caused to be paid to your orator a portion of the said contract price for said machinery and materials, but has failed to pay the remainder thereof, to wit, the sum of \$14,889.98, which amount, with interest thereon from March 23, 1904, is due and payable to your orator on account of said contract, and the furnishing of said machinery and materials. Your orator has frequently demanded payment of said sum of \$14,889.98, but hitherto the said Rolling Mill Company of America has failed and neglected to pay the same; and the whole amount thereof, together with interest thereon as aforesaid, is now due and payable to your orator without any set-off or abatement whatever."

"Your orator is entitled to and has filed a mechanic's lien for all its said claim of \$14,889.98, with interest as aforesaid, against said real estate and manufacturing plant, in accordance with the laws of the state of West Virginia, and claims and is entitled by virtue thereof to a lien on said property."

The contract of December 5, 1901, between the Rolling Mill Company of America and the Canton Company, included, as part of the machinery to be furnished for the lump sum of \$35,000, 24 chilled rolls. Under the head of "miscellaneous" the Canton Company agreed also to furnish 24 additional rolls—"six pairs to be delivered with the mills, balance when required at Association prices f. o. b. Canton, Ohio, terms 30 days, net." Of the 24 additional rolls (described in the invoices and mechanic's liens as "extra rolls"), 2 were shipped on January 29, 1903, 1 on March 19, 1903, and 9 on February 22, 1904. The remaining 12 were never required or shipped.

Concerning the nature and use of the extra or spare rolls, the testimony of Humbert and Loyd is to the effect that a set of spare rolls is as necessary a part of the equipment of hot tin mills as is the original set of rolls. Neither the original nor the extra rolls were ever intended to become affixed permanently to the freehold. The West Virginia statute (section 3111, Code 1906), reads:

"Every mechanic * * * or other person who shall * * * furnish any material or machinery for constructing * * * any mill, manufactory * * * or other structure * * * shall have a lien * * *."

While this statute, as we read it, does not give a lien to the person furnishing tools, it does give a lien for machinery used in the construction of a mill or factory. The spare rolls, when put in use, would be integral parts of the heavy "mills," and, as such, as much machinery used in the construction of the factory as would the first or original set of rolls.

The filing of the mechanic's lien on June 25, 1903, which was abandoned, does not vitiate the lien filed February 24, 1904, if the latter was filed within 60 days after the lienor had "ceased to furnish machinery." Section 3113, Code 1906. The facts as to the shipment on February 22, 1904, of the last 9 of the 12 extra rolls, which were to have been delivered with the mills, are as follows: On January 31, 1903, the Morgantown Tin Plate Company wrote to the Canton Company:

"We do not desire any of the spare rolls shipped in until after all the other material is received. * * *"

And again on March 18, 1903:

"Do not make or ship any spare rolls for our account until further notice. We * * * have no room for these at present is our reason for requesting delay. We will notify you soon as can take them."

On March 28, 1903, the Canton Company wrote:

"Rolling Mill Company of America, Morgantown, West Va.

"Gentlemen: We received several days since your letter requesting us not to ship any more of the extra rolls at this time, and the letter was received just in time to head off a shipment. We had ordered in a car for the rolls covered in the enclosed invoice. We will hold the rolls temporarily for your accommodation."

As these spare rolls, which should not be confused with the six pairs to be delivered "when required," were a part of the machinery embraced in the original contract, were made prior to March 28, 1903, but withheld on the express request of the vendee, we do not perceive any good reason why the Canton Company could not preserve its right of lien by delaying shipment at the request of the tin plate company, and could not finally ship without an order to such effect.

We are therefore of opinion that the decree of the trial court should be so modified as to decree to Sturgiss and the Farmers' Bank, assignees of the claim, a lien, prior to that of the bondholders, for the amount of the claim originally asserted by the Canton Company. *Cushwa v. Association*, 45 W. Va. 490, 32 S. E. 259.

2. This brings us to the consideration of the correctness of the two decrees of the lower court, appealed from, respecting the bonds of the

bankrupt company hypothecated for the indebtedness due by it, and subsequently alleged to have been sold to and purchased by the appellee Frank J. Logan. A brief review of the facts connected with this transaction will be found necessary to its intelligent consideration.

The Morgantown Tin Plate Company, successor to the Rolling Mill Company of America, was organized under the laws of West Virginia in December, 1903, with W. J. Logan, Hector M. Hitchings, Jacob Meurer, Dick S. Ramsey, and M. G. Palliser as its officers and directors; that George C. Sturgiss and George J. Humbert were the active representatives of said company, at Morgantown, W. Va., and W. J. Logan, Jacob Meurer, Dick S. Ramsey, Melvin G. Palliser, and H. M. Hitchings (the two last named being members of the law firm of Hitchings & Palliser, attorneys for the company) were the New York representatives, the said W. J. Logan being president, and Palliser secretary, of the company. That it was contemplated that the plant could be established upon an expenditure of something like \$200,000, which estimate, however, proved to be inadequate, and other moneys had to be raised before it could be made a going concern. The New York representatives and their associates put in the sum of \$100,000 taking stock therefor, before the consolidation of the two companies; Humbert, \$10,000; and Sturgiss put into the reorganized company \$20,000 in money, donated real estate supposed to be worth some \$20,000, and paid for \$50,000 of first mortgage bonds at par; and it was later found necessary to raise other sums to complete the plant, and the New York directors, Logan, Meurer, and Ramsey, advanced \$7,500; and, still needing money, in May, 1903, Jacob Meurer, being at the dates of contracting the loans president and vice president thereof, effected a loan through a trust company in Brooklyn, of which he was also an officer, for \$21,500, being the aggregate of three several sums secured by him on May 2d, May 26th, and August 2d, and hypothecated with the trust company bonds of the Morgantown Tin Plate Company for \$100,000, he also becoming personally responsible to the trust company from which the money was borrowed for the indebtedness. This money was likewise used in the effort to finish the plant, which as a matter of fact was never completed. Prior to and about the time of the borrowing of this money, the financial outlook of the company was not bright, and what had been hoped at first to be a most successful enterprise seemed to have proven a failure, and the parties apparently became demoralized; and on the 17th of June, W. J. Logan, as president and a director, tendered his resignation, and Dick S. Ramsey, another director, resigned, and L. W. Thompson (an employé in the office of Hitchings & Palliser) was named as a director in place of Ramsey, and took part in the meeting, and August Cahula was elected a director in place of Logan, but it does not appear whether he accepted the position or not. Dissensions quickly arose; Sturgiss and Humbert taking one view, and the New York parties in interest another. Suits were instituted against the company, and finally bankruptcy proceedings, in which the property was sold, and brought unexpectedly, because, it is alleged, of an agreement between Sturgiss and what is familiarly known as the "Tin Plate Trust," some \$200,000, which was considerably more than it was believed to be worth, and more than

enough to pay its entire indebtedness, upon the assumption that the liability by reason of the hypothecation of the bonds would only be for the amount received by the company on its loan. The contest as to the bona fides of the sale and transfer of these bonds, and whether or not Frank J. Logan is or not a bona fide holder for value, is the great point in issue. The payment of the \$100,000 of bonds, with interest, as claimed by him, will not leave enough to pay even the lien debts of the company; but by refunding him what he is alleged to have paid for them with interest, there will be ample funds to pay all creditors, and a surplus to the company.

The facts concerning this transaction respecting the sale of the hypothecated bonds are rather unique. After Meurer negotiated the loan with his trust company in the spring of 1903, the same was allowed to run until the 16th of October, 1903, on which day the trust company wrote Meurer demanding payment of the \$21,500 on Monday, October 19th, before 12 o'clock. On October 17th, having received a communication from Meurer also dated the 16th, stating the inability to comply with the demand for payment of the \$21,500 by Monday, the 19th, at noon, the trust company wrote him that they would cause to be sold at public auction, at the office of Adrian H. Muller & Son, No. 55 William Street, New York City, the 200 first mortgage bonds of the defendant company, and that advertisement would be made of such sale on Monday, the 19th instant, and the bonds sold on Wednesday, the 21st instant. Notice of this proposed sale was published in two New York newspapers, and the bonds were duly exposed for sale on the day and at the place mentioned, and one George J. Weedon, a representative of the firm of R. J. Kimball & Co., purchased the \$100,000 of bonds at 22½ cents on the dollar, which purchase, he says, he made upon the order of M. G. Palliser, on account of W. J. Logan, to whose account they were charged, and taken credit for with him in current settlement; and the said W. J. Logan, subsequently, to wit, on the 7th day of January, 1904, gave to said firm of R. J. Kimball & Co. his receipt for the bonds in his own handwriting, and the same were delivered to him. The said Weedon testified further that Frank J. Logan had dealings in the account of W. J. Logan, and that he represented W. J. Logan when the latter was abroad, and that what he meant by Frank J. Logan "having dealings in account with W. J. Logan" was that he had a power of attorney to act for the latter, and occasionally so acted. The \$22,500 thus received from the sale of these bonds was accounted for to the trust company, and the notes of the Morgantown Tin Plate Company duly taken up, and an account by the trust company to Meurer for the Morgantown Tin Plate Company duly rendered, with check for \$190.36, the balance; and this check was thereupon turned over by Meurer to Palliser, who was then attorney for, and a director and secretary of, the Morgantown Tin Plate Company, and he gave credit, as he claims, for the \$190.36 on his firm's account against the Morgantown Tin Plate Company, and, on October 28th following, he wrote the company at Morgantown of what had occurred, and requested that proper entries be made on the company's books with a view of having the transaction clear.

Upon receipt of the notice of this proposed sale by Meurer, president,

from the trust company, the New York parties in interest were duly advised, but no information was given to those at Morgantown to be affected thereby. No meeting of the directors was called, nor any step taken to raise the money or secure delay of the sale, and no advice whatever was given to the parties in interest at Morgantown of the sale. Nor was the notice as published in the newspapers of sufficient length of time to advise them of what was to be done, and they had no knowledge thereof. Promptly after this alleged sale, the parties in interest at Morgantown used their best efforts to get the facts concerning the same, and to ascertain the name of the purchaser, and were given but scant assistance by those connected with the company in New York, and denied all information as to the name of the purchaser.

Shortly after the sale of these bonds, to wit, on the 7th day of January, 1904, and before the plant had sold at the high figure aforesaid, Sturgiss and Humbert, the Morgantown managers and parties in interest, proceeded to New York to see if the stock and bonds of the company could be acquired; and Sturgiss procured from Palliser an option upon \$75,000, part of the bonds of \$100,000 alleged to have been sold, and 825 shares of the stock of the company, at the price of \$30,000, \$22,500 of which it was claimed by Palliser was to reimburse the purchaser of the bonds the amount paid therefor, and \$7,500 to refund to W. J. Logan, Jacob Meurer, and Dick S. Ramsey, the three directors of the company who had advanced \$7,500 to the company as aforesaid. One thousand dollars was paid on this transaction by Sturgiss to Palliser. The option was never taken up by Sturgiss, and the matter ended there, and upon his examination Palliser refused to say on account of whom, if any one, other than himself, he held the \$1,000.

The bill filed in the equity suit under consideration in the Circuit Court on the 23d day of June, 1904, especially assailed the sale of the bonds placed as collateral for the \$21,500 loan, and to this bill the said Jacob Meurer, Hector M. Hitchings, Melvin G. Palliser, Dick S. Ramsey, W. J. Logan, and others, on the 4th day of November, 1904, filed their joint answer, in which they studiously avoided giving the name of the alleged purchaser of said bonds, and sought to maintain ownership of the same in the hands of some unknown bona fide holder. Notwithstanding the fact that the ownership and bona fides of the acquisition of the title to the bonds was being, and had been, controverted virtually from the time of the alleged sale, the name of no purchaser was ever given until the 22d of December, 1904, when, in connection with the contest over the sale of the bankrupt's property in the bankruptcy proceedings, it appeared that one A. K. Bolan, of the city of New York, claimed to be the purchaser, and the recitals of the decree of the bankrupt court entered on the 3d day of January, 1905, show that he duly appeared by the same counsel as that of the other New York parties to oppose the sale. Promptly after receiving the name of the alleged purchaser, by direction of the referee in bankruptcy, the trustee in bankruptcy of the Morgantown Tin Plate Company, Frank P. Corbin, proceeded to New York with the view of seeing him in connection with the transaction, when he had an interview on the subject with Palliser, and attempted to see Bolan, but the

latter avoided him, and would not see him without knowing his business, and upon receiving the information, after calling several times, Corbin found a note, informing him that anything in relation to the purchase of the bonds would have to be taken up with Mr. Palliser, of Hitchings & Palliser, and that Bolan refused to see him. On the 27th of the same month, Palliser wrote Sturgiss complaining of the action of the trustee in bankruptcy in seeking an interview with his client, and stating that he did not like his attitude of attempting to talk with his client behind his back.

The appearance of Bolan, as shown by the decree of 3d of January, 1905, and the ineffectual efforts of the bankrupt's trustee to see him, as stated, and the letter to Sturgiss of the 27th of January, from Palliser, complaining of the effort to see Bolan by the bankrupt's trustee, seems to have been his only connection with this transaction, and, on the 27th of June following, he died; and the next person brought forward as the alleged owner of the bonds, as shown by the deposition of Palliser, taken on the 27th day of December, 1905, is Frank J. Logan, and he then, for the first time, is known in connection with the matter. Subsequently, on the 27th of September, 1906, some nine months thereafter, he, Logan, presented his petition in the bankruptcy proceedings, setting up his claim to the bonds, and this petition is his first and only appearance in the entire proceeding. Though he appeared then for the first time as the owner of the bonds, the title, ownership, and honest acquisition of which had been in dispute certainly since June, 1904, more than two years previously, and another person had already claimed and asserted ownership thereof, and shortly theretofore had died, he did not himself go upon the witness stand, or offer in any way to prove his ownership of the bonds or the bona fides of his acquisition of the same, or his ability to make such purchase, but contented himself to rest upon the testimony taken in the chancery cause in the Circuit Court to maintain his claim; and that, too, in the light of the fact that the testimony on which his claim to the bonds mainly rested was that of Melvin G. Palliser, a director, counsel for, and secretary of the Morgantown Tin Plate Company, and in whose law firm's office the Morgantown Tin Plate Company's office was maintained in the city of New York, who testified that the purchase of these bonds was first brought to the attention of Frank Logan by him, and that they were purchased at public sale in Palliser's presence, and by his direction, on account of said Logan, through Mr. Weedon, a member of the firm of Kimball & Co., with the understanding that he, Palliser, was to share in the profits in the transaction, and that, as shown by the testimony of Weedon, they were purchased at a lower figure than he had been authorized by Palliser to bid for them; and notwithstanding the further fact that it appeared from the testimony of Weedon that the bonds in question were bought by him under said Palliser's direction, that they were paid for out of W. J. Logan's funds, and charged to the account of said W. J. Logan, who had shortly before been an officer and director of the company; and that he, the said W. J. Logan, subsequently regularly received for the bonds individually, and turned them over to Palliser, who gave the option on them in

connection with certain stock, as he claims, and out of the proceeds of the money arising from the option, W. J. Logan, Jacob Meurer, and Dick S. Ramsey were each to receive \$2,500. Palliser's explanation of the acquisition of the bonds by Logan, his interest in the transaction, and his effort to show Bolan's connection therewith after his death, is in substance that the representative of the firm of Kimball & Co., brokers, by his direction and upon his advice, bought in these bonds on account of Frank J. Logan; that Frank J. Logan was a client of his (Palliser's) and also of said Kimball & Co., and that no one had an interest in the transaction other than himself and Logan; and that he had an interest if they succeeded in making some money out of it at any time; and he admitted that, in explanation of the transaction of the retention of \$25,000 of the bonds from the option on the \$75,000 given Sturgiss, they were to be divided as a profit in the business; and in answer to the question of why the name of Frank J. Logan as owner of the bonds had been withheld until his deposition of 1905, and six months after Bolan had died, said there was no necessity or call for stating it earlier; and he explained that Bolan, who had prior to the time of his death claimed the bonds, had, and still did not have, an interest in them, his story being that Frank J. Logan, who had purchased the bonds on his advise, seeing that the matter was to be complicated for some time, became dissatisfied, and asked him to arrange to get somebody to take the bonds off his hands; that he so arranged with Bolan to take care of the bonds, but the plan was never carried out; but that Bolan had an agreement to take the bonds, and was to take them and stand in with him (Palliser) on them, but he never did. Palliser further explained that Frank J. Logan put in his money, and he, Palliser, his knowledge, time, and ability in handling the transaction, and services as attorney, against the money they hoped to realize.

The law applicable to this transaction is well settled. The officers and directors of the bankrupt company occupied and acted in a fiduciary relation in the matter of the sale of the collateral deposited by them to raise money for their corporation before its insolvency and bankruptcy; and any sale whereby they, or any or either of them, became interested in the purchase of such securities, to be valid, must at least have been in all respects free and clear from any fraud and taint of suspicion or wrongdoing or unfair dealing on their part.

In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 588, 589, 23 L. Ed. 328, Mr. Justice Miller, speaking for the Supreme Court, said:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. *Koehler v. Black River Falls Iron Co.*, 2 Black, 715, 17 L. Ed. 339; *Drury v. Milwaukee & Superior R. Co.*, 7 Wall. 299, 19 L. Ed. 40; *Luxemburg R. R. Co. v. Paquay*, 25 Beav. 586; *Cumberland Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311. The general doctrine, however, in regard to contracts of this class is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, this

is the general rule; for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. * * * It is very true that as a stockholder, in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness."

In Clark and Marshall on Private Corporations, vol. 3, § 763, it is said:

"The directors and other managing officers of a corporation are under a duty to the corporation and the other stockholders to prevent the property of the corporation from being sold under execution, or for taxes, or on foreclosure, etc., or, if they cannot prevent the sale, to do what they can to have it sell at the highest possible price, and, if they bring about such a sale, not under any right acquired by contract with the corporation, but in violation of their trust, and purchase the property themselves, or if, although the sale is brought about by a creditor, they purchase the same otherwise than in the most perfect good faith, all of the courts undoubtedly agree that the corporation is entitled to have the sale set aside, or hold them as trustees, or to compel them to account for profits made, or pay the fair value of the property."

See, also, Thompson on Corporations, §§ 4063, 4071, 4072; Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 553; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Hope v. Salt Co., 25 W. Va. 789, 802, 808; Jones, Ex'r, v. Clark et al., 25 Grat. (Va.) 642; Addison, etc., v. Lewis, etc., 75 Va. 701, 720, 721; Cook v. Sherman (C. C.) 20 Fed. 167, and note.

In this case, whether the purchase of the bonds was made for W. J. Logan individually, or on behalf of himself and his co-stockholders and directors, or for Frank J. Logan, as claimed, is immaterial from a legal standpoint, as in either event Palliser, a stockholder, a director, the secretary of and the attorney for the bankrupt company, spoke and acted for the company, and was also the representative and attorney in the purchase of the bonds, and he admits that he was jointly interested in the profits arising from the venture with Frank J. Logan, whom he now says was the purchaser. Moreover, Meurer, the president of the bankrupt company, sent Palliser to the sale, and the latter directed Weedon, the stockbroker, to buy the bonds in, and authorized him to bid more than he, in his presence secured the bonds for. Palliser was thus the company's representative, the purchaser's representative, and jointly interested in the acquisition of the property sold. The fact that Palliser succeeded in acquiring an interest in the bonds through a third person, assuming Frank J. Logan

to be the purchaser, will not serve to relieve him, Palliser, from his fiduciary obligation, or validate his acts. Nor will the innocence of Frank J. Logan, if such was the fact, in a transaction of this character, protect him, and enable him to derive the benefit thereof, as the knowledge of Palliser, through whom he acted, will be imputed to him.

In *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076, two executors combined to purchase, and through an agent employed by them, did purchase, the property of the testator. The sale was held fraudulent and void, under the civil law, the common law, and the general jurisprudence of the nation. The court dwells at pages 559, 560, of 4 How. (11 L. Ed. 1076), on the device of using another's name for the accomplishment of the sale, showing (page 560 of 4 How. [11 L. Ed. 1076]) that it was known and denounced, before our language was spoken, as a purchase "fraudulent and void, from having been made per interpositam personam." "Where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent interest; for a third person by seeking to derive any benefit from such a transaction, or to retain any benefit resulting, becomes particeps criminis, however innocent of the fraud in the beginning." Perry on Trusts, § 172. "So property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the property is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured, or, as Lord Chief Justice Wilnot said: 'Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it.'" Perry on Trusts, supra, § 211; Hill on Trustees (4th Am. Ed.) p. 163; *Coles v. Trecothick*, 9 Ves. 234; *Brooks v. Martin*, 2 Wall. 70, 84, 85, 17 L. Ed. 732; *Bailey v. Teakle*, 2 Brock. 51, 54, Fed. Cas. No. 13,811; *Newcomb v. Brooks*, 16 W. Va. 32, 62; *Reilley v. Oglebay*, 25 W. Va. 36, 43; *Lamb v. Pannell*, 28 W. Va. 665, 666; *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88.

After the most careful consideration, we find ourselves unable, from any viewpoint that we can take of the transaction respecting the sale of these bonds, to hold the same other than as fraudulent and void, except as to the money advanced in payment at the time of sale. According to the most favorable view that can be taken in behalf of Frank J. Logan, he was the joint purchaser with Palliser, who at the time was the representative in three fiduciary capacities of the Morgantown Tin Plate Company, and he thus participated in the devastation of the assets and effects of this then insolvent and defunct concern, and he ought not, and should not in equity and good conscience, be allowed to receive anything more than the return of the money actually paid out, with interest—if, indeed, he should receive that. The testimony strongly tends to support the contention that this purchase was made by Palliser, in the interest of the New

York parties, especially W. J. Logan, Jacob Meurer, Dick S. Ramsey, H. M. Hitchings and Palliser himself. The fact that the purchase of the bonds was made on account of W. J. Logan, the same regularly charged in his account, and paid for by him, and the bonds subsequently delivered to him, and his personal receipt taken therefor, and that he was interested in the option later given by Palliser on the bonds, coupled with the haste of the sale, the failure to advise all parties in interest of the same, the general secrecy in connection with the transaction, the delay in the appearance of the alleged real owner, and the pretended lack of knowledge of the name of such purchaser, which could not possibly have been true, either on the part of W. J. Logan, if his bank account was used by his brother to pay for the bonds on his own account, or of M. G. Palliser, who claims to be half owner of the bonds, is alone consistent with this view; and that, first, Bolan, and then Frank J. Logan, the so-called purchasers, were mere dummies, and never in fact and in truth had any real existence as bona fide buyers. Whether this be true or not, certainly Frank J. Logan's alleged acquisition of the property was under such circumstances as to disentitle him or his copartner, Palliser, in equity, to profit and speculate on the misfortunes of this bankrupt company. His purchase is shrouded in too much mystery and doubt. His failure to come forward, as a straightforward man would have done, and explain his action and connection therewith, cannot be lightly brushed aside; and the fact that he was never known or heard of until death had removed the first alleged owner, Bolan, is a powerful circumstance tending to show his delay in appearing in the transaction. The inference is almost irresistible that had Bolan, the first claimant, lived, Logan would never have been heard of. Had Frank J. Logan been the bona fide purchaser of these bonds, involving the no mean sum of \$22,500, and out of which he expected to make considerably more than four times that amount, his purchase would have been easily susceptible of proof, as well as the fact of how he secured the money to buy the same, and why the bonds were acquired in his brother's name, charged to his brother's account, and delivered to his brother instead of himself, and, indeed, any and every thing about the transaction; and he would have been more than careful to have produced proper witnesses, and gone upon the stand himself to give a full and complete account of his actings and doings in the premises, and never have risked his case, involving so much to him, upon any such testimony, taken in another case, as he is attempting to do, and without taking any proceeding other than the filing of his petition in the bankruptcy case, and in which he makes the modest request to have the face value of these bonds, with interest, amounting now to upwards of \$130,000, turned over to him; nor would there have been any such varying, uncertain, and unnatural performances in the assertion of the claim as Logan's standing aside and Bolan stepping in, then Bolan dropping out and Logan resurrected to make the claim. Neither Logan, Meurer, Ramsey, Palliser, or Hitchings, by reason of their relation to the bankrupt company, could have acquired these bonds at a profit to themselves, and Frank J. Logan, who it is claimed bought the bonds for himself and Palliser, is in no better position than

Palliser would have been himself. Palliser was a director of the company, its secretary and its attorney, and the law will not countenance a transaction on his part whereby he used his information, acquired by him in his fiduciary capacity, to speculate, directly, or indirectly, upon the property of his cestui que trust; and his copartner, the one to whom he, from his own account, afforded the information, is charged with his knowledge, and cannot escape the consequence, of the source from which he acquired the same. It would be unconscionable in the last degree to allow any of the parties in question to profit by a transaction such as the one involved here, or to receive more than they actually paid with interest; and they should be deemed fortunate that a court of equity will even thus far recognize their rights, and afford them relief, in an undertaking of such doubtful and questionable character.

3. Coming to the questions arising on the intervening petitions of the Farmers' Deposit National Bank of Pittsburgh and George C. Sturgiss, we likewise find ourselves unable to concur with the lower court in the view that either the bank or Sturgiss are estopped from appearing, as creditors of the bankrupt company, to assert the debts and enforce the liens set up by their said petition against the Morgantown Tin Plate Company, and the decree dismissing the same should at least have been entered without prejudice, to the end that the bankrupt court in the distribution of the bankrupt's estate could have ascertained and decreed the payment of the said debts in the proper order of their priorities, as will be hereinafter indicated.

It follows from what has been said, and the conclusion of the court upon the three causes heard and submitted together is:

First. That the decree of the Circuit Court in the equity cause appealed from (being No. 780), in so far as it denies to the complainant the Canton Roll & Machine Company, the relief sought, and dismisses its bill, should be reversed at the cost of the defendant the Morgantown Tin Plate Company, which should include as well the costs in this as in the lower court; and that the assignees aforesaid of said complainant should be decreed the amount of its claim, with interest, as a lien against the assets of the bankrupt company, ahead of the bondholders under the general mortgage executed by the company, said lien to be so recognized and enforced in the bankruptcy case in the distribution of the bankrupt's assets; and that said decree should be also reversed in so far as it dismisses unconditionally, instead of without prejudice, the bill and intervening petitions seeking to contest the sale of the bonds of the bankrupt company, deposited as collateral security, and claimed to have been acquired by innocent holders for value, as well as because of the like dismissal of the joint petitions of the Farmers' Deposit National Bank of Pittsburgh and George C. Sturgiss, setting up certain debts against the bankrupt company. Said cause should be retained on the docket until the final distribution of the bankrupt's estate in the bankruptcy proceedings, to the end that the testimony already taken in the equity cause, when needed, may be used in consideration of any particular claim in the bankruptcy case.

Second. That the decree of the District Court appealed from in the

bankruptcy case (being No. 781) should be modified so as to award to the appellee Frank J. Logan the sum of \$22,500, with interest at 6 per centum per annum from the 1st day of January, 1903, instead of \$100,000, with interest from said date, and that, as modified, said decree should be affirmed with costs to the appellants in said bankruptcy appeal, against the appellee Frank J. Logan, they having substantially prevailed; and that in said bankruptcy case the bankrupt's estate should be duly administered, determining the order of priority of debts as herein provided, that is to say:

(1) Paying to the Canton Roll & Machine Company the amount of its claim, with interest and costs; the costs incurred in the equity cause by the complainant and the bankrupt's trustee, together with the proper costs of administration of the bankrupt's estate, and any unpaid labor, mechanics' and supply claims.

(2) The amount due on the mortgage bonds held by George C. Sturgiss and Frank J. Logan, respectively.

(3) The amount of the claim of the Hooven-Rentschler Company for \$13,868.08, with interest, being for the purchase price of certain personal property acquired by the bankrupt company, and sold by the court herein, and for which there was a reservation of title in the vendor, though no lien therefor recorded.

(4) To the general creditors of the bankrupt's estate.

(5) The residue to the stockholders of the bankrupt.

Third. That the petition to superintend and revise in matter of law the decree of the District Court in favor of Frank J. Logan (being No. 762) be dismissed at the cost of the petitioners, the Farmers' Deposit National Bank of Pittsburgh, Pa., and George C. Sturgiss.

And these causes are respectively remanded to the proper lower courts, with directions to proceed therein in accordance with the views herein expressed.

In re CAN PON et al.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1909.)

No. 1,625.

1. COURTS (§ 405*) — JURISDICTION OF CIRCUIT COURTS OF APPEALS—CASES INVOLVING CONSTITUTIONAL QUESTIONS.

The fact that constitutional questions were involved in a case in a Circuit or District Court does not deprive the Circuit Court of Appeals of jurisdiction to entertain an appeal therein, where other questions also were involved and determined.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1099; Dec. Dig. § 405.*]

2. CONSTITUTIONAL LAW (§ 318*) — DUE PROCESS OF LAW—CHINESE EXCLUSION ACTS—HEARING OF APPLICANT CLAIMING CITIZENSHIP.

An applicant for entry into the United States of Chinese descent, but claiming to be a citizen thereof, is not deprived of his liberty without due process of law by reason of his detention by the immigration officers, if he is given a hearing as to his rights by the appropriate officers of the department. Such hearing, however, must be granted and conducted in good faith, and the officers must take the testimony of such witnesses as may be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suggested by the applicant if pertinent, although they are not required to permit him to be present in person or by counsel or to be informed of the nature of the testimony.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

3. **HABEAS CORPUS (§ 23*)—GROUNDS FOR RELIEF—CHINESE EXCLUSION ACTS—DENIAL OF FAIR HEARING TO APPLICANT FOR ADMISSION.**

Where an applicant for entry into the United States of Chinese descent, but claiming to be a native-born citizen, was denied the right of entry and detained for deportation by the immigration officers, and took an appeal to the Secretary of Commerce and Labor, the failure of such officers, through inadvertence or otherwise, to include in the record testimony taken on the hearing, and which bore upon the question of citizenship, was a substantial denial of the right of appeal given to the applicant by the statute, and entitles him to maintain habeas corpus proceedings, in which he may have a fair hearing on his right to enter and to be discharged from detention.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 23.*]

4. **HABEAS CORPUS (§ 113*)—HEARING ON APPEAL—QUESTIONS OF FACT.**

On an appeal in a habeas corpus proceeding in a federal court, all questions of fact upon the evidence are open to consideration, and the findings of the court below are not conclusive upon the appellate court, but they should not be set aside unless the court is convinced that they are erroneous.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114; Dec. Dig. § 113.*]

Morrow, Circuit Judge, dissenting.

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

For opinion below, see 161 Fed. 618.

Look Wing, the father of the petitioner presented to the court below a petition for a writ of habeas corpus, alleging that in the month of August, 1892, in the city of Seattle, state of Washington, Can Pon was born of Chinese parents who then resided and were permanently domiciled in said city; that in the year 1899 he, with his parents, departed from the United States and went to the empire of China, where he remained until October, 1907; that he then returned to the United States and applied for admission at the port of Sumas, in the state of Washington; that upon his arrival he was placed in confinement by Harry Edsell, the Chinese inspector in charge at the port of Sumas, and was not permitted to communicate with his counsel or friends, but was subjected to a rigid and severe examination, at which no one but the inspector and his deputies was permitted to be present. The petition sets forth the proceedings taken with respect to the application of Can Pon for admission into the United States, the taking of testimony in relation thereto while he was detained at the port of Sumas, where it was impossible for him to see or hear any of the witnesses produced against him, the action of the inspector in charge in preventing him from procuring witnesses in his own behalf to prove his identity, denying him the right to return, and ordering his deportation to the empire of China, and the appeal of Can Pon to the Department of Commerce and Labor. The petition alleges that prior to taking said appeal neither the said Can Pon nor his counsel or friends were permitted in any way to examine or inspect the evidence produced on behalf of the government; that during the examination and investigation the inspector in charge obtained certain testimony exceptionally favorable to the said Can Pon, but neglected to submit the same to the Secretary of the Department of Commerce and Labor on the appeal, and that said testimony was not before the Secretary when said appeal was decided, and was never presented to the Department of Commerce

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Reg'r Indexes

and Labor on the appeal; that the Secretary of Commerce and Labor affirmed the decision of the inspector, and ordered the deportation of Can Pon. The petition alleges that the inspector, in rendering his decision, and the Secretary of Commerce and Labor, in affirming the same, acted arbitrarily, without any evidence to support their decision, and that by reason of prejudice and secret communications they grossly abused their discretion, and that by said decisions Can Pon has been deprived of his rights and liberty as a citizen of the United States, and has been ordered to be deported from his native land, without just cause or due process of law. The petition refers to rules 5, 6, 12, and 13 promulgated by the Secretary of the Department of Commerce and Labor, under which the rights of Can Pon were adjudicated, and alleges that those rules do not and cannot apply to a citizen of the United States; that they are arbitrary, inconsistent, and void under the fifth amendment to the Constitution of the United States, in that they deprive a citizen of the United States of his rights, liberty, and property without due process of law; that in detaining, confining, and restraining said Can Pon the inspector and the Secretary of Commerce and Labor acted arbitrarily, and contrary to law and the Constitution of the United States, and without jurisdiction, and that Can Pon is imprisoned and about to be deported without due process of law. Upon this petition the Judge of the District Court issued a writ of habeas corpus, and upon the return to the writ referred the case to a commissioner to take testimony. Upon the testimony so taken the court found that there was an investigation had by the inspector, but that it took place and was carried on in the city of Seattle, many miles distant from the port of Sumas; that neither the applicant nor his counsel was permitted to be present during such investigation, nor permitted to know or inspect the evidence or information gathered by the agents of the inspector until after the rejection of the said applicant; that no opportunity was afforded or given to the applicant or his counsel to be present at the examination of witnesses, nor were they permitted to examine the witnesses, nor were they given an opportunity to refute or explain any statements that may have been obtained against said applicant; that, in taking the testimony and examining the applicant's right to enter the United States, the officers acted in a partial and arbitrary manner, and abused the discretion reposed in them by law, and obtained testimony in a manner inconsistent with a fair judicial investigation; that testimony favorable to the applicant was taken during the course of the investigation, but was by the inspector inadvertently withheld from the record on the appeal, and the applicant was denied the benefit thereof on the appeal; that the Secretary of the Department of Commerce and Labor did not at all consider the appeal, but that the Acting Secretary of the department, who heard and dismissed the appeal, was the same person who as solicitor for the same department recommended the dismissal; that the appeal was not considered on its merits, nor was the ruling of the inspector in charge affirmed; that the appeal was dismissed without consideration upon its merits. The court further found upon the evidence that Can Pon was born in Seattle in the year 1892, and that he was entitled to enjoy liberty in his own country, and ordered that he be discharged from custody.

Elmer E. Todd, U. S. Atty., and F. G. Dorety, Asst. U. S. Atty., for appellants.

J. M. Hammond and Frank E. Hammond, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is suggested that this court is without jurisdiction of the appeal, for the reason that the case presents questions of the application of the Constitution of the United States. We find no ground for so holding. If the case as brought to this court presented constitutional questions only, the appellate court jurisdiction of the Supreme Court would, of course, be exclusive. It is doubtful whether the appeal does involve the application of the Constitution. No such question is suggested in

the assignment of error or in the brief of either of the parties before this court. It is true that the petition alleges that certain rules promulgated by the Secretary of the Department of Commerce and Labor are unconstitutional, but those rules have been before the Supreme Court and have been sustained in *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, and *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. But conceding that constitutional questions are presented in the record, it is clear that the appeal brings before us other questions not involving the application of the Constitution, for the appellant complains of error in the court below, first, in holding that the appellee was denied a fair opportunity to prove his citizenship, and, second, in finding upon the evidence in the record that the appellee was born within the United States and is a citizen thereof. The presence of such other questions in the record gives this court appellate jurisdiction. The cases of *Dimmick v. Tompkins*, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110, and *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, which are referred to as denying our jurisdiction, go no farther on this point than to sustain the proposition that the appeal in such a case as this may, at the election of the appellant, be taken directly to the Supreme Court instead of to the Circuit Court of Appeals. In *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397-407, 24 Sup. Ct. 376, 378, 48 L. Ed. 496, the court said:

"Was the judgment of the Circuit Court subject to review only by this court, or was it permissible for the plaintiff to take it to the Circuit Court of Appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the Circuit Court. *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290-295, 22 Sup. Ct. 452, 46 L. Ed. 546. But the case distinctly presented other questions which involved simply the construction of the act, and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the act of 1891 (Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549]), and, consequently, could not have come here directly from the Circuit Court. As, then, the case made by the plaintiff involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court, although, if the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record."

See, also, *Harris v. Rosenberger*, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762, and *Hooper v. Rimmel* (C. C. A.) 165 Fed. 336. The case of *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, was a case which involved constitutional as well as other questions. Appeal had been taken to the Circuit Court of Appeals. From the decision of that court the case was taken by certiorari to the Supreme Court. In that court the contention was made that the Circuit Court of Appeals had no jurisdiction of the appeal, but the Supreme Court sustained the jurisdiction. Such, also, is the effect of *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct.

644, 49 L. Ed. 1040, a case which went to the Supreme Court on certificate from the Circuit Court of Appeals.

In approaching the question whether upon the record in this case the applicant for admission to the United States was denied such a hearing as the statute contemplates, we must find our guiding principles in the construction which the Supreme Court has placed upon the law in the *Ju Toy* Case and in the *Chin Yow* Case. In the *Ju Toy* Case it was ruled that in such a case as this due process of law does not require a judicial trial. In that connection the court expressly approved the doctrine of *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, in which it was said that "the decisions of executive and administrative officers acting within the powers expressly conferred by Congress are due process of law." In the *Chin Yow* Case the doctrine of the *Ju Toy* decision was modified, and it was held that habeas corpus might properly issue on behalf of a Chinese claiming to be a citizen of the United States, upon a petition showing that he was prevented by the officials of the Commissioner of Immigration from obtaining the testimony of certain designated witnesses, and allegations setting forth such facts were held to import that the petitioner arbitrarily was denied such a hearing and such an opportunity to prove his right to enter the country as the statute meant that he should have. In brief, it is the doctrine of these two decisions that an applicant for admission to the United States, detained upon the border thereof by the officials of the Department of Commerce and Labor, is not deprived of his liberty without due process of law if his rights are determined without a judicial trial, and that the decision of the officers is due process of law, with this limitation, that such officers must grant a hearing in good faith, something more than the semblance of a hearing, and must take the testimony pertinent to the questions involved of such witnesses as may be suggested by the applicant. This does not mean, and the decisions cannot be construed as holding, that the applicant is entitled of right to be present in person or by counsel at the taking of the testimony, or to be informed of the nature thereof, while it is being taken. In this respect we do not find that the investigation and proceedings before the officers at Sumas and at Seattle in the present case were conducted in such a manner as to deprive the applicant of due process of law. Nor, in the light of the record, are we able to assent to the conclusion reached by the trial court that the officers who conducted the examinations acted in a partial or arbitrary manner, or abused the discretion reposed in them, or acted upon improper testimony, or failed to conduct the investigation according to law and the rules of the department, or that the applicant was denied a fair opportunity to produce his testimony. It is obvious that he, coming to the United States at the age of 15 years, after having lived in China since his early boyhood, could have no personal knowledge of the testimony that might or ought to be adduced in his favor. His father, Look Wing, represented him, produced witnesses in his behalf, and apparently presented all the testimony that was available. Look Wing, in testifying, had made such inconsistent and contradictory statements as to justify the severity

of the examination to which he was subjected. We do not find in the manner in which the examination was conducted any convincing evidence that the inspector was biased or that he was actuated by any purpose other than an honest desire to sift the evidence and to ascertain whether it was free from the deception and imposition which it is well known is not infrequently attempted in this class of cases.

But the applicant upon his appeal from the decision of the local officer was entitled to the benefit of all the material evidence which was before the inspector. To withhold any thereof, and to exclude it from the record on the appeal, was to deny him the right of appeal which the statute gives him. The testimony of a witness which was on the whole favorable to the applicant's contention was by inadvertence omitted from the record on the appeal, and was not considered on the hearing thereof. It makes no difference that such evidence was taken at the instance of the inspector, and that it never came to the attention of the applicant or his counsel; it was a portion of the evidence taken by the inspector as an officer of the government, whose duty it was to act impartially and to ascertain the truth as to the question at issue. A portion of the testimony so omitted was direct evidence to the effect that the applicant was born within the United States. The inspector discredited it, but the applicant was entitled to the benefit of it on the appeal. It is no answer to this to say that portions of the testimony of that witness tended to contradict certain statements of Look Wing. Having been denied the benefit of all the testimony taken upon the question of his right of admission to the United States, the applicant has been deprived of the right of appeal which the statute confers upon him, and he may, therefore, upon habeas corpus, test the legality of his imprisonment. In *re Monaco* (C. C.) 86 Fed. 117; *United States v. Wong Chung* (D. C.) 92 Fed. 141; *United States v. Chin Fee* (D. C.) 94 Fed. 828; *Rodgers v. United States*, 152 Fed. 346, 81 C. C. A. 454; *United States v. Nakashima*, 160 Fed. 842, 87 C. C. A. 646.

The court below, upon the new testimony adduced on the hearing upon the writ, found that the applicant was born in the United States and was a citizen thereof. Upon the appeal all questions of fact upon the evidence are open to consideration, and the findings of the court below are not conclusive upon us, as they would be in actions at law upon a waiver of a jury, or in cases in admiralty. *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914. The finding, however, should not be set aside unless the evidence in the record is such as to convince an appellate court that it was erroneous. *Quock Ting v. United States*, 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501. There are marked contradictions and inconsistencies in the testimony of Look Wing, and we are not impressed with the credibility of the excuse which is made that his memory had been impaired by recent illness. But the finding of the court below was based on the testimony of several witnesses who testified directly to the fact that the applicant was born in the United States, and the court was particularly influenced by the testimony of a white witness who had not testified on the original hearing.

Upon a consideration of the whole of the evidence, we are not convinced that there was error in the finding so made. The judgment, therefore, will be affirmed.

MORROW, Circuit Judge (dissenting). The petition of Look Wing to the District Court alleged that he was the father of Can Pon, and that Can Pon was a native-born citizen of the United States; that he was born in the city of Seattle, in the state of Washington, in the month of August, 1892; that thereafter in the year 1899 the said Can Pon together, with his father, mother, and brother, departed from the United States and went to the empire of China, where the said Can Pon remained until the month of October, 1907; that the said Can Pon then returned to the United States, and applied for admission at the port of Sumas, in the state of Washington; that immediately upon his arrival he was placed in confinement by said Harry Edsell, Chinese inspector in charge at the port of Sumas; that he was not permitted to communicate with his counsel or friends, but was subjected to a rigid and severe examination, at which time no one but the said inspector and his deputies were permitted to be present. The petition recites the proceedings taken with respect to the admission of Can Pon into the United States; the taking of testimony in that behalf at Seattle, while Can Pon was detained at the port of Sumas, many miles distant from the investigation, where it was impossible for him to see or hear any witnesses produced against him; the action of the inspector in charge in preventing Can Pon to procure witnesses in his own behalf and prove his identity; the action of the inspector denying him the right to return, and ordering his deportation to the empire of China; and the taking of an appeal to the Department of Commerce and Labor.

It is alleged that prior to the taking of said appeal neither the said Can Pon, his counsel, nor his friends were permitted in any way to examine or inspect the evidence produced on behalf of the government. It is further alleged that, during the examination and investigation of the right of said Can Pon to enter the United States, the inspector in charge obtained certain testimony exceptionally favorable to the said Can Pon; that the said inspector in charge neglected to submit such testimony to the Secretary of the Department of Commerce and Labor on the appeal taken to said Secretary; that said testimony was not before said Secretary when said appeal was decided, and was never presented to said Department of Commerce and Labor on said appeal. It is alleged that the Secretary of Commerce and Labor affirmed the decision of the inspector and ordered the deportation of Can Pon. It is alleged that, in rendering the said decision by the said inspector in charge and its affirmance by the said Secretary of Commerce and Labor, these officials acted arbitrarily, without any evidence to support their decision, and by reason of prejudice and secret communications grossly abused their discretion; that by the said decision of the Secretary of Commerce and Labor the said Can Pon has been deprived of his rights and liberty as a citizen of the United States, and the inspector in charge and the said Secretary of the Department of

Commerce and Labor have ordered his deportation from his native land without just cause or due process of law.

Certain rules of procedure, established by the Secretary of the Department of Commerce and Labor, under which the rights of Can Pon, alleged citizen of the United States, were adjudicated, are set forth in the petition. These rules are numbered 5, 6, 12, and 13, and it is alleged that these rules do not and cannot apply to a citizen of the United States; that they are arbitrary, unconstitutional, and void under the fifth amendment of the Constitution as applied to the said Can Pon, in that they deprive a citizen of the United States of his rights, liberty, and property without due process of law. It is further alleged that in detaining, confining, and restraining the said Can Pon the said inspector and the said Secretary are acting arbitrarily, contrary to the law and the Constitution of the United States, and without jurisdiction, for the reason that the said Can Pon is a citizen of the United States of America, and is now imprisoned and about to be deported without due process of law. These allegations are supported by a statement in detail of the proceedings before the inspector, before the Department of Commerce and Labor, and by affidavit. Upon this verified petition the Judge of the District Court issued a writ of habeas corpus, and upon the return of the writ referred the matter to a commissioner of the court to take testimony. The testimony being taken, the matter was submitted to the court for decision.

The court found as facts from the testimony that there was an investigation had by the inspector upon application of Can Pon for admission to the United States at the port of Sumas, but this investigation took place and was carried on in the city of Seattle, many miles distant from Sumas, where the applicant was confined; that neither the applicant nor his counsel were permitted to be present during such investigation, nor were they or any of them permitted to know of or inspect the evidence or information gathered by the agents of the said inspector until after the rejection of the said Can Pon; that no opportunity was afforded or given to the petitioner or his counsel to be present at the examination of witnesses obtained by the said inspector against the applicant, nor were they permitted to examine the witnesses, nor were they given an opportunity to refute or explain any statements that may have been obtained against the said Can Pon; that the examination of the said Can Pon was conducted and the testimony for the purpose of ascertaining the applicant's right to enter the United States was taken, and the officers intrusted with the duties thereto acted in a partial and arbitrary manner, and in abuse of the discretion reposed in them by law, and obtained said testimony in a manner inconsistent with a fair judicial investigation, and said investigation was not conducted according to law or the rules governing such investigations, and wholly in violation thereof; that testimony favorable to the applicant taken during the course of the investigation was by the inspector inadvertently withheld from the record on appeal, and the applicant was denied the benefit thereof before the Secretary of the Department of Commerce and Labor in determining said appeal; that the Secretary of the Department of Commerce and Labor, to whom by law appeals are

allowed in this class of cases, did not at all consider this case, but that the Acting Secretary of the Department of Commerce and Labor, who dismissed the appeal, was the same person who, as solicitor for the same department, recommended the dismissal; that the said appeal was not considered upon its merits, nor the ruling of the inspector in charge affirmed, but was dismissed without consideration upon its merits. With respect to this finding the court says in its opinion :

"The statutes cannot be so construed or applied as to deprive citizens of their birthright, and the power of the judicial branch of the government to relieve against oppression amounting to deprivation of liberty cannot be restricted to any extent greater than is necessary for the exercise of the functions which naturally and properly pertain to the executive branch. Laws which confer judicial discretion upon administrative officers must be construed with a degree of strictness requisite to make them consonant with the spirit of the fundamental doctrines of the Constitution. Having this principle in mind, I hold that as applied to a case involving a question as to the right of an individual, claiming to be a citizen, to enter the United States, the law which gives the right of appeal to the head of an executive department from an adverse decision by a subordinate official places a grave responsibility upon an officer of exalted station, requiring him to give personal consideration to the appeal and to render an impartial decision, which is incompatible with a right to delegate his discretionary power."

The court further found that Can Pon was born in the city of Seattle, in the state of Washington, in the year 1892, and the court was of the opinion that he was therefore by force of the fourteenth amendment to the Constitution of the United States a citizen and entitled to enjoy liberty in his own country. Upon the facts thus found, the court discharged Can Pon from custody.

From the facts found by the District Court it appears that the Chinese inspector followed the rules of procedure prescribed by the Secretary of Commerce and Labor in investigating the claim of right asserted by Can Pon to return to the United States, and that the procedure on appeal was in accordance with such rules. The claim is that these rules do not and cannot apply to a citizen of the United States, that they are arbitrary, unconstitutional, and void under the fifth amendment of the Constitution, in that they deprive a citizen of the United States of his rights, liberty, and property without due process of law.

In my opinion, all there is in this case is the question whether the method of procedure followed by the officers was due process of law. With respect to the omission of testimony from the record on appeal to the Secretary of Commerce and Labor referred to in the opinion of the majority of the court, it is sufficient to say that this defect in the procedure was a lack of due process of law, and, by reason of that fact, the omission of the testimony became known only by the proceedings in court upon the petition for a writ of habeas corpus. Without such proceeding this testimony might never have come to the knowledge of the petitioner or his attorney. A citizen of the United States returning from a foreign country and claiming the right to come into the United States as such citizen may never know under this procedure the testimony produced against him, may never have an opportunity to meet it, or to cross-examine the witness who may testify against him. Is this due process of law? And whether it is

or not is a constitutional question. The question involved in this appeal is therefore, in my opinion, a single constitutional question, the determination of which, under the provisions of section 5 of the act of March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 549), establishing the Circuit Courts of Appeals, is vested in the Supreme Court of the United States. *Craemer v. Washington State*, 168 U. S. 124, 127, 18 Sup. Ct. 1, 42 L. Ed. 407; *Dimmick v. Tompkins*, 194 U. S. 540, 546, 24 Sup. Ct. 780, 48 L. Ed. 1110; *Chin Yow v. United States*, 208 U. S. 8, 10, 28 Sup. Ct. 201, 52 L. Ed. 369.

In my opinion, the appeal should be dismissed.

In re TANG TUN et ux.

In re GANG GONG.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1909.)

No. 1,633.

HABEAS CORPUS (§ 23*)—CHINESE EXCLUSION ACTS—REVIEW OF ORDERS OF DEPORTATION—JURISDICTION OF COURTS.

Where a person of Chinese descent asks admission to the United States upon the ground that he is a native-born citizen thereof, and the lawfully designated executive officers find that he is not, such action should be treated by the courts as having been by a competent tribunal, with due process of law, and as final and conclusive, in the absence of a showing that there was abuse of discretion on the part of such executive officers; and, unless such abuse of discretion is shown, a court cannot entertain habeas corpus proceedings based solely on the ground of applicant's alleged citizenship.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 23.*]

Morrow, Circuit Judge, dissents on the ground that the question involved in the case is a constitutional one, and the court was therefore without jurisdiction of the appeal.

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

For opinion below, see 161 Fed. 618.

The appellees, who are Chinese persons, were denied admission into the United States after investigation by the inspector in charge at the port of Sumas, in the state of Washington, and were by him ordered returned to China, whence they came. An appeal from the inspector's decision was taken to the Secretary of Commerce and Labor, and by that officer affirmed. While detained at Sumas in pursuance of the order of deportation, the appellees, through one Woo Gen, filed in the court below a petition praying for a writ of habeas corpus, in which petition it was, among other things, alleged that Tang Tun was born in the year 1879 at Seattle, in the then territory of Washington, of Chinese parents who then resided and were permanently domiciled in that city; that in the year 1884 he departed, with his parents, for the empire of China, and remained there 15 years; that in 1897 he returned to the United States, and, after examination, was admitted thereto at the port of Port Townsend, state of Washington, by J. C. Saunders, then collector of customs there; that after being so admitted he entered the employment of the mercantile firm of Wah Chong Company, of the city of Seattle, and remained in such employment as a clerk and general assistant until 1903, when he acquired an interest in that firm, which he has ever since retained and now owns; that in September,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1905, he again returned to China for the purpose of getting married, and during that visit was in fact married, in accordance with the laws of China and the consular requirements of the United States, to the appellee Leung Kum Wui; that in June, 1906, he again returned to the United States and sought entry for himself and wife at the port of Sumas, state of Washington, which application was refused by the inspector; that thereafter an appeal was prosecuted from the said order of rejection to the Secretary of Commerce and Labor, and such proceedings were had thereon that the said order was in all things affirmed, in consequence of which the appellees were held by the said inspector at Sumas for deportation to China.

The petition for the writ further alleged, in effect: That the examination of the witnesses, designated by the petitioner as persons able to identify the appellee Tang Tun as a native-born citizen of the United States, was conducted by the inspector during his absence, "so as to prevent said witnesses from completely and accurately identifying your petitioner as the person who had been born and acquired a permanent residence in the United States, and was further conducted by said inspector in such a manner as to prevent said witnesses from testifying as to the facts within their own knowledge, and said inspector failed and neglected to take in the proper manner, or at all, the testimony of the witnesses designated by your petitioner. That said inspector in charge, in arriving at the conclusions expressed in said order rejecting the application for admission of your petitioners, used and gave credence to, and placed reliance upon, testimony of witnesses who were not sworn before giving testimony. That said inspector in charge, in order to reach the conclusion that your petitioners were not entitled to entry, had recourse to and made use of secret documents, papers, and files which were not made a part of the record when submitted to the applicants for their examination, or to their counsel, and which were not, and could not be, made a part of the record sent up on appeal to the Secretary of Commerce and Labor, but after being used by said inspector as aforesaid were secreted by him so as to prevent the fact of their illegal use being brought to the attention of the Secretary of Commerce and Labor on appeal. That, in conducting the inquiry into the status of these applicants, said inspector abused the discretion reposed in him by the laws of Congress and the regulations of the Department of Commerce and Labor, in that he refused to take in proper or legal manner, or at all, testimony of witnesses designated by these applicants, and in secretly making use of papers and documents outside the record, and disconnected therewith, and which were fictitious and false, and known to be such by said inspector at the time he had recourse to them. That for the purpose of influencing and prejudicing the mind of the Secretary of Commerce and Labor, and securing an affirmation of the order of rejection, said inspector in charge, Edsell, after the transmission of the record on appeal, privately communicated with him the substance of the unsworn testimony used by him as aforesaid, and the documents, papers, and records hereinabove referred to, and by reason of such communication the said Secretary affirmed the order rejecting the application of Tang Tun and Leung Kum Wui for admission, and thereby abused the discretion and authority vested in him by law and the regulations of his department. That there are a number of well-known and reputable people in the city of Seattle who are well acquainted with the applicant, Tang Tun, and with the fact that he is a native-born citizen of the United States, and who, if they had been given an opportunity, would so testify, and on a further, fair, and impartial hearing by the inspector in charge would testify not only that said applicant was born in this country of parents then permanently domiciled here, but also that he was engaged in the city of Seattle for a number of years in mercantile pursuits, and while so engaged, acquired an interest in the mercantile firm of Wah Chong Company."

The court below awarded a writ of habeas corpus, and the matter, subsequently coming on for hearing before the court, was submitted upon this written stipulation of the respective parties:

"That the record herewith submitted, to wit: The record in the appeal case of Tang Tun and Leung Kum Wui, from the files of the Bureau of Immigration and Naturalization of the Department of Commerce and Labor of the United States, certified to be such by F. P. Sargent, Commissioner General of

Immigration, together with exhibits numbered 1 and 2, 3, 4, 5, 6, none of which were shown to applicant or his counsel and have never been exhibited to applicant or counsel, and the identification papers of the alleged wife, Leung Kum Wui, and the papers setting forth the marriage of the two applicants, is the original record of the hearing upon the application of the said Tang Tun and Leung Kum Wui to enter the United States as a native-born citizen and wife, and the appeal thereon; that attached to said papers is a copy of a telegram from the Department of Commerce and Labor at Washington, D. C., to the immigration service at Sumas, Wash., dismissing said appeal, and a letter corroborating said telegram; also a letter from H. Edsell, said inspector, stating that nothing other than the said telegram and letter corroborating same was received from the said Department of Commerce and Labor at Washington, D. C., relative to the dismissal of said appeal; that said record filed herewith, with the said copy of telegram and letters, shows every fact which the parties hereto deem necessary to present to the above-entitled court in the consideration by the said court of the allegations of the abuse of discretion; that the said parties hereto rely wholly upon said record and said telegram and letters referred to for the purposes of determination by the court of the question of abuse of discretion as alleged in said application for a writ of habeas corpus aforesaid, and the order of reference in this case to the United States Commissioner A. C. Bowman is hereby modified in accordance with this stipulation.

"It is further stipulated and agreed that should the above-entitled court, after examining the record filed herewith, find that there has been no abuse of discretion, as set forth in the petition for a writ of habeas corpus in the above-entitled case, that the said writ issued therein shall be dismissed; should the above-entitled court find abuse of discretion as alleged, then testimony in the said case shall be taken as provided for in the general order of reference."

The court below by its judgment discharged the appellees from custody, from which judgment the present appeal comes.

Elmer E. Todd, U. S. Atty., and Charles T. Hutson, Asst. U. S. Atty., for appellant.

Kerr & McCord and J. C. Whitlock, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). In the case of the United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, it was adjudged by the Supreme Court that under the Chinese exclusion and the immigration laws, where a person of Chinese descent asks admission to the United States upon the ground that he is a native-born citizen thereof, and the lawfully designated executive officers find that he is not, such action should be treated by the courts as having been made by a competent tribunal, with due process of law, and as final and conclusive, in the absence of a showing that there was abuse of discretion on the part of such executive officers; and that in habeas corpus proceedings commenced thereafter, and based solely on the ground of the applicant's alleged citizenship, the court should dismiss the writ, and not direct new and further evidence as to the question of citizenship.

In the subsequent case of Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, the same court held, as we understand its opinion, that where such a person is given only a semblance of a hearing by the executive officers, and is by them arbitrarily denied an opportunity to prove his right to enter the country, a court should, by writ of habeas corpus, take jurisdiction of the case, in which event the first question to be determined is, whether the petitioner has in

fact been denied by the executive officers a fair opportunity to present his case; if not, the court can proceed no further. The Supreme Court, in the Chin Yow Case above referred to, further decided that the circumstance that the hearing before the executive officers may have been summary is of no consequence; that a denial of due process of law cannot be established by merely proving that the decision on the hearing that was had before such officers was wrong, and that jurisdiction in the courts can "not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced."

Bearing in mind these rules of law by which we are, of course, controlled, we are to consider the statement embodied in the stipulation upon which the present case was submitted. That statement shows that Tang Tun was examined and testified at great length before the inspector at Sumas on the 23d of June, 1906; that he was re-examined and testified at length before the inspector on the 27th of the same month; that on July 2, 1906, two witnesses—S. F. Coombs and William B. Thompson—were called, sworn, and testified on behalf of the applicant, Tang Tun; that on July 5, 1906, the applicant for admission as a native-born citizen was further examined by the inspector, when he was questioned, and answered as follows:

"Q. Tang Tun, can you explain to me why the records at Port Townsend should show that you were rejected in May, 1897, when you claim that you were admitted in April, 1897? A. I was examined, and Saunders admitted me, but I don't know how he put it on the paper. I don't see how there could be two papers with his signature on, the one admitted and the other rejected. Q. Mr. Coombs and Mr. Thompson have been examined in your case, and their testimony is not satisfactory. Can you furnish any additional testimony as to your nativity? A. I was too small, and only my mother knows it. Q. Don't you know anybody in the United States besides Mr. Coombs and Mr. Thompson who knows the facts concerning your birth? A. Do you want Chinese or white people? Q. I would prefer white people. A. I was too small, and don't know anybody. I might have known some one, but now it has been so long that I don't remember them now. Q. You told me that you believed you once had a sister. Was that sister born before you or after you? A. She was younger. (After a pause) I don't know how it comes, but I think she was older than me. She was born before I was, but I am not sure. Q. How long did she live? A. I don't know. Some one told me, but I don't know myself. Q. Who told you? A. I forget."

It appears that the inspector then rejected the application of Tang Tun, as well as that of his wife, since her claim rested entirely upon that of the husband, in this order:

"The applicant presented at the time of his arrival at this port an identification paper setting forth that he had been admitted at Port Townsend, Washington, on April 20, 1897, as a native-born citizen of the United States. He subsequently secured from Chin Quong, the manager of the Wah Chong Co., of Seattle, Washington, a copy of the identification papers on which the said admission was alleged to have been granted—the said copy bearing the following indorsement over the alleged signature of J. C. Saunders, collector: 'Arrived at Tacoma, Washington, April 10th, '97, on Str. "Tacoma," from China, and admitted April 20/97.' The applicant at first stated that this indorsement had been placed on his paper at the time of his admission, Collector Saunders having written it in his presence and handed the paper back to him. He afterwards testified, however, that he was mistaken in that statement, having re-

called that he did not get the said indorsed paper until some time after his admission, when it was secured for him and given to him in the Wah Chong store by Chin Quong, the manager of the said store, who had arranged for his coming to the United States.

"The records of the Port Townsend office contain the original of the indorsed paper secured by the applicant from the Wah Chong store, and such original bears the following indorsement: 'Rejected May 25/97, J. C. Saunders, Collector.' This indorsement is supported by the other records of the Port Townsend office under case No. 12,343.

"It is a matter of record that another Chinaman and alleged native-born citizen of the United States who was rejected at the same time by the Port Townsend office, having arrived on the same ship with the applicant herein, was subsequently found in the store of the Wah Chong Co., was arrested, and after due hearing of his case before the courts was ordered deported to China, and was so deported. Further, it is a matter of record that a number of other Chinese were arrested at the same time as the deported Chinaman above mentioned, all having been found in the Wah Chong store, and all having been in possession of 'native-born citizen' papers bearing the alleged indorsement of Collector J. C. Saunders. Each was given due hearing before the proper courts, and each was deported to China by order of the court on a finding that the records of the Port Townsend office did not show the landing claimed.

"With a desire to treat the applicant justly, he has been given an opportunity to prove his claim of nativity, but has failed to furnish evidence which under the circumstances would justify his admission as a citizen of the United States.

"There appears in his application intimation that the applicant might make a claim that he had been a domiciled merchant in the United States. His own testimony as to his occupation prior to departure shows that during the three years immediately preceding his departure he was engaged chiefly as the driver of a wagon between the Wah Chong gardens and the wholesale houses of Seattle, delivering vegetables and making his home at the gardens.

"The applicant is therefore denied admission on the grounds:

"First. That his status has already been adjudicated by officers duly charged with the enforcement of the Chinese exclusion laws.

"Second. Though given an opportunity to show that injustice may have been done by the former finding in his case, the applicant has failed to furnish any evidence to support such a conclusion.

"Third. The applicant has not furnished sufficient evidence of any status by which he is entitled to admission to the United States.

H. Edsell,

"Chinese Inspector in Charge."

On the same day the inspector notified Tun in writing of the denial of his application, saying in his letter:

"This decision is not final. If you desire to avail yourself of the right of appeal to the Honorable Secretary of Commerce & Labor at Washington, through an attorney or responsible representative, you may communicate with such representative, or your friends, either by letters or telegrams sent through this office, but your written notice of appeal must be filed within two days. Your signature and acknowledgment of the foregoing is requested."

Within the two days, to wit, July 7th, Tun, through an attorney, took an appeal to the Department at Washington from the decision refusing him admittance to the United States. The subsequent proceedings upon the appeal, disclosed by the record, are too voluminous to set forth in an opinion, but they show that on July 9th the attorney for Tun asked of and obtained from the inspector additional time, extending to July 20th, in which to take additional testimony in behalf of the applicant, and making in his letter this further request:

"That you send me an affidavit made in 1897, on which Tang Tun was admitted into the United States, by J. C. Saunders, Collector of Customs, at

Port Townsend, Washington. It is absolutely necessary that I have that paper in order to intelligently present the facts of the case on the part of Tang Tun. I do not understand that that affidavit belongs to your files in the case, but in the event I am in error, will return the same to you soon as testimony is taken."

This last-mentioned letter was preceded by one from the inspector to the applicant's attorney, in which the inspector said:

"With reference to our telephonic conversation on July 6, 1906, wherein you served upon me a verbal notice of appeal in the cases of Tang Tun and Leung Kum Wui, alleged native-born citizen of Seattle, and wife, respectively, I beg to call your attention to the fact that the written notice which you promised to forward me on Saturday has not yet arrived, nor have I received any formal written request for the additional time which you stated was necessary for the proper presentation of your clients' cases. I desire to give you every opportunity to prove the merit of the cases you represent, but must insist that the routine requirements be observed, as otherwise the records would go to the Department in an incomplete condition. Kindly forward at once the formal notice and request referred to."

On July 11th the inspector at Sumas wrote to the applicant's attorney this letter:

"J. C. Whitlock, Attorney at Law, Seattle, Washington.

"Sir: In compliance with your request over long distance telephone of yesterday morning, I am forwarding to Inspector in Charge Estell, Seattle, the paper on which your client Tang Tun is alleged to have been landed at Port Townsend, Washington, in April, 1897, as a native-born citizen. This action is taken in order that you may exhibit the said paper to a witness in behalf of your client, but you will not be permitted to remove the said paper from the custody of the officers of this Service.

"In preparing your affidavits and other documents incident to prosecution of this appeal, I will appreciate it if you will submit them in duplicate so that one copy may remain on file in this office and the other be forwarded to the Secretary of Commerce and Labor.

"On the strength of your assurance in our telephonic conversation of yesterday morning that you would need until July 20th to complete the showing you desire to make in behalf of your clients, I have granted you until that date to perfect your appeals."

And on the same day the inspector at Sumas wrote to the inspector at Seattle this letter:

"W. B. Estell, Inspector in Charge, Seattle, Washington.

"Sir: I beg to inclose herewith the paper on which Tang Tun, now an appellant at this port from my decision denying him admission to the United States as a native-born citizen of the United States, is alleged to have been admitted to the United States at Port Townsend in April, 1897. This paper is forwarded to your office at the request of the applicant's attorney and on his statement that he desired to exhibit it to a witness in order that the said witness could identify it in some manner. I have advised the said attorney—J. C. Whitlock—that he would not be permitted to remove the said paper from the custody of officers of this Service, but that he would be permitted to see the paper in your presence and to exhibit it to his witness.

"The witness he spoke of over the long-distance telephone yesterday morning was one Walter Bowen, who, I believe, was at one time employed in the office of Collector J. C. Saunders in the capacity of chief clerk, special deputy collector, or some similar position. I anticipate, therefore, that it is the attorney's intention to try by Mr. Bowen to establish the genuineness of Mr. Saunders' signature. If on receipt of Mr. Bowen's testimony or affidavit, I find that my expectation is realized, I will return the papers to you for examination of Mr. Bowen as to the signature of Mr. Saunders on certain other documents in my possession.

"In this connection I beg to acknowledge receipt of your letter of July 9, 1906, No. 2109, advising me that you are endeavoring to locate the affidavit of some white witness as to Attorney Whitlock's connection with alleged 'Saunders' papers. I am glad that you are making careful search, as I believe the said affidavit will prove a valuable exhibit in the government's case."

Additional testimony having been introduced on behalf of the applicant by C. W. Chamberlain, Walter Bowen, S. A. Brinker, J. C. Whitlock, Chin Quong, Robert Fitzhenry, and Walter Burritt, within a further extension of time allowed by the inspection officers, and the whole case, including the additional testimony so taken on behalf of the applicants, together with exhibits numbered 1, 2, 3, 4, 5 and 6, referred to in the aforesaid stipulation of the parties, finally and in due course reached the Department of Commerce and Labor, and was there argued in writing on behalf of the respective parties. In the argument on behalf of the inspector, exhibits 1, 2, 3, 4, 5, and 6 are thus described:

Exhibit 1 contained a photograph of Tang Tun, indorsed across the face thereof, "Arrived at Tacoma, Washington, Apl. 10, '97, on steamer 'Tacoma' from China and admitted Apl. 20, '97. J. C. Saunders, Collector."

Exhibit 2 were the original identification papers from the Port Townsend records presented by Tang Tun at the time of his application for admission in 1897, the same being numbered 12,345, and are the original copy of Exhibit 1, the photograph thereon being made from the same negative, but the indorsement across the face is, "Rejected May 25, '97. J. C. Saunders, Collector."

Exhibit 3 is a typewritten list from the Port Townsend records of the Chinese who arrived on the steamer Tacoma April 10, 1897, the said list having been prepared according to the custom prevailing in the office of Collector Saunders for the purpose of making memoranda as to the examination and disposition of each case, as it was considered by the collector on the ship, on the last page of which list appears, "Tang Tung—son Quong Lee, born, Seattle, rejected."

Exhibit 4 contains the papers of Ah Toye, a Chinese fellow passenger with Tang Tun on the steamer Tacoma, which arrived at Port Townsend April 10, 1897. He was rejected on May 20, 1897, and on June 19, 1902, was admitted, one of his witnesses being Mr. S. F. Coombs, also a witness in the case of Tang Tun.

Exhibit 5 is composed of the papers in the matter of Gin Goon, another fellow passenger of Tang Tun on the steamer Tacoma, arriving at Port Townsend April 10, 1897, and also rejected May 20, 1897. This exhibit also shows that Gin Goon was subsequently and in July, 1903, admitted upon a paper bearing an indorsement similar to that disclosed by Exhibit 1, showing the admission of Gin Goon at the time the records show him to have been rejected.

Exhibit 6 contains the papers in the case of Teft Mun, still another fellow passenger of the appellee Tang Tun on the steamer Tacoma, arriving April 10, 1897. He also was rejected on the same day on which the appellee's rejection is dated, May 25, 1897; nevertheless, on February 22, 1905, he was arrested on the premises of the Wah Chong Company, in Seattle, and presented to the officers a paper bear-

ing the alleged signature of J. C. Saunders, purporting to show his admission in April, 1897.

The foregoing descriptions of Exhibits 1, 2, 3, 4, 5, and 6 are but the statements of their contents in the argument of the inspector, filed with the Secretary of Commerce and Labor.

In the brief of the attorney for the applicants filed with the Secretary of Commerce and Labor, we find the following:

"We find that the inspector in charge at Sumas found it necessary, after delivering what might be termed a lecture to the appellant, apparently to justify himself for this order of rejection, proceeded to set out specific reasons therefor. The first of these reasons, namely, that the status of appellant had already been adjudicated by officials duly charged with the enforcement of the Chinese exclusion law, is rather hard to understand; what he means by it is rather hard to say. In the examination of Mr. Bowen, who was special deputy collector at the port of Port Townsend, under Mr. Saunders, we find the following:

"Q. I will show you a paper, and will ask you if that is his signature—Collector Saunders'—upon which Tang Tun claims he was admitted by Collector Saunders in the year 1897, and will ask you if the signature across the face of it is that of Collector Saunders? A. I don't think there is any doubt about that. Q. Can you say positively that it is his signature? A. Yes, I would swear to it."

"The paper referred to is that presented by Tang Tun, and upon which he claims to have been admitted to the United States by J. C. Saunders, Collector of Customs, in 1897. (This paper shows arrival at Tacoma on April 10, 1897, admitted April 20, 1897).

"There is another paper, however, in the case, which purports to show that the appellant herein arrived, admittedly, some time in the early part of the month of April, 1897, and was deported May 25, 1897. The testimony of Mr. Bowen clearly shows that there was no detention house for the keeping of Chinese, in the district of Puget Sound, at that time; that Collector Saunders used to board the steamers when they arrived at Port Townsend, and journey to Tacoma to the headquarters of the corporation (the N. P. Ry.) at Tacoma, which was the only Oriental line operating directly out of the Puget Sound ports in those days. There being a substantial conflict in the records, we have taken the testimony of Mr. Bowen to endeavor to clear up the discrepancies in these particulars, as he was connected with the Port Townsend office at that time.

"Summing up the entire evidence adduced in this case it would seem to an unbiased mind, all immaterial issues being eliminated, that Tang Tun has assumed the burden of proof in this case, and that the testimony in this case fairly preponderates on the side of the appellant; this being the case, he is certainly entitled to admission as a native-born American citizen. The apparent reason of Inspector Edsell's rejection of this appellant, and the cause of his making his general and special findings of fact, is the fact, though the officer is unconscious of it, that his mind seems to be poisoned with an animus directed at Chin Quong, manager of the Wah Chong Co. We do not deny that the testimony given by appellant, and that given by Chin Quong, differs slightly in some particulars, still, Honorable Secretary, you will agree with us when we say that oftentimes witnesses who are entirely honest in their statements make numerous errors as to what occurred at a certain time and place several years removed, and matters which at the time of their occurrence were not considered particularly significant. The inspector in charge at Sumas, on the contrary, seems to hold the contra view, thinking it is necessary for these witnesses to corroborate each other in every small detail. It would seem to any person who is familiar with the practical methods employed in the enforcement of the Chinese exclusion law here, that owing to the fact that Seattle has a very small Chinatown, Tang Tun, if he had made a surreptitious entry into the United States, would have fallen in the hands of the ever vigilant inspectors, and been promptly deported. On the contrary, it appears from the record and the testimony that Tang Tun landed here in April, 1897, and

remained here domiciled in the city of Seattle all of the time up to the month of September or October, 1905, when he left the United States of his own volition for a visit to the empire of China.

"After looking this case over thoroughly, and considering it from all standpoints, it is perfectly plain that the more likely side of the testimony is that given by the appellant and his witnesses. It therefore follows that error prejudicial to the rights of this appellant has been committed, and that the order of rejection and deportation made and entered in this case July 5, 1906, be reversed, vacated, and held for naught, and that Tang Tun be permitted to enter the United States, and again enjoy the inestimable heritage which is the right of every freeborn American.

"I wish now, very briefly, to consider the case of Leung Kum Wui, wife of appellant herein. I realize of course at the outset that this appeal will be predicated entirely upon the outcome of the appeal of Tang Tun, her husband, as she has no rights which do not come from him, and I claim none for her."

We have made the foregoing references to the proceedings before the executive officers in order to show that the hearing before them was neither summary nor arbitrary, and that, so far from being a mere semblance of a hearing, it was a protracted one, based on repeated extensions of time requested by the applicants, and on a very considerable quantity of evidence introduced by each side to the controversy. Under such circumstances we do not understand, in view of the law as declared by the Supreme Court in the cases hereinbefore referred to, that any court is authorized to review the action of the Department of Commerce and Labor in the matter of admitting or weighing evidence, or to consider whether the conclusions drawn by its officers were right or wrong.

The judgment of the court below is reversed and the case remanded, with directions to dismiss the proceedings.

MORROW, Circuit Judge (dissenting). In my opinion the question in this case is a constitutional question, and for the reason stated in the case of *In re Can Pon* (No. 1,625) 168 Fed. 479, I think the appeal should be dismissed.

MOORE et al. v. SECURITY TRUST & LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1909.)

No. 2,793.

1. INSURANCE (§ 85*)—CONTRACT OF AGENCY NOT BROKEN BY REINSURANCE AND ABANDONMENT OF BUSINESS.

A contract by a life insurance company, whereby it turns over its property and business to a rival company and incapacitates itself to continue its insurance business, is not a breach of a contract of appointment of agents which contains no agreement fixing the time such appointment shall continue.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 85.*]

2. INSURANCE (§ 85*)—CONTRACTS WITH AGENTS FOR COMMISSIONS ON FUTURE RENEWAL PREMIUMS NOT BROKEN BY REINSURANCE AND ABANDONMENT OF BUSINESS.

A contract by a life insurance company whereby, at or after the lawful conclusion of the term of the agency, it turns over to a rival company all its business and property and disables itself from collecting future re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

newal premiums, does not constitute an anticipatory breach of an agreement with its agents that after the termination of the agency commissions will be paid them on such premiums as collected by the company, which will sustain an action for the present worth of the commissions before the renewal premiums have become due or been collected.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 85.*]

8. PRINCIPAL AND AGENT (§ 33*) — AGENCY PRESUMED TO BE AT WILL UNLESS OTHERWISE STIPULATED.

The general rule is that a principal may revoke and an agent may renounce the appointment of the latter, in the absence of an agreement that it shall continue for a specific term.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 54; Dec. Dig. § 33.*]

4. INSURANCE (§ 85*) — CONTRACTS OF AGENCY—RIGHT OF COMPANY TO TERMINATE ITS BUSINESS IMPLIEDLY RESERVED IN.

The right of an insurance company to manage its business, to determine the term of its continuance, whether or not, and when, if at all, it will reinsure its risks, turn over its business to another company, and cease to carry it on, is vital to its existence, success, and the due exercise of its corporate power, and it is impliedly reserved in contracts of agency which contain no agreements to the contrary.

The exercise of this right and the consequent termination of the agency is no breach of a contract of agency which contains no agreement forbidding or limiting the exercise of this right.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 85.*]

5. INSURANCE (§ 85*)—PRESUMPTION OF RESERVATION SUPERIOR TO IMPLICATION FROM SPECIFICATION OF CAUSES OF TERMINATION.

The presumption of the reservation of this right is superior to the implication from the existence of clauses in an agency contract, unnecessary if the agency is at will, specifying causes for its termination.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 85.*]

6. CONTRACTS (§ 329*) — ANTICIPATORY BREACH—INAPPLICABLE TO AGREEMENTS TO PAY MONEY EXECUTED BY THE PARTIES OF ONE PART.

The rule that where one party to an agreement disables himself from its performance, or gives notice that he will not fulfill it, the other may maintain an action for damages for the anticipatory breach before the time of performance arrives, applies to mutually executory contracts.

It does not govern actions on bonds, notes, or upon contracts for the payment of money at times specified, which are completely executed by the parties of one part.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1511; Dec. Dig. § 329.*]

Van Devanter, Circuit Judge, dissenting in part.

(Syllabus by the Court.)

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

Robert Stone (Troutman & Stone and D. R. Hite, on the brief), for plaintiffs in error.

Frank Ewing, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

SANBORN, Circuit Judge. Is an agreement by a life insurance company, whereby it turns over all its business and assets to a rival company and incapacitates itself to continue its insurance business,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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a breach of a contract of appointment of agents which contains no stipulation fixing the time the appointment shall continue? Does a contract by a life insurance company whereby, at or after the lawful conclusion of the term of the agency, it turns over to a rival company all its business and assets and disables itself from collecting future renewal premiums upon its policies, constitute an anticipatory breach of an agreement with its agents that after the termination of their agency commissions will be paid on such future premiums as collected by the company, which will sustain an action for the present worth of the future commissions before the renewal premiums have become due or been collected? These are the questions which are presented in this case by a demurrer to the complaint, which the court below sustained. The contract between the defendant insurance company and its agents, the plaintiffs, was in writing, and it took effect on May 15, 1904. By the terms of that agreement the insurance company appointed the plaintiffs its agents in the state of Kansas and promised to pay them certain commissions during the continuance of their agency, and that after the termination of the contract a commission of $7\frac{1}{2}$ per cent. would be paid to them on renewal premiums upon the insurance which they obtained as these premiums were collected by the company. The contract provided that the agreement of agency, with the exception of the stipulation that the commission on the future renewal premiums should be paid after its termination, should cease if the authority of the company to operate in Kansas terminated, if the agents withheld funds, policies, or receipts of the company 30 days after they should have been transmitted to it, or 30 days after they were demanded by the company, and if either party for just and reasonable cause gave 30 days' notice of its termination. It contained no stipulation that the insurance company would continue the appointment of the agents, or that the plaintiffs would continue to serve as agents, for any length of time. There was an agreement in it that the agents should pay all the expenses of conducting the business transacted under the terms of the contract. In September, 1906, the defendant made a contract with the Pittsburg Life & Trust Company whereby it turned over to that company all its business and property and disabled itself from continuing in the business of life insurance and from collecting the future renewal premiums upon insurance secured by the plaintiffs, which insurance amounted to more than \$1,000,000, and it notified the plaintiffs of this fact and that the contract of agency was terminated. The present worth of the plaintiffs' commission on the future renewal premiums upon this insurance was \$18,792.60, and they had expended \$8,370 in the promotion of the defendant's business during the agency in reliance upon reimbursement from its continuance. Upon these alleged facts the plaintiffs demand judgment for \$27,162.96.

It is a general and indisputable rule of law that the principal may revoke and the agent may renounce the latter's appointment at will and at any time, without committing any breach of the contract of agency and without incurring any liability for damages. There are exceptions to this rule, as where the agent acquired an interest, not

in the fruits or profits of the thing, but in the thing itself which is the subject-matter of the agency. *Hunt v. Rousmanier*, 8 Wheat. 175, 203, 5 L. Ed. 589. But the agents acquired no such interest in this case, and it is useless to consider or discuss this or other exceptions that are equally inapplicable. In view of the general rule, which has been stated, parties who intend that their contracts of agency shall exist for definite times embody in their contracts express provisions that they shall continue for specified terms, and the absence of such a provision in a contract of agency raises a strong presumption that it was an agency at will.

Counsel argue that the provisions of this contract that it should terminate (1) 30 days after the agents failed to transmit due or demanded funds, policies, or receipts, (2) when the authority of the company to operate in Kansas should terminate, and (3) for just and reasonable cause on 30 days' notice, show that the parties intended to agree, and, therefore, did contract by implication, that the contract of agency should be permanent. There is persuasive force in this contention; but there are other considerations not less convincing. The basic rule for the ascertainment of the true meaning of a contract is to examine all its terms in the light of the situation of the parties when it was made, and to deduce from them the true intention of those who signed it. This agreement contained stipulations that the agents "shall devote their time and best energies to the service of said company," and "pay all the expenses of conducting the business transacted under the terms of this contract," but no provision that they shall continue to do so during the term of their natural lives or during any other specified time. Did the plaintiffs intend by that contract to undertake through health and sickness, through profitable and unprofitable business, through fortune and misfortune, to pay the expenses of and to devote all their time and energies to the insurance business of the defendant in Kansas during the term of their natural lives and to subject themselves to damages for a failure to do so? The question is susceptible of but one rational answer. They must have intended to reserve their right, at their own free will and without liability for damages, to renounce this agency whenever the unprofitableness of its business, the superior inducements of other business, or occupation or location, or the health or comfort of themselves or their families, should convince them that it was either their duty, their interest, or their pleasure so to do; and if they had renounced the agency at any time for any of these reasons no court could have sustained a judgment against them for a breach of their contract. Their right thus to renounce was impliedly reserved to them in the contract, and the defendant took the chances of their exercise of it when it made the agreement without any stipulation that they should serve it for a definite time.

The defendant was a corporation empowered by the state to conduct the business of life insurance. It was and is common knowledge, of which the parties to this contract could not have been ignorant, that more than 60 per cent. of the companies that embark in that business fail to find it profitable and in a few years either reinsure their risks

and turn over their business to some other company, or become insolvent and abandon their attempt to insure the lives of their policy holders. The right to determine what risks it should accept and what it should reject, what rates it should charge, in what states it should conduct its business, and in what it should not, how long it should continue to insure lives, in view of its present and probable success or failure, and whether it should continue an unprofitable business to the ultimate loss of itself and its policy holders, or reinsure its risks in some other company and prevent greater loss, and generally to determine and carry into effect the business policy of the company, was vital to the due exercise of its corporate powers, to its continued existence, and to its success. Did the company, in view of this fact, intend by this agreement to deprive itself of this right, or to subject its exercise of it to an agreement to accept such applications for insurance as the plaintiffs directed, for the right to direct the acceptance of any is the right to direct the acceptance of all, to conduct such business in Kansas as the agents demanded, and to continue so to do, and to continue to carry on its general business of life insurance, whether profitable or unprofitable, during the entire term of the lives of the defendants, or during any other specific time? The true answer does not seem to be doubtful. It is obvious, from the nature of the company and the surrounding facts, that it intended to reserve to itself the right at its own free will to determine what applications for insurance it should accept and what it should reject, in what states and on what terms it should conduct its insurance business, what premiums it should charge, how long it should carry on its general business, whether or not, and when, if at all, it should turn over its business to another company, reinsure its risks, and cease to do an insurance business, free from all liability to its agents for damages for so doing. This right and its free exercise were as essential to the due exercise of the corporate powers of the defendant as the right of the plaintiffs to be free from lifelong service to it was to their comfort and prosperity, and nothing less than a clear and unequivocal agreement to surrender this right or limit its exercise could convince of such an intention. There was no such agreement. The implication invoked that the contract was not terminable at will, because it contained clauses, unnecessary if it was so terminable, specifying causes for its termination, is too feeble to withstand the compelling force of the presumption that the plaintiffs could not have intended to surrender control of their own business and services for life, and the defendant could not have intended to surrender its right or to limit the exercise of its right to manage, control, continue, or terminate its business of insurance at will. The existence of this right in the defendant and its free and continuous exercise were implied in this contract of agency, and the plaintiffs took the chances of its exercise when they signed the agreement and entered upon their service under it. *Willcox & Gibbs Sewing Machine Co. v. Ewing*, 141 U. S. 627, 636, 637, 12 Sup. Ct. 94, 35 L. Ed. 882; *In re English & Scottish Marine Ins. Co.*, 5 Ch. App. 737; *Pellet v. Manufacturers' & Merchants' Ins. Co.*, 104 Fed.

502, 509, 511, 43 C. C. A. 669, 676, 678; *Stier v. Imperial Life Ins. Co.* (C. C.) 58 Fed. 843, 845, 846.

Moreover, the cause of the termination of this contract fell within two of the causes for such a termination specified in the agreement. The cause was the transfer of all the defendant's property and of its life insurance business to another company, whereby it became incapacitated from continuing to do the business of life insurance. The right to make such a transfer inhered in the corporate power of the defendant, was not renounced or limited by the agreement of agency, but, as we have seen, was impliedly reserved to the defendant, and the exercise of this right was a just and reasonable cause for the termination of the agency contract. It was also a termination of the authority of the company to operate in the state of Kansas (Gen. St. Kan. 1901, § 3423), and each of these causes was stipulated in the agreement to be good ground for the termination of the contract of agency. The defendant, therefore, committed no breach of this agreement of agency by making a contract with the Pittsburg Company whereby it turned over its business and assets to that insurance company and incapacitated itself from continuing to carry on the business of life insurance, and the first question presented in this case must be answered in the negative.

The defendant agreed that after the termination of the contract the plaintiffs will be paid a renewal commission upon subsequent premiums as collected by said company on insurance in force to their credit. There is no claim that the plaintiffs had not received all the commissions due them upon all renewal premiums that had become due when this action was commenced; but they allege that they would have received \$35,000 in commissions on future premiums if the defendant had not made the contract whereby it turned over its business and property to the Pittsburg Company, that the defendant thereby disabled itself from collecting these future renewal premiums, and they demand as damages the alleged present worth, \$18,792.60, of their future commissions. They found this claim upon the proposition that where one party to a mutually executory contract notifies the other that he will not fulfill it, or puts it out of his power to perform it before the time of performance by him arrives, the opposite party may sue at once for all the damages occasioned by the anticipatory breach; and they cite *Newcomb v. Imperial Life Ins. Co.* (C. C.) 51 Fed. 725, *MacGregor v. Union Life Ins. Co.*, 121 Fed. 493, 57 C. C. A. 613, *Lewis v. Ins. Co.*, 61 Mo. 534, *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423, *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, *Cutter v. Powell*, 2 Smith's Leading Cases, 1212, and *Hochster v. De La Tour*, 2 El. & Bl. 678. This contention rests upon the erroneous assumption that the agency contract contains an express or implied agreement that the defendant will maintain and continue its insurance business and will collect these future renewal premiums, although in the opinion of the company it becomes unwise, unprofitable, or impossible to carry on its business in that way, or at all. But the company made no such agreement. On the other hand, as we

have seen, it reserved to itself under this contract of agency the corporate power and the right to determine its own business policy, and the term of the continuance of its business, whether or not, and when, if at all, it would reinsure its risks, turn over its business to another company, and cease to carry it on, free from any liability to the plaintiffs for damages on account of the exercise of that right, and the plaintiffs took the chances of that exercise when they signed the agreement. The terms of the contract did not provide that the defendant would collect the renewal premiums and pay the plaintiffs 7½ per cent. commission on them, but that this commission "will be paid" on these premiums "as collected by the company." Literally the contract bound the company to pay the commissions on the premiums actually collected by it only, and only when collected; but the rational interpretation of it is that, subject to the company's right to reinsure its risks, to turn over its property, and to discontinue its business at will, the chance of which the plaintiffs took, just as the defendant took the chance of the plaintiffs' renunciation of their agency, it would use reasonable endeavors to collect the premiums, and when collected would pay the commissions on them to the plaintiffs. As, when the defendant made the contract with the Pittsburg Company whereby it turned over its business and property to that corporation and ceased to insure lives, it exercised a right it had reserved under the contract, a right which it had not agreed that it would not exercise, that act merely wrought a disability to collect the premiums which it had reserved the right to create, the chance of the exercise of which the plaintiffs took when they made the agreement, and it constituted no anticipatory breach of its contract to pay the commissions on the future premiums as collected by it. *Pellet v. Manufacturers' & Merchants' Ins. Co.*, 104 Fed. 502, 510, 43 C. C. A. 669, 677; *In re English & Scottish Marine Ins. Co.*, 5 L. R. Ch. App. 737; *Kansas Union Life Ins. Co. v. Burman*, 141 Fed. 835, 849, 73 C. C. A. 69; *Stier v. Imperial Life Ins. Co. (C. C.)* 58 Fed. 843.

The opinions in the cases called to our attention by counsel for plaintiffs do not determine this question otherwise. None of them holds that an insurance company breaks a stipulation to pay a commission on future renewal premiums in a contract of agency at will by agreeing to turn over its property and business to a rival company and discontinuing to write insurance while the opinions of the English Court of Appeals in Chancery and of the Circuit Court of Appeals of the Seventh Circuit and of this court just cited sustain the view which has been expressed. This conclusion is not necessarily inconsistent with the position that, where an insurance company makes an express agreement to employ an agent for a specific term and to pay him commissions during that term upon the business he secures, it breaks the agreement and subjects itself to all the damages which naturally flow from that breach by transferring its property to another and abandoning its business during the agreed term, as in *MacGregor v. Union Life Ins. Co.*, 121 Fed. 493, 495, 498, 57 C. C. A. 613, and *Lewis v. Insurance Co.*, 61 Mo. 534, 539, or radically changes the nature of its business during the term, as in *Newcomb*

v. Imperial Life Ins. Co. (C. C.) 51 Fed. 725, 727, 728, and Id., 62 Fed. 97, 10 C. C. A. 288, because an implication that the company will continue its business for the agreed term of the agency may inhere in such a time contract, while it does not in a contract of agency at will; and so far as the opinions in these cases depart from the view already expressed they are not convincing and they fail to commend themselves to our judgment.

Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423, was a suit in equity by a holder of a life insurance policy against an insurance company which had reinsured its risks and abandoned its business, and the court held that he had the option to accept the reinsurance or to recover the present value of his policy. But the radical differences between a life insurance policy and a contract of agency at will deprive this decision of both authority and persuasive force in the case in hand. The main object of a contract of life insurance is permanence, security, that shall endure, not only during, but after, life. The parties contemplate that the agreement shall continue during the life of the insured, and that the company will perform its part of it after his death, and, therefore, it is necessarily an agreement that the company will maintain its financial standing and property and continue its business until after the death of the policy holder, and a disposition of both property and business by the company in his lifetime is a patent anticipatory breach of the contract. It is not so with a contract of agency at will. Such an agreement is temporary in character, terminable at the will of either party, implies no continuance, and no agreement of the principal corporation that it will continue its business or refrain from disposing of its property after the agency terminates. The other authorities cited do not relate in any way to the question whether or not the reinsurance of risks and abandonment of business by an insurance company constitutes a breach of a stipulation in a contract of agency at will to pay commissions on future premiums after its termination, and the conclusion is that the disability of the company to collect the future premiums and to pay the commission upon them after the agency terminated, wrought by the contract with the Pittsburg Company, whereby it turned over its property and business to that company and discontinued the latter, was one which the defendant reserved the right to create under the agency contract, that the plaintiffs took that contract subject to the reservation of that right, and that the exercise of it constituted no breach of the stipulation of the agreement under consideration.

There is another reason why the creation of this disability does not sustain an action for an anticipatory breach of this stipulation of the contract. It is that the rule that the creation of a disability to perform a contract, or notice that one will not perform it before the time of performance arrives, warrants an immediate action for damages, applies only to actions on contracts that are mutually executory, such as contracts for marriage, for the rendition of services, or for the transportation or the sale and delivery of property, where the covenants of the parties are interdependent and to be simultaneously

performed. Illustrations of the contracts to which this rule applies are a contract of life insurance, where the undertakings of the parties are mutually executory and to be performed from time to time throughout the life of the party (*Lovell v. St. Louis Life Ins. Co.*, supra); a contract for the future services of a courier to be subsequently paid for, where the employer notified the courier that he would not employ him before the time for the rendition of the services arrived (*Hochster v. De La Tour*, 2 El. & Bl. [Q. B.] 678), contracts for the delivery of articles purchased in specific portions at different times, to be paid for as delivered (*Roehm v. Horst*, 178 U. S. 1, 17, 18, 20 Sup. Ct. 780, 44 L. Ed. 953; *Nichols v. Steel Company*, 137 N. Y. 471, 487, 33 N. E. 561), a contract to marry (*Frost v. Knight*, L. R. 7 Ex. 111), and a contract to manufacture articles to be paid for upon delivery (*Danube & Black Sea Co. v. Xenos*, 13 C. B. [N. S.] 825).

But this rule is inapplicable to, and it does not govern, actions upon bonds, notes, and upon other contracts to pay money at times specified, where the party of one part has completely executed the contract and it is executory only upon the part of the other party. No action for damages lies before the time of payment arrives against one who disables himself from paying, or gives notice that he will not pay, his obligations under contracts of this kind. *Roehm v. Horst*, 178 U. S. 1, 17, 18, 20 Sup. Ct. 780, 44 L. Ed. 953; *Nichols v. Steel Company*, 137 N. Y. 471, 487, 33 N. E. 561; *Washington County v. Williams*, 111 Fed. 801, 810, 49 C. C. A. 621, 630. The claim to recover for the breach of the agreement to pay the commissions on the renewal premiums due after the termination of the agency contract is founded on an agreement of the latter class. The plaintiffs have performed their part of the contract of agency, they have completely earned the commissions, the contract is completely executed on their part, nothing remains executory but the agreement of the defendant to pay the commissions when the renewal premiums are collected, and those premiums had not become due or been collected, and the time had not arrived when the commissions were due when this action was brought. The defendant's creation of its disability to collect the premiums and to pay the commission did not make the latter due earlier, and it created no cause of action for their present worth, and this action was prematurely brought.

In *Washington County v. Williams*, 111 Fed. 801, 810, 49 C. C. A. 621, 630, an action was brought upon bonds issued by the county whereby it agreed to pay their principal and interest pro rata with the others of an issue of 150 in number out of a special fund to be created by the levy of an annual tax at a fixed rate upon all the taxable property of the county, and it had disabled itself from paying anything upon these bonds by refusing to make the levy and by denying all liability thereon. The Circuit Court rendered judgment for the amount of the principal and interest, in reliance upon the rule that is invoked in this case; but this court, after a careful review of the authorities, reversed that judgment and held that this doctrine applied to contracts that were mutually executory only, that it would

not sustain an action upon contracts to pay money executory on one part only before the time of payment there specified, notwithstanding the fact that there were preliminary acts to be performed by the obligor, such as the levy of the tax before the time of payment would arrive. The case at bar falls far within the decision of that case, and the second question presented in this case must be answered in the negative.

This case has been considered in the light of the broad, general averments of the complaint that the defendant made such a contract with the Pittsburg Company that it disabled itself from continuing its business and from collecting the future renewal premiums; but no inference should be drawn from the course here pursued to the effect that the court was able to wink so hard as not to see that the contract with the Pittsburg Company was probably the ordinary reinsurance agreement, that the latter company may be liable to pay the plaintiffs their commission upon the renewal premiums it collects as they fall due (*Schrimplin v. Farmers' Life Association*, 123 Iowa, 102, 98 N. W. 613), and that it is not improbable that the reinsurance increased, rather than diminished, the plaintiffs' chance of obtaining their commissions. No opinion is formed or expressed regarding the liability of either of the insurance companies for these commissions when they become due.

The decision of the court in this case is, for the reasons which have now been stated, that the facts alleged in the complaint set forth no cause of action at the time when that pleading was filed; and the judgment below is affirmed.

VAN DEVANTER, Circuit Judge (dissenting). Although concurring in the conclusion that the plaintiffs' agency was terminated lawfully, leaving them without any right of action in respect of the expenditures made in anticipation of its continuance, I am unable to assent to the judgment of affirmance in other respects. It is quite clear, as it seems to me, that the defendant engaged to hold itself in readiness to receive and collect the future renewal premiums upon the insurance solicited and procured by the plaintiffs during the life of their agency, and to pay to them the stipulated commission upon those premiums as collected by it; that by wholly incapacitating itself from receiving or collecting those premiums it unequivocally breached its engagement in that regard; and that that engagement was not an ordinary contract for the payment of money, but was one the breach of which in the way described entitled the plaintiffs, at their election, to maintain a present action to recover their damages. *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *In Re Neff*, 157 Fed. 57, 60, 84 C. C. A. 561, 564; *Northwestern National Life Ins. Co. v. Gray*, 161 Fed. 488, 88 C. C. A. 430. I perceive no reason for believing that the plaintiffs, by reason of having performed their part of the contract, are in a less favorable position than if the contract was still executory as to them. The case of *Washington County v. Williams*, cited in the majority opinion, does no more

than to hold, following the limitation stated in *Roehm v. Horst*, that the rule in respect of the right flowing from an anticipatory breach has no application to money contracts, pure and simple, where one party has fully performed his undertaking, and all that remains for the opposite party to do is to pay a certain sum of money at a certain time or times. This, as it seems to me, is not such a case.

ELLSWORTH v. HUNT.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1908. Rehearing Denied November 24, 1908.)

No 1,441.

1. MASTER AND SERVANT (§ 332*)—INJURIES TO SERVANT—INDEPENDENT CONTRACTOR—QUESTION FOR JURY.

Where plaintiff, a servant of certain machinery movers, was directed by them to assist in moving a heavy motor from defendant's place of business, and he was injured while doing so by the fall of defendant's elevator by which the motor was lowered, evidence held to justify submission to the jury of the question whether plaintiff's employers were engaged to do the work as independent contractors and selected the elevator as their means of doing their own task, or whether defendant was in charge of the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 332.*

Who are independent contractors, see note to *Atlantic Transport Co. v. Coneys*, 28 C. C. A. 392.]

2. NEGLIGENCE (§ 119*)—INJURIES TO SERVANT—ISSUES AND PROOF.

In an action for injuries by the fall of an elevator, plaintiff could not complain of negligence in loading a motor on the elevator at the time of the accident, where the negligence was limited to the elevator cables and appliances being permitted to become weak and unsafe, and in defendant's permitting the motor to be loaded onto the elevator knowing it was not of sufficient strength.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 119.*]

3. NEGLIGENCE (§ 136*)—ELEVATORS—OVERLOADING—QUESTION FOR JURY.

In an action for injuries to plaintiff while assisting in lowering a motor by means of defendant's elevator, evidence held to warrant the submission of the question of defendant's negligence in permitting the elevator to be overloaded to the jury.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.*]

4. MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSONS—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where, in an action for injuries by the fall of an elevator, plaintiff's only allegation of negligence related to the weakness or the insufficiency of the elevator, and defendant claimed that the lowering of a motor in which plaintiff was engaged when injured was the work of plaintiff's employers as independent contractors, and that they selected the elevator as their own means in doing the work, the court erred in charging that if the jury did not find plaintiff's employers were independent contractors, but that plaintiff for the time being became defendant's servant, it was defendant's duty to furnish a reasonably safe working place and reasonably safe appliances, and if he failed to do so, and plaintiff was injured without contributory negligence, he could recover.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 332.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The burden of proving contributory negligence is on the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 226-234; Dec. Dig. § 122.*]

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

William S. Oppenheim, for plaintiff in error.

William E. Griffin, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Hunt recovered judgment against Ellsworth for damages due to personal injuries.

The declaration was in two counts. In the first, plaintiff alleged that defendant operated a factory, in which a freight elevator was used; that defendant had on the third floor a 5000-pound motor which he desired to lower to the ground floor and send away; that plaintiff was in the employ of Mix & Jackson, general teamsters; that Mix & Jackson, at the instance of defendant and for a valuable consideration, sent plaintiff with a heavy wagon to assist in loading and hauling away the motor; that on plaintiff's arrival he was ordered by defendant to go to the third floor and assist defendant in loading the motor onto the elevator, by which defendant intended and attempted to lower the motor to the ground floor; that prior to this time defendant had negligently permitted the cables and other appliances by which the elevator was raised and lowered to become in such an unsafe, weak, and insufficient condition that they were likely to break while the motor was being loaded or lowered on the elevator, all of which the defendant knew, but which plaintiff, through no want of care, did not know; that, while plaintiff was on the elevator assisting in the work in obedience to defendant's orders, the cables and other appliances broke as the direct result of their weak and unsafe condition, whereby plaintiff, without fault on his part, was dropped to the basement and severely injured.

The second count differed from the first only in this: That the negligence alleged consisted of defendant's loading the motor onto an elevator which he knew was not of sufficient strength.

To this declaration defendant pleaded the general issue.

The first assignment presented is that the court erred in refusing to direct the jury to return a verdict in defendant's favor. One ground of this contention is that defendant contracted with Mix & Jackson that they should lower the motor from the third floor; that Mix & Jackson, through plaintiff as their agent, selected the elevator as their means of doing their own task; and that defendant was therefore not answerable to plaintiff for the defective condition or the insufficient capacity of the elevator. Delano, defendant's superintendent, testified that Patterson, his assistant (who was not a witness), telephoned to Mix & Jackson within his hearing as follows:

"This is Edward Ellsworth & Co. We have a motor on the third floor that we want brought down and sent to the Gregory Electric Company. We

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have another motor at the Gregory Electric Company we want you to bring back. We want your machine wagon and a machine mover to do this work."

If it be granted that there was further evidence from which the jury might have found that the message as stated was received by Mix & Jackson and agreed to, that plaintiff was informed that the lowering of the motor was Mix & Jackson's work, and that he selected the elevator in preference to rigging up a block and tackle in the elevator shaft, nevertheless the action of the court was right, for there was evidence to the contrary which properly was submitted to the jury. Jackson testified that he did not know what the arrangement was between his firm and defendant; that the message was received by one of the clerks in the office, and was transmitted by an employé named Weir. Neither the clerk nor Weir stated what the message was as they received it. Weir said that the order from Ellsworth came to the office, was told to him, and by him passed on to the driver (plaintiff). As soon as plaintiff with the wagon reached defendant's factory, defendant's foreman, Pankey (according to plaintiff's version, which is in direct conflict with Pankey's) proceeded with the work of lowering the motor, and all that plaintiff did was to assist and obey Pankey. So the jury may have concluded (and presumably did) that what was done was better evidence of the contract relations than one side of a telephone conversation.

It is further contended that the case should have been taken from the jury because, even if there was evidence that plaintiff, under defendant's contract with Mix & Jackson, was sent to the factory to assist defendant's servants in lowering the motor, then plaintiff became the servant of defendant for that purpose, and therefore should not be heard to complain of the negligent manner in which his fellow servants placed the motor upon the elevator. Independently of the fellow-servant rule, plaintiff should not be heard in this action to complain of negligence in the way the motor was loaded onto the elevator, because such was not the negligence counted on in the declaration. If the undisputed evidence showed that the cause of the injury was, as defendant asserts, the negligent manner in which Pankey and other workmen put the motor upon the elevator, the jury should have been directed to return a verdict for defendant, not because plaintiff and Pankey were fellow servants, but because plaintiff had failed to establish the case which he had caused defendant to be summoned into court to answer. Now, while the testimony of Pankey and others might have warranted the jury in finding that the cause of the injury was the negligent manner of loading, and not the defective condition or inadequate capacity of the elevator, our examination of the bill of exceptions satisfies us that the testimony for plaintiff might justify the inference that the sinking of the elevator below the floor level, whereby the motor, as it was being loaded, toppled over and jarred the elevator, was not due to the carelessness of the men in ordering or doing the work, but was attributable to the elevator's insufficiency of strength to stand in position while receiving the weight of the motor, which was 65 per cent. above the certified capacity of the elevator. In this state of the evidence it would have been error not to submit the case to the jury.

The remaining assignments relate to the giving and refusal of instructions. The pleadings and the evidence, hereinabove stated, show the respective contentions of the parties. Plaintiff asserted that the work of lowering the motor was defendant's, and that the cause of the injury was the unsoundness or insufficiency of the elevator. Defendant said no, the work was Mix & Jackson's; and, at all events, the injury was not caused by the unfitness of the elevator, but by the method of loading. Instructions should be limited, of course, to the issues.

The court charged:

"Assuming you should find the plaintiff became the defendant's servant, still it is the duty of the master—it was the duty of Ellsworth—to furnish a reasonably safe working place, reasonably safe appliances. So, if you find the defendant did not perform his duty in this respect, notwithstanding you may think that Hunt was his servant, and the accident happened by reason of not furnishing a sufficient elevator, and not through the plaintiff's contributory negligence, then you might be authorized to find a verdict for the plaintiff, although you might find he was for the time being working for the defendant; and then further, on the same theory, if you should take the defendant's theory that Hunt was for the time being defendant's servant, still, if you find that the accident was caused by anything that Delano did, or anything that Pankey did with Delano's knowledge, express or implied, if those acts of Delano or Pankey were negligent, still you might find that plaintiff is entitled to recover if he himself was not guilty of contributory negligence."

At the conclusion of the charge, defendant excepted—

"to that portion of the instructions which stated that if this accident happened because of the obeying by plaintiff of any instructions of Delano or Pankey, then defendant would be liable."

Plaintiff urges that this exception is not available because it fails to identify with sufficient accuracy the part of the charge that was considered erroneous. But in a colloquy concerning this exception, the trial judge stated that he understood that exception was being taken to the "and then further" part of the foregoing quotation from the charge. That the part excepted to had reference to the question of the negligence of the workmen in the method of loading is made certain, we think, by the very next words of the charge:

"Now, if the accident was not caused by the weakness or insufficiency of the elevator, but was caused by the way they put this machine on the elevator, and if plaintiff was not in the exercise of ordinary care, then he should not be allowed to recover."

It was prejudicial error to instruct the jury that plaintiff had a right to recover on any basis other than that the accident was caused by the weakness or insufficiency of the elevator.

As we read the record, defendant's strongest insistence was that the job of lowering the motor was Mix & Jackson's, and that plaintiff as their agent selected the elevator as his own means of doing the work. At the opening of the evidence defendant's counsel had stated to the court:

"We insist that it (the motor) was turned over to them (plaintiff's employers, Mix & Jackson) for removal."

In the part of the charge herebefore quoted, the court stated that, if plaintiff became defendant's servant, it was defendant's duty to furnish reasonably safe appliances. Further on the court said:

"If, on the other hand, you find that he was not defendant's servant at any time, then the same rule applies as to the defendant furnishing him a safe elevator."

At the conclusion of the instructions, the following occurred:

"Mr. Oppenheim: I think your honor ought to instruct the jury that if Mr. Hunt went there and took charge of this work, then the defendant could not be liable for any order or direction given by Mr. Hunt.

"The Court: That is, that he became the servant?"

"Mr. Oppenheim: No, that he took charge as claimed by the defendant.
* * * If he went there and took charge and directed the men to move this motor upon the elevator, that is immaterial whether the elevator in such case was sufficient to bear the weight or not, and in such case he cannot recover.

"The Court: No, I would not give that. I don't think that is right."

While neither the charge nor the request is so precise that it cannot be applied to other contentions than the one of defendant now under review, yet when we note defendant's claim at the beginning of the evidence, and the reference to the claim in connection with the request, and the fact that the evidence contains no other matter to which the instruction and request would pertinently apply, we are unable to avoid the conclusion that defendant was virtually deprived of all benefit of his principal line of defense.

The last exception is as to the charge respecting contributory negligence. There is nothing in the record that takes this case out of the established rule in the federal courts that the burden of proof of contributory negligence is upon the defendant.

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

CHAMPAGNE LUMBER CO. et al. v. JAHN.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909.)

No. 1,466.

1. CORPORATIONS (§ 253*) — STOCKHOLDERS' LIABILITY FOR CORPORATE DEBTS — EFFECT OF JUDGMENT AGAINST CORPORATION.

Stockholders of a corporation between whom its property has been divided cannot set up as a defense to a creditors' suit brought to enforce a judgment against the corporation a matter which was litigated in the action or which would not be ground for setting aside the judgment in equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1024; Dec. Dig. § 253.*

Stockholders' liability to creditors in equity, see notes to Rickerson Roller-Mill Co. v. Farrell Foundry & Min. Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.]

2. CHAMPERTY AND MAINTENANCE (§ 1*) — ACTS CONSTITUTING — AIDING LITIGANT.

Advising a minor to ignore a settlement of a cause of action which was not binding on him and to bring suit, or aiding him financially in doing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

so, does not constitute maintenance, where it does not appear that the person so aiding has any financial interest in the action.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 3; Dec. Dig. § 1.*]

3. CREDITORS' SUIT (§ 18*)—DEFENSES.

In a creditors' suit by an assignee of a judgment, the adequacy of the consideration paid by him for the same cannot be questioned by the defendants.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 92; Dec. Dig. § 18.*]

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

For opinion below, see 157 Fed. 407.

The decree in favor of appellee, complainant below, was entered after a hearing on bill and answer. (C. C.) 157 Fed. 407.

In July, 1892, one Nyback, then 18 years old, was injured while working in the sawmill of appellant corporation. In April, 1896, he commenced in the court below an action at law to recover damages. Between that date and March, 1903, there were four trials of the case. Judgment for \$2,000 and costs was entered in March, 1903, and was affirmed by this court in January, 1904. Thereafter execution was issued and returned nulla bona. Between 1892 and 1903 the lumber company quit doing business as a going concern, and its assets were divided among the stockholders by their mutual consent. The assets in the hands of appellants Stewart and Alexander when the bill herein was filed by appellee as assignee of Nyback were sufficient to pay appellee's claim in full, and there were no other unpaid claims against the corporation. The bill sought to reach the funds in the hands of Alexander and Stewart, who were the only holders of assets within the jurisdiction.

The contentions for reversal, namely, (1) that the judgment was obtained by means of Nyback's perjury, with appellee's connivance, (2) that appellee was guilty of maintenance, and (3) that appellee paid Nyback a grossly inadequate consideration for the assignment and therefore equity should not aid such an unconscionable speculation, are based on the following parts of the answer.

"(4) These defendants are informed and believe, and charge the fact to be, that, at the time the said John Nyback obtained a final judgment against the Champagne Lumber Company, he had not the means at hand nor at his command, nor the ability nor the inclination nor the intention, to further prosecute any action or proceedings to enforce the collection of said judgment, and that the complainant herein, with full knowledge of the facts concerning such action, and with full knowledge that the said John Nyback could not and would not, if let alone, further prosecute any action on the said judgments to enforce the collection thereof, and with full knowledge that the Champagne Lumber Company had no assets from which said judgments could be collected, and for the sole purpose of speculating upon the said judgments, solicited and obtained from the said John Nyback the written assignments and conveyances of the said judgments set forth in the bill of complaint.

"(5) These defendants are informed and believe, and charge the fact to be, that, notwithstanding the recitals in said assignment and conveyance, the complainant herein paid to the said Nyback only a small and inadequate consideration for the said judgments, not exceeding the sum of fifteen dollars, while the said judgments at the time amounted to upwards of three thousand dollars. That the said assignment was taken for the sole purpose of speculation, and upon the chance of forcing a contribution from the various stockholders of the said defendant company."

"(7) Notwithstanding said verdict in the action in which said John Nyback was plaintiff and the said Champagne Lumber Company defendant, these defendants are informed and believe, and charge the fact to be, that the said verdict was obtained by the said John Nyback by the commission of perjury

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the said John Nyback upon the trial of said action in the Circuit Court of the United States for the Western District of Wisconsin, in this, to wit: The said action was based on the legal proposition and alleged grounds of liability that the said Champagne Lumber Company was negligent in maintaining and keeping unguarded, adjacent to a place where the said Nyback was instructed to work, a hole or chute, and in negligently failing to instruct the said Nyback as to his duties and how to perform his work, and warn him against the dangers of falling into the said hole and becoming injured thereby; that one of the defenses set up by the said Champagne Lumber Company was that the plaintiff, Nyback, was guilty of carelessness and negligence on his part, which directly contributed to the injury received; that on the trial of the said action the said Nyback, being first duly sworn, testified that previous to his falling into the hole in question and receiving his injury he did not know of the existence of the hole, he had never seen the hole, he had never been instructed as to his duties, and he had never been warned against the dangers of falling into the said hole, whereas, in truth and in fact, one Eric I. Odegard, previous to his employment, fully explained to him the nature of his duties and where and how to perform them, and instructed him how to perform them so that if he followed the instructions he would not have fallen into the said hole and received his injury, and also told him about the hole, and told him to look out and not to get into the hole himself; that at the time the said Nyback gave his testimony on the said trial in which said judgment was obtained he knew that his testimony was false, and knew that the said Eric I. Odegard could testify to the instructions and statements aforesaid; that notwithstanding said knowledge he deliberately perjured himself, and concealed from the court and the defendant Champagne Lumber Company the fact that the said Odegard had given such instructions and such information, and that the said Odegard could testify to that effect; that at the time the said action was commenced the said Odegard had become involved in a quarrel with the manager of the said Champagne Lumber Company, and when the Champagne Lumber Company's attorneys began to prepare for the trial of said action, on account of such quarrel said Odegard refused to disclose what he knew in regard to the transaction, and refused and failed to inform the Champagne Lumber Company, its officers, agents, and attorneys, of the facts aforesaid, and threatened that if he was forcibly compelled to attend and give evidence as a witness in the said action he would give testimony that would injure and endanger the Champagne Lumber Company's case, and that his testimony would not aid or benefit them, and refused to divulge or disclose any fact or evidence which was material to maintain the defense of said Champagne Lumber Company in the said action; that by reason thereof, and fully believing that no testimony existed to establish the facts known by the said Odegard, the said Champagne Lumber Company did not obtain the testimony of the said Odegard on any of the trials of said action; that there was no other witness by whom the Champagne Lumber Company could prove the facts within the knowledge of the said Odegard, and no officer or agent of said company knew of such facts; that the Champagne Lumber Company and all of its officers and agents used due care and diligence, but was never able to ascertain the fact that the said Odegard could or would, if placed under oath, testify to the facts aforesaid until after the verdict of the jury upon which final judgment was rendered in the said action; that by mere accident after such verdict the said Champagne Lumber Company learned of the facts within the knowledge of the said Odegard as aforesaid, and obtained the affidavit of the said Odegard setting forth such facts, and that if a new trial was had said Odegard would testify to such facts, and use said affidavit, together with other affidavits, to show diligence on the part of the defendant Champagne Lumber Company, in support of a motion for new trial in the said action; that on account of the strict rules in actions at law in said court the trial court held that the said Champagne Lumber Company was not entitled as a matter of law to a new trial in the said action; that the said Nyback willfully and maliciously opposed the granting of a new trial, with full knowledge on his part that the same had been procured by perjury as aforesaid; that by reason of the facts aforesaid and the willful false swearing of the said Nyback it would be inequitable for a court of equity to assist and aid in the enforcement of the collection of the

said judgments from the individual defendants in this action; that the complainant herein was fully aware and cognizant of the act of the said John Nyback in committing perjury upon the trial of said action.

"(8) These defendants allege that the said John Nyback, for a good and sufficient consideration, soon after the happening of the said injury, and at the time he was 18 years of age, released the said Champagne Lumber Company from all damages resulting from said injury, and that the said release was fair and entirely free from fraud, and that the complainant herein was fully aware of the execution of said release to the said Champagne Lumber Company. These defendants are informed and believe, and charge the fact to be, that the said John Nyback was entirely and fully satisfied with the settlement with the Champagne Lumber Company, and that he did not intend to make any other or further claim against it for damages because of the said injury, and that he would not of his own accord have begun the suit aforesaid in the Circuit Court of the United States for the Western District of Wisconsin. These defendants are informed and believe, and charge the fact to be, that the complainant herein, together with divers other persons unknown to these defendants (well knowing of the full and fair settlement made between the said John Nyback and the said Champagne Lumber Company), and that the said John Nyback did not intend to make any further claim for damages against the Champagne Lumber Company, and with the intention of promoting and stirring up litigation, induced the said John Nyback to begin suit against the Champagne Lumber Company, and that they furnished the said John Nyback with the means wherewith to carry on said suit against the Champagne Lumber Company, and paid for the said John Nyback the costs and expenses incurred in said suit."

Reid, Smart & Curtis (John B. Sanborn, of counsel), for appellants.
D. B. Nash (Julius J. Patek, of counsel), for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). As equity looks beyond form to substance, the first thing to observe is that a corporation is an instrument by means of which individuals upon an agreed capital do an agreed business, with limited personal liability; that Stewart and Alexander and the other stockholders were in reality Nyback's adversaries in the action at law; and that Stewart and Alexander, with corporate assets in their hands, are in no better position than the corporation itself to challenge appellee's prima facie right to the action of the chancellor in aid of the execution.

Appellants say that appellee, by noticing the cause for hearing on bill and answer, confessed that the judgment at law was obtained by means of perjury on the part of Nyback. Such notice was rather an assertion by appellee that appellants were barred by the adjudication on the law side of the court from requiring appellee to relitigate the truth of the original declaration. The subject-matter of the alleged perjury as set out in the seventh paragraph of the answer was the subject-matter of Nyback's alleged cause of action. This subject-matter had been litigated to an end on the law side. A motion for a new trial on account of newly discovered evidence had been made and overruled. In the present answer there is no disclosure of any further newly discovered evidence; there is no showing of any act on the part of Nyback which misled appellants into not preparing to make a complete defense; in short, the answer fails to exhibit to the court on the equity side a single contention with respect to the justice of the original cause of action, or a single item of evidence in support of

the defense that was not considered and acted upon by the court on the law side. And so, under the authority of *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, appellants virtually confess that their showing would be insufficient to warrant any affirmative relief against the judgment or against an execution thereon. But they contend that this same showing is enough to prevent a court of equity from granting any relief to appellee. If the contention is sound, a new way to defeat judgments at law would be opened. After a defendant has fully litigated an action at law, so that he cannot get a court of equity to set aside the judgment or enjoin the enforcement of an execution, let him hide his property or convey it to a trustee before a levy can be made; then, when proceedings in aid of the execution are instituted, let him answer that the judgment was obtained by means of the plaintiff's falsely testifying in support of his claim; and thereby the judgment is rendered worthless, for if the plaintiff demurs he is beaten, and if he replies and wins he gets his money, not by virtue of the judgment, but by means of the new litigation. We are not disposed to hold that a court of equity can be so used.

The averments in the eighth paragraph of the answer are insufficient to charge maintenance. The settlement with Nyback was made when he was a minor, and appellants knew that it was not binding. The action of appellee in inducing Nyback to disregard the settlement and to bring his action is not alleged to have been taken maliciously or for his own profit. It is not averred that appellee had any financial interest in the result of the lawsuit, and nothing appears from which to question that the relation between Nyback and appellee was such that it was entirely proper for appellee to give the advice and pay the costs and expenses. Under such circumstances, "the intention of promoting and stirring up litigation" would not be iniquitous.

From what has been said so far, our conclusion is apparent that there would be no want of equity in requiring Stewart and Alexander to pay the judgment if it was owned by Nyback. In this view the allegations of the fourth and fifth paragraphs of the answer with respect to the inadequacy of the consideration for the assignment become immaterial. It is enough that appellee can give a valid release.

The decree is affirmed.

MONTANA MINING CO., Limited, v. ST. LOUIS MIN. & MILL. CO. OF MONTANA.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1909.)

No. 1,574.

INJUNCTION (§ 72*)—GROUNDS—PROTECTIVE REMEDY.

Under Code Civ. Proc. Mont. 1895, § 871 (Rev. Codes, § 6643), which provides that, "when it appears by affidavit that the defendant during the pendency of an action threatens or is about to remove or to dispose of his property with intent to defraud the plaintiff, an injunctive order may be granted to restrain the removal or disposition," when it appears from the decisions in prior litigation that a mining company in a pending suit will

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

probably recover a large judgment against another company for the value of ore extracted from veins owned by plaintiff, a court is authorized to grant an injunction restraining the defendant from extracting and selling the ore from its mine, where it is shown by affidavit that the result would be that it would not have sufficient property remaining to respond to the judgment.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 138; Dec. Dig. § 72.*]

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

Wm. Wallace, Jr., and Carpenter, Day & Carpenter, for appellant.
Gunn & Rasch, Clayberg & Horsky, and Walsh & Nolan (M. S. Gunn and T. J. Walsh, of counsel), for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. A controversy arose in the year 1884 between the owners of the St. Louis lode claim and the Nine Hour lode claim, in the state of Montana, concerning a disputed boundary between the two claims. The controversy involved the possession and ownership of a strip of ground 30 feet wide, and including an area of about 12,844 square feet. At the time of applying for a patent the locators of the St. Louis claim included in their survey a portion of the ground claimed by the owners of the Nine Hour claim. The latter made an adverse claim, and brought an action to determine the rights of the parties thereto. Before the case was tried the suit was compromised, and a bond executed by the owner of the St. Louis claim to the owners of the Nine Hour claim, under which it was agreed that the owner of the St. Louis claim should include in the survey of that claim the compromise ground, and, as soon as a patent issued to the St. Louis claim, the owner of that claim would then convey to the owners of the Nine Hour claim the strip of land embraced in the compromise.

The owner of the St. Louis claim, having obtained a patent, refused to make the conveyance. The Montana Mining Company having become the owner of the Nine Hour claim, and the St. Louis Mining & Milling Company the owner of the St. Louis claim, the former company brought suit against the latter company for the specific performance of the contract. A decree was rendered in favor of the Montana Company (*Montana Mining Co. v. St. Louis Mining & Milling Co.*, 20 Mont. 394, 51 Pac. 824; *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U. S. 650, 19 Sup. Ct. 61, 43 L. Ed. 320), and in pursuance of this decree a conveyance of the ground was executed by the St. Louis Company to the Montana Company.

There then arose a controversy as to the extralateral rights of the St. Louis Company in what has since been designated the "compromise ground." The ground has been found to be very valuable, and the controversy respecting the rights of the parties thereto has been the subject of prolonged litigation. *Montana Mining Co. v. St. Louis Mining & Milling Co.*, 102 Fed. 430, 42 C. C. A. 415; *St. Louis Min-*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing & Milling Co. v. Montana Mining Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; Montana Mining Co. v. St. Louis Mining Co., 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444. In the latter case the Supreme Court held that the bond of the owner of the St. Louis claim and the conveyance of the compromise ground by the St. Louis Company, "together with all the mineral therein contained," and "all the dips, spurs, and angles," did not merely locate a boundary between the two claims, leaving all surface rights to be determined by the ordinary rules recognized in mining districts of Montana and enforced by statutes of Congress, but as conveying all mineral below the surface, including that in a vein therein which apexed in the un conveyed land of the grantor. The court further said:

"To the suggestion that giving this construction to the bond and conveyance is in effect the granting of a section of a vein of mineral, the answer is that there is nothing impracticable or unnatural in such a conveyance. It does not operate to transfer the vein in toto, but simply carves out from the vein the section between the vertical side lines of the ground and transfers that to the grantee. The title to the balance of the vein remains undisturbed.

"To the further suggestion that the owner of the apex might be left with a body of ore on the descending vein beyond the further side line of the compromise ground which he could not reach, the answer is that this assumes as a fact that which may not be a fact. The owner of the apex may be the owner of other ground by which access can be obtained to the descending vein, and it also is a question worthy of consideration whether a section out from a descending vein does not imply a right reserved in the grantor to pass through the territory of the section conveyed in order to reach the further portion of the vein. Those are questions which need not now be determined. This secondary vein does not appear to have been known at the time of the compromise, and while, of course, there is always a possibility of such a vein being discovered, yet parties are more apt to contract and settle upon the basis of what they know than upon the possibilities of future discovery."

It appears from the complaint in the present action that the suggestion made to the Supreme Court that the owner of the apex might be left with a body of ore on the descending vein beyond the further side line of the compromise ground was what would have been the situation had not the Montana Company prior to that time entered into and upon that portion of the vein underneath the surface of the Nine Hour claim and east of the east boundary line of the compromise ground, and extracted the quartz, rock, and ore therefrom, and removed and converted the same to its own use and benefit, and had thereafter continued to extract the quartz, rock, and ore, and remove and convert the same to its own use and benefit in the alleged value of \$1,000,000. It appears further that on September 16, 1903, the St. Louis Company brought a suit at law against the Montana Company to recover damages in the sum of \$200,000 for ores so extracted and removed by the latter company from this vein east of the eastern side line of the St. Louis claim and underneath the surface of the Nine Hour claim.

This complaint was thereafter amended to conform to the adjudication in the course of the litigation concerning the compromise ground and the work of the Montana Company in extracting and removing ore therefrom. The first amended and supplemental complaint was filed November 21, 1898, in which damages were alleged at \$200,000

as in the original complaint. The second amended and supplemental complaint was filed June 26, 1899, in which it was alleged that since the filing of the original complaint and up to the 26th day of June, 1899, the Montana Company had extracted ore from the premises and vein described amounting in value to \$400,000, and a judgment was demanded for \$600,000. The third amended and supplemental complaint was filed December 2, 1907, in which it was alleged that the damages sustained by the St. Louis Company by the operations of the Montana Company in the vein east of the easterly side line of the St. Louis claim had amounted to \$1,000,000.

In the original complaint the action was on the part of the St. Louis Company to recover from the Montana Company damages for the extraction and removal of ore from any vein having its top or apex within the surface boundaries of the St. Louis claim. In the first amended and supplemental complaint, filed November 21, 1898, the St. Louis Company alleged its ownership of the ores in all veins apexing within the surface boundaries of the St. Louis claim, particularly describing such boundaries, and saving and excepting therefrom the surface of the compromise ground described in the amended and supplemental complaint. This was in accordance with the decision of the courts in the action brought by the Montana Company against the St. Louis Company for the specific performance of the agreement to convey the compromise ground to the Montana Company, in which action specific performance of the agreement by the St. Louis Company was decreed. *Montana Mining Co. v. St. Louis Mining & Milling Co.*, 20 Mont. 394, 51 Pac. 824; *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U. S. 650, 19 Sup. Ct. 61, 43 L. Ed. 320.

The present action is a suit in equity ancillary to the suit at law brought by the St. Louis Company against the Montana Company to enjoin and restrain the Montana Company from removing or extracting any ore from within or underneath the compromise strip as the same is described in the complaint, and from conducting any mining operations therein, or from selling or disposing of any ore extracted therefrom until the final determination of the suit at law; and this is an appeal from a temporary restraining order in substantially the same terms as the injunction prayed for in the complaint, but limited to continue during the pendency of the suit and until the further order of the court.

It is alleged in the complaint that in the litigation between the parties thereto, and in the course of the action referred to and the proceedings had therein, it has been determined and adjudicated that the St. Louis Company is the owner of and entitled to all the ores in the said vein east of the east line bounding plane of the compromise strip, to the extent that the apex of said vein is wholly or partly in said St. Louis claim as patented, and that in the course of trials theretofore had in the said action, it was conceded by the Montana Mining Company that large quantities of ore have been extracted by the said company from within the said territory, that is to say, from that part of said vein the apex of which is wholly or partly in said St. Louis claim as patented in the said Nine Hour claim and east of the east line

of the compromise strip, and that there remains only to be determined in the said action the exact quantity of ore so extracted from the said territory and the value thereof.

It is alleged that the Montana Company is engaged in extracting, removing, and shipping the ore from within the compromise ground, and has already shipped, sold, and disposed of a large quantity of valuable ore so extracted from the ground, and that it intends to continue extracting, removing, and shipping the ore within the said vein and underneath the said compromise strip. That if it is allowed to continue extracting and removing the ore from underneath said ground it will have removed and disposed of so much thereof before a trial of the said action can be had that there will not remain therein ore sufficient, with such other property as the defendant may own within the state of Montana or the United States, as shall be sufficient to satisfy such judgment as your orator will recover in the said action.

It is further alleged in the complaint that the St. Louis Company has caused a large amount of development work to be done beneath the surface of the compromise strip, for the purpose, among others, of disclosing the identity and continuity of the vein from the apex within the boundary of the St. Louis claim to and underneath the surface of the Nine Hour claim. This development work was done under order of the court, and such order was made by the court upon showing the necessity for such development work; that it is essential to complainant that such development work should remain undisturbed until the final disposition of the action, for the reason that in order to establish the claim made by the complainant in said action it will be necessary that the witnesses or some of them go through said workings and examine the conditions on the ground as disclosed therein; that if the Montana Company is permitted to continue extracting from the vein underneath the compromise ground the evidence upon which complainant must lawfully rely to establish the course of said vein and its width and extent and the quantity and value of the ore extracted from the said vein beyond the said compromise strip will be utterly destroyed.

To the complaint the Montana Company answered, denying many of the allegations of the complaint and admitting others, but averring that it will contend, as it always has contended, that the St. Louis Company has no right, title, or interest in any of the ores or minerals situated beneath the surface of the Nine Hour claim.

It is contended by the appellant that the restraining order entered in this case was granted by the court without authority. Section 871 of the Code of Civil Procedure of 1895 of Montana (Rev. Codes, § 6643) provides, among other things:

"When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition."

Without entering into a discussion concerning the construction placed upon a similar provision in the New York Code of Procedure, it is sufficient to say that we are satisfied that the statute authorizes a

restraining order under circumstances such as are presented in this case. High on Injunctions, § 1407; Morey v. Ball, 90 Ind. 450; Lee v. Gross, 126 Ind. 102, 25 N. E. 891; Rubens v. Joel, 13 N. Y. 488. The probability that the St. Louis Company will recover a judgment against the Montana Company for ore extracted and removed by the latter company from the vein in controversy, beyond the further side line of the compromise ground is foreshadowed, we think, in the decision of the Supreme Court in Montana Mining Co. v. St. Louis Mining & Milling Co., 204 U. S. 204, 218, 27 Sup. Ct. 254, 51 L. Ed. 444. Under all the circumstances of the case we think there was no abuse of the discretion of the court in the granting of the order.

The order of the lower court is affirmed.

CANNER v. WEBSTER TAPPER CO. et al.

(Circuit Court of Appeals, First Circuit. March 11, 1909.)

No. 809.

1. BANKRUPTCY (§ 467*)—APPEAL—REVIEW—FINDINGS OF FACT.

Findings of fact, made by a referee in bankruptcy and confirmed by the District Judge, are to be accepted by an appellate court, unless clearly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*

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

2. BANKRUPTCY (§ 76*)—INVOLUNTARY PROCEEDINGS—CREDITORS ENTITLED TO JOIN IN PETITION—ESTOPPEL.

The rule that creditors who assent to a general assignment by their debtor are in general estopped to join in a petition in bankruptcy against him does not apply where they are induced to do so by his fraud or misrepresentation, and in such case they may repudiate the assignment and allege it as an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 97; Dec. Dig. § 76.*]

3. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—GENERAL ASSIGNMENT.

Under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), the making of a general assignment by a debtor constitutes an act of bankruptcy, although it is not valid for all purposes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

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

Elisha Greenhood, for appellant.

Harvey H. Pratt (John J. Neal and John J. Coady, on the brief), for appellees.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. On September 4, 1908, the Webster Tapper Company, the A. G. Crosby Company, and James Dempsey

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

filed an involuntary petition in bankruptcy against Louis Canner. The act of bankruptcy alleged was the making of a general assignment July 18, 1908. The petition (thus anticipating a probable defense) further alleged that the petitioners accepted the assignment by reason of the false and fraudulent representations made by Canner, viz.: (1) That Canner had, at the date of the assignment, book accounts to the value of \$10,000; whereas, in fact, he had, on July 10th, attempted to convey these book accounts to Wolfman as security for the sum of \$2,300, and had secreted the said \$2,300, or that part of it which had come into his hands. (2) That Canner owned and was possessed in his own right, but in his wife's name, of certain real estate; whereas, in fact, the said real estate stood in the name of Mrs. Canner and of Mrs. Freedman, and the "real title" was in Canner and Jacob Freedman as copartners. (3) That Canner had not before been adjudicated a bankrupt; whereas, in fact, the true name of the said Louis Canner was Benjamin S. Canner, and under the latter name he had been adjudicated a bankrupt July 16, 1902, and was still undischarged. That the petitioners relied upon these statements, and that, had they known that any or all of Canner's said representations were false or fraudulent, they would not have assented to or signed the assignment.

In his answer, Canner denied the act of bankruptcy, and further alleged that the petitioners had become parties to the assignment and had agreed to accept thereunder their distributive shares of his property, and so had ceased to be his creditors, and that the petitioners, with his other creditors, had participated in the assets and proceeds of the business and in his property for more than six weeks. Canner further denied the false representations alleged in the petition.

The matter was referred to the referee under General Order 12 (89 Fed. vii, 32 C. C. A. xvi), and the referee reported that a meeting of certain creditors of Canner was held at the office of the Webster Tapper Company on July 18, 1908. At that meeting, Tapper produced a list of assets and liabilities which he had received from Canner. The assets were stated to be about \$9,700; the liabilities, \$10,406. The assets included Canner's book accounts, which were represented by him to be easily worth \$7,000. These figures were read to the creditors, and an assignment in the usual form was executed by the bankrupt and by some of the creditors. "After some of the creditors had signed the assignment, it developed that these book accounts had been assigned to Wolfman, who then had possession of the books, for a loan of \$2,300." The referee further found (1) that the creditors, or a majority of them, who assented to the assignment, were not at that time fully conversant with the claim of Wolfman; (2) that there was no equity in the real estate, as stated by Canner to Tapper, owing to the fact that a mortgage had recently been placed on it; (3) that Canner had misrepresented by giving the wrong name. The referee found "these allegations to be established by the evidence, and that the creditors were misled into entering into this assignment, and that they would not have entered into the assignment had they known the facts as they were subsequently ascertained." He therefore recommended an adjudication of bankruptcy.

The case came on for further hearing before the learned judge of the District Court, who adjudged Canner a bankrupt. In his opinion he stated that the referee had found that false representations were made by Canner to his creditors: (1) In respect of his name and his former adjudication in bankruptcy; (2) in respect of the Wolfman pledge; (3) in respect of the real estate. The learned judge added that the evidence supported the findings, and that Canner was attempting to keep his creditors in ignorance of the facts. He concluded as follows:

"An assent to an assignment induced by fraud on the bankrupt's part ought not to be treated as a voluntary assent on the creditors' part. Under the circumstances shown, I think these creditors had the right to repudiate their assent and treat Canner's execution of the assignment as an act of bankruptcy unassented to by them."

From the adjudication of bankruptcy Canner appealed to this court, assigning as errors that the court had erred in adjudicating him a bankrupt, and in holding (1) that the petitioning creditors were entitled to become parties to the petition after they, or some of them, had advised and joined in the making of the general assignment; (2) that the petitioning creditors could or did legally avoid the assignment; (3) that false representations were made; and (4) that the petitioners were deceived. The other assignments of error we do not feel ourselves called upon to notice.

We perceive no error in the findings of fact made by the referee and confirmed by the judge. These we are to accept, unless clear error in them is shown, according to a late statement of the rule in *Page v. Rogers*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. —, and *Smith v. Nat. Suffolk Bank*, 127 Fed. 286, 62 C. C. A. 218.

Canner urges, first, that the petitioning creditors, having become parties to the general assignment, are estopped from filing a petition in involuntary bankruptcy against the assignor; and, second, that, even if they be not thus generally estopped altogether from joining in a petition in involuntary bankruptcy, yet they are estopped from setting up in that petition, as the alleged act of bankruptcy upon which the petition is based, the general assignment whose effect upon them as parties they seek to avoid. Canner contends that the petitioning creditors are thus seeking, on the one hand, to avoid the assignment to which they were parties, and, on the other, that they are relying upon it as an act of bankruptcy.

1. That a creditor who has become a party to a general assignment may not ordinarily join as a petitioning creditor in bankruptcy proceedings is settled, as has been said by this court and by the District Court for the District of Massachusetts. *Moulton v. Coburn*, 131 Fed. 203, 66 C. C. A. 90; *In re Romanow* (D. C.) 92 Fed. 510. But in the first-mentioned case this court placed its decision upon the ground that, the petitioning creditor "having voluntarily elected that the bankrupt's estate shall be administered under the assignment, and having accepted the provisions of the deed of trust, he is estopped from action inconsistent with the agreement. *Lowell on Bankruptcy*, § 51. While special circumstances might entitle a creditor to repudiate his

agreement or release him from the consequences, no such circumstances are present in this case." Where the petitioning creditor has become a party to the assignment, relying upon the false representations of his debtor, the general rule stated in *Moulton v. Coburn* and in *Re Romanow* does not apply, and the exception to the rule suggested in the former case has its proper application. The false representations thus relied upon need not be sufficient to form the basis of an action of deceit. The debtor who offers a general assignment to his creditors is bound to a fair disclosure of his circumstances without concealment or falsehood. *Pollock on Contracts* (7th Eng. Ed.) 282; *Id.* (Williston's Ed.) 381.

2. In *Griffin v. Dutton* (C. C. A.) 165 Fed. 626, 627, we held that an assignment constitutes an act of bankruptcy, although it be not valid for all purposes; e. g., by reason of a want of the assent of creditors. We observed:

"The language of the bankruptcy act is general. It makes no distinction between strictly valid instruments and those which may be invalid for certain purposes. To limit its operation to those assignments which are in all respects valid would be contrary to the intent and purpose of the act."

In his opinion the learned judge of the District Court rested his decision upon a repudiation by the petitioning creditors of their assent to the assignment. This repudiation, which was permissible under the circumstances, left the assignment still executed by the debtor. Thus it remained a sufficient basis for an adjudication of bankruptcy, although it was not assented to by any creditor. With this reasoning we agree. Our decision is in accord with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Re Curtis*, 94 Fed. 630, 36 C. C. A. 430. There, it is true, the petitioning creditor had not formally assented to the general assignment, except by filing his claim for a share in the assigned assets; but we do not regard as material the difference between that case and the case at bar, though the difference has sometimes been alluded to in comments made upon the former.

We therefore accept the facts as found by the learned District Judge and the referee. We agree with their interpretation put upon these facts and with their construction of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

NOTE.—The following is the opinion of Dodge, District Judge, in the court below:

DODGE, District Judge. Louis Canner, the alleged bankrupt, is also known as Benjamin S. Canner. He has still another name under which he carries on a business wherein he is the sole person concerned, viz., the *Marshall Hay & Grain Company*.

The act of bankruptcy charged is a general assignment for the benefit of creditors on July 18, 1908. That he executed such a general assignment is not disputed. The document is in evidence as Exhibit 1. He is described in it as Benjamin S. Canner, doing business under the name and style of the *Marshall Hay & Grain Company*. Albert K. Tapper, who signs this petition on behalf of the *Webster Tapper Company*, one of the petitioning creditors, is the

assignee named. James Dempsey and the A. G. Crosby Company, the other two petitioning creditors, signed it as creditors assenting to it, as did also the Webster Tapper Company and five other parties. In the assignment the bankrupt is nowhere described as Louis Canner, nor is any reference made to that name.

A creditor who assents in writing to an assignment like this, and voluntarily becomes a party to it, as these creditors have done, is ordinarily estopped to allege it as an act of bankruptcy for the purposes of an involuntary petition against the assignor. This is the settled law, at least in this circuit. *Re Romanow* (D. C.) 92 Fed. 510; *Moulton v. Coburn et al.*, 131 Fed. 201, 203, 66 C. C. A. 90, 92. As declared by the Circuit Court of Appeals for this circuit in the case last cited: "This is not because he has ceased to be a creditor, but because, having voluntarily elected that the bankrupt's estate shall be administered under the assignment, and having accepted the provisions of the deed of trust, he is thereby estopped from action inconsistent with the agreement." Page 203.

In the same opinion it is said, immediately after the quotation above made: "While special circumstances might entitle a creditor to repudiate his agreement or relieve him from the consequences of an election, no such circumstances are presented in this case." The question in the case at bar is whether or not such special circumstances are shown in it as ought to have the effect described.

In their involuntary petition, filed some six weeks after the assignment, viz., on September 4, 1908, the petitioners set forth that they were induced to assent to the assignment by certain false and fraudulent representations made to them by Canner. In his answer Canner denies making the false representations charged. He also denies the commission of the alleged act of bankruptcy or that he was insolvent. There is no doubt that he did execute the assignment; and, this being so, the question of his insolvency becomes irrelevant. *West Company v. Lea*, 174 U. S. 590, 599, 19 Sup. Ct. 836, 43 L. Ed. 1098.

Under a reference to ascertain and report upon the facts, the referee has found that false representations were made by the bankrupt to his creditors at a meeting of his creditors, during which, after a statement of assets and liabilities obtained from him had been presented, the assignment was executed and assented to as above. The false representations found by the referee may be thus stated; some particulars not appearing in his report being inserted from the evidence which accompanies it:

(1) The bankrupt gave his name only as Benjamin S. Canner, doing business as the Marshall Hay & Grain Company. But his real name, or at least his earlier name, is Louis Canner, the name under which, on July 16, 1902, he filed a voluntary petition in this court. On that petition he has never been discharged. In those proceedings he appears only as Louis Canner. At the time of the assignment he represented to the creditors present that he had never been in bankruptcy. They did not then know that his real name, or former name, was Louis Canner.

(2) He represented his book accounts as easily worth \$7,000, and amounting, as they stood, to \$10,000; whereas, he had in fact assigned them all to one Wolfman as security for a note for \$2,600, which he had given for a loan of \$2,300. He had also, as afterward appeared, put his books in Wolfman's possession, and Wolfman declined to give them up to the assignee.

(3) He represented as an item of his assets certain real estate standing in his wife's name, that there was an equity in this real estate worth \$800, and that it would be conveyed to the assignee. In fact, the real estate stood in the joint names of his wife and another person, and there was no equity in it of substantial value; it having recently been mortgaged by the record owners.

The referee has further found that the creditors who assented to the assignment relied on and were misled by the above false representations, and would not have become parties to it, had they known the real facts.

The evidence seems to me to support the referee's findings. In my opinion it shows that Canner, in the discussion of his affairs which resulted in the execution of and assent to the assignment, was attempting to keep his creditors in ignorance of anything which might lead them to withhold the prospect of relief on easy terms which the proposed assignment afforded. If there is any

possible question whether some of the petitioning creditors ought not to have known or suspected that the facts regarding the book accounts or the real estate were not as represented, before they signed the assignment, I see no reason at all to doubt that the bankrupt deceived them all by his use of a name not his own, or at any rate differing from that under which he had passed in 1902, and by representing, contrary to the fact, that he had never been in bankruptcy.

An assent to an assignment induced by fraud on the bankrupt's part ought not to be treated as a voluntary assent or election on the creditor's part. Under the circumstances shown, I think these creditors had the right to repudiate their assent, and treat Canner's execution of the assignment as an act of bankruptcy unassented to by them. *Re Curtis*, 94 Fed. 630, 36 C. C. A. 430.

Adjudication is therefore ordered.

LEVY v. KANSAS CITY, KAN.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1909.)

No. 2,834.

1. ACTION (§ 4*)—WHEN MAINTAINABLE—MORAL TURPITUDE OR ILLEGALITY.

It is a general rule of public policy and of law that no action may be maintained which arises out of the moral turpitude of the plaintiff, or out of his violation of a general law enacted to effectuate the public policy of a state or nation.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 17; Dec. Dig. § 4.*]

2. ACTION (§ 4*)—RULE APPLIES TO ACTIONS TO RECOVER LOSSES AND DAMAGES.

The maintenance of actions to recover moneys or property lost, or damages sustained, through transactions or contracts wherein the plaintiffs were guilty of moral turpitude, or of the violation of a general law of public policy, is prohibited by this rule, as well as the maintenance of actions to enforce such contracts.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 4.*]

3. ACTION (§ 4*)—ACTS OF DEFENDANT INDUCING BELIEF IT WILL VIOLATE LAW AND PERFORM CONTRACT WILL NOT SUSTAIN.

The fact that the plaintiff was induced by the misleading acts of the defendant to part with his money or property in the belief that the defendant would continue to violate the law and would perform the illegal contract for which he paid his money will not sustain his action.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 4.*]

4. ACTION (§ 4*)—RECOVERY OF FEE FOR LICENSE TO CONDUCT UNLAWFUL OCCUPATION DENIED.

There was a statute of the state of Kansas (Sess. Laws 1895, p. 294, c. 155) which prohibited pool selling and book making in that state, with an immaterial exception, and there was an ordinance of Kansas City, Kan., that any person might carry on that business in that city for a year for \$5,000. The plaintiff bought of the city a license under this ordinance, and paid \$5,000 for it, and the second day after he commenced his business the city stopped him, and it has prevented him ever since from carrying it on. He sued the city for the \$5,000.

Held, the plaintiff was guilty of a violation of a general law enacted to effectuate the public policy of the state of Kansas, and his action was not maintainable.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 17, 18; Dec. Dig. § 4.*]

(Syllabus by the Court.)

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

I. J. Ringolsky (D. I. White and C. F. Hutchings, on the brief), for plaintiff in error.

Ralph Nelson (H. L. Alden, on the brief), for defendant in error.

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

SANBORN, Circuit Judge. Conducting the business of pool selling and book making in the state of Kansas, except within the inclosure of a race track for not exceeding two weeks in any year, was prohibited under a penalty of imprisonment for one year and a fine of \$1,000 by section 1, c. 155, p. 294, of the Session Laws of Kansas of 1895. In April, 1898, the city council of Kansas City enacted an ordinance to the effect that any person might carry on the business of book making and pool selling in that city for an annual license fee of \$5,000. The plaintiff brought an action against the city of Kansas City, and alleged in his complaint that on July 29, 1905, he purchased a license to conduct the business of book making and pool selling at Nos. 5 and 5½ Central avenue, in that city, for the term of one year, and paid the city \$5,000 for it under its ordinance; that he leased and furnished a room at those numbers for that business, and engaged in it there under his license; that on July 31, 1905, the city wrongfully and forcibly arrested him, and by force and threats of repeated arrests has excluded and prevented him ever since from carrying on the business of book making or pool selling in that city; that these acts of prevention and exclusion were instigated and performed by the city at the request and for the benefit of persons who were conducting the same business in that city under a similar license, and for the purpose of depriving him of his \$5,000 and of appropriating it to the use of the city; that he has demanded the return of his \$5,000, and the city has refused to repay it. The court below sustained a general demurrer to this complaint, and the plaintiff sued out this writ of error to reverse the judgment founded upon that ruling.

"Ex dolo malo non oritur actio" is a maxim which lies at the foundation of a general rule of public policy, the rule that the courts will not sustain an action which arises out of the moral turpitude of the plaintiff or out of his violation of a general law enacted to carry into effect the public policy of the state or nation. *Coppell v. Hall*, 7 Wall. 542, 552, 557, 558, 19 L. Ed. 244; *Thomas v. City of Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453; *Oscanyan v. Arms Co.*, 103 U. S. 261, 269, 26 L. Ed. 539; *Irwin v. Williar*, 110 U. S. 499, 510, 4 Sup. Ct. 160, 28 L. Ed. 225; *Embrey v. Jemison*, 131 U. S. 336, 345, 9 Sup. Ct. 776, 33 L. Ed. 172; *Central Trans. Co. v. Pullman's Car Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Pullman's Car Co. v. Trans. Co.*, 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108; *McMullen v. Hoffman*, 174 U. S. 639, 654, 658, 19 Sup. Ct. 839, 43 L. Ed. 1117; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 295, 25 Sup. Ct. 493, 49 L. Ed. 739; *Continental Wall Paper Co. v. Voight & Sons*, 212 U. S. 227, 29 Sup. Ct. 280, 292, 53 L.

Ed. —. But counsel say, and it is true, that this is not an action to enforce the illegal contract evidenced by the license, but to recover back the money he paid for this contract that the city repudiated, this contract for which he received no consideration. But the maintenance of actions to recover moneys or property lost, or damages sustained, through transactions or contracts wherein the plaintiffs were guilty of moral turpitude, or of the violation of a general law passed to effectuate a public policy, is prohibited by this rule, as well as the maintenance of actions upon contracts of that nature. *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453; *Irwin v. Williar*, 110 U. S. 499, 510, 4 Sup. Ct. 160, 28 L. Ed. 225; *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491, 499; *Scott v. Brown & Co.*, L. T. R. (N. S. 1892) 782; *Babcock v. Thompson*, 20 Mass. 446, 449, 15 Am. Dec. 235; *Abbe v. Marr*, 14 Cal. 210, 212; *Knight v. Linzey*, 80 Mich. 396, 45 N. W. 337, 339, 8 L. R. A. 476; *Morgan v. Groff*, 5 Denio (N. Y.) 364, 365, 49 Am. Dec. 273; *Myers v. Meinrath*, 101 Mass. 366, 370, 3 Am. Rep. 368; *Haynes v. Rudd*, 102 N. Y. 372, 376, 377, 7 N. E. 287, 55 Am. Rep. 815; *Bryant v. Wilcox*, 137 Mich. 669, 100 N. W. 919, 920; *Shaffner v. Pinchback*, 133 Ill. 410, 24 N. E. 867, 868, 23 Am. St. Rep. 624; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, 377; *Shiple v. Reasoner*, 80 Iowa, 548, 558, 45 N. W. 1077; *Robeson v. French*, 53 Mass. 24, 25, 45 Am. Dec. 236; *Lyon v. Strong*, 6 Vt. 219; *Duffy v. Gorman*, 64 Mass. 45.

The complaint shows that the city had enacted an ordinance which by its terms authorized the plaintiff to carry on for a year his business of book making and pool selling, that other persons were conducting a business of that nature under that ordinance with the consent of the city, and that the city received the plaintiff's money and issued a license to him; and counsel argue that the plaintiff was deluded into parting with his money by the acts of the city, by its ordinance, by its practice of issuing licenses and of permitting other licensees to carry on a similar business thereunder, and by its acceptance of his money and its issue of the license to him. It is conceded that the action of the city in taking his money for a license to do business for a year under its ordinance, in depriving him of the use of this license two days later, and in refusing to return his money to him, is abhorrent to the sense of fairness and justice and despicable. Nevertheless, one who loses his money or his property by knowingly engaging in a contract or transaction which involves his own moral turpitude, or his violation of a general law enacted to carry into effect a public policy, may not maintain an action for his loss or his damages because the acts of others deluded or persuaded him to believe that they would continue to violate the law or to perform an illegal contract, and this because his own moral turpitude and his violation of the law repel him from the courts. *Haynes v. Rudd*, 102 N. Y. 372, 376, 377, 7 N. E. 287, 55 Am. Rep. 815; *Babcock v. Thompson*, 20 Mass. 446, 449, 15 Am. Dec. 235; *Abbe v. Marr*, 14 Cal. 210, 212; *Scott v. Brown & Co.*, L. T. R. (N. S. 1892) 782; *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491, 499; *Robeson v. French*, 53 Mass. 24, 25, 45 Am. Dec. 236; *Gregg v. Wyman*, 58 Mass. 322,

325; *Duffy v. Gorman*, 64 Mass. 45. In view of these established rules of law, the allegations of the complaint that the plaintiff was induced by the acts of the city to fit up a place of business at great expense, and that the city was instigated and induced to prevent him from carrying on his illegal business by those who were conducting a rival business, and that it prevented him from proceeding with his business for the benefit of his rivals and for the purpose of appropriating to the benefit of the city his \$5,000, are immaterial and will not be farther noticed. The controlling issue in this case is the legality and righteousness of the acts of the plaintiff. Those of the defendant have little materiality.

In the year 1903 the Legislature of Kansas passed an act which gave to Kansas City, and to other cities of its class, power "to restrain, prohibit, and suppress games and gambling houses" (Laws Kan. 1903, p. 186, c. 122, § 50); and it is contended that this act effected by the use of these words a repeal of the general law of 1895 which prohibited book making and pool selling in the state. The argument is that, because games and gambling houses could not be restrained unless they were permitted, the effect of this statute must have been to repeal the prohibition of the former statute and to permit them. But the act of 1895 is a general law putting into effect a public policy of the state of Kansas regarding book making, pool selling, and gambling in various other forms, while that of 1905 is a general law granting powers to and imposing duties upon certain cities of the state. The two acts treat of different subjects, are not in *pari materia*, and the act of 1905 evidences no intention of the Legislature to modify or repeal the law of 1895. The conclusion is that it did not repeal it, and that the law of 1895 is still in force.

It is said that this law is unconstitutional; but no provision of the Constitution of the United States, or of the Constitution of Kansas, which it is alleged to violate, is cited, and no reason why it is unconstitutional is suggested, except that the Supreme Court of Missouri once held a similar statute inconsistent with the Constitution of that state. *State v. Walsh*, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231. The Supreme Court of Kansas, however, which is controlling authority in the national courts upon the question whether or not this statute conflicts with the Constitution of that state, has sustained and enforced it. *Levy v. Kansas City*, 74 Kan. 861, 86 Pac. 149. No provision of the Constitution of the United States which it violates occurs to our minds, and the suggestion that it is unconstitutional must be overruled.

Cases are cited in which corporations have been held to be estopped from denying that their officers had authority to do lawful acts for the corporation within the scope, but beyond the limits, of the power of the officers (*Martel v. City of East St. Louis*, 94 Ill. 67), and in which they have been compelled to return moneys paid for licenses and *ultra vires* contracts which they subsequently revoked or repudiated (*Pearson v. City of Seattle*, 14 Wash. 438, 44 Pac. 884; *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. 465, 7 Am. St. Rep. 515; *Railroad Company v. Howard*, 7 Wall. 392, 19 L. Ed. 117; *Central*

Trans. Co. v. Pullman's Car Co., 139 U. S. 24, 58, 59, 11 Sup. Ct. 478, 35 L. Ed. 55). The rule is invoked that, where one has availed himself of an unconstitutional law to secure all the benefits of a contract, he may be estopped from pleading its unconstitutionality to defeat an action to compel him to bear its burdens. *Ferguson v. Landram*, 5 Bush (Ky.) 230, 96 Am. Dec. 350; *Stewart v. Board of Commissioners*, 45 Kan. 708, 26 Pac. 683, 23 Am. St. Rep. 746; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187. Attention is called to the fact that courts of equity have sometimes relieved parties from the loss of, or from injury to, their rights of property which have resulted from mistakes of law. *Freichnecht v. Meyer*, 39 N. J. Eq. 551, 558; *Bales v. Hunt*, 77 Ind. 355, 359, 360; *Kerr on Fraud and Mistake*, 400. Counsel argue from these decisions that the courts should hold that the city is estopped from denying the validity of its ordinance and should grant him a recovery of the money he expended for his license. But the answer to this argument is that in none of the cases he cites did the fatal vice of the moral turpitude of the plaintiff, or of his violation of a general law of public policy, inhere, and for that reason they are neither controlling nor persuasive in the case at bar. The question here is, not what the plaintiff might have recovered in the absence of that vice, but what he can recover in the presence of it.

In *Brent v. State*, 43 Ala. 297, 301, cited by counsel for the plaintiff, Brent was indicted for the violation of a statute which prohibited the operation of a lottery; but the court held that he was lawfully licensed to carry on the lottery under a subsequent statute, which in so far as it created a corporation was unconstitutional, but in so far as it granted a license to the defendant in that case was legal. The court then proceeded to declare that the defendant was not charged with notice that the second statute was unconstitutional, and counsel found upon this last statement the contention that the parties to this action were not charged with knowledge that the ordinance was void and that the business of book making and pool selling was illegal. But the declaration in the Brent Case upon which they rely was obiter dictum, and if it were a true statement of the law it would be far from convincing that the parties to this suit were ignorant of the general law of 1895 and of the illegality of the ordinance and the license. The act of 1895 was not a new law. It was 10 years old when the plaintiff procured his license. It not only prohibited him from carrying on the business of book making and pool selling on Central avenue in the city of Kansas City, but it disclosed a public policy of the state which had been patent and well known for more than 10 years, the policy to prevent the carrying on of the business of book making and pool selling in that state. Much is written in the brief of counsel for the plaintiff of a mistake of law into which the parties to this action are supposed to have fallen; but the complaint has been searched in vain for any averment that either of them was ignorant of the act of 1895, or that either of them believed that the ordinance of 1898, was valid, and in the absence of any such averment or proof

the legal presumption is conclusive that they knew the law and that they intended to disregard it.

There is, therefore, no escape from the result that the plaintiff is here asking the court to compel the defendant to restore to him money which he paid to it for a license to carry on a business prohibited by a penal statute, and he falls far within the rule that courts will not lend their aid to parties to recover money or property lost through contracts or transactions in which they were guilty of the violation of a general law enacted to carry into effect the public policy of a state or nation; and the judgment below is affirmed.

CIMIOTTI UNHAIRING CO. et al. v. AMERICAN FUR REFINING CO. et al.

AMERICAN FUR REFINING CO. et al. v. CIMIOTTI UNHAIRING CO. et al.

(Circuit Court of Appeals, Third Circuit. February 10, 1909.)

No. 48.

1. INJUNCTION (§ 239*)—WRONGFUL INJUNCTION—LIABILITY—LIMITATION BY BOND.

Where a federal court, as a condition to the granting of a preliminary injunction, required complainant to give a bond in a stated sum to indemnify the defendant against loss or injury due to the improvident or erroneous grant of such injunction, the liability of the complainant, as well as the surety, is limited to the amount of such bond, and neither further damages, interest, nor costs can be awarded thereto.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 542; Dec. Dig. § 239.*]

2. EQUITY (§ 409*)—FINDINGS OF MASTER—PRESUMPTIONS SUPPORTING.

The conclusions of a master on matters of fact have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 920-923; Dec. Dig. § 409.*]

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

For opinion below, see 158 Fed. 171.

S. L. Moody, for appellants.

Henry Schreiter, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. These are cross-appeals from an order in a patent case, which was entered on February 20, 1908, upon the coming in of the report of the master, who had been appointed on February 9, 1904—

“to ascertain and report to the court what loss and damages defendants had suffered, if any, by reason of the granting of the preliminary injunction against them on the 28th of August, 1902, and until the entry of the interlocutory decree entered herein on the 21st day of February, 1903.”

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 168 F.—34

The preliminary injunction here referred to had been granted—
“upon condition that complainants give a bond with good and sufficient surety or sureties, to be approved by the court, in the sum of \$15,000, to indemnify the defendant corporation, until the entry of an interlocutory decree upon final hearing herein, against loss or injury due to the improvident or erroneous grant of this order, and provided the court finally dismisses the bill of complaint herein.”

Accordingly the complainants gave a bond of the Lawyers' Surety Company of New York, by which that company undertook—

“in the sum of fifteen thousand dollars, to indemnify the defendant corporation in the above-entitled matter so enjoined, until the entry of an interlocutory decree upon final hearing herein, against loss or injury, not exceeding the said sum of fifteen thousand dollars, due to the improvident or erroneous grant of this order, and provided the court finally dismisses the bill of complaint herein; such loss or injury and damages therefor to be ascertained as the court shall direct.”

This court affirmed the order for a preliminary injunction (118 Fed. 838, 55 C. C. A. 513); but it reversed the subsequent decree sustaining the bill (123 Fed. 869, 59 C. C. A. 357), and this reversal the Supreme Court upheld on May 15, 1905, in *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100. On June 8, 1907, the master reported:

“That the loss and damages suffered by the defendants by reason of the granting of the preliminary injunction against them on the 28th day of August, 1902, and until the entry of the interlocutory decree entered herein on the 21st day of February, 1903, amounts to \$18,406.70.”

But the decree under review, which is copied at length in the margin,¹ reduced that amount to \$15,000; and now on the one side it is insisted that this sum is less, and on the other that it is more, than it ought to be.

¹ The master, appointed by the order of this court, entered herein on the 9th day of February, 1904, and directed by this order “to take proofs in the case, to ascertain and report to the court what loss and damages defendants had suffered, if any, by reason of the granting of the preliminary injunction against them on the 28th day of August, 1902, and until the entry of the interlocutory decree entered herein on the 21st day of February, 1903,” having filed his report on the 7th day of June, 1907, and this report having been considered by me, together with the complainants' exceptions filed on the 6th day of July, 1907, and the defendants' motion to confirm this report, and thereafter an order having been made and entered herein on the 16th day of January, 1908, overruling complainants' exceptions and assessing the damages sustained by the defendant, the American Fur Refining Company, at the sum of fifteen thousand dollars (\$15,000), and it appearing that due notice of the hearing before said master was given to the Lawyers' Surety Company, the surety who executed the injunction bond herein given, inviting said company to attend said hearing and cross-examine witnesses produced on the part of the defendants:

Now, on consideration thereof and upon due deliberation, it is ordered, adjudged, and decreed: (1) That the defendant, the American Fur Refining Company, do have and recover from the complainants, the Cimiotti Unhairing Company and John W. Sutton, and from the Lawyers' Surety Company, the surety on the bond given herein, the sum of fifteen thousand dollars (\$15,000), and that the defendant, the American Fur Refining Company, have execution therefor.

The first three specifications on behalf of the defendant below aver, in effect, that the court erred in limiting the amount of the loss and damages recoverable by it from the complainants to \$15,000; and the contention in support of this averment is that, though the amount of the bond, which was executed by the Lawyers' Surety Company only, fixes the extent of its liability, yet—

“as against the complainants the defendant corporation is entitled to recover the entire amount of its loss and damages as found by the master; the office of the bond being, as to them, merely that of a collateral security for their fulfilling of the condition ‘to indemnify the defendant corporation,’ imposed by the court in the order of August 28, 1902.”

This contention assumes that the order just mentioned imposed a condition which in terms, at least, it certainly did not impose. Its requirement was not that the complainants must “indemnify the defendant corporation,” but that they must “give a bond” to indemnify it; and that these different phrases mean different things is manifest. It may be conceded that, if the injunction had issued in pursuance of a decree expressed to be upon condition that the complainants indemnify the defendant, the defendant would have been “entitled to recover the entire amount of its loss and damages”; but we cannot agree that the requirement of a bond for \$15,000 was merely a provision for “collateral security” for the fulfillment of an obligation—implicit, if not express—to indemnify generally and without limitation.

None of the judicial decisions to which we have been referred appears upon examination to sustain the proposition that, where such a bond as in this case is ordered and given, the applicant for a preliminary injunction, if it be erroneously granted and issued, becomes liable for the entire amount of the loss and damage thereby occasioned to the defendant, even where that amount exceeds the penal sum of the bond. For instance, in *Meyers v. Block and Meyers v. Isaacs*, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642, cited in supposed support of that proposition, the Supreme Court, speaking by Mr. Justice Bradley, said that, though by the law of the state of Louisiana (from whose Supreme Court the cases had come) damages might be recovered for suing out an injunction without just cause, independently of a bond:

“This cannot be done in the United States courts. Without a bond, no damages can be recovered at all. Without a bond for the payment of damages, or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything.”

The present case, of course, is not one of malicious prosecution; and therefore nothing would have been recoverable, but for the condition prescribed by the order granting the injunction, and the bond given in compliance therewith, for without these any damages resulting from the issuance of the writ would have been attributable wholly to the judgment of a competent court, and therefore *damnum absque injuria*.

The remaining specification on behalf of the defendant below avers that:

"The court erred in holding that the decree should not include interest and costs, in addition to the sum fixed as the maximal amount that can be assessed against the complainants for the loss and damages sustained by the defendant by reason of the injunction, as against the said complainants, the Cimiotti Unhairing Company and John W. Sutton."

In our opinion, however, the court below was clearly right in not adding interest or costs to the sum named in the injunction bond. It limited the total liability (for interest as well as principal) to \$15,000, and provided for the ascertainment of the actual amount thereof as the court should direct; and even a court of equity, whose discretion as to costs is generally controlling, would, we think, exceed its authority if, as to proceedings taken under such a provision, it ordered a payment of costs to either party. As was said by Mr. Justice Bradley, *supra*, it is only by reason of the bond that a party against whom an injunction wrongfully issues can recover anything; and therefore it is difficult to see how the claim of the defendant for interest and costs, not nominated in the bond, could possibly have been allowed.

In the brief submitted in support of the appeal of the complainants below, it is said that the substance of their assignment of errors is:

"The failure of the court to find that at the time of the preliminary injunction the defendant had machines not shown to be covered by the injunction which would enable it to continue its business without interruption by reason of the preliminary injunction; that with these machines defendant could readily handle all its business, or at any rate it could handle a very large proportion thereof, and defendant has failed to show how much could not be so handled."

Upon the point thus made it is unnecessary to enlarge. The master, in dealing with it, observed that the injunction had in terms restrained the use, not only of certain designated machines, but also of "like or similar" machines; and he found as a fact that the particular machines which it was claimed, and is now asserted, the defendant could and should have used, were like or similar to those specifically mentioned in the writ, and accordingly he held as matter of law that they were included in its inhibition. This conclusion of law was unquestionably right, and we have not been convinced that the finding of fact upon which it rested was erroneous. As was said by the learned District Judge:

"The well-settled rule is that the conclusions of a master on matters of fact have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part. *Tilghman v. Proctor*, 125 U. S. 149, 150, 8 Sup. Ct. 894, 31 L. Ed. 664; *Callaghan v. Myers*, 128 U. S. 666, 9 Sup. Ct. 177, 32 L. Ed. 547; *Crawford v. Neal*, 144 U. S. 596, 12 Sup. Ct. 759, 36 L. Ed. 552; *Davis v. Schwartz*, 155 U. S. 636, 15 Sup. Ct. 237, 39 L. Ed. 289; *Girard Insurance Co. v. Cooper*, 162 U. S. 538, 16 Sup. Ct. 879, 40 L. Ed. 1062."

In view of this rule, we think the court below would not have been warranted in setting aside the finding of fact to which we have referred, and that therefore this court, of course, should not do so.

The decree of the Circuit Court is in all things affirmed, with costs upon each appeal against the party appellant therein.

TERRY & TENCH CO., Inc., v. MERRITT & CHAPMAN DERRICK & WRECKING CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 182.

SHIPPING (§ 58*)—CHARTERS—INJURY TO VESSEL—LIABILITY OF CHARTERER.

In a suit to recover for injury to a derrick chartered by libelant to respondent, and which sank while in the exclusive possession and control of respondent, the burden rested upon respondent, as bailee in possession, in order to avoid liability, to show how the injury occurred and that it was free from negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 239; Dec. Dig. § 58.*]

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

Marsh, Winslow & Wever, for appellant.

Wing, Putnam & Burlingham (Henry E. Mattison, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This was a libel in personam to recover damages for injuries sustained by a derrick belonging to the libelant while in the possession of the respondent as a charterer. The following is a summary of the undisputed facts.

In August, 1906, the libelant chartered its derrick to the respondent. About a week later she was found to be leaking and was returned to the libelant for repairs. She was sent to a dry dock and repaired, and was returned to the respondent on September 14th, and was used by it and in its exclusive possession until September 20th, when the accident occurred. On the afternoon of that day she was loaded with stone at Weehawken, N. J., and was made fast alongside the respondent's tug, which started across the Hudson river. When about two-thirds across the river the derrick listed to starboard, capsized, and sank. After hearing the evidence the District Judge said, in substance, that she was sunk without known cause, resorted to a presumption that she was unseaworthy, and dismissed the libel.

This case is similar to the recent case of Swenson v. Snare & Triest Co., 160 Fed. 459, 87 C. C. A. 443. In that case this court said:

"This was a libel in personam to recover damages for the loss of a pile driver which occurred in the East River in July, 1905. It is admitted that the pile driver was chartered by the respondent from the libelant, and that while in the exclusive possession of the respondent it sank and was lost. As such an occurrence is not in the ordinary course of things, the burden was thrown on the respondent, as a bailee, to show how the loss took place and that it was not caused by its negligence."

These principles are applicable here. The vessel having been injured while in the exclusive possession of the respondent, as bailee, the burden is upon it to show:

- (1) How the injury occurred.
- (2) That it was free from negligence.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The respondent did show the circumstances of the accident, but offered no evidence to show the cause of the sinking of the vessel, and, to rebut the presumption against it, relied upon the presumption of unseaworthiness arising from the sinking of the vessel without apparent cause. The presumption of unseaworthiness generally arises in insurance cases, where a vessel is in the possession of the insured, and where means of knowledge concerning the condition of the vessel are available to him, rather than to the insurer. But where a vessel is in the exclusive possession of a charterer, means of knowledge are as readily available to him as to the owner, and we perceive no especial reason why there should be any presumption in the matter. We deem it unnecessary to decide this question, however, as we are of the opinion that, if the presumption of unseaworthiness exists in the case, the libellant rebutted it by its proof concerning the condition of the vessel before and after the accident. In our opinion the respondent failed to sustain the burden of proof imposed upon it as a bailee in possession, and the decree was erroneous.

The decree of the District Court is reversed, with costs, and the case is remanded, with instructions to enter a decree in favor of the libellant, in the usual form, for its damages and costs.

NOTE.—The following is the opinion of Adams, District Judge, in the court below:

ADAMS, District Judge. This action was brought by the Terry & Tench Company to recover from the Merritt & Chapman Derrick & Wrecking Company the damage caused to derrick No. 7 by her sinking.

The respondent denies that there is any ground of recovery and states that the derrick was unseaworthy. It alleges that after the cargo had been properly loaded and stowed No. 7 sprang a leak and leaked so badly as to show that she was unseaworthy. That was before this occurrence, however, and the respondent notified libellant of the defective condition of the vessel and she was accordingly returned by them as unsafe and unseaworthy; that the respondent was thereafter informed by libellant that the derrick had been caulked and otherwise repaired so as to render her safe and seaworthy and thereupon the respondent took the derrick back into its service on September 14, but that the repairs were deficient and that she was in an unseaworthy condition.

The respondent alleges that about the 18th day of September the derrick was engaged at the West Shore Railroad, Weehawken, to load a cargo of limestone, which was loaded with due care by the master—the stone being placed one tier deep on deck with only a few blocks on top, the entire load weighing about three hundred gross tons; that thereafter the tug William E. Chapman took No. 7 in tow and with the lighter fast to the steamer's starboard side proceeded towards New York; that the wind at the time was southeast; that there was a short choppy sea, light rain and flood tide; that the derrick No. 7 lay on an even keel, was properly manned and to all appearances in proper condition to tow; that out in the river the lighter listed to starboard, dumped its cargo and capsized.

The determination of this case turns upon the question whether, or not, the derrick was seaworthy. Of course if she was not seaworthy that was the libellant's fault and there can be no recovery. But it is contended that when the derrick was taken back by the libellant for the purpose of repair that she was thoroughly caulked and was in fact seaworthy then and remained so and they are unable to suggest any cause for this sinking.

The respondent contends that the cause of the sinking is that the derrick continued unseaworthy, that she was in fact unseaworthy all the time and particularly so because the libellant did not caulk the seams up as far as they

should towards the deck, that the top sides were practically in some places leaky and defective. That is the problem to be solved.

The law is reasonably well settled now since the late decision of the Circuit Court of Appeals in *Swenson v. The Snare & Triest Company*, 160 Fed. 459, 87 C. C. A. 443. That is a case very similar to the present one. The claim there was for loss of a pile driver which occurred in the East River in July, 1906. The Circuit Court of Appeals said: "It is admitted that the pile driver was chartered by the respondent from the libellant and that while in the exclusive possession of the respondent it sank and was lost."

Those facts are quite similar to those in this case except in that case, as I remember, the man who was on board and in charge, as is customary in chartering boats around New York Harbor, was still in the pay of the owner. In this case the master of the derrick, who was in charge, at the time of this occurrence was and had been for some little time before in the employ of the respondent, so that the owner had no one on board the vessel representing him.

I recur to the opinion which says: "As such an occurrence is not in the ordinary course of things, the burden was thrown on the respondent as bailee to show how the loss took place and that it was not caused by negligence." And further the Court said: "We need not go so far as the District Judge, it is sufficient for us to say that we have carefully examined the whole record, and in view of the findings of the Trial Court, are unable to hold that the respondent has sustained the burden of proof imposed upon it by law."

The question here is, Has the respondent sustained the burden of proof to show how this loss occurred? It refers to the familiar doctrine that where a vessel sinks without any apparent cause she is to be deemed unseaworthy when she started on the voyage. No one here has been able to state what the cause of this sinking was and I am a good deal in doubt about it myself. The testimony leaves me in doubt. I thought at one time it might have been caused possibly by overloading, but the testimony seems to exclude any such theory as that. The master of the derrick said he had carried larger loads on her than was put upon her this time, or quite as large, and nothing happened to her. If she was not overloaded—and I do not think that the testimony warrants any such conclusion—the question is how did this occurrence take place. No one has been able to give any direct explanation.

The libellant has maintained that the burden of showing the unseaworthiness of the boat has not been sustained. That the derrick had been repaired after her first return; whether she was fully repaired or not, is not by any means clear. She started out on this trip in tow of a tug that is not over powerful—although it has been contended that she is—a tug whose engine and power for a boat of that size is less than usual. She started out and went across the Hudson River making a sort of circle and when she got pretty well over on the New York side her lines suddenly began to "crack," I think the Captain of the tug called it, and in a few seconds they broke and the derrick went over capsizing her load. The derrick was subsequently saved but with a loss of her load.

It is an extremely difficult case to decide. Without the presumption which has just been adverted to, it is almost impossible to say how this loss occurred. The derrick was apparently made seaworthy after she was repaired; she went to work again and carried her loads safely—one load I think previous to this although it did not weigh as much, she carried that load safely and was apparently in a fair condition for work. On this occasion she was loaded rather deeper than she had been before—I do not think it could be said she was over loaded but she had more of a load on than on the first occasion and that exposed these seams, which it is claimed were not caulked, to the effect of the water.

I am unable to say how this loss occurred unless it was through some defective seams in the upper part of the boat. She met with nothing on the trip to cause her to capsize. It is true that she had a man aboard that was inexperienced but it does not appear that he did anything negligent, or failed to do anything which an ordinary man ought to do. His companion was not on the derrick at the time of the occurrence but had gone on board the tug. I am unable, as I said a few minutes ago, to determine how this accident hap-

pened if it were not that the vessel was unseaworthy. It has been shown here that there was a lot of cement used to strengthen the seams and to cover some worm holes. While there is no evidence to show that such use of cement was open to criticism in any way yet it is rather significant that such a method had to be resorted to to make the boat apparently seaworthy. It has been argued here, and I think truly, that wooden boats ordinarily are not aided by cement. We all know that the seams of iron and steel boats have to be made tight in that way but wooden boats are ordinarily supposed to be able to have their seams made tight by caulking without the aid of cement. I am somewhat in doubt as to exactly where the seams were in which the cement was used. I think it was shown it was used on the bottom of the boat. The fact, however, that after the accident she was still able to be used with satisfaction seems to preclude the idea of the bottom seams having opened or being worm eaten. Still, this boat sunk without any known cause and the only thing that the Court can do is to resort to such presumption as the law affords to aid it in determining a cause for the accident. The law says if a boat sinks without apparent cause she is to be deemed unseaworthy and I feel forced to come to that conclusion in this case, and I shall dismiss the libel on the ground that the boat was unseaworthy.

HICKEY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1900.)

No. 1,346.

1. ASSAULT AND BATTERY (§ 64*)—ASSAULT WITH DANGEROUS WEAPON—DEFENSES—EXERCISE OF AUTHORITY.

On the trial of a defendant, charged with assaulting a person with a revolver while attempting by force to eject such person and others from a mining claim of which they were in possession, evidence offered by defendant to show that he was the owner of the claim was not pertinent to the issue, and was rightly excluded, since such fact, if shown, was no justification for the assault.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 64.*]

2. ASSAULT AND BATTERY (§ 96*)—PROSECUTION FOR ASSAULT WITH DANGEROUS WEAPON—INSTRUCTIONS.

On the trial of a defendant, charged with the commission of an assault with a dangerous weapon, where he admitted striking the person assaulted with a revolver, the only question for the jury was whether defendant was guilty of the offense charged, or not guilty, and it was not error for the court to refuse to charge that he might be convicted of assault and battery, or simple assault.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 96.*]

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

R. B. Milroy and Geo. D. Schofield, for plaintiff in error.
John J. Reagan, Asst. U. S. Atty.

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

WOLVERTON, District Judge. Error is prosecuted by plaintiff from a judgment of conviction in the District Court for the District of Alaska, Division No. 2, upon a charge of being armed with a dangerous weapon, to wit, a revolver, and assaulting one E. E. Powell therewith.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The facts, briefly stated, are: That Powell, with his brother and others, was, on the day named in the indictment, engaged in doing what they assert was assessment work upon a mining claim, being then in the possession thereof. The defendant claims to be the owner, and he, with four other persons, came and ordered Powell and those with him off the claim. The order was accompanied, as the evidence tends to show, first with an assault upon Oleson, one of the men with Powell, and later with an assault upon Powell, culminating in Powell's being struck over the head with a revolver which defendant had in his possession at the time. The evidence for the prosecution tends strongly to show that the defendant first assaulted Powell, and that with the revolver, clubbing Powell with it, while holding it in his hand. Upon the other hand, the defendant claims that defendant first shoved or pushed Powell in an effort to get him off the claim, whereupon Powell hit the defendant with his hand or fist, and this was resented by defendant striking Powell with the revolver. The defendant himself admits the use of the revolver in that way. The altercation was continued until the parties were separated. During the altercation Powell was knocked down by the defendant with the revolver; the blow taking effect, as before stated, upon his head. In his cross-examination, defendant relates that he went to the place with his gun, intending to put Powell and his men off with force, if necessary.

It further appeared that defendant had previously applied to the district attorney for a warrant by which to eject other persons previously found upon the claim, but the warrant was refused, and that, by reason of the refusal, he concluded to eject these men by force; hence the altercation. During the course of the trial the defendant offered evidence tending to show that he was the owner of the mining claim, which was overruled by the court. On cross-examination of Powell and his brother, it was sought to inquire, also, whether Powell had not previously offered to buy the claim from the defendant, which, over objection of the government, defendant was not permitted to show. Under the rulings of the court in this regard, error is predicated, because the defendant was not permitted to show that he was the owner of the claim in dispute, and entitled to possession; the court holding that the title to the premises was not pertinent to the inquiry.

Under the attending conditions, as disclosed by the evidence, we are impressed that the trial court was right in its position. There was manifestly a dispute between the parties about the right of possession as it respects the claim, and the defendant had no right to attempt to settle that dispute by undertaking to eject Powell and his men by physical force, after they had refused to vacate the premises, when so ordered. Even if the defendant were the owner, with a perfect title, he had no legal right to oust trespassers in that way. The law provides peaceable methods for obtaining possession where wrongfully denied, and a resort to force and violence without pursuing the due course of law is seldom excused.

Counsel assert in their brief that the defendant had applied to the United States district attorney's office for assistance to have some persons previously upon the claim removed, but without avail, and

that, finding these men on there, "he [the defendant] went personally to remove them, because he could not have them removed by the arm of the law." There is no warrant of law for such a course of action. It would lead to riot and bloodshed, and make every man the judge of his own property rights and the executioner of his own judgments. A person has a right to defend his domicile or habitation against the intrusion of others, and to apply ample force to remove any such found therein. *Long v. People*, 102 Ill. 331. And he may prevent trespass upon his lands by force sufficient to repel the same; but, being himself dispossessed, he has no right to recover possession by force and by a breach of the peace. *Sampson v. Henry*, 11 Pick. (Mass.) 379, 387. The law applicable here is pertinently stated by Pollock, J., in *State v. Bradbury*, 67 Kan. 808, 809, 74 Pac. 231, 232. He says:

"While one rightfully in possession of property may defend his possession against an attack, and while one lawfully entitled to the possession of real property may, if he can, enter and take peaceable possession, yet, no matter what lawful right to possession one out of the actual possession of real property may have, he will not be justified in making a forcible entry and committing a breach of the peace in ejecting by force an actual occupant."

It is clear, from the record, that Powell and his men were in possession, and were working there. While the defendant, if in possession, might have kept them out by force, yet, finding them in possession, though trespassers, he could not use force to oust them, because the law provides a more peaceable way for doing it. These propositions seem so plain that no further authority is needed in their support.

The next assignment of error is predicated upon the refusal of the court to instruct the jury that they might find one of four verdicts, namely, assault with a dangerous weapon, assault and battery, simple assault, or not guilty. It is very apparent, however, from the testimony, that defendant was either guilty of the offense charged or he was not guilty at all. There is not the slightest doubt that he assaulted Powell with a revolver, using it as a club. Indeed, he admits this himself. That such an instrument, so used, is a dangerous weapon, no one will question. So that, the assault being established, there was but one defense, namely, that the defendant was justifiable in making it. If justifiable, he was not guilty; but, whether guilty or not guilty was a question for the jury. There was no room, therefore, for the jury to find the defendant guilty of a lesser offense than assault with a dangerous weapon, and the court rightly refused to submit the question to them. The principle is thoroughly settled by the Supreme Court of the United States. See *Sparf and Hansen v. United States*, 156 U. S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343, and *Wallace v. United States*, 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039.

These are the only assignments of error seriously urged, and, being determined against the plaintiff in error, the judgment of the trial court will be affirmed.

UNITED STATES v. KNAUTH, NACHOD & KUHNE.

(Circuit Court of Appeals, Second Circuit. March 16, 1909.)

No. 190 (4,231).

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—STEEL GAS HOLDERS—"TUBES."

Steel cylinders, severally 19 feet in length and 4 feet in diameter and 35 feet in length and 8 feet in diameter, used as storage tanks for illuminating gas, are "tubes finished," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

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

There was no written opinion below. The Circuit Court reversed a decision by the Board of United States General Appraisers (G. A. 6,345; T. D. 27,295), which had affirmed the assessment of duty by the collector of customs at the port of New York. The facts of the case and the nature of the issue appear from the following extract from the opinion filed by the Board of General Appraisers:

"FISCHER, General Appraiser. The merchandise involved in these two protests is described on the respective invoices as 'steel cylinders.' Duty was assessed thereon at the rate of 45 per cent. ad valorem, under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645); and the importers now claim that the articles are 'tubes,' properly dutiable at 35 per cent. under paragraph 152 of said act (30 Stat. 163 [U. S. Comp. St. 1901, p. 1641]), which reads as follows: '152. 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; all other iron or steel tubes, finished, not specially provided for in this act, thirty-five per centum ad valorem.'

"Protest 183,638 sets up some alternative claims, which were not pressed at the hearing, and which will not be referred to further. * * * Such articles have never to our knowledge been passed on by the court, and we regard the suggestion that the decision in the Downing Case, 105 Fed. 1005, 44 C. C. A. 686, should be stretched so as to apply to these cylinders, tanks, or reservoirs, as they have been variously termed, as unreasonable, and the arguments advanced in support of such suggestion as lacking in logical force. This is plain, in our opinion, from a mere description of the goods. The importations comprise severally one cylinder, 35 feet in length and 8 feet in diameter, and six cylinders, each 19 feet in length and 4 feet in diameter. Both classes of cylinders are necked at one end, * * * but in the butt end of the larger cylinder is a manhole into which a valve is fitted with screw bolts. Into the corresponding end of the other cylinders a three-fourth inch square-head plug is screwed.

"No testimony was offered by the importers, except that they produced a storekeeper in the employ of the Safety Car Heating & Lighting Company, the ultimate consignees of the merchandise, who identified the sample in the appraiser's warehouse, described the appearance and use of the cylinders, and submitted a sketch of the large tank, which was admitted in evidence. It appears from this that the articles are used for storing illuminating gas at high pressure, being kept at railway terminals for the purpose of replenishing therefrom the small cylinders attached to the bottoms of passenger coaches, which carry the supply of gas used in the illumination of the cars. This witness knew nothing of the manufacture of the articles; but we gather from the testimony * * * that they are made from plates rolled into a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cylindrical form and welded in a longitudinal seam. The heads are then stamped and welded in a circumferential seam.

"We know of no authority, judicial, lexicographical, or commercial, in support of the proposition that these enormous tanks, reservoirs, cylinders, or gasholders, as they were variously termed, are dutiable properly under such a provision as paragraph 152, and not an atom of evidence was introduced by the importers' counsel to that effect. Throughout the examination of importers' witness, counsel for the importers never once referred to the articles in dispute as tubes, but always as tanks or reservoirs, as did also the witness. It is noted, also, in this case, as in the prior one, that the bill of lading, entry, and invoice all describe the goods as steel cylinders; the suggestion that they are tubes being apparently of cis-Atlantic origin. It is clear to us that the testimony is in quantity overwhelming and in quality extremely satisfactory that in the trade which deals in tubes, tanks, and cylinders these gas tanks are in no sense bought, sold, or designated as tubes. Such being the case, we are entitled to take notice of the ordinary meaning of the word, and to resort to the dictionary as aid to the memory or understanding. *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745.

"This brings us to a point much urged by counsel for the importers, namely, that the definition of 'tube' given by the Standard Dictionary justifies his contention herein. The definition follows: 'A long, hollow, cylindrical body, as of wood, metal, rubber, or glass, generally used for the conveyance of something through it, but often as a receptacle for holding something.' Note Webster: 'A pipe; siphon; a canal or conduit; a hollow cylinder, either of wood, metal, or glass, used for the conveyance of fluids, and for various other purposes.' Century Dictionary: 'A pipe or hollow cylinder, especially when of small size, and used as a conduit for liquids or for containing liquids, as in some forms of scientific apparatus.' American Mechanical Dictionary: 'A metallic pipe of many kinds and uses. It would be well to call water pipes tubes, and fire pipes flues, if it were not too late to attempt careful nomenclature now. The present practice is to call them flues or tubes, according to their relatively large or small diameter, respectively.' Dr. Ure's Dictionary of Arts, Manufactures, and Mining treats of tubes exclusively as conduits for the passage of fluids and gases.

"We need not dwell further on the subject from a lexicographical viewpoint, and any comment is equally needless. The case as submitted for decision shows that the goods are not commercially or commonly known as 'tubes,' and our conclusion is that we cannot, without doing violence to common sense and understanding, hold that the articles are dutiable under the tariff provision for tubes.

"On motion of counsel for the importers, the printed transcript of the record of appeal in the Downing Case was admitted in evidence.

"Protest 186,368 is overruled, and the decision of the collector in assessing duty at the rate of 45 per cent. is affirmed."

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

Everit Brown, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The decision of the Circuit Court is affirmed, following *Downing v. U. S. (C. C.) 99 Fed. 423*, *U. S. v. Downing*, 105 Fed. 1005, 44 C. C. A. 686, and *U. S. v. Liquid Carbonic Co.*, 160 Fed. 455, 87 C. C. A. 671.

UNITED STATES v. CHARLES MORNINGSTAR & CO.

(Circuit Court of Appeals, Second Circuit. March 16, 1909.)

No. 185 (4,964).

1. CUSTOMS DUTIES (§ 38*)—FREE LIST—MINERAL WAX—WORDS USED IN POPULAR SENSE.

The expression "wax, * * * mineral," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 695, 30 Stat. 202 (U. S. Comp. St. 1901, p. 1689), must have been used in the popular sense of those words, inasmuch as the so-called mineral waxes are not waxes in the chemical sense.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

2. CUSTOMS DUTIES (§ 38*)—FREE LIST—"WAX, VEGETABLE OR MINERAL"—CARNAUBA WAX SUBSTITUTE.

Carnauba wax substitute, which is compounded of carnauba wax (vegetable wax) and paraffin (mineral wax), and which is to all appearance a waxy substance used for the same purpose as other waxes, is covered by the provision for "wax, vegetable or mineral," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 695, 30 Stat. 202 (U. S. Comp. St. 1901, p. 1689).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

3. CUSTOMS DUTIES (§ 38*)—CONSTRUCTION—ARTICLE COMPOSED OF TWO ENUMERATED SUBSTANCES—"WAX, VEGETABLE OR MINERAL."

A compound article may be classified under a tariff provision separately enumerating the substances of which it is compounded, as carnauba wax substitute, composed of a vegetable and a mineral wax, is classifiable under a provision for "wax, vegetable or mineral."

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

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

This cause comes here upon appeal from a decision of the Circuit Court, affirming a decision of the Board of General Appraisers (G. A. 6,609; T. D. 28,220), which reversed a decision of the collector, classifying the merchandise in suit as a nonenumerated manufacture under the provisions of the tariff act of 1897.

The opinion filed in the Circuit Court is as follows:

PLATT, District Judge (orally). The importation involved in this appeal is invoiced as carnauba wax. One of the importers in his testimony designates it as carnauba wax substitute. The affidavit of the manufacturer, which is in evidence, states that the merchandise consisted of two qualities, that both qualities are a by-product or remainder of bleached carnauba wax, and that in order to bleach carnauba wax it is necessary to add paraffin to it. The importation was assessed for duty at 20 per cent. ad valorem as a nonenumerated manufactured article under the provisions of Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693). The importers in their protest contend that it should be admitted free of duty as paraffin, under paragraph 633, § 2, Free List, 30 Stat. 200 (U. S. Comp. St. 1901, p. 1686), or as a vegetable or mineral wax, under paragraph 695 of the act, 30 Stat. 202 (U. S. Comp. St. 1901, p. 1689). The Board of Appraisers sustained the protest under said paragraph 695, from which decision the government appealed. Some additional testimony has been taken in this court.

The only difference between the case before the court and the one before the board is that Dr. Berry, government chemist, thinks the board misconstrued his evidence. He stated in his testimony, upon which the board acted, that the "remainder of the material, besides the paraffin," which he designated as "the difference," had been derived in part, if not entirely, from a vegetable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wax. He says now that "the difference" cannot be called wax in any sense. The case was not as carefully tried as I should like to have had it; but I understand, from all Dr. Berry's testimony, that he means to say that after carnauba wax is bleached with paraffin, the by-product, which must have come from one or the other of the original waxes, cannot be called a wax. But it is plainly composed of the ingredients which result from the combination of the two waxes. Of course, in the form in which we find them, they are not the natural waxes; but nothing new has been introduced. Paragraph 695 does not restrict the "wax, vegetable or mineral," to a natural wax. It would be unjust to place this merchandise, which is inferior to pure carnauba wax, in a provision which calls for 20 per cent. duty, when nothing has been done to the original free article except to treat it with another free article, and when it is clear that by such treatment no essential nonwax ingredient has been added to the merchandise. On the whole case, the decision of the board is sustained.

Decision affirmed.

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

Everit Brown, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The relevant paragraphs are both on the free list and read as follows:

"Par. 695. Wax, vegetable or mineral."

"Par. 633. Paraffin."

The importation is known as "carnauba wax substitute"; carnauba wax being a vegetable wax. The government's chemist admits that, although the so-called mineral waxes are not regarded as waxes in the chemical sense, paraffin belongs to that group. Evidently Congress used the words "mineral wax" in their popular sense; otherwise, they would cover nothing. The article in question is compounded of carnauba wax and paraffin, and when completed is to all appearance a waxy substance, used for the same purpose as are other waxes, and containing no animal wax. We concur with the board and the Circuit Court.

The decision is affirmed.

BELT RY. CO. OF CHICAGO v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. February 3, 1909. On Rehearing, March 18, 1909.)

No. 1,475.

RAILROADS (§ 229*)—INTERSTATE COMMERCE—SAFETY APPLIANCE ACTS.

Defendant owned a railroad located wholly in Cook County, Ill. Its road constituted a belt which intersected the trunk lines leading into Chicago, and forming, by means of Y's, direct physical connection with such trunk lines. Defendant's business consisted entirely of transporting cars between industries located along its line and trunk lines and between such trunk lines, for which it received an arbitrary charge per car, which was collected monthly from the railroad companies, defendant having no dealings with shippers. Defendant paid no attention to the class of traffic, but acted as an agent for the trunk lines in transferring cars. Defendant on the occasion in question moved a train of freight cars, containing one consigned from a point in Illinois and destined to Wisconsin, from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tracks of the Chicago & Eastern Illinois Railroad to those of the Chicago & Northwestern Railroad. *Held*, that such transfer constituted in effect a continuous carriage over both such roads, so that defendant with respect thereto was engaged in interstate commerce, and was within the safety appliance acts in relation to power brakes. Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act Cong. April 1, 1896, c. 87, 29 Stat. 85; Act Cong. March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

Seaman, Circuit Judge, dissenting.

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

William J. Henley, for plaintiff in error.

James H. Wilkerson, Luther W. Walter, Philip J. Doherty, and Edwin W. Sims, U. S. Atty., for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. The writ is addressed to a judgment assessing a penalty against plaintiff in error for an alleged violation of the provisions of the Safety Appliance acts in relation to power brakes. Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act Cong. April 1, 1896, c. 87, 29 Stat. 85; Act Cong. March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Certain questions relating to the purpose, scope, and validity of this legislation are considered in *Wabash R. Co. v. U. S.*, and *Elgin, etc., R. Co. v. U. S.* (herewith decided), 168 Fed. 1.

The only assignments presented and discussed by plaintiff in error are that the court erred in refusing to direct a verdict of not guilty, and in giving the following instruction:

"The question therefore presents itself, and it is a legal question, was the Belt Company, at the time it moved this string of 42 freight cars, containing a car originating in Illinois and destined to Wisconsin, engaged in interstate commerce? I charge you that when a commodity originating at a point in one state and destined to a point in another state is put aboard a car, and that car begins to move, interstate commerce has begun, and that interstate commerce it continues to be until it reaches its destination. If, between the point of origin of this commodity and the point of destination of this commodity, the car in which it is being vehicled from origin to destination passes over a line of track wholly within a city, within a county, or within a state, the railway company operating that line of track while moving this commodity, so originating and destined from one point to another point, intrastate, is engaged in interstate commerce."

Was there sufficient evidence to warrant the jury in finding that in hauling the train in question plaintiff in error as a common carrier was "engaged in interstate commerce by railroad"?

The railroad tracks of plaintiff in error lie wholly within Cook county, Ill. There are 21 miles of main line and about 90 miles of switching and transfer tracks. The main line constitutes a belt that intersects the trunk lines leading into Chicago. By leads and Y's direct physical

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

connection with the trunk lines is maintained. Plaintiff in error's business consists in transporting cars between industries located along its line, between industries and trunk lines, and between trunk lines. The first two kinds need not be noticed, as the transportation here involved was between trunk lines. The train in question contained, among others, a car laden with lumber, and consigned from a point in Illinois on the Chicago & Eastern Illinois to a point in Wisconsin on the Chicago & Northwestern. This car was taken by plaintiff in error from the tracks of the Eastern Illinois over the Belt Line and put on the tracks of the Northwestern. For services of this kind plaintiff in error makes arbitrary charges of so much a car, which are collected monthly from the railroad companies for which the services are rendered. In such operations plaintiff in error has no dealings with the shippers, and pays no attention to the class of traffic. Its relation to the traffic was stated by the general superintendent, as follows:

"The Belt Company acts practically as an agent for the trunk lines in the handling of cars from one connection to another through its yards."

In *United States v. Geddes*, 131 Fed. 452, 65 C. C. A. 320, defendant as receiver was operating a narrow-gauge railroad that lay wholly in Ohio. "At Bellaire it connected with the Baltimore & Ohio Road, in the sense that it received from the Baltimore & Ohio freight from other states marked for points on its line, and delivered to the Baltimore & Ohio freight from points on its line marked for other states, in the following manner: There was no interchange or common use of cars, the gauges of the two roads being different. The cars of the defendant road were used only on its own line. But a transfer track ran from the main line of the Baltimore & Ohio to the terminal station of the defendant road, so that the freight cars of the two roads could be placed alongside adjoining platforms, and the transfer of freight made by the use of trucks handled by the Baltimore & Ohio men. No through bills of lading for such freight were issued by either road, no through rate was fixed by mutual arrangement, and no conventional division of a through freight charge was made." The Circuit Court of Appeals for the Sixth Circuit decided that the narrow-gauge cars in question were not subject to the safety appliance act, holding that a common carrier was not "engaged in interstate commerce by railroad" within the meaning of the safety appliance act unless, referring to the definition in the original interstate commerce act, it was "engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management, or arrangement for a continuous carriage or shipment" from one state to another. The equipment of a narrow-gauge railroad which lay wholly in Colorado, and which was similarly endeavoring to conduct a separate and independent business, was held by the Circuit Court of Appeals for the Eighth Circuit to be within the safety appliance act. *U. S. v. Colorado, etc., R. Co.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167. Plaintiff in error argues the present case as if the judgment could not properly be affirmed without our adopting the decision in the Eighth Circuit as against that in the Sixth. In our judgment the question presented to

those courts is excluded from our consideration by certain distinguishing and controlling facts. The narrow-gauge track had no direct physical connection with the broad-gauge tracks of the interstate trunk lines, and so no cars from other states, laden with goods from other states, were hauled on the local highway. The Belt Line physically connected its track with those of the Eastern Illinois and of the Northwestern, so that a continuous highway across state lines was formed, on which interstate traffic, loaded on interstate cars, was moved from origin to destination without change of cars. The narrow-gauge road, by limiting its bills of lading to points on its own line, endeavored to escape being held a common carrier engaged in interstate transportation. The Belt Line, issuing no bills of lading because of having no dealings with the shipper or with any one on his behalf, performing its gateway service on account of and as agent of the trunk lines, made its track the track of its principals. Consequently the character of the transportation should be determined by considering the transportation as the act of such principals. Trunk-line yards are in some instances so related to each other that through cars can be transferred without the intervention of a go-between. We are of opinion that the transportation in question was the same in legal effect as if the Eastern Illinois by means of its own locomotive and track had put the through car on the Northwestern's track. In this view there was evidence from which the inference of fact might warrantably be drawn by the jury that there was a common arrangement for a continuous carriage over the Eastern Illinois and the Northwestern; and so, with respect to the movement in question, plaintiff in error was engaged in interstate transportation.

When the portion of the charge complained of is read in the light of the undisputed facts, we see no basis for saying that the substantial rights of plaintiff in error were injuriously affected.

The judgment is affirmed.

SEAMAN, Circuit Judge (dissenting). I cannot concur in the affirmance of this judgment, as I believe the operation of the Belt Company described in the record is not within the meaning of the safety appliance act. It clearly appears that this company was an independent railroad within the city, engaged only in transferring cars (loaded or unloaded) from the terminal of one trunk line in Chicago to that of another trunk line; that it had no part in the shipment of any commodities which were upon the cars, nor interest in shipping bills or rates charged, nor concern in their ultimate destination and delivery to consignee; that its only service involved herein was the transfer of cars over its own lines, from one terminal to the other in Chicago, when the cars were delivered to it by a trunk line to be so transferred, for which service the Belt Company was paid by the trunk line an arbitrary rate per car, on monthly collections. In such service the Belt Company is neither chargeable with notice whether the service of the trunk lines in respect of the cars is interstate commerce or otherwise, nor concerned in such inquiry, as I believe. It was not "engaged in interstate commerce," as defined in the interstate commerce act, and I

am of opinion that the two acts are in pari materia, so that the terms of the safety appliance act are inapplicable to the service thus performed by the Belt Company, and the judgment should be reversed.

UNITED STATES v. ILLINOIS TERMINAL R. CO.

(District Court, S. D. Illinois. February 23, 1909.)

1. CARRIERS (§ 37*)—RATES—PUBLICATION.

Effective railroad regulation must begin with publicity of rates. The penalty for failure on the part of any carrier subject to the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) to publish and file its rates is as severe as the penalty for failure to strictly observe such rates after filing.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 37.*]

2. COMMERCE (§ 34*)—REGULATION OF RATES—INTERSTATE COMMERCE.

The line of the defendant railway is entirely within the state of Illinois. The defendant is, however, engaged in the transportation of property moving wholly by railroad from one state to another state. It is, therefore, as much subject to the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) as it would be if it owned and operated a railway connecting the points in different states between which moved the commodities mentioned in the indictment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 82; Dec. Dig. § 34.*]

3. CARRIERS (§ 38*)—TRANSPORTATION—INTERSTATE COMMERCE—FAILURE TO FILE RATES.

By the amendment of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), transportation by rail of property moving in interstate commerce by a carrier which has not filed its rates for such service is a misdemeanor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 96; Dec. Dig. § 38.*]

(Syllabus by the Court.)

William A. Northcott, U. S. Atty., Henry A. Converse and Joseph H. Story, Asst. U. S. Attys., and John H. Marble, Atty. Interstate Commerce Commission.

Ashcraft & Ashcraft, and Edwin M. Ashcraft, Jr., for defendant.

HUMPHREY, District Judge. The defendant here was indicted under section 6 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), as amended by the Hepburn act of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 895), for transporting by rail certain car loads of glass bottles, which were moving in interstate commerce, without having first filed with the Interstate Commerce Commission its schedules of rates and charges applicable to such transportation.

The defendant owns and operates a line of railway entirely within the state of Illinois, extending from the east bank of the Mississippi river, at Alton, Ill., in an easterly and southeasterly direction for a distance of about 16 miles. This railway line intercepts and makes

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

junction with a number of trunk railway lines which extend eastwardly to points in other states than Illinois.

The indictment is in six counts. Each count recites the carriage by the defendant railway of a car load of glass bottles moving from a point in the state of Indiana to destination at Alton, Ill. Each car load so moving was received by the defendant at the junction point of its railway with one of the railways extending to the eastward, as above recited, and was by the defendant transported from such junction in the state of Illinois to Alton, Ill., where it was delivered to the consignee. The indictment recites that such transportation was so furnished without defendant having filed with the Interstate Commerce Commission any rate or charge whatever applicable to such transportation, or any evidence of the concurrence by the defendant in any rate or charge for such transportation theretofore filed by any of its connecting carriers.

The defendant by a plea of guilty has admitted all the material facts alleged in the indictment. The court, therefore, has the duty of imposing the penalty for the offenses set forth.

The original Cullom act for the regulation of interstate commerce, approved February 4, 1887, provided:

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

The Cullom act also provided that such schedules should be plainly printed in large type; that copies for the use of the public should be kept in every depot or station of such railroads for public inspection; that no advance in rates should be made except after 10 days' public notice; that copies of the schedules of rates should be filed with the Interstate Commerce Commission.

By the amendment of March 2, 1889, the above provisions were amplified and extended, carriers being required to publish and file the classifications of freight, and to state separately the terminal charges and any rules or regulations affecting or determining any part or the aggregate of the rates. By this amendment of March 2, 1889, the commission was also given power to prescribe the form of the schedules of rates, and to change such form from time to time as might be found expedient. The purpose of this amendment was evidently that which prompted the original Cullom bill. Effective railroad rate regulation must begin with publicity of rates. To be public the rates must be laid before the Interstate Commerce Commission, must be kept in the stations of the carriers for the information of the public, and must also be printed in such form that they shall be intelligible to the average shipper upon examination. All of this was perceived by the lawmakers 20 years ago, and the rules, based upon these considerations, then written into the law, have continued unchanged, except as they have been from time to time strengthened and amplified.

On February 19, 1903, Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), the "Elkins Act." became law. Section 1 of this act contains the following provision:

"The willful failure upon the part of any carrier subject to the said acts [the acts to regulate commerce] to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to the law shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 for each offense."

By the amendment of June 29, 1906, section 6 of the act to regulate commerce was rewritten, and still further strengthened. The transportation of passengers or property in interstate commerce by any carrier which had not filed its rates in accordance with the act was made unlawful. The Elkins act at the same time was also amended by addition of the penalty of imprisonment for individuals.

Prior to the act of June 29, 1906, such a prosecution as this could not have been maintained. Before that time the act made failure to file rates with the commission at Washington an offense, but did not provide that transportation without filing rates should also be an offense. Under the old law, therefore, it has been decided that the prosecution for failure to file could be brought only in the District of Columbia, where the office of the commission is situated. By the amendment, however, the prosecution for transporting when rates are not filed may be well brought in any district through which the transportation passes. *New York Central & Hudson Railroad Co. v. United States*, 166 Fed. 267.

The above case was decided by the Circuit Court of Appeals of the Second Circuit on December 15, 1908. In this opinion the court said:

"Section 6 of the present interstate commerce act [substituted by the Hepburn act in the place of the section which we have examined] makes it unlawful for a carrier to engage in transportation unless its rates have been published and filed. It is now an offense to transport without a filed rate as well as to fail to file the rate. Under the statute as it now stands prosecutions may be instituted in any district through which the transportation may have been conducted."

It thus appears not only that the performance of interstate transportation by a carrier which has neglected to file and publish its rates and charges is a misdemeanor under the act to regulate commerce and under the Elkins act, punishable by as severe penalties as any other violation of these acts, but it also appears that the requirement for filing and publication of the rates has been in the act to regulate commerce ever since the passage of the original Cullom bill, and that its importance has been recognized by the Congress by successive amendments designed to make it more precise and its violation more surely and more severely punishable.

The railroad line of the defendant here is entirely situated within the state of Illinois. It is not more than 16 miles in length. It is really no more than a switching road connecting the various railways reaching East St. Louis and Alton, Ill., with each other and with various industries which have been established upon its rails. From the indictment and the plea thereto it appears, however, that this defendant is engaged in the transportation of property moving wholly by railroad from one state to another state. It is, therefore, as much subject to the act as though it owned and operated all the line of railroad connecting the points in different states between which moved the com-

modities mentioned in the indictment. *C., N. O. & T. P. Ry. v. I. C. C.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *L. & N. R. R. v. Behlmer*, 175 U. S. 650, 20 Sup. Ct. 209, 44 L. Ed. 309; *U. S. v. C. & N. R. R. Co.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167; *Belt Ry. Co. v. U. S.* (C. C. A., 7th Cir., October term, 1908) 168 Fed. 542.

These authorities establish that the law regarding publication of rates and charges for interstate transportation applies with equal force to all carriers engaging in such interstate transportation, whether such carriers operate trains from one state to another state or operate entirely within the boundaries of a single state.

The chief object of the act to regulate commerce is the prevention of discrimination. Carriers, being engaged in a public employment, must serve all members of the public on equal terms. This was the doctrine of the common law. It has been explicitly stated and strengthened by the successive acts to regulate commerce. The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates. Whenever discriminating rates or practices are made public, a thousand forces of self-interest and of public policy will be set at work to reduce them to fairness and equality. The failure of any carrier to properly file and publish its rates is quite as serious a violation of the act to regulate commerce as a failure to observe such rates after they have been properly filed and published.

The indictment states six separate instances in which cars moving in interstate commerce were carried by the defendant at a time when it had not filed its rates covering such service. The fact that the failure to file the rates does not appear to have been part of any scheme to discriminate forbids great severity. The fact that the violation admitted is serious and goes to the very heart of the whole subject of railroad regulation forbids that the penalty should be nominal. In view of all the circumstances, the fine assessed upon this indictment is fixed at the sum of \$12,000.

KELLOGG SWITCHBOARD & SUPPLY CO. v. DEAN ELECTRIC CO. et al.

(Circuit Court, N. D. Ohio, E. D. August 11, 1908.)

No. 6,869.

PATENTS (§ 328*)—INFRINGEMENT—CURRENT CONTROLLING DEVICE FOR TELEPHONE CIRCUIT.

The Dean patent No. 722,212, for a current controlling device for telephone circuits, the purpose of which is to prevent the greater part of the steady current from passing through the subscriber's receiver, is not infringed by the device of the Manson patent No. 818,897, which operates on a different principle.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. On final hearing.

Curtis B. Camp and R. S. Taylor, for complainant.
Brown & Williams, for defendants.

TAYLER, District Judge. This is a suit for the infringement of patent No. 722,212, issued March 10, 1903, to the complainant, the Kellogg Switchboard & Supply Company, as assignee of William W. Dean. Infringement is claimed by the use of a device made in accordance with patent No. 818,897, granted April 24, 1906, to Ray H. Manson.

This patent refers to the method of controlling in the subscriber's telephone circuit the energizing current, sometimes called "steady current," which comes from the central station. This current, if permitted to pass unimpeded through the receiver, injures that delicate instrument. Under the old system of local batteries, this difficulty was avoided by having an independent battery at the subscriber's station of much lower intensity or strength than the central station battery, this battery being located in a closed circuit, including the transmitter and the primary winding of an induction coil. The patent was intended to cover a device whereby a small part only of the steady current originating at the central station should be permitted to pass through the receiver.

When a person talks into a telephone transmitter, the vibrations of its diaphragm produce undulations or changes of strength in the current. These changing conditions in the strength of a current furnish one of the most interesting phases or manifestations of electricity, and constitute an important element in scientifically considering this question, but it need not be further discussed in an opinion of this character. It is sufficient to say that, on account of the undulating or alternating character of what is called the "voice current," different qualities as to conductivity attach to different materials and different arrangements and constructions of devices for conducting or interfering with the conduction of the electric current from those which arise where there is a steady current.

Now, since the unimpeded passage of the steady current, the energizing current from the central station, through the receiver, would require a receiver very much larger and more expensive than such receivers as are in ordinary use, and, indeed, would be very much less desirable in every way than to continue the use of a local or independent circuit and battery at the subscriber's station, resort is had to well-understood principles applicable to the different degrees of opposition furnished to steady currents and to voice or undulating currents, whereby the steady or stronger current is diverted from the receiver, and only the lighter or voice currents permitted to pass through it. The principles just referred to are these: That voice or undulating currents are choked or checked by what are called "impedance coils," and steady currents pass through impedance coils freely. On the other hand, what are known as "condensers" present almost complete resistance to steady currents, while at the same

time offering apparently slight resistance to the flow of alternating or voice currents.

Now, it becomes apparent that if the energizing or steady current is permitted to pass freely through the circuit, except the receiver, and the voice current freely passes through the receiver, a situation arises where the receiver is unaffected by the strong or steady current, and the end sought for is attained. It was this which the patent in suit undertook to accomplish; and it was the principles just announced which the inventor undertook to apply and did apply to accomplish that result.

The following quotations from the patent will show the inventor's own idea of the scope and character of his invention. On page 1, from line 14 to line 65, the object and character of the invention are stated in general terms, as follows:

"In telephone systems of the common-battery or central-energy type, where-in current is supplied from the central station to the microphone at the sub-station, it has been the common practice to include the telephone receiver in series with the microphone, so that the energizing current which traverses the microphone also passes through the coils of the telephone receiver. This is objectionable, for various reasons. It frequently happens that the polarity of the source of energy at the central station is reversed often by the reversal of the line-wires by a lineman, and the energizing current is thus sent through the coil of the receiver in such a direction as to demagnetize the permanent magnet of the receiver, thereby destroying the efficiency and effective operation of the receiver. Moreover, since the coils of the receiver must carry the energizing current, the coils must be made of wire larger in cross-section than would need to be employed were the coils traversed only by the talking currents. Due to the employment of the larger wire, the coils cannot be as efficiently disposed upon the magnet-cores as would otherwise be possible, and, again, the passage of the energizing current through the coils subjects the diaphragm to a constant pull or tension. To counteract this constant pull or tension, the diaphragm must be made of increased rigidity or inflexibility, and a considerable air space must be left between the diaphragm and the ends of the magnet-poles, thereby decreasing the efficiency of the receiver.

"It is the object of the present invention to remove the receiver entirely from the influence of the energizing current traversing the microphone, whereby the several objections above enumerated are obviated.

"In accordance with the present invention, the receiver is included in a path which is opaque to the passage of the energizing current, which is usually continuous, while a parallel path is provided around the receiver, which is opaque, to the passage of the talking currents, while permitting the energizing current to pass freely therethrough. In practice, I usually include a condenser in the path containing the receiver, and an impedance or choking coil in the path which is parallel thereto."

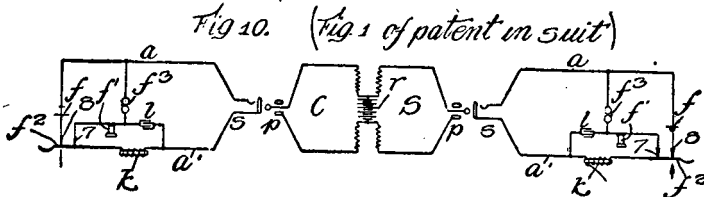
On page 2, lines 82 to 97, the term "opaque," as used in the patent, is distinguished and specifically defined as follows:

"By the term 'opaque,' as employed herein in defining a circuit in its relation to the energizing current, I contemplate a circuit containing a condenser or equivalent device which prevents the passage through the circuit of an appreciable or substantial amount of current—that is, a sufficient amount to affect the operation of the system to an objectionable degree—and by the term 'opaque,' when referring to the talking currents, I contemplate that characteristic of the circuit which will prevent the passage of the talking currents therethrough in sufficient amount to materially affect the transmission of the talking currents through the path containing the telephone receiver."

In some of the claims the word "opaque" is used in describing the two parallel paths, as in claim 14, which is in these words:

"(14) A telephone substation circuit and apparatus comprising a main circuit, said circuit having two parallel paths, one path opaque to voice currents but permitting the flow of steady currents, and the other opaque to steady currents but permitting the flow of voice currents, a receiver in the latter path responsive to the voice currents thereover, a transmitter in the main circuit outside of said parallel paths, and a switch-hook automatically controlling the circuit through the said paths in the use of the apparatus, substantially as described."

The apparatus described in the patent as the best known to the patentee for the accomplishment of the objects of his invention is illustrated in Fig. 1 of the drawings, which is here reproduced.



In this figure, *a* and *a'* are the two limbs of the circuit which connect the substation with the central station, CS, and over which the mingled steady current and voice current flow. At *k* is an impedance coil in one branch of the conductor, *a'*, at *l* a condenser, and at *f* the receiver, both in the other branch of the conductor, *a'*. The impedance coil permits the free flow of steady current, but obstructs the flow of voice currents, while the condenser permits the ready flow of voice currents, but prevents the flow of steady current. Hence the steady current takes the path through the coil, and the voice currents the path through the condenser and receiver to unite again at the hook switch contact 8.

The principle applied in this arrangement is very simple. It is to divide the line conductor into two parallel branches at the substation, and put the receiver in one of them, and put in the receiver path some sort of an obstruction to the flow of steady current, and in the other path some obstruction to the flow of voice currents. Such a combination will separate the voice currents from the steady current more or less perfectly, according to the effectiveness of the devices used in the two paths to perform their intended functions. Thus we see that the receiver is in the path which is opaque to steady currents, but permitting the flow of voice currents.

If we now look at the description of the alleged infringing patent, we discover the distinction between the two. Patent No. 818,897, p. 2, l. 90:

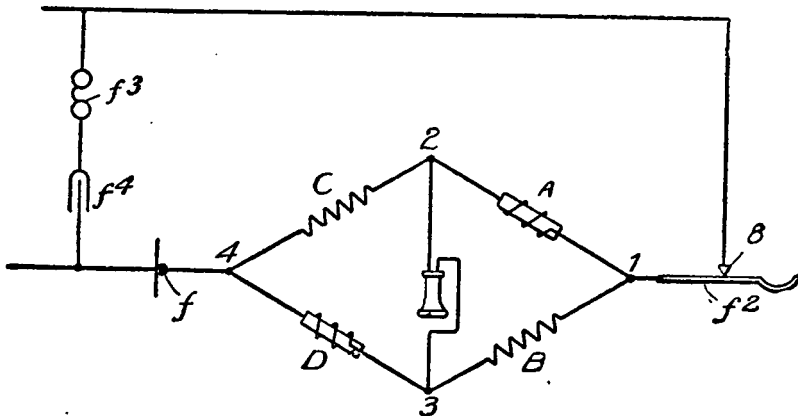
"To put the matter more specifically, I employ a Wheatstone bridge in series with the transmitter in the line-circuit over which the transmitter current flows, the receiver being located in the bridge-wire proper. The resistance of the four arms of the bridge are so proportioned with respect to each other that, although steady current flowing over the line will pass through them freely, no current will pass through the bridge-wire containing the receiver. This means that I employ a Wheatstone bridge adjusted to a state

of balance with respect to direct currents, such currents being excluded from the receiver not because the receiver-circuit is in any sense opaque to such direct currents, but because there is no difference of potential between the terminals of the receiver circuit, and therefore no tendency for current to flow through the receiver.

"It will be seen that the method which I employ for preventing a flow of steady current through the receiver is wholly distinct from any method based on insulation, opposition, or obstruction, for in my arrangement steady current could flow if a cause existed, but will no more flow, due to the balance of the bridge, than if the receiver-terminals were truly short-circuited.

"In order that fluctuating currents may not for the same reason be caused to pass by rather than through the receiver-circuit, I make the diagonally opposite arms of the Wheatstone bridge possess in large degree the property of self-induction, thereby giving to these two arms comparatively a very high impedance to fluctuating currents. It is evident, therefore, that the same conditions that hold with respect to steady currents do not hold with respect to fluctuating currents. In other words, the bridge is balanced with respect to steady currents, with the result that fluctuating currents choose the comparatively low impedance path through the receiver rather than the comparatively high impedance path through the two arms of the bridge that possess self-induction. By these means I achieve the desirable result of excluding direct current from the receiver without employing any medium opaque to direct currents in the receiver-circuit, and at the same time I force practically all fluctuating currents through the receiver-path."

The following diagram correctly represents the circuit arrangement employed by the defendants:



Let us now compare the principle and method of operation of these two devices. There are two ways of excluding steady current from an electrical circuit, or from a device such as a receiver in a circuit: First, resistance. This is what the patent in suit employs. Second, by the balance of pressure which may be brought about with reference to any particular part of the circuit or device in the circuit. It is by this method that the defendants' device excludes a steady current from the receiver. To put it in another form, but expressing really the same principle, we find that the device of the patent in suit puts a barrier in the circuit which virtually opens the circuit more or less completely, while the defendants' device leaves the circuit intact and

excludes current by the opposing electromotive force of the current itself.

Complainant's device is one which depends upon the fact that resistances are so arranged that the receiver is on a line which is opaque to steady currents and a conductor of voice currents. The defendants' device depends upon a balance of electromotive force due to the use of what is called a "Wheatstone bridge," and the receiver in this device is not in what we may call a territory opaque to any kind of current. If this be true, then we have a different philosophy at the foundation of the two separate systems. This, it seems to me, must be true when we bear in mind that the theory of the quality of voice currents has long been understood, and that certain kinds of resistances were opaque to steady currents and conductors of voice currents, and other resistances were opaque to voice currents and conductors of steady currents. Now, these facts being true, it seems to me that where, as in the patent in suit, the theory of its efficiency was the presence of these resistances, and, in the other, the presence of these resistances, of course, as they had long been known to exist, but with the basic principle upon which the place of safety for the receiver was put being the balance of forces of currents in the bridge, we have a different situation.

Making the distinction summarily in different form, we have this: In the device of the patent in suit, the receiver is in the path which is opaque to steady currents, but permitting the flow of voice currents. In the Manson, or alleged infringing, device, the receiver is in a path not opaque to any current as such, but at a place where, while equilibrium exists between the two steady currents, it is as if it was a non-conductor or opaque. But this is not because it is opaque. It furnishes no resistance at all to steady current. But on account of the low impedance path through the receiver and the comparatively high impedance path through the two arms of the bridge that possess self-induction, the voice or fluctuating currents choose the easier path by way of the receiver. It is a balanced Wheatstone bridge for steady current, but, on account of the self-induction of the impedance coil in the two arms of the bridge, it becomes unbalanced for alternating currents.

With this view of the principles involved in the two devices, I find no infringement. The bill is therefore dismissed.

VICTOR TALKING MACH. CO. v. HAWTHORNE & SHEBLE MFG. CO.

(Circuit Court, E. D. Pennsylvania. March 12, 1909.)

No. 179.

PATENTS (§ 328*)—INVENTION—IMPROVEMENT IN TALKING MACHINES.

The Dennison patent, No. 832,896, for an amplifying horn for talking machines, which consists of making the horn in two parts for reasons of convenience in shipment, etc., and providing well-known means for uniting the parts for use, is void on its face for lack of invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit for infringement of letters patent No. 832,896, for an amplifying horn for talking machines, granted to Wilburn N. Denison, October 9, 1906. On demurrer to bill.

Horace Pettit, for complainant.
Samuel Owen Edmonds, for defendant.

J. B. McPHERSON, District Judge. It is true that the improvement covered by the patent in suit (No. 832,896) is *prima facie* novel. The grant of letters carries with it such a presumption; but the presumption must give way if the court is clearly convinced, from examining the improvement, that the element of invention does not appear. In my opinion, such a situation is presented, as it seems to me no invention is disclosed by the device in question. What the patentee did was simply to take the old amplifying horn of a talking machine, cut it in two for reasons of convenience, and provide well-known means for refastening the parts when the occasion to operate the machine should arise. The specification does not refer to the reasons that suggested the change of construction; but they are thus stated—and no doubt correctly stated—in the brief of complainant's counsel:

"It will be evident to this honorable court that a talking machine having an amplifying horn, such as is shown at 11, in Figure 1 of the drawings, immovably fixed to its supporting bracket, would be most unsuitable for transportation and shipping purposes; and, furthermore, when not in use, the amplifying horn would occupy a large amount of unnecessary space; and if it should be desired to store the talking machine having its amplifying horn immovably mounted upon its bracket, the clumsiness and inconvenience of handling and storing the talking machine will be obvious; and, further, it may be desired to change horns."

As thus stated, all this is "evident," and I think that the device of the patent by which these inconveniences are avoided is evident also, and did not call for the exercise of the inventive faculty, but merely for such skill as a capable artisan is not likely to lack.

The demurrer is sustained, and the bill is dismissed.

THE MORRO CASTLE.

(District Court, S. D. New York. March 18, 1909.)

SHIPPING (§ 167*)—CARRIAGE OF PASSENGERS—LOSS OF BAGGAGE.

Damage to passengers' baggage on a steamer through negligence upon reaching Nassau, West Indies. The ticket provided that the limit of recovery should be \$100 for each person. *Held*, that the limitation was valid and should be sustained.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 553; Dec. Dig. § 167.*]

(Syllabus by the Judge.)

Blandy, Mooney & Shipman, for libellants.
Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. These actions were brought by Rawson Underhill and Jessie C. Underhill against the steamship Morro Castle,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the New York and Cuba Mail Steamship Company, to recover the damages, alleged to amount to respectively \$500 and \$960, caused by the negligence of the steamer in allowing the baggage of the libellants, and of their son, Rawson Underhill, Jr., to fall overboard while being transferred from the said steamer to a smaller one for the purpose of being taken ashore at the port of Nassau, West Indies, early in February, 1908. The libellants paid for first class passages from New York to the said port, obtaining one ticket for the three persons, and it was at the termination of the passage that the injury occurred.

The answer denied any negligence but it has since been conceded that the libellants have established their contention in such respect and the defense now relied upon is a provision contained in the passenger ticket as follows:

"(b) Twenty cubic feet of baggage is allowed to each passenger, provided said baggage is delivered on board one hour before sailing, marked clearly with owner's name and destination; but the Company is not to be held liable or responsible for any loss of or damage to the said baggage or any part thereof, or resulting from the delay in the delivery thereof, unless the said loss or damage or delay is proved to have occurred from the negligence of the Company or its servants; nor in any event shall the Company be held liable or responsible, nor shall any demand be made upon it because of such loss, damage or delay beyond the sum of one hundred dollars in case of a first class passenger or fifty dollars in case of an intermediate or second class passenger, at which sum the baggage of the passenger is hereby valued, unless at the time of delivery thereof to the Company notice is given to the Company in writing of the character and true value thereof, and one per cent. of the excess of said value over one hundred dollars or fifty dollars, as the case may be, is paid to the Company as compensation for the additional risk incurred."

The answer, after quoting the above limitation, alleges:

"As the claimant is informed and believes, on or about February 3rd, 1908, while the Morro Castle was in the port of Nassau, and the passengers' baggage was being discharged from the steamship onto a tug, a net sling in which the libellant's baggage was being lowered struck the rail of the tug and became unhooked and the contents of the sling fell into the water and, as the claimant is informed, were more or less damaged by water.

No notice whatever was given by or in behalf of the passenger to the claimant or its agents of the character and true value of the baggage brought on board by the libellant, nor was any excess payment made for the carriage of such baggage as provided in said contract of carriage.

And the claimant alleges that, if it was guilty of any negligence causing or contributing to the damage of said baggage, which it denies, nevertheless the extent of its liability is expressly limited by the terms of said contract of carriage to the sum of one hundred dollars. * * *

The question to be determined, therefore, is whether the limitation is valid.

The testimony shows the tickets were sold to Mr. Underhill and that at the time of the purchase of the ticket, he did not read it over nor was his attention called to its terms. His own testimony on this point was that he did not read any printed parts of the ticket, which covered the passage of the libellants and their son. He said:

"Q. Are you in the habit of looking at the tickets you buy? A. I never do, except to see what they say regarding staterooms.

Q. I show you a form of ticket (showing ticket to witness) which was sold you, the original having been lost, according to the proofs, after it was turned in. It had, according to the testimony, got into a basket with a lot of others

to be sent up to be filed away, and was thrown away by a cleaner. You did not bother reading the conditions to which the contract was subject? A. No sir, I never have, and have done a great deal of traveling.

Q. You did not think it was worth while to bother with that sort of stuff? A. No.

Q. But you saw it was there? A. Yes.

Q. Why did you not read it? A. Life's too short.

Q. You are not a man who generally pleads the 'baby act' on a contract? A. Not by a darn sight.

Q. Here is a ticket (showing ticket to witness) which at the top says: 'Notice, your attention is especially directed to the conditions of this contract.' Assuming that this is the same form as the one that you had, would that notice have any effect on you? A. Not a bit.

Q. As showing the terms and conditions of the contract? A. No.

Q. You make it a practice to shorten trouble by not looking at these things? A. Yes, sir.

Q. You know they are there, but you do not pay any attention to them? A. I know there is something there.

Q. You have been to Europe many times, I suppose, and are familiar with the forms of tickets, and that is your invariable rule not to look at them? A. I have never done so."

The steamer, with the passengers on board, left New York January 31, 1908 at 3:10 P. M. The libellants had with them two trunks a-piece, a steamer trunk for their stateroom, two dress suit cases, a hat box, two golf bags and a soiled clothes bag. They were going on a pleasure trip and provided themselves with suitable clothing for use at a fashionable winter resort, where high prices doubtless prevailed. There is no dispute that the injury to the value of the baggage was far in excess of the limitation.

The libellants claim to be entitled to the full amount of their injury by reason of the circumstances and because (1) the provisions of the ticket were not brought to their attention and (2) such provisions are unreasonable, against public policy and void.

The libellants urge a number of cases to sustain their contentions, viz.: *The Bourgogne*, 144 Fed. 781, 75 C. C. A. 647; *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729; *Railroad Company v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531; *Smith v. North German Lloyd*, 151 Fed. 222, 80 C. C. A. 574; *Weinberger v. Compagnie Générale Transatlantique (D. C.)* 146 Fed. 516; *The New England (D. C.)* 110 Fed. 415; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; *Bradley v. Lehigh Valley R. Co.*, 153 Fed. 350, 82 C. C. A. 426. Without analyzing these authorities here, it seems sufficient to say that none of them covers the situation now under consideration, or entitles the libellants to recover the full amount of their loss. Here, while there was no verbal notice at the time of the purchase of the ticket, there was ample opportunity for the libellants to have ascertained what the contract was which the steamer was willing to make. The limitation was contained in the body of the contract. It cannot be deemed a mere condition of passage or notice. The limitation was an essential part of the contract and does not appear to have been unreasonable.

Mr. Underhill said on cross-examination:

"Q. The question is, whether you have ever taken the trouble, in your business experience and your experience as a traveler, to ascertain the fact that

passenger tickets usually contain fixed, if not invariable, clauses limiting liability in regard to baggage to a certain number of dollars? A. No, I did not, if I had known that I would have insured my stuff.

Q. You certainly had ample opportunity to observe that in this ticket which you bought ten days before you sailed? A. Yes, if I looked at the ticket. I did not care for anything except for my rooms and that the ticket was paid for."

It would not be reasonable to expect the steamship to pay for damage, even if negligently caused, beyond the amount for which she was willing to be responsible in conformity with the contract of passage. There was no information withheld from the libellants; they simply failed to avail themselves of ample opportunity to advise themselves of a reasonable limitation of value. It was said by Mr. Underhill that if he had known of the limitation, he would have insured his goods, meaning, doubtless, that he would have effected insurance with usual mercantile underwriters, but he not only failed to resort to that method of securing indemnity but he neglected to utilize that which was already at hand, that is, the responsibility of the steamer, which would have insured the passengers for one per cent. It appears that the libellants expect the steamer to act as insurer without consideration.

The limitation here was clearly expressed in legible type of a fair (minion) size, and it could only have been carelessness or indifference on the libellants' part which prevented them from protecting themselves in a proper manner if they did not wish to encounter the risk of loss. There was no signed agreement here as in *Bachman v. Clyde S. S. Co.*, 152 Fed. 403, 81 C. C. A. 529, but it was said in that case (page 404 of 152 Fed., and page 530 of 81 C. C. A.):

"Even in the case of a mere notice, however, 'it is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk.' *Railroad v. Fraloff*, 100 U. S. 24-27, 25 L. Ed. 531."

I conclude that the limitation should be sustained. There will be a decree for the libellants for \$100, in each case, with interest.

WESTERN UNION TELEGRAPH CO. v. WRIGHT, Comptroller General.
(Circuit Court, N. D. Georgia. February 27, 1909.)

APPEAL AND ERROR (§ 458*)—SUPERSEDEAS—AUTHORITY TO GRANT—CONTINUING INJUNCTION.

A Circuit Court, on the dismissal of a bill and dissolution of a temporary injunction, granted at suit of a telegraph company, restraining the collection of taxes levied against it by a state, has power in its discretion to grant a supersedeas continuing the status quo pending an appeal, on the giving of a bond to protect the state.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 458;* Injunction, Cent. Dig. § 413.]

See, also, 158 Fed. 1004, 166 Fed. 954.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Dorsey, Brewster, Howell & Heyman, for complainant.
John C. Hart, Atty. Gen., for defendant.

NEWMAN, District Judge. In granting the supersedeas in this case I submit the following brief statement:

The rule on the subject of the grant of a supersedeas in a case like this is stated in *Hovey v. McDonald*, 109 U. S. 150, 160-161, 3 Sup. Ct. 136, 27 L. Ed. 888. In the opinion in that case by Mr. Justice Bradley, he stated of the *Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915:

"It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or nonexercise is not an appealable matter. In recognition of this power, and for the purpose of facilitating its proper exercise in certain cases, on appeals from the Circuit Courts, this court, by an additional rule of practice in equity, adopted in October term, 1878, declared that: 'When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.'"

To the same effect is *Cotting v. Kansas City Stockyards Company* (C. C.) 82 Fed. 850-857. In that case the judges presiding (Thayer, Circuit Judge, and Foster, District Judge), in view of the importance of the questions involved, granted a supersedeas, although they dissolved the injunction and dismissed the bill. In the Supreme Court of the United States (*Cotting v. Kansas City Stockyards Company*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92), this action of the judges presiding in the Circuit Court, in granting the supersedeas, was clearly approved, I think, in view of the language used by Mr. Justice Brewer in the commencement of his opinion.

In the case at bar I have no doubt whatever that the Western Union Telegraph Company is subject to taxation by the state of Georgia on its franchise; that is, its right to exist as a corporation, make contracts, collect tolls, and carry on generally the business of telegraphy. The doubt I have in the case, and the only doubt, arises by reason of the paper attached by the board of arbitrators to their award. I have stated, in the two opinions filed by me in the case, my reasons very fully for gathering from this paper, properly construing it, the fact, and only that, that the arbitrators were mistaken in supposing that any part of the franchise exercised by the Western Union Telegraph Company in Georgia was derived from the act of Congress. I have stated that in my opinion they first found the value of the franchise, and only misconceived the source from which that franchise was derived. I still believe this; but it is not a question entirely free from doubt, and consequently, while I recognize fully the delicacy of interfering with the state in the collection of its revenue, and the fact that this should be done, even temporarily, only in exceptional

cases, I have concluded that the proper course is to grant the superedeas and to continue the restraining order, heretofore granted in this case, of force. This is to be done, however, only upon the Western Union Telegraph Company entering into a bond in the sum of \$15,000, payable to Hoke Smith, Governor, and his successors in office, with sureties to be approved by the court; such sureties becoming parties to the litigation and bound by any decree to be entered in the cause, and the condition of the bond being that if the decree of this court shall be affirmed in the Circuit Court of Appeals, or in the Supreme Court, upon the entry of the mandate showing such affirmation, the Western Union Telegraph Company and the sureties on its bond will at once pay the amount of the taxes due by that company on its franchise for the year 1907, with interest thereon in accordance with the statutes of Georgia up to the time such payment is made.

LUCKENBACH et al. v. DELAWARE, L. & W. R. CO.

(District Court, S. D. New York. March 25, 1909.)

ADMIRALTY (§ 86*)—COMMISSIONERS—FINDINGS—REVIEW BY COURT.

Where the court, upon the consent of the parties, has delegated a commissioner to hear and determine the issues in an action, the court is without power to rule upon the findings and the exceptions should be dismissed.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 621-625; Dec. Dig. § 86.*]

(Syllabus by the Judge.)

Peter S. Carter for libellants.
James J. Macklin for respondent.

ADAMS, District Judge. This is a motion on the part of the libellants to dismiss certain exceptions to a commissioner's report in this action. The matter was referred to the commissioner in an order of which the following is a copy:

"The above-entitled action being called for trial on the 11th day of June, 1907, it was consented by the proctors for the respective parties that all the issues raised in said action be referred to Herbert Green, Esq., as United States Commissioner.

Now on motion of Peter S. Carter, proctor for the libellants, it is

Ordered, that the above-entitled action be referred to Herbert Green, Esq., United States Commissioner, to hear and determine the issues in dispute, raised by the libel and answer, and to ascertain the amount due, if any, to the libellants, and to report to this court with all convenient speed."

This order was entered upon the consent of the parties. Subsequently the commissioner reported that the libellants were entitled to recover a certain amount and the respondent thereupon excepted. The present motion to dismiss was then made.

The libellants urge that the exceptions can not be considered because the whole matter was referred and the respondent's only remedy is by an appeal. It seems that this point is well taken. When the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court and the parties agreed that the matter should be heard and determined by the commissioner, apparently the court had no supervising powers over his action. It then became similar to the familiar practice in the state courts and the United States Circuit Court of using referees to assist in the work of the court, the referees in such cases being invested with the full power of the court in the respects mentioned, necessarily excluding any revision by the court.

The respondent argues in opposition that the order in question after directing the commissioner to hear and determine all the issues, also directed him to report to this court, and it is still within the power and is the duty of the court to make its own decree with reference thereto. The decree here, of course, must be made by the court. That power, under the practice prevailing here, could not be delegated and it is still necessary that the decree should be the court's, but that does not prevent the court, with the consent of the parties, from appointing a person to pass upon the law and merits of the controversies involved, without review by the court.

The exceptions are dismissed.

SULLIVAN MACHINERY CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 15, 1909.)

No. 5,312.

1. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—UNSET MINERS' DIAMONDS.

Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 545, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683), provides for "diamonds * * * not advanced from their natural state by cleaving, splitting, * * * including miners' * * * diamonds not set." *Held*, that the provision for miners' diamonds is not qualified by what precedes, and that such diamonds, split, but unset, are within the paragraph.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

2. CUSTOMS DUTIES (§ 38*) — TARIFF ACT — CONSTRUCTION — "INCLUDING" AS WORD OF ADDITION.

In the provision for "diamonds * * * not advanced, * * * including miners' diamonds," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 545, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683), "including" is used as a word of addition, rather than of specification.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3499, 3500; vol. 8, p. 7685.]

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,772 (T. D. 29,054).

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

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

LACOMBE, Circuit Judge. The merchandise in controversy consists of certain articles indifferently known by the specific names of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 168 F.—36

"carbon," "carbonado," or "black diamonds." The testimony supports the finding of the Board of General Appraisers that "it was this substance Congress embraced within the term 'miners' diamonds.'" That term is found in the free list (Tariff Act July 24, 1897, c. 11, § 2, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683] at—

"Par. 545. Diamonds and other precious stones, rough or uncut, and not advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, including miners', glaziers' and engravers' diamonds not set, and diamond dust or bort."

The appellant contends that the three diamonds here imported, which have been split, but have not been set, are covered by this paragraph. The collector and the board classified them under—

"Par. 435. Diamonds and other precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, and not set, ten per centum ad valorem."

Judge Platt had the two paragraphs before him in *United States v. Fifteen Drilled Diamonds* (D. C.) 127 Fed. 753, and construed it, holding that the qualifying words following "other precious stones," to and including "other process," refer only to the preceding phrase "diamonds and other precious stones." I concur in his opinion, and conclude that miners', glaziers', and engravers' diamonds, whether whole or split, are free of duty, if they are not set.

The decision of the board is reversed.

A. A. VANTINE & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 16, 1909.)

No. 5,192.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—PAINTED CALENDAR—"PAINTINGS."

The term "paintings," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), includes hand-painted panels having a small calendar affixed, which is a trifling part of the entire article.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 6, pp. 5158, 5159.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The importation in controversy was made at the port of New York, and was classified as manufactures of wood, paper, etc., according to the component of chief value. The importers contended, inter alia, for classification under the provision for "paintings in oil or water colors," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678). The Board of General Appraisers overruled this contention in an opinion reading in part as follows:

"FISCHER, General Appraiser. The merchandise consists of certain calendars which are hand-decorated. * * * The articles are calendars of various shapes and composed of various materials. Each calendar has a small calendar pad attached thereto, and the calendar backs are illustrated or ornamented with pictures painted by hand. We do not regard these articles as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paintings in a decorative sense. The purpose of the calendar is as an object of utility, rather than as a painting. Though hand-painted, the pictures on the calendars are merely incidental or auxiliary, and intended only to add an additional feature to an otherwise completed article.

"Following *Woolworth v. U. S.* (C. C.) 152 Fed. 483, T. D. 27,853, we overrule the protest and affirm the decision of the collector."

Kammerlohr & Duffy (John G. Duffy of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

LACOMBE, Circuit Judge. The articles imported are hand-painted panels, to be hung on a wall or other appropriate place. To each one there is affixed a small calendar, manifestly a trifling part of the entire article. They seem to be within the principle laid down in *Tiffany v. United States* (C. C.) 66 Fed. 736, and should be classified under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678).

Decision reversed.

THE TOMMY.

(District Court, S. D. New York. February 13, 1909.)

ADMIRALTY (§ 119*)—REMAND AFTER REVERSAL—PROCEDURE BELOW.

The question of a right to limit liability involves a right to contest it, and, where a petitioner's right to contest and limit has been decided in her favor on appeal, it only remains for this court to determine whether a claimant is entitled to recover, and, if so, to what extent.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 119.*]

(Syllabus by the Judge.)

See, also, 81 C. C. A. 50, 151 Fed. 570.

James J. Macklin and De Lagnel Berier, for libellant.
Charles C. Sanders and Herbert C. Smyth, for claimant.

ADAMS, District Judge. An action having been brought in the New York Supreme Court by Hilma C. Johnson, administratrix of Charles H. Johnson, to recover from the libellant herein a sum for damages suffered by reason of the death of the said Charles H. Johnson, through the use of a pair of tongs on the barge Tommy in May, 1903, the libellant brought an action in this court to contest and limit her liability. In the last mentioned action, it was found here that the libellant was not entitled to succeed because the tongs were found to be defective and the vessel was therefore not properly equipped. It was further found that the persons delegated by the libellant to represent her in the matter were unfit to perform the duties of agents in the selection of proper tools to carry out the work involved. The libel was consequently dismissed. *The Tommy* (D. C.) 142 Fed. 1034. An appeal was taken from this decision and it was there determined that although the tongs might have been defective, the libellant had provided a suitable agent to represent her in the matter and could not be deprived of the benefit of the statute. 151 Fed. 570, 81 C. C. A. 50.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Subsequently the action was sent back to this court with instructions in the mandate, as follows:

"That the decree of said District Court be and it hereby is reversed with costs taxed at the sum of \$200.30, and cause remanded with instructions to adjudicate the rights of the parties and take such proceedings as are not inconsistent with the opinion of this Court."

The original claimant having paid the costs of the appeal, now moves for a decree on the mandate, which will entitle her to proceed as though she had established her right to recover the appraised value of the vessel. This is opposed by the libellant, who contends that there has been no adjudication of the claimant's cause of action and in order to recover anything, she must establish her right in the usual way.

The question which was tried in this court and on appeal was simply to determine whether the libellant was entitled to limit her liability. It was said in the opinion here (page 1036 of 142 Fed.):

"It is urged that the deceased was himself to blame for the accident because he did not handle the rails properly. It may be that he did not handle them with due care in view of the condition of the tongs. Whether he exercised the necessary amount of caution in view of what he might have seen, it is not necessary to determine here, the question now presented being whether the vessel was seaworthy in her equipment."

While the right of the claimant may have been regarded as established, it was obviously for the purposes of the argument only. The libellant's contention is correct and I have signed her proposed decree.

THE PROVIDENCE.

(District Court, S. D. New York. February 19, 1909.)

SHIPPING (§ 81*)—STEAMERS—INJURY BY SWELLS—LIABILITY.

A claim against the steamer Providence for damages said to have been caused to a schooner by her swells, in the channel between Blackwells Island and Manhattan, dismissed, because (1) it did not clearly appear that this steamer created the swells, and, (2) if she did, they were not more than ordinary under reduced speed, and there was no negligence on her part.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 345; Dec. Dig. § 81.*

Liability of vessel for injuries caused by creation of swell, see note to The Asbury Park, 78 C. C. A. 3.]

(Syllabus by the Judge.)

Collin, Wells & Hughes, and William H. Parke, for libellants.

William Greenough, George Whitefield Betts, Jr., and Francis H. Kinnicutt, for claimant.

ADAMS, District Judge. These actions were brought by the Perth Amboy Fire Brick Company, the owner of certain fire brick loaded upon the schooner Deborah T. Hill, and Otto F. Gehlhaus, the owner of said schooner, to recover the damages alleged to have been suffered by them, respectively \$502.33 and \$2000, through the loss of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

their property on March 31, 1908, about 6 o'clock P. M., by reason of swells caused by the Providence, when passing the schooner in the westerly channel of the East River between Blackwells Island and Manhattan. The tide was flood.

The first libel alleges that the schooner was bound under sail from the Fire Brick Company's dock near Perth Amboy, New Jersey, to points on the East River at and above 115th Street, and was proceeding northerly through the said channel; that when she was two or three blocks north of Blackwells Island Bridge, the Providence, on its way to Long Island Sound, passed the schooner on her starboard side at a distance of about 100 feet, at so high a rate of speed that the swells from the Providence turned the schooner in such a manner that it was impossible to control her and caused her to come into collision with a scow which was anchored off the foot of East 67th Street, and to pound the schooner against the scow in such a manner that her side was smashed in, she capsized and dumped her cargo, causing a total loss thereof.

The libel of the owner of the schooner was substantially the same as to the allegations of the movements of the vessels, and alleged a total loss of the schooner.

The answers on behalf of the steamer were general denials.

The libellants' testimony shows that while the schooner was sailing in the said channel, the Providence overtook and passed her to starboard, a short distance north of the Blackwells Island Bridge, near 62nd or 63rd Street, at a distance of about 100 feet, and caused swells of between 3 and 4 feet in height, which had the effect of throwing her head about and causing the booms to swing back and forth across her deck. The schooner at the time was on her port tack, heading for Blackwells Island, but the swells caused her crew to lose control of her navigation and she was forced against a barge anchored about 50 feet from the bulkhead line at 67th Street on the Manhattan side. A hole was stove in her port side and she immediately filled and capsized, going over on her starboard side. This version of the accident was given by her master and mate, who said that the steamer was the Providence.

The substance of the testimony for the defence is that the accident happened at from 5.30 to 5.40 o'clock P. M., and the Providence did not pass this point on the night in question until several minutes after 6 o'clock, and further that even if she did pass at the time and within the distance claimed by the libellants and the accident happened, the swells of the Providence were not the proximate cause of the libellants' loss.

It appears by the log of the Providence that she left her pier in the North River at 5.32 P. M. and passed Hell Gate at 6.13. There would be but a few minutes difference between Hell Gate and the point in the channel where this occurrence is said to have taken place. The times mentioned in the log are corroborated by the testimony of several witnesses, and if it is true that the accident happened to the schooner some time before six o'clock, then evidently the Providence could not have been the cause of it. The only testimony that she was, came from the two men on the schooner. Their statements did not

amount to more than estimates of the time of the occurrence, were somewhat vague in other respects, and as they were greatly interested in the result of the action, their evidence is not very reliable.

The steamer's testimony is to the effect that the schooner was first observed when her wreck was seen a mile and a quarter ahead, the Providence having then reached the vicinity of the bridge, and that the wreck was passed about 10 minutes after 6 o'clock in the vicinity of Horn's Hook, 89th Street. The crew of the steamer testified to this effect, and it is corroborated by the statements of some disinterested witnesses. If this testimony is true, and there does not seem to be any reason for doubting it, it seems clear that the schooner was not injured by swells from the Providence.

Assuming, however, that the swells were from that steamer, and that they did have some effect upon the schooner, the question remains whether there was any negligence on the steamer's part in creating them. In passing Blackwells Island Bridge, she was going under one bell and at a speed not to exceed 9 knots through the water. Her officers had no reason to expect that such a speed would prove detrimental to any vessel. The swells were not above 2 or 2½ feet in height and there was no ground for believing that they would prove injurious to other vessels.

This accident can be more reasonably accounted for by a failure of the wind, leaving the schooner helpless and subject to a swift tide setting her on the Manhattan shore, than by swells from the Providence.

Considering all the circumstances of the case, I have come to the conclusion that no cause of action exists against the Providence.

The libels are dismissed.

In re WILSON.

(Circuit Court, D. Rhode Island. March 8, 1909.)

Food (§ 12*)—FOOD AND DRUGS ACT—VIOLATION—MISBRANDING.

Syrup, 10 per cent. of which is made from maple sugar and 90 per cent. from white sugar, put up in bottles having thereon labels containing the name "Gold Leaf Syrup," with a trade-mark consisting of a gold leaf in the form of a maple leaf and stalks of sugar cane, and the words "composed of maple and white sugar" in plain and distinct letters, with the name of the maker, cannot be said to be misbranded, so that its shipment in interstate commerce constitutes a misdemeanor under Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928).

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

Charles A. Wilson, U. S. Atty., and G. H. Huddy, Jr., Asst. U. S. Atty., for petitioner.

BROWN, District Judge. The attorney for the United States moves for leave to file an information in accordance with the practice followed in *United States v. Smith* (C. C.) 40 Fed. 755.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is conceded that it is proper for the court to examine the information and the affidavits in support thereof, and if the same shall be found insufficient to deny the motion.

The information charges that a certain company shipped, by a carrier, from the state of Rhode Island to the District of Columbia, a certain article of food in bottles, to wit, syrup, bearing a certain label upon which was printed the following words: "Gold Leaf Syrup, composed of Maple and White Sugar; Huntington Maple Syrup and Sugar Company, Providence, R. I."—and that the label bore also, in the center thereof, the design and representation of the leaf of the maple tree, as the trade-mark of said company. It is alleged that the syrup was misbranded, and that—

"the design and device and said printed matter were false and misleading and calculated to deceive and mislead the purchaser thereof, in that said article of food was in fact composed principally of white sugar, and contained no substantial quantity, but, on the contrary, a very small quantity, of maple sugar, to wit, not more than 10 per centum by weight of maple sugar; whereas, said design and device, and said printed matter upon said label as aforesaid, represent, and are calculated to lead the purchaser thereof to believe, that said article of food is composed principally or in substantial part of maple sugar."

Appended to the motion is an affidavit in support of the information by an analyst of the Bureau of Chemistry to the effect that as a result of an analysis of the syrup it was found to contain approximately 90 per cent. of white sugar and not more than 10 per cent. of maple sugar.

A sample of the bottle is also presented, with a label printed in gold, blue, and red, which at the top has in plain large letters the words "Gold Leaf" in gold, "Syrup" in red, with a blue circular underscoring, a trade-mark consisting of a gold leaf, said to be a maple leaf, with stalks projecting on each side, apparently representing sugar cane, with the name of the company in smaller letters in the middle; the words "composed of" in white on a blue field, being very distinct, and the words "maple and white sugar" in blue on a white field at the bottom, being also very distinct. The very conspicuous features are the words "Gold Leaf Syrup," "Composed of," and "Maple and White Sugar."

It is impossible, upon the most partial interpretation of these statements, and having in mind the decisions of the courts concerning what amounts to fraudulent misrepresentation upon labels, to find any intimation as to the proportions of maple and white sugar contained in this preparation, which is given the general title of "Gold Leaf Syrup." The purchaser is informed in the most distinct and unequivocal manner that he is buying a compound of maple and white sugar, and from the report of the analyst it appears that this is the fact. There is no statement contained on the label which is in the slightest degree calculated to convey the impression that there is more maple than white sugar, and, if a purchaser should suppose that there was, such an idea would come entirely from his own imagination, and not from any suggestion fairly implied by the label. The label affords not the slightest evidence of an intention to convey such an idea to the purchaser.

Such remote possibilities of the imagination cannot be a basis for a proper interpretation by the court of terms of clear and unambiguous meaning. The label says nothing of proportions, either directly or by any reasonable implication.

As to the maple sugar, it appears as a fact that 10 per centum is contained in the avowed compound. The article is designed for table use. The addition of so substantial an amount of maple sugar as 10 per cent., if sufficient to give to this compound syrup a maple flavor, serves to make the article more palatable and to satisfy the purpose of the buyer. A person who should buy this syrup would expect that he was getting a considerable portion of white sugar, with the addition of a sufficient amount of maple sugar to please his palate. Unless his palate is disappointed by the absence of the flavor which he expects, I am unable to imagine how there can be any variance between the contents of this bottle and the statements on the label. Even if we search this label with a most prejudiced eye, and endeavor to discover upon it some innuendo or insinuation, we are at great difficulty in finding even the most remote suggestion. Is there an innuendo that there is more maple than white sugar in the composition? Clearly not. Is there an innuendo that there is more than 10 per cent. of maple sugar? Viewing this in the light of the subject-matter, to wit, the purpose of the purchaser and the expectations aroused in him as a consequence of statements on the label, I am unable to perceive any more definite suggestion than that there is imparted to the Gold Leaf Syrup a desirable quality due to the presence of maple sugar.

In order to convict a person of misbranding upon such a showing of fact, the court would be obliged to go entirely beyond all the established legal principles upon the question of deceit and misrepresentation, and beyond any of the decisions of the equity courts as to what is abhorrent to the conscience of a chancellor. In fact, I think that we should be obliged to go, not only outside the boundaries of legal and equitable rules, but also outside the boundaries of rational common sense.

From examination of former cases dealing with the subject of misleading representations on labels, I am impressed with the great value of the legislation known as the "Pure Food Act" (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1907, p. 928]); but I am further impressed with the fact that an attempt to apply that act to cases of this character cannot but serve to bring that act into such disfavor as to impair its usefulness. The distinction between the enforcement of law and the abuse of law is lost sight of in the attempt to make this obviously innocent act a criminal misdemeanor.

The motion for leave to file the information is denied.

UNITED STATES v. L. STRAUS & CO.

(Circuit Court, S. D. New York. March 16, 1909.)

No. 5,084.

CUSTOMS DUTIES (§ 25*)—CLASSIFICATION—EARTHENWARE WITH ONE COLOR GLAZE—"DECORATED"—"STAINED."

Earthenware, to which a single color glaze has been added, is, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 96, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633), not only "decorated," but may also be reasonably concluded to be "stained," within the meaning of the paragraph.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 45; Dec. Dig. § 25.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below reversed the assessment of duty by the collector of customs at the port of New York. The case relates to the following provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 96, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633):

"96. * * * Earthen * * * ware * * * stained * * * or otherwise decorated or ornamented in any manner, sixty per centum ad valorem; if not ornamented or decorated, fifty-five per centum ad valorem."

The Board of General Appraisers held the goods in controversy to have been improperly classified as "decorated," sustaining the importers' contention for classification as "not ornamented or decorated." The board's opinion reads in part as follows:

HAY, General Appraiser. The merchandise, the classification of which is called in question in this case, is jardineres made of ordinary earthenware and finished with a single or solid color glaze. * * * A vast amount of testimony was introduced, witnesses being called both by the importers and the government for the purpose of showing that the words "decorated or ornamented," as applied to earthenware, had a distinctive commercial meaning prior to and at the time of the passage of the law under which this merchandise is assessed. This testimony is of but little, if any, value. The witnesses introduced by the importer, all of them having some personal interest, either direct or remote, in the decision to be reached, apparently colored their testimony accordingly; and the witnesses introduced by the government, being interested in the domestic manufacture of like commodities, would seem to have had an interest upon the other side. At all events, the evidence, taken together, is of but little value. Yet we think, if it is to be weighed at all, taking the testimony of both sides, the importer has failed to establish by a preponderance of the evidence that the word "decorated" or "ornamented," as applied to earthenware, had any meaning different from the ordinary meaning at the time of the passage of the act. In fact, we think we are left in the decision of the case in practically the same situation as if there had been no testimony introduced by either side. The presumption is in favor of the correctness of the classification, but that classification is apparently in conflict with the law as pronounced by this board and the courts.

What might be our view if this question was presented to us as an original one is not important, as it seems to be pretty well settled by all the more recent decisions that a single or solid color does not change an article from a plain to a decorated or ornamented one, within the meaning of these words as used in paragraph 96. See Schade's Case, G. A. 5,336 (T. D. 24,424); Straus' Case, G. A. 6,061 (T. D. 26,443); Burley's Case, Abstract 13,136 (T. D.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

27,665); *Koscherak v. U. S.*, 98 Fed. 596, 39 C. C. A. 166. If the rule which has been established by these cases is to be changed, we think it should be changed by the court.

The protests are therefore sustained, and the collector directed to reliquidate the entries, classifying the merchandise under paragraph 96, as earthenware not ornamented or decorated, and assessing duty at 55 per cent. ad valorem.

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

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

LACOMBE, Circuit Judge. I concur in what seems to be the unconstrained opinion of the Board of General Appraisers, namely, that the addition of this colored glaze to the earthenware has "decorated" it within the meaning of the statute, although but a single color is shown. Indeed, it would seem upon the proofs to be a reasonable conclusion that the earthenware is "stained," although the stain is in the glaze, not in the substructure. Evidently the word "stained" has no special trade meaning. I do not concur, however, in the final conclusion of the board that they are constrained by former decisions of the courts to hold that the importations are "plain." Neither *Koscherak v. U. S.*, 98 Fed. 596, 39 C. C. A. 166, nor *U. S. v. Thurnauer*, 159 Fed. 122, 86 C. C. A. 86, requires such a holding.

The decision is reversed.

UNITED STATES v. WAENTIG.

(Circuit Court, S. D. New York. February 9, 1909.)

No. 4,146.

CUSTOMS DUTIES (§ 33*) — CLASSIFICATION — EMBROIDERED ARTICLES — "EMBROIDERY."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), for "embroidery" and articles "embroidered in any manner," does not include articles stitched on the edge with needlework of the plainest description, which simply serves the necessary and useful purpose of preventing raveling. The fundamental idea of embroidery is that it is needlework done upon a previously completed fabric, as distinguished from tapestry or lace work, in which the design is a part of the original fabric. It is also essential that it should be ornamental, rather than merely useful.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 92; Dec. Dig. § 33.*

For other definitions, see Words and Phrases, vol. 3, p. 2361.]

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,205 (T. D. 26,853).

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

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

HOLT, District Judge. The question involved in this appeal is whether certain towels and doilies imported by the defendant are em-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

broidered. The towel is cut in a scalloped shape at each end, and then stitched at the edge. The doily is also cut in a scalloped shape entirely around its edge, and stitched in the same way. The government claims that they were imported under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), which provides that "embroideries" and other articles "embroidered in any manner" shall pay a duty of 60 per cent. ad valorem. Duty was originally assessed at this rate, but upon an appeal by the importer the Board of General Appraisers reversed this appraisal and assessed duty at a lower rate, appropriate for such articles if they were not embroidered.

A large amount of testimony was taken on the question whether such goods are commercially known as "embroidered goods." The evidence is very conflicting. Some witnesses say that such goods are known in the trade as "embroidered scalloped work," and others say they are known simply as "scalloped work" and not as "embroidered work." On the merits, I think the test of whether an article is embroidered is whether the needlework upon it serves an ornamental purpose. If it simply serves a useful purpose, it does not seem to me that any one would term it embroidery. The fundamental idea of embroidery seems to be that it is needlework done upon a previously completed fabric, as distinguished from tapestry or lace work, in which the design is a part of the original fabric, and the idea that it shall be ornamental also seems to be essential to the definition. All the dictionary definitions include the idea that embroidery is ornamental work, as shown by the following definitions:

The Century Dictionary:

"Embroidery: 1. The art of working with the needle raised and ornamental designs in threads of silk, cotton, gold, silver, or other material, upon any woven fabric, leather, paper, etc. 2. A design produced or worked according to this art."

The Standard Dictionary:

"Embroidery: Ornamental work done with a needle on canvas, cloth, leather, etc. * * * The work may be done by hand or with machinery. and threads of cotton, silk, silver, gold, etc., may be used; but embroidery is always work added to the completed fabric by means of a needle."

The New International Encyclopedia:

"Embroidery: The art of producing, by means of needle and thread, ornamental designs upon cloth or other fabrics. The term 'embroidery' is always applied to a completed fabric; and the art is thus distinguished from the kindred arts of tapestry and lacemaking, in which the ornament is part of the structure of the material."

I think the true test in this case is whether the needlework on the edge of the towels and doilies in question is ornamental. My conclusion is that it is not. I think the cutting of the two ends of the towel and the edge of the doily into a scalloped shape is to some slight extent ornamental; but the needlework which is alleged to be embroidery is of the plainest description, and simply serves the necessary and useful purpose of preventing the articles from raveling at the edge when in actual use. The fact that it is done over a cord does not seem to me important. The cord serves simply to strengthen the stitching. If the

ends of the towels and the edge of the doilies had been left unscaloped, and the needlework that is already upon them had been done upon a straight edge, I think that it could not be claimed that such needlework was ornamental. Some kind of needlework at the edge would be necessary in any case to prevent the article from raveling in use; and I do not think that the kind of needlework which is shown on the towels and doilies in this case differs in any essential particular from any ordinary needlework, some form of which must be used in finishing the edge of these articles.

My conclusion is that the decision of the General Appraisers in this case should be affirmed.

BLOCHMAN BANKING CO. v. BLAKE, Collector.

(Circuit Court, S. D. California. March 8, 1909.)

No. 1,312 (1,969).

CUSTOMS DUTIES (§ 25*)—CLASSIFICATION—MEXICAN "ONYX.

So-called Mexican onyx is dutiable as "onyx," rather than as "marble," under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 25.*

For other definitions, see Words and Phrases, vol. 6, p. 4982.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below (G. A. 6,519, T. D. 27,846) affirmed the assessment of duty by the collector of customs at the port of San Diego. The opinion filed by the Board of General Appraisers reads as follows:

McCLELLAND, General Appraiser. The merchandise which is the subject of this protest was assessed for duty at the rate of \$1.50 per cubic foot under the provisions in paragraph 114 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635]), for "onyx in block, rough or squared." The protesting company claims that it should have been admitted to entry with duty only at the rate of 65 cents per cubic foot under another provision in the same paragraph for "marble in block, rough or squared only." The merchandise is described in the invoice as "148 pieces of onyx," and was so returned by the appraiser. There is no dispute as to the character of the stone. It is Mexican onyx, and is generally so styled in the trade; but the contention of the protesting company is that it is so denominated in the trade simply to distinguish it from other marbles similarly distinguished by names to indicate the localities or countries from whence they came.

Counsel for protestants cites in support of his argument a former decision of the board. G. A. 1,907 (T. D. 13,669). We have carefully examined this case, but fail to find anything in it which can possibly be controlling here. In the first place, it is not clear that the article involved was Mexican onyx. The issue arose under the tariff act of 1890, and appears to have been whether certain blocks of marble, so described on the invoices, and so returned, and so classified, were subject to duty at 65 cents per cubic foot, or entitled to free entry as crude mineral; but, even if we assume that it was in fact Mexican onyx, the conclusion reached that it was properly subject to the rate of duty provided in said act of 1890 (Act Oct. 1, 1890, c. 1244, 26 Stat. 567) for marble in blocks cannot be of influence here, because of the change made by Congress in the tariff provisions for marble.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the tariff acts of 1890 and 1894 there was no special provision for onyx, and unquestionably onyx, being a species of marble, was subject, during the existence of these two tariff acts, to the marble rate of duty; but in framing the tariff act of 1897, under which this issue arises, Congress deliberately separated onyx from other classes of marble by making special provision therefor and establishing special rates of duty thereon. As already set forth, the rate of duty on marble in block, rough or squared only, is 65 cents per cubic foot, and for onyx in block, rough or squared only, \$1.50 per cubic foot, and for marble or onyx, sawed or dressed, over 2 inches in thickness, \$1.10 per cubic foot. Again, in paragraph 115 Congress has distinguished between manufactures of marble and manufactures of onyx, although the same rate of duty is provided for both.

Mexican onyx was well known in trade long before the passage of the act of 1897, and we think there is no escape from the conclusion that it was the deliberate purpose of Congress, in framing paragraphs 114 and 115, to separate onyx from other species of marble and fix definite rates of duty thereon. If it had been the intention to continue the marble rates of duty on Mexican onyx, as distinguished from onyx coming from any other country, it is but reasonable to infer that such exemption would have been specifically made.

We find the merchandise to be onyx, and hold it to be subject to duty at the rate of \$1.50 per cubic foot, as assessed. The protest is overruled, and the decision of the collector is affirmed.

Sam Ferry Smith, for importers.
Aloysius I. McCormick, Asst. U. S. Atty., for collector.

WELLBORN, District Judge. Decision affirmed.

HERMANN BOKER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 20, 1909.)

No. 5,180.

1. CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—"CIRCULAR SAW PLATES."
The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 141, 30 Stat. 162 (U. S. Comp. St. 1901, p. 1640), for "steel circular saw plates," includes plates that resemble circular saw plates in size, shape, general finish, and general quality of steel, though imported for other uses.
[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]
2. CUSTOMS DUTIES (§ 19*)—CONSTRUCTION—RULE OF CLASSIFICATION—ADAPTABILITY FOR SPECIFIED USE—"SAW PLATES."
An enumeration of an article in a tariff act according to its use as "saw plates" includes articles that, though intended for other uses, have the necessary qualities and characteristics of the article designated.
[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 19.*]

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision by the Board of General Appraisers, which is reported as G. A. 6,694 (T. D. 28,625), affirmed the assessment of duty by the collector of customs at the port of New York. The board's opinion is as follows:

FISCHER, General Appraiser. The merchandise in question consists of circular steel plates measuring 16 inches in diameter and .078 inch in thickness. They were assessed with duty at the rate of 1.3 cents per pound

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), as steel saw plates, with an additional duty of one-half cent per pound under paragraph 141, 30 Stat. 162 (U. S. Comp. St. 1901, p. 1640), which provides that "on steel circular saw plates there shall be paid one-half of one cent per pound in addition to the rate provided in this act for steel saw plates." The importers contend that the plates are not saw plates, and are not subject, therefore, to such additional duty. They claim that the articles are properly dutiable under the provisions of paragraph 135 as "sheets and plates, in all forms and shapes not specially provided for."

The testimony of Carl F. Boker, the sole witness for the importers, goes to show that the circular steel plates were imported for the Western Electric Company, to be used by that corporation as the end pieces of spools or reels on which wire is to be wound. Affidavits made by the purchasing agents confirm this testimony. Boker, however, could not say whether the plates here in dispute were suitable for saw plates. He admits that saw plates are sold by him at 9 cents per pound, while the plates before us are sold at 11¼ cents, which in itself is an indication that the quality of steel is not inferior to that of the saw plate. The importers' case rests entirely on the fact that the steel disks brought in by them have not been imported by them for the use of the sawmaker. If the provision covering saw plates limited them to such as were suitable only for such use, or provided that articles, to be dutiable as such, must be imported for that use, then the claim of the importers might be well founded; but, as the destined use to which any given importation is to be put does not necessarily control its classification, the purpose for which these disks are to be used does not establish affirmatively the importers' claim, nor does it prove that the articles are not in fact circular saw plates. The question is, Have they the necessary qualities and characteristics which saw plates must possess in order to be so designated? We have nothing to do with their ultimate use after importation. *Jessup v. Cooper* (D. C.) 46 Fed. 186; *Godwin v. U. S.* (C. C.) 66 Fed. 739.

It only remains to determine whether the article as imported does possess such character as would, upon proper examination, indicate and determine its general use. In *Worthington v. Robbins*, 139 U. S. 337, 11 Sup. Ct. 581, 35 L. Ed. 181, it was held that, to be dutiable as "watch materials," the article when imported must be in such form of manufacture as to show its adaptation to the making of watches. The witnesses for the government have testified that the articles imported are adapted to the manufacture of circular saws. In size, shape, general finish, and quality of steel they testify that the plates correspond to that of circular saw plates. An analysis made shows that these plates will take a temper; and as this permits their use as plates for saws, and as in all other particulars they resemble and correspond to what are known and imported generally for such use, we find that the articles are in fact steel circular saw plates, and hold that they are properly dutiable as assessed.

The protests are overruled, and the decision of the collector in each case is affirmed.

McLaughlin, Russell, Coe & Sprague (Edward P. Sharretts, of counsel), for importers.

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

HOLT, District Judge. Decision of the board affirmed.

NIXON v. DORAN.

(Circuit Court, E. D. New York. March 17, 1909.)

COPYRIGHTS (§ 85*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In a suit for infringement of a copyright for a dramatization of a novel, the copyright on which has expired, by another author, who also dramatized the same work, a preliminary injunction will not be granted, where the validity of complainant's copyright and infringement are both denied and are not clearly established by the showing made.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 85.*]

In Equity. On motion for preliminary injunction.

Ligon Johnson, for complainant.

James Foster Milliken, for defendant.

CHATFIELD, District Judge. The novel "Lena Rivers," by a well-known author, Mrs. Mary J. Holmes, has become the property of the public through the expiration of the copyright. The complainant, Burton Nixon, holds by assignment a dramatization of this novel, which has been composed or constructed since the copyright terminated. The defendant, Marie Doran, has as well a compilation or dramatization, which the complainant alleges infringes the rights of the complainant, and which in the complaint is said to have been copied from the dramatized work owned by the complainant, rather than from the novel itself.

The complainant's play was filed in the office of the Librarian of Congress, in an attempt to comply with the copyright statute, in the year 1906; the original novel being stated to have been published in 1852. The defendant's drama purports to have been made up from the novel itself, and the attention of the court has been called to no dramatization of this novel other than the two involved in this action. Both the complainant and the defendant, in advertising, make use of the reputation of the novel, and each party seems, according to the affidavits, to have been calling to the attention of the public, by means of correspondence, etc., the dispute which is involved in this action. The performance of the play and the sale of rights for such performances usually involve such injuries that a preliminary injunction is not only appropriate, but frequently necessary, if the infringement of the rights of the complainant is clearly apparent, and if the defendant does not raise an issue as to which testimony must be taken before it can be determined that the complainant is sufficiently in the right, so that the continuation of the acts of the defendant would cause irreparable injury, pending the trial of the case.

The defendant has attacked the validity of complainant's copyright in her answer, upon the grounds which she has previously raised by demurrer, but which had been made of no effect by the filing of an amended complaint; and the defendant also claims that her work is compiled from the original novel, without reference to the dramatization of the complainant. It is evident that the points of similarity in two dramatizations of the same novel must necessarily be much greater than

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

would be possible in any two original dramas, if each were written entirely independent of any knowledge of the other. In the same way, a copyright of the dramatization of a novel, if the novel is free to the world by the expiration of the original copyright, can protect merely the original portions of the drama, and the original arrangement of scenes and characters, in so far as they are not an exact reproduction of the book. A play which resembles another in merely immaterial points would not be an infringement of the other, if both were based upon a book of another author, which any one had the right to use; and much less would this be true if the points of resemblance were contained in the book.

In the present case a careful examination of the novel and of both dramatizations shows many points in which the defendant's dramatization is similar, in arrangement, language, stage setting, and characters, to the dramatization of the defendant, and that, too, in particulars not found in the novel. The defendant's dramatization also resembles the book in many of the same sort of particulars, which are not found in the complainant's dramatization. The inspection which the court has been able to give indicates that the novel was certainly used in the preparation of the defendant's work, independently and apart from any use that may have been made of the complainant's work. As has been said, there are indications that the complainant's work was used, or that similar ideas, and even similar language, were employed, by the defendant, and that this language and these ideas were not copied from the novel. But it is impossible to determine on this motion that one work is a substantial infringement of the original parts or arrangement of the other; and as the issue as to the validity of the copyright is even less possible of determination on the pleadings and affidavits, the case would seem to fall directly within the decision of *Colliery Engineer Co. v. United Correspondence Schools Co.* (C. C.) 94 Fed. 152, where (page 154) the court says:

"Even conceding full weight to the suggestions above set forth, some of the resemblances between the two sets of publications are strongly indicative of piracy. But a preliminary injunction, such as is prayed for, would be practically a judgment in advance of hearing, working irreparable damage to defendants; and it is thought best to relegate the question to final hearing."

In that case the validity of the complainant's copyright was not called in question as an additional issue, and there is, therefore, in the present case even less reason for granting a preliminary injunction.

The application must be denied.

RUSSELL et al. v. GRIGSBY.

(Circuit Court of Appeals, Sixth Circuit. March 22, 1909.)

No. 1,864.

1. INSURANCE (§ 199*)—NATURE OF POLICY—ASSIGNMENT.

In the absence of restrictions to the contrary, a life insurance policy payable to insured's executors, administrators, or assigns is an assignable chose in action, provided assignment is not forbidden by public policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 468; Dec. Dig. § 199.*]

2. INSURANCE (§ 147*)—POLICY—CONSTRUCTION—WHAT LAW GOVERNS.

Where a life insurance contract was made in Pennsylvania and provided that the place of the contract should be the state of Pennsylvania, the contract of insurance would be construed according to the laws of that state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 293; Dec. Dig. § 147.*]

What law governs policies, see notes to Corley v. Travelers' Protective Ass'n, 46 C. C. A. 287; Globa & Rutgers Fire Ins. Co. of New York v. David Moffat Co., 83 C. C. A. 100.]

3. INSURANCE (§ 147*)—CONSTRUCTION—WHAT LAW GOVERNS.

In the absence of a provision in a life insurance contract as to the law of the state by which it is to be construed, its construction is a question of general and not of local law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 293; Dec. Dig. § 147.*]

4. INSURANCE (§ 200*)—LIFE POLICY—ASSIGNMENT—WHAT LAW GOVERNS.

A provision in a life insurance policy that the place of the contract should be the state of Pennsylvania did not apply to an assignment of the policy made in Tennessee, the validity of the assignment being governed by the law of that state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 469; Dec. Dig. § 200.*]

5. INSURANCE (§ 212*)—LIFE POLICY—ASSIGNMENT—STATUTES.

Shannon's Tenn. Code, § 3516, making certain obligations, including insurance policies, assignable though not negotiable at common law, and giving to the assignee the right to maintain an action in his own name, does not qualify one to take by assignment a policy of life insurance who was disqualified by public policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 212.*]

6. COURTS (§ 372*)—RULES OF DECISION—DECISIONS IN STATE COURTS—CONFORMITY ACT.

Rev. St. § 721 (Judiciary Act Sept. 24, 1789, c. 20, § 34, 1 Stat. 92 [U. S. Comp. St. 1901, p. 581]), providing that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, is limited to local statutes and usages, and does not apply to questions of general law not based on local statutes or usages nor involving settled local rules of property having a situs within the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.*]

State laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

7. COURTS (§ 372*)—FEDERAL COURTS—QUESTIONS OF GENERAL LAW.

Where the validity of an assignment of a life insurance policy between citizens of Tennessee and made in that state is to be determined by a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 168 F.—37

federal court sitting therein, and such validity does not depend on a local statute or usage but is to be decided on principles of general law, the court must exercise an independent judgment, though it leads it to a different conclusion from that arrived at by the Tennessee courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.*]

8. INSURANCE (§ 593*)—ASSIGNMENT—INVALIDITY—EFFECT.

Where a life insurance policy was valid when issued, the fact that an assignment thereof to one having no insurable interest was invalid did not affect the liability of the insurer on the policy to persons entitled to take in the face of the assignment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1452; Dec. Dig. § 593.*]

9. INSURANCE (§ 593*)—LIFE INSURANCE—ASSIGNMENT—INSURABLE INTEREST.

A policy insured decedent's life for the benefit of his executors, administrators, and assigns, and provided that any claim against the insurer arising under an assignment of the policy should be subject to proof of interest. Before the third premium fell due, insured, having met with financial misfortune, was unable to meet it. Insured also needed a surgical operation, but was without means to obtain the service, and in this condition he assigned the policy to claimant in consideration of \$100 in money and claimant's engagement to pay the premium then past due and future premiums, which he did until insured died from a disease, not traceable to the injury, some two years thereafter. Claimant at the time of the assignment was neither a relative nor creditor of insured. *Held*, that the assignment was void for want of an insurable interest in claimant, and that he was only entitled to receive from the proceeds of the policy the amount actually paid and advances for subsequent premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1482; Dec. Dig. § 593.*]

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

G. T. Hughes, for appellants.

J. A. Pitts, for appellee.

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

LURTON, Circuit Judge. Under a bill of interpleader, the Penn Mutual Life Insurance Company, a corporation of the state of Pennsylvania, paid into the court below \$10,000 due from it upon a policy of insurance upon the life of John C. Burchard, and the only question is as to whether the fund shall be paid to an assignee of the policy or to the administrators of the assured.

The facts necessary to be stated are these: Upon the personal application of the assured, John C. Burchard, an ordinary life policy was issued to him January 23, 1903. The assured lived in Tennessee. The contract was actually concluded at the office of the company at Philadelphia, and the contract on its face provided "that the place of contract shall be the city of Philadelphia, state of Pennsylvania." It was payable to the "executors, administrators or assigns" of the assured. But in respect of assignments it was provided "that any claim against the company arising under an assignment of this policy shall be subject to proof of interest." The assured paid two annual pre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

miums. The third fell due January 23, 1905. The assured had in the meantime met with financial misfortune and was unable to meet this premium. He had also incurred a serious injury which necessitated a grave surgical operation, and was without the means to obtain the service he needed. In this critical condition he sold and delivered his policy to the defendant in error, receiving for the same \$100 in money and the engagement of Dr. Grigsby that he would pay the premium then past due and all future premiums. The assignment executed was in these words:

"In consideration of the sum of one hundred dollars (\$100.00) paid to me, the receipt of which is acknowledged and the further consideration of the payment to the company of the premium upon the life insurance policy hereinafter mentioned, now due and payable, as well as the payment of the premiums hereafter to accrue upon said policy, I, John C. Burchard, insured as John Cook Burchard, do hereby assign, transfer and convey to A. H. Grigsby my life insurance policy in the Penn Mutual Life Insurance Company of Philadelphia, for ten thousand dollars (\$10,000.00), No. 230,176, of date January 26, 1903, together with all the legal rights and interests I have in the same and all the benefit, interest and right accruing by virtue of same.

"To have and to hold unto the said A. H. Grigsby absolutely, and I hereby authorize said life insurance company to pay to the said A. H. Grigsby the sum insured at my death upon the conditions mentioned in said policy. Executed in duplicate this the _____ day of February, 1905."

A copy duly acknowledged was sent to the insurer. The assignee paid two annual premiums, when the assured died of a disease not traceable to the injury he had sustained. The insurer, being notified that the amount due under the policy was claimed both by the assignee and the administrators of the assured, filed a bill of interpleader against the contestants, and was discharged upon paying the fund into court. Upon this state of facts the court below adjudged the fund to the assignee.

Dr. Grigsby, the appellee and assignee of the policy, was not related to Mr. Burchard. Neither was he a creditor. He had, therefore, no insurable interest in the life of the assured whatever. If, therefore, this policy had been originally obtained in pursuance of some agreement or understanding that it should be assigned to and carried by him, the transaction would have been a wagering or gambling transaction under all the cases, and invalid as against public policy. But that is not the case. The policy was applied for by the assured without any purpose of assigning it. After paying two annual premiums he was driven to sell it for what he could get. This raises the single sharp issue as to whether one who has no insurable interest in the life of an assured is to be protected in his right as assignee of a policy, originally issued in good faith to the assured, beyond the actual amount of his disbursements on account of the transaction.

In the absence of restrictions imposed by the contract, such a policy is an assignable chose in action, provided the assignment is not one forbidden by settled principles of public policy. The contract of insurance was one thing, and the contract of assignment was another. The insurance contract was made in Pennsylvania, and provides that the place of contract shall be the state of Pennsylvania. This is an obligatory term, and the contract of insurance will be con-

strued according to the law of Pennsylvania. *Penn Mutual Ins. Co. v. Mechanics' Bank*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33. In the absence of such a term in the contract, the construction and interpretation of a policy of insurance is a question of general and not local law. *Carpenter v. Providence Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044. But the contract of assignment, so far as it is not affected by any term of the policy, was made in Tennessee, and its interpretation and validity must be determined by the law of the place of the execution of the assignment. There is no question of construction, and the validity of the assignment depends upon whether the contract of assignment was contrary to principles of public policy.

What, then, is the law of Tennessee? There is no applicable statute law. Section 3516, Shannon's Code, Tenn., has been referred to as having some bearing. That provision makes assignable certain obligations not negotiable at the common law, and gives to the assignee the right to maintain an action in his own name. Policies of life insurance have been held to be within it. *Mutual Insurance Co. v. Hamilton*, 5 Sneed (Tenn.) 269; *Scobey v. Waters*, 10 Lea (Tenn.) 551, 561. The statute plainly does not qualify one to take by assignment a policy of life insurance who is disqualified by considerations of public policy. *Franklin Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Brennan v. Franey*, 142 Pa. 301, 21 Atl. 803; *Insurance Co. v. Lane* (C. C.) 151 Fed. 276.

There being no Tennessee statute which affects the question, it is obviously one to be determined by the general law, and the decisions of the Tennessee courts are not obligatory upon a court of the United States. Section 721, Rev. St., being section 34 of the judiciary act of September 24, 1789, c. 20, 1 Stat. 92 (U. S. Comp. St. 1901, p. 581), which provides that "the laws of the several states * * * shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," has been construed as limited to local statutes and local usages, and as not applying to questions of general law not based on local statutes or usages nor involving settled local rules of property having a situs within the state. *Swift v. Tyson*, 16 Pet. 19, 10 L. Ed. 865; *Carpenter v. Providence Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Railroad v. National Bank*, 102 U. S. 14, 29, 26 L. Ed. 61 et seq.; *B. & O. Railroad v. Baugh*, 149 U. S. 378, 13 Sup. Ct. 914, 37 L. Ed. 772; *Hartford Ins. Co. v. Railroad*, 175 U. S. 100, 20 Sup. Ct. 33, 44 L. Ed. 84. Although the assignment here in question was made in Tennessee and between citizens of that state whose rights are to be determined by a court of the United States sitting in that state, its validity does not depend upon a local statute or usage, and must be determined by the court, as it would be if before a court of the state, upon principles of general law. When that is the situation, federal courts are under obligation to exercise an independent judgment, when such judgment must lead them to a different conclusion from the local courts. *Carpenter v. Providence Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Hartford Ins. Co. v. Railroad*, 70 Fed. 201, 203, 17 C. C. A. 62, 30 L. R. A. 193; *Gordon v. Ware National Bank*, 132 Fed. 444, 446, 65 C. C. A. 580, 67 L. R. A. 550; *Insurance Co. v. Lane* (C. C.) 151 Fed. 276,

affirmed by the Circuit Court of Appeals 157 Fed. 1002, 85 C. C. A. 677.

With respect to the particular question of general law here involved, there cannot be said to be any clearly defined and well-settled rule of decision in the Supreme Court of Tennessee. The question seems never to have been definitely decided until the unreported case of *Lewis v. Edwards*, decided December 14, 1903, in which a bare majority of the court reversed a majority opinion of the Tennessee Chancery Court of Appeals. Possibly the fact that no opinion was filed, or that the judgment was that of only a majority of the court, should affect its force and effect if we were compelled to follow the decisions of that court. As we are under no such obligation, we feel less reluctance in reaching a different conclusion, because there seems to be no settled line of decisions in that state.

Coming, then, to the validity of an assignment of a policy of life insurance, applied for and carried in good faith by the assured, and transferred as a matter of financial necessity to a person having no insurable interest in the life of the assured, we are compelled to confess that there is a hopeless division between the decisions of the courts which have directly passed upon the question. The view taken by perhaps a decided majority of the state courts is that in such circumstances an assignment should be upheld as serving to give a greater sale value to such instruments by widening the class of possible purchasers, and that public policy is best subserved by upholding the commercial character of such contracts when there has been no connection between the assignee and the inception of the contract of insurance. Among the opinions which uphold this view we may cite *Mutual Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, and *Olmsted v. Keyes*, 85 N. Y. 593.

Among the cases holding that such assignments to one having no insurable interest in the assured are contrary to public policy, may be cited *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Franklin Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313. The English decisions throw little light upon the subject. The cases are few, and turn mainly upon the construction of the act of 14 Geo. III, c. 48. That statute declared void any policy in favor of one who "shall have no interest" in the life of the assured. The third section of the act is in these words:

"That in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount or value of the interest of the insured in such life or lives, or other event or events."

In *Goodsall v. Boldero*, 9 East, 72, decided in 1807, the action was by the payee of a policy taken by certain creditors of the great William Pitt. There was no question but that the necessary interest in the life of the debtor statesman existed when the policy issued, and that when the assured died this interest had not ceased. The debt was in excess of the amount of the policy, and was unpaid. The debtor's estate was likewise insolvent. But before suit, the English

Parliament assumed all of Mr. Pitt's debts and paid them, including the debt of the plaintiffs. Lord Ellenborough, C. J., held that the creditors, having sustained no loss by the death of the assured, his debts having been paid, could maintain no action under the statute. In *Ashley v. Ashley*, 3 Sim. 147, Vice Chancellor Shadwell, after referring to the statute, contented himself with saying, "Now, there is not a word said here as to the assignment of policies." In *Dalby v. India & London Assurance Co.* (1854) 15 C. B. 365, the word "hath" in the third section, set out above, was construed as referring to an interest in the life of the assured "at the time of effecting the insurance," and that such interest need not continue until death of the assured, thus overruling *Goodsall v. Boldero*.

The decisions by the Supreme Court of the United States, curiously enough, are cited by learned counsel for both views of the question, and, what is still more odd, are cited in more than one state court opinion as authority for antagonistic conclusions. This is a misapprehension due to a casual examination, for there can be no doubt that the plain trend of opinion in that court has been in the direction of requiring any claimant to the proceeds of a policy to show an interest in the life of the assured. In order of time, the cases in that court are as follows: *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244; *Conn. Mutual Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *New York Mutual Ins. Co. v. Armstrong*, 117 U. S. 597, 6 Sup. Ct. 877, 29 L. Ed. 997; *Crotty v. Insurance Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566.

Cammack v. Lewis was a suit by the administratrix and widow of the assured against an assignee of a policy upon her husband's life, the assured being the beneficiary, to whom the policy had been assigned, and to whom on the death of the assured the policy had been paid by assent of the widow. The policy was taken out by Lewis at the suggestion of Cammack, a creditor, to the extent of \$70, under an agreement that it should be assigned to Cammack, who undertook to pay the premiums and \$1,000 to the widow of the assured out of the policy when collected. Although Cammack had collected the policy and had paid over to the widow \$1,000 under the agreement and in full satisfaction of any claim she might have, she was permitted to recover from him the entire sum collected by him, less only the actual amount of his debt and the premiums paid by him.

Conn. Mutual Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, was an action upon a policy of joint insurance payable to the survivor, the assured being husband and wife. There was a divorce. The subsequent premiums were paid by the wife, who survived the husband. The action was by the survivor. She was permitted to recover, the court holding that, having an insurable interest when the policy issued, it did not become invalid because her interest in the life of her husband had ceased by divorce. The case is plainly sustainable as joint insurance, and this is distinctly conceded, for the court says:

"The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of an interest avoids a policy good at its inception."

The court did, however, go on and decide that a policy, "valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provision of the policy itself." The court, however, added:

"That in cases where the insurance is effected merely by way of indemnity, as where the creditor insures the life of a debtor, for the purpose of securing his debt, the amount of his insurable interest is the amount of his debt."

Upon this general principle, the court in that case laid down the proposition that "an interest of some kind in the insured life must exist," and that:

"It is generally agreed that a mere wager policy—that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction—is void as against public policy."

In *Ætna Life Ins. Co. v. France*, the court held that a policy taken out by a brother in favor of a sister was valid, the relation involving an insurable interest, although the beneficiary was to pay the premiums.

The case of *New York Mutual Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997, has no bearing. The policy under both the so-called majority and minority rules was valid, as it was taken out in favor of one who had no sort of insurable interest in the life of the assured. The case went off upon the ground that the beneficiary had been convicted and executed for the murder of the assured, committed to mature the policy, the other point not being made. The facts of that case afford a strong commentary upon the impolicy of relaxing the rule of public policy which forbids any contract whereby one obtains an interest in the destruction of the life of another.

The principal case is that of *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924. That was a suit by the administrator of one Crosser against the assignees of a policy upon the life of Crosser which had been assigned to them. The plaintiff was held to be entitled to recover, subject to the deduction of the actual sum paid by the assignees to keep up the policy and the amount paid over to the widow of the assured under the contract of assignment. The statement of the case shows that Crosser applied for the policy on February 27, 1872. On the same date he entered into an agreement with the defendants that the policy should be assigned to them in consideration of all dues thereon and one-tenth of the policy when collected to the wife of the assured. It also appears that the policy bore date of February 27, 1872, and that on the next day, February 28, 1872, it was assigned according to the agreement of February 27th. Notwithstanding these facts, the court treated the case as that of a policy valid when issued and subsequently assigned upon the consideration mentioned. Upon this point the court, speaking by Mr. Justice Field, said:

"The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute

what is termed a 'wager policy,' or a mere speculative contract upon the life of the assured, with a direct interest in its early termination."

Again, the court said:

"The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money."

The court refers to and states the facts in *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313, where the assured found himself unable to pay the second premium, and therefore sold it to avoid a total loss for forfeiture to one having no insurable interest, and assigned it with the consent of the insurers, the assignees paying the unpaid premiums, and quote with approval the judgment of the Indiana court that the assignment was void because—

"all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. That in either case the holder of such a policy is interested in the death rather than the life of the party assured."

Justice Field also refers to the decisions of the New York Court of Appeals as opposed to the Indiana case, saying:

"They hold that a valid policy of insurance effected by a person upon his own life is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum payable, without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. *St. John v. American Mutual Life Insurance Company*, 13 N. Y. 31, 64 Am. Dec. 529; *Valton v. National Loan Fund Life Assurance Company*, 20 N. Y. 32. In the opinion in the first case the court cite *Ashley v. Ashley* (3 Sim. 149) in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who had no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions upon this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

"In this conclusion we are supported by the decision in *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244. There a policy of life insurance for \$3,000, procured by a debtor at the suggestion of a creditor to whom he owed \$70, was assigned to the latter, to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company, and paid the widow \$950 as her portion, after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity

and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion."

It is impossible, with due respect for that tribunal, to treat this opinion as mere dictum. To do so would be simply to say that the court did not decide the case that was before them, but another and non-existent case.

In *Crotty v. Union Mutual Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, the policy was payable to O'Brien on January 15, 1841, "or if said O'Brien shall die before that time to pay said sums * * * to Michael Crotty, his creditor, if living, if not then to said O'Brien's executors, administrators or assigns." There was evidence that O'Brien was largely indebted to Crotty at the inception of the policy. O'Brien died in 1883, and Crotty made proof of death and sued, averring that "he had otherwise performed all of the conditions of the contract." The answer denied that the assured was ever indebted to Crotty, or that he had performed the conditions except by furnishing proof of death. On the trial there was no other evidence of the interest of the plaintiff in the policy than that afforded by the policy itself, and an averment in the proofs of death that he claimed "as creditor of the deceased and beneficiary named in the policy." The court upon this state of the case instructed a verdict for the insurer, and this judgment was affirmed. The question of public policy in respect of the necessity of an insurable interest to sustain a policy of life insurance was referred to in these words by Justice Brewer, who announced the opinion of the court:

"It is the settled law of this court that a claimant under a life insurance policy must have an insurable interest in the life of the insured. Wagering contracts in insurance have been repeatedly denounced. *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244, in which a policy of \$3,000, taken out to secure a debt of \$70, was declared 'a sheer wagering policy.' *Connecticut Mutual Life Insurance Co. v. Schaefer*, 94 U. S. 457, 461, 24 L. Ed. 251, in which it was said: 'In cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.' *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924."

As to the insurable interest of a creditor in the life of his debtor, the court said:

"If a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor loses all interest therein, and the policy becomes one for the benefit of the insured, and collectible by his executors or administrators. In 2 May on Insurance (3d Ed.) § 459a, the author says: 'A creditor's claim upon the proceeds of insurance intended to secure the debt should go no further than indemnity, and all beyond the debt, premiums, and expenses should go to the debtor and his representatives, or remain with the company, according as the insurance is upon life or on property.'"

Referring to the terms of this policy and the facts of the particular case, the learned Justice said:

"Still, again, not only does justice between the parties, but also that public policy which denounces wagering contracts, require that the proof of indebtedness should be distinct and satisfactory. It would tend to a successful

consummation of wagering contracts in insurance if the mere recital in the policy was held sufficient to sustain a recovery in favor of the alleged creditor, no matter how long after the date of the policy the death of the insured happened. Admissions, whether direct or incidental, should never be carried beyond their actual extent or the reasonable inferences therefrom, and should not be invoked to work injustice to parties litigant or thwart the demands of sound public policy."

This review of the decisions and opinions of the Supreme Court leads us to the conclusion that an insurable interest is absolutely essential to the support of a policy of insurance upon the life of a third person. Without such an interest the beneficiary has no interest in the continuance of the life of the assured, but rather an interest in its early termination. The field of doubt is as to what is an insurable interest. That one has such an interest in his own life is clear. That he has also such an interest in the life of a close relative by blood or marriage, such as parent and child, husband and wife, there is no dispute. When we pass beyond those relations where there is both a legal and a moral responsibility for support and maintenance, we approach the debatable line. It may be safely said that when a recognized legal dependency does not exist, nor the relation of creditor and debtor, an insurable interest must involve some reasonable expectation of pecuniary benefit or advantage from the continuance of the life of the assured. In *Kentucky Life Ins. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42, we had occasion to refer to the fact that one may have an insurable interest by reason of expectations or advantages dependent upon the continuance of the life of the assured independent of those blood or marital relations usually deemed essential. In *Warnock v. Davis*, 104 U. S. 775, 779, 26 L. Ed. 924, the court upon this subject say:

"It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of the parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the assured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy."

The courts are not agreed as to the extent of the insurable interest of a creditor or of one standing in an equivalent business relation, such as that of partner, joint adventurer, master, or servant.

The cases of *Cammack v. Lewis*, *Warnock v. Davis*, and *Crotty v. Union Mutual Insurance Co.* strongly tend to show that the Supreme Court of the United States regard the insurable interest of

one in the relation of creditor as measured by the extent of the debt or business obligation. When the debt is paid, or the business relation terminated, the interest ceases, and the claim of such a beneficiary is cut off, both as to the insurer and the assured, or those representing him. There is, moreover, a marked difference between the consequences resulting from a policy taken out by one having no insurable interest and the subsequent assignment of a policy issued to one upon his own life and afterwards assigned to one having no interest in the continuance of the life assured. In the first case the contract of insurance is invalid, in the other it is valid and the assignment invalid. In the first case the insurer has never become liable upon the contract; in the other the liability of the insurer to somebody is unaffected by the assignment, in the absence of some term in the insurance contract avoiding it if assigned. The British act of 14 Geo. III, c. 48, deals alone with the validity of the contract of insurance itself. In *Warnock v. Davis*, cited above, the contract of insurance was not affected because it had been assigned, although the agreement for such assignment antedated the policy. The same is to be said of the contracts in every one of the cases decided by the Supreme Court of the United States. Undoubtedly the contract of insurance in the case at bar was valid. The only question is as to the legal effect of its subsequent assignment. The invalidity of that need not in any way affect the liability of the insurer to the representatives of the assured. Hence it is that the payment by the insurer of the amount of the policy into court has no consequence upon the legal or equitable rights of the rival claimants to the proceeds. The company was liable in any event to somebody, unless some term of the contract made the claim uncollectible at all in case of an assignment. That is not the case here, for the clause making the claim of an assignee subject to proof of interest would only limit the recovery of the assignee to a sum measured by his interest, and leave the company liable to the representatives of the assured for the rest. What, after all, is the moral or legal distinction between an assignment by an assured to one having no interest in his life, made with or without some antepolicy agreement for such assignment? There is undoubtedly a sharp conflict between the decided cases, as we have already noticed. What is the attitude of the Supreme Court upon the question of public policy? Upon this question we must hold that the Supreme Court of the United States recognizes no such distinction. To quote from *Warnock v. Davis*:

"The assignment of a policy to a party having no insurable interest is as objectionable as the taking out of a policy in his name. * * * If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same grounds which invalidate the one should invalidate the other—so far, at least, as to restrict the rights of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life."

Coming to the case for decision, Grigsby had confessedly no insurable interest in the life of Burchard. Under all the cases, if he had been named as beneficiary in the policy under an agreement to pay the premiums, or had an agreement for its assignment when issued, the assignee to pay the premiums, the policy in the one case and the assignment in the other would be illegal and unenforceable. The reason for this result, and the only reason, would be found in the fact that such a beneficiary or assignee would have no interest in the continuance of Burchard's life, but an interest in his speedy death. This speculative interest in human life is obviously contrary to sound public policy. The case we have differs from the one just stated only in the fact that Grigsby was not the appointee in the policy, and did not become an assignee by an arrangement antedating the policy. Burchard found himself unable to pay the third premium, and in need of \$100 to obtain a surgical operation of a serious character. Grigsby agreed to give him the \$100 needed in this extremity, pay the past-due premium and all other premiums which should thereafter fall due, and take an assignment of the policy. Can one imagine a more purely speculative transaction in which human life was the stake? Burchard might not survive the very operation which he was immediately to undergo. If this should prove the case, for one premium and \$100 he would at once realize \$10,000. When each recurring premium came due, a like problem was presented to the assignee. "If I pay this, he may die before I have to pay again," would be his natural reflection. He took the chance twice, and before he was required to take another Burchard died. Plainly the transaction was a gambling or wagering bargain, and Grigsby had an interest against, and not an interest in, the continuance of Burchard's life. The evil inseparable from such a bargain is undoubtedly mitigated when the whole of the premiums has been paid once for all, or when the assured is to keep the policy alive. The cost of carrying the policy would not rest upon the assignee, and to that extent his interest in the early termination of the life of the assured would be lessened. Among the authorities which regard this circumstance as in a large degree affecting the validity of such contracts are: *May on Insurance*, § 112; *Foster v. Insurance Co. (C. C.)* 125 Fed. 536; *Gordon v. Ware Nat. Bank*, 132 Fed. 444, 447, 65 C. C. A. 580, 67 L. R. A. 550; *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 254, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; and *Campbell v. Insurance Co.*, 98 Mass. 381. Where, as in this case, the assignee undertook himself to pay the recurring premiums, we are unable to see why the contract of assignment is not as much a gambling contract as if the policy had been issued under an agreement that it should be assigned. The argument against such a conclusion is bottomed upon the commercial idea that considerations of public policy which restrain the assignability of such contracts are not enough in this commercial age to justify the disadvantages to follow from the full right of an assured to do as he will with a contract in which he is the payee. Nowhere is this view of the subject more clearly stated than by Judge Sanborn, in speaking for the Circuit Court of Appeals

for the Eighth Circuit, in *Gordon v. Ware Nat. Bank*, 132 Fed. 444, 449, 65 C. C. A. 580, 584, 67 L. R. A. 550, where he says:

"This is a great commercial nation. The policy of the nation, the business habits and acts of its citizens, and the tendency of the decisions of its courts are to depart more and more from the old rule that choses in action are not assignable, to make them more and more the subjects of traffic and of commerce, and to sustain their transfers in the ordinary course of business."

The fields of finance and commerce are sufficiently broad without extension in the direction of the negotiability of contracts which have their origin in the wholesome desire to provide for the contingencies of life, the hazards of business, and the support of those survivors dependent upon the assured. Their use as collateral, to secure an actual advance made at the time and the payment of premiums necessary to carry the contract, is recognized by the courts which regard sound public policy as opposed to mere speculative bargains based upon the chances of the continuance of human life.

We have not overlooked the fact that the policy on its face provides that "any claim against the company arising under an assignment of the policy should be subject to proof of interest." Thus the company might escape payment—not of the policy, for that was undoubtedly valid when issued—to an assignee who could not show an interest. The contention is that this clause is inserted solely for the benefit of the insurer, and that it has no effect as between the assured and his assignee. It is thus said that the insurer, having paid the money into court, has thereby waived this clause. In support of this, counsel for appellee cite *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650, *Spencer v. Meyers*, 150 N. Y. 269, 44 N. E. 942, 34 L. R. A. 175, 55 Am. St. Rep. 675, as well as certain other cases not much in point. We are not disposed to assent to the proposition that a clause of this character is inserted wholly for the benefit of the insurer. It is there in recognition of public policy in respect to the necessity of an insurable interest. When *Burchard and Grigsby* made the agreement of assignment, they must be taken to have had knowledge of this limitation. The assured as well as the general public were concerned. A different principle might apply if the limitation were one plainly inserted for the benefit of the insurer alone. This distinction is recognized by *May on Insurance*, § 110, and in *Stevens v. Warren*, 101 Mass. 564, 566. In that case the policy forbid any assignment without the consent of the insurer. The policy was assigned to one who had no interest in the life of the assured, but the proceeds were paid by the company without objection to the administrator of the assured. The bill was one of interpleader to determine the rights of the administrator of the assured and the assignee. After saying that the assignment could only take effect, the company not having assented, "as a designation by mutual agreement" of the assured and the assignee, the court said:

"The purpose of the clause in the policy, forbidding assignments without the assent of the company, is undoubtedly to guard against the increased risks of speculating insurance. The insurers are entitled to the full benefit of such a provision, as a matter of contract; and, as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contravention of the provision.

"The administrator will therefore hold the proceeds of the policy as assets of the estate of his intestate, discharged of any claim thereto under the assignment of the policy to Dewey K. Warren."

But if there is no question of public policy involved in respect of the assignability of such contracts, the clause, in the circumstances of this case, is of little consequence. Certainly the waiver of the clause does not affect the question of the validity or invalidity of the assignment as between the assured and the assignee. The conclusion of the whole matter is that the assignment is valid to the extent of the money actually paid for it as well as for all advances of premiums subsequently made. Beyond this it is a gambling contract and not enforceable.

Decree will be reversed, with directions to enter a decree reimbursing Dr. Grigsby as indicated, and for the payment of the remainder of the fund to the administrators of the assured.

EDDY v. EDDY et al.

(Circuit Court of Appeals, Sixth Circuit. March 25, 1909.)

No. 1,867.

1. WILLS (§ 797*)—PROVISION FOR WIDOW—ELECTION—FRAUD—RESCISSION.

Where the widow of a man whose estate amounted to more than \$400,000, 78 years old, in feeble health, unused to business, and in need, was approached by her husband's son, who was named as his executor, and who was a devisee, legatee, and an intelligent and competent business man, knowing all the facts concerning the estate, and was induced by him to make an election of an annuity, the present worth of which was not more than \$3,500, without giving her any information concerning her right under the statutes of the state to elect to take a widow's portion, which would have been of much greater benefit to her, and to renounce the will, the widow would be relieved in equity from the consequences of such election, especially where her application was made before the estate had been closed, so that no harm would result to the interest of other beneficiaries.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2069; Dec. Dig. § 797.*]

2. COURTS (§ 489*)—FEDERAL COURTS—JURISDICTION—PROBATE PROCEEDINGS.

While federal courts will not take cognizance of purely administrative proceedings in the settlement of deceased's estates, and will not invade the possession of the assets taken by probate courts for the purpose of administration, federal courts will take jurisdiction of a suit by a widow, a citizen of one state, against the executors of her deceased husband's estate situated in another state, to set aside her election to take under the will, as procured by fraudulent concealment by one of the executors, and to establish and enforce her claim under the statute of descents and distribution of the state, allowing a widow to elect to take a statutory estate instead of the provision made for her by the will.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 489.*]

Probate jurisdiction, see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.]

3. COURTS (§ 200¼*)—PROBATE COURTS—EQUITABLE JURISDICTION.

A probate court has no plenary equitable jurisdiction to grant a widow relief from an election to take under her husband's will, procured from her by one of the executors by alleged fraudulent concealment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 476, 477; Dec. Dig. § 200¼.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. **LIMITATION OF ACTIONS (§ 100*)—COMPUTATION OF PERIOD—DISCOVERY OF FRAUD.**

After the filing of a husband's will for probate, one of the executors went to another state, where the widow was residing, and by fraudulent concealment procured from her an instrument which she did not know was an election to take an annuity under the will and releasing her statutory estate, and in fact did not know that she had a right to make such an election. She had no knowledge at the time as to the value of the estate nor that she had been imposed upon, until May 25, 1907, more than five years after making such election, when within two months thereafter she filed a bill to vacate her election and to receive her statutory estate. *Held*, that the year within which the widow was required to elect as provided by Comp. Laws Mich. § 9301, did not begin to run until she discovered the fraud, and hence she was not barred thereby from obtaining such relief.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 480-493; Dec. Dig. § 100.*]

5. **COURTS (§ 489*)—FEDERAL COURTS—ACCOUNTING.**

Where a federal court had jurisdiction of a suit by a widow to set aside an election to take under her husband's will and to be awarded her statutory estate, the widow being entitled to such relief, the court would not only determine her right, but would take an account, the estate being still unsettled, and determine the amount the widow was entitled to receive therefrom.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 489.*]

6. **WILLS (§ 797*)—WIDOW'S ELECTION—VACATION—EVIDENCE.**

In a widow's suit to set aside an election to take under her husband's will, awarding her only a small annuity, procured by one of the executors by fraudulent concealment, the books of a business concern in which the widow was interested were admissible as bearing on the disparity between the value of the widow's statutory interest and what she received.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 797.*]

7. **EQUITY (§ 404*)—TESTIMONY BEFORE MASTER—OBJECTIONS.**

Where testimony in an equity suit is taken before a master, counsel has no right to direct a witness not to answer questions believed to be objectionable, the proper course being to state the objection on the record, after which the answers must be received and the objections retained to the hearing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 888; Dec. Dig. § 404.*]

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

Alfred Lucking, for appellant.

W. S. Humphrey, for appellees.

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

SEVERENS, Circuit Judge. This is an appeal taken by the complainant from the decree of the Circuit Court dismissing her bill, wherein she sought the rescission of an instrument in which she had signified her acceptance of the provisions made in her behalf by the last will and testament of her deceased husband, Charles K. Eddy, and released all other claims against his estate. She alleged that the instrument was obtained from her by undue influence and fraudulent concealment practiced by Walter S. Eddy, who was one of the execu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tors of the said will, and the following were some of her prayers for relief:

"(3) That this court will by its decree hold that the failure of complainant to file in the probate court for Saginaw county the statutory notice of her election to take her widow's portion of her husband's estate in lieu of the provisions for her made in the will of her husband was due to the fraud, fault, and artifice of said defendants, and not to any fault or neglect of complainant.

"(4) That this court will by its decree find that complainant was fraudulently prevented by defendants from securing her just rights in her husband's estate and from taking the provisions allowed to her by the statutes of Michigan, and that this court will establish complainant's present right to elect to take, in lieu of the provisions of said will, the share of her husband's present estate secured by statute as aforesaid to her as his widow, and will give her the same allowance as if she has duly elected to take under the statutes of Michigan, and will in all respects undo the effects of said fraud and restore your oratrix to her rights.

"(5) That this court will order an accounting of the assets of the estate of said Charles K. Eddy, deceased, and of the dealings between defendants, individually, and as executors, as to the affairs of said estate, including all receipts and disbursements, and will cause said defendants to pay and turn over to this complainant her just share of the present assets of the estate of her husband, just as if she were now electing lawfully and formally to take under the provisions made for her by the laws of Michigan, in lieu of the annuity left her under the terms of the will of her deceased husband."

By section 9300, Comp. Laws Mich., it is provided:

"That all dispositions of personal property by last will and testament shall be subject to the following limitations and restriction:

"First, if the testator shall leave surviving him, a wife, the testamentary disposition shall be subject to the election of such wife, to take any interest that may be given to her, by the testator in his last will and testament; or in lieu thereof, to take the sum or share that would have passed to her, under the statute of distributions, had the testator died intestate, until the sum shall amount to five thousand dollars, and of the residue of the estate one-half the sum or share that would have passed to her, under the statute of distributions, had the testator died intestate, and in case no provision be made for her in said will, she shall be entitled to the election aforesaid.
* * *

And by section 9301 that:

"The election to take otherwise than under the will, in any contingency above contemplated, shall be made in writing, and filed in the court in which proceedings for the settlement of the estate are being taken, within one year from the probate of the will; and the failure to file such election within the time above provided shall be deemed an election to take under the will."

The defendants are the executors of the will and the heirs, legatees, and distributees of the estate.

The facts which constitute the subject of the controversy as alleged in the bill are substantially these, although others may be mentioned incidentally in dealing with particular topics: Charles K. Eddy, already somewhat advanced in years, was a man of considerable wealth, residing at Saginaw, Mich., where he had a home and a place of business. He, with his three children, the defendants in this suit, owned, each one-fourth, the capital stock of C. K. Eddy & Sons, a corporation engaged principally in dealing in lands and timber. He had a home at Los Angeles, Cal., where he spent portions of the year. He had also other property. And in the whole his estate was of the value of nearly \$500,000. He had already made, in anticipation of his marriage, a

division of his property between his three children by a former marriage and himself in such manner that each would own a one-fourth interest. In the summer of 1897 he met the complainant, with whom he had been in close friendly relations in their youth while living at their homes in Maine, and to whom he was at one time engaged to be married. She, too, had been married, but the wife of the one and the husband of the other had been dead for several years. Their friendship was renewed, and on November 3, 1897, they were married. He was then about 76 years old, and she was about two years younger. They lived together happily, most of the time at Los Angeles, until his death, which occurred May 9, 1901. His children were not pleased with the marriage, but the sons treated her with respect and kindly. Their relations with her were, however, not intimate. There is some evidence in the record indicating that the father felt hurt at the lack of cordiality shown by his children to his wife. He left a will made December 9, 1896, and a codicil thereto dated July 30, 1898. By these he devised his homestead at Saginaw to his son Walter, and then devised and bequeathed all his other real and personal property to his children in specified proportions; but he charged upon the estate an annuity of \$500 to be paid to Cordelia Dunning Dolliver of Saginaw during her life, and another "annuity of \$500, per year during her natural life," to his wife, Caroline M. Eddy. He appointed his sons as executors. At the time of Mr. Eddy's death, the lady named Dolliver in the will was living or staying with the Eddys at Los Angeles. The expenses of his last illness and his funeral consumed the funds on hand, and Mrs. Eddy was in some embarrassment about her means of sustenance. Nothing was heard from Mr. Eddy's children in Michigan until finally some friends of Mrs. Eddy communicated by letter with them, apprising them of her need and inquiring whether any and what provision had been made for her by her late husband. No response was made to these inquiries except to say that they were engrossed with anxiety over the illness of the daughter, Mrs. Mills, but that as soon as was practicable they would give attention to the matters inquired about and would then give information about them. Meantime they sent to Mrs. Dolliver the sum of about \$2,500 to pay funeral expenses and for her use and that of Mrs. Eddy. How much came to Mrs. Eddy does not appear. She continued to be in need. Mrs. Dolliver seems to have regarded Mrs. Eddy with much disfavor, and as a burden which she was evidently anxious to be rid of. Mrs. Dolliver was a sister of Mr. Eddy's first wife. A letter found in the record, written by Charles K. Eddy not long before his death to his son Arthur, shows that his children were already endeavoring to obtain assignments of his property, and that he protested vigorously against what he called their "wholesale scramble for the assignment of all my interests (supposed or otherwise) outside of the corporation," which, he says, "is uncalled for, and not conducive to happiness for any of us." But the danger was that, being in feeble health, he might be moved to make some other disposition more favorable to his widow than he had made by his will. This letter, of which we have quoted only a small portion, shows his extreme solicitude for

peace in the family, and explains the motive he had in making so meager a provision for his wife.

On August 26, 1901, Walter S. Eddy filed his petition for the probate of his father's will (and codicil) in the probate office at Saginaw, and a day was set for hearing. In this petition he stated the value of the estate to be \$50,000. On the same day he started for Los Angeles, taking a copy of the will and of his petition for the probate thereof with him, and a deed of the Saginaw homestead, running to himself, ready to be executed by his father's widow. One of the letters of inquiry written to the relatives in Michigan was sent by a Mr. Weller, an attorney at Los Angeles, who had been spoken to by a friend of Mrs. Eddy about the way of getting help for her from her husband's estate. Remembering this, Mr. Walter Eddy, on his arrival at Los Angeles, went first to the office of Mr. Weller, and stated his object to be to adjust with Mrs. Eddy her claims upon the estate of his father, and asked him to go with him and be present at his interview with her. Mr. Weller declined to do this unless he should be requested to do so by Mrs. Eddy. It should be stated that Mr. Weller had not been retained generally to assist her in the settlement of her claims against the estate. At the instance of a friend of hers, made in her presence, he had written to find out what was intended to be done by the family for her, and had informed himself of the law of Michigan in regard to the rights of widows in the estates of deceased testators. But it does not appear that he had ever informed her what that law was. It does appear, however, that he did not regard himself as employed to advise her in regard to the settlement of her claims, and this was sufficiently evident to Mr. Eddy from Mr. Weller's refusal to attend at the proposed conference. After the conference was over, Mr. Eddy saw him again and proposed to settle with him for his services to Mrs. Eddy. He had been told by Mrs. Eddy that Mr. Weller had not been employed by her, but he paid him \$10. On first leaving Mr. Weller, Mr. Eddy went to see Mrs. Eddy, and he testifies that he told her the object of his visit to be to find out what her wishes were in regard to her claims upon the estate; that he told her she had a right to elect whether to take under the will or to take under the statute of Michigan; that he told her what the provision in the will was; that he proposed to pay her \$300 for the furniture in the house at Los Angeles, which she agreed to accept; that he advised her to have her counsel present, but that she said she was capable of taking care of her affairs and did not want a lawyer; that he read the will to her, and that she stated her desire to be to take what her husband left for her. His testimony about this interview gives a different account about these details from that of Mrs. Eddy. Mrs. Dolliver was present, but was not called as a witness. But the important facts are that if, as he says, he told her there was a statute in Michigan under which she might elect, which we doubt, he did not tell her what its provisions were, what share of the estate she would get under it, or how long a time she had in which to inform herself and make her choice. Nor did he tell her the value of the estate. He gave her the impression that it was of a value which would make her share under the statute about of the value of her an-

nunity under the will. He had present a copy of the will, which he says he read to her. Attached to that was a copy of the petition for its probate, and in that it was stated that the value of the estate was \$50,000. It is fair to presume that he did not omit to point out that statement. He had it for some purpose. When testifying upon this subject, the following colloquy took place:

"Q. Now, did you tell her the size of your father's estate, what he left? A. I told her anything that she asked me. Q. Did she ask you how much he had left? A. I don't know that she asked me that question in so many words. Q. Did you tell her what it was? A. I told her anything that she asked me. Q. Did she ask you that? A. I couldn't say whether she did or didn't. Q. Did you tell her the contents of the petition you had signed the day you left here? A. I told her the facts of anything— Q. Did you tell her that the petition showed that his personal property was worth \$50,000? A. I did, if she asked me. Q. Well, did she ask you to tell her how much the estate was? A. I couldn't say. Q. To the best of your knowledge and recollection, state whether or not, if you did tell her, you told her it was \$50,000? A. I told her exactly the facts, what I told her. Q. No, no; did you tell her what that petition showed? Did you mention the petition to her? A. I couldn't say; I don't remember. Q. No recollection of doing so. Have you any recollection of doing so—telling her what the petition showed? A. Recollection of doing what? Q. Telling the size of her father's estate—of her husband's? A. I stated, if she asked me any questions, I answered them. Q. But you remember some things she asked you about; do you remember her asking you that question? A. No, sir; I have no recollection. Q. If you had told her anything about it, you would have told her, wouldn't you, this petition—as to the amount stated in any petition subscribed by you and filed the day you left? A. I probably would have told her exactly what the facts were. Q. Well, would you have said \$50,000? A. If that is the amount spoken of, I should, naturally."

Mrs. Eddy testified that she knew her husband was, or was reputed to be, a man of large means, large enough to enable him to live without work, but she did not know how large; that she was ill and depressed in spirits when Walter Eddy came to her after her husband's death; that she did not read the instrument, nor ask to have it read; that she supposed Walter was doing what was right; that she had no knowledge of the statute giving her an election, and supposed that all one could have was what was given her by the will. She is described in the testimony as being at that time 78 years of age, in feeble health, of little experience in business affairs, and as gentle and trustful in disposition. Mr. Eddy obtained from her a quitclaim deed of the homestead at Saginaw, and the following election and renunciation of all claim in her husband's estate:

"Los Angeles, Cal., September 4, 1901.

"For and in consideration of the payment to me of the sum of \$300.00 by W. S. Eddy, receipt of which is hereby acknowledged, I, Caroline E. Eddy, hereby transfer and assign and relinquish to W. S. Eddy, all the right, title or interest I may have or might have in the household furniture or personal property in the former residence of my late husband, Charles K. Eddy, at the southeast corner of Twelfth street and Westlake avenue, in Los Angeles, California, and also all my right, title and interest in and to the household furniture or personal property heretofore belonging to my husband, the late Charles K. Eddy, excepting from said personal property such as I may have selected. The personal property which I have selected to be removed by me at once. It is understood that I have already made the selection of personal property which I may take and that the same has been removed from said residence. This receipt and assignment is intended to be a full and complete assignment

of all my interest in any personal property belonging to my late husband, Charles K. Eddy, and of any interest in his estate, other than the interest which I have by reason of a right to an annuity of \$500.00 per annum. And I hereby also acknowledge receipt of the sum of \$250.00 as the first semi-annual payment of my annuity as provided for me in the will and codicil of my late husband, Charles K. Eddy. Said will being of date December 9, 1896, and being filed for probate in the county of Saginaw, state of Michigan, on the 26th day of August, 1901. In consideration of the foregoing payment, I declare that I recognize the validity of said will, consent to the probate thereof, and agree to accept the terms and conditions of said will as entirely binding upon me.

"In witness whereof, I have hereunto executed this assignment, agreement and receipt, the day and year first above written. Caroline E. Eddy."

And in return she secured an annuity of \$500 during her life. When asked what she intended to do with herself, she told him she was going to live with her son in Oregon. He hired a man to take her there. The place was a small farm near a hamlet of about 200 people, and the house is described by the witnesses as "a little old shack, * * * a couple of rooms, that was boarded up and down." The annuity of \$500 was seasonably paid by the executors. She lived there a number of years without any knowledge of the value of what she had forfeited, until, in 1907, she happened to be called to testify in a divorce case between her husband's daughter and the husband of the daughter, when she was informed of the value of her husband's estate by a lawyer who was conducting the case for one of the parties. The present suit was commenced soon after. The settlement of the estate in the probate court has not been closed, and meantime the executors have been carrying on the business of the company with the assets of the company as before the testator's death.

These, then, are the salient facts. A widow of a man whose estate is worth from \$400,000 to \$500,000, 78 years old, in feeble health, unused to business affairs, in need of the means of support, and still in the shadow of her husband's death, is approached by the executor of his will, who is also a devisee and legatee and an intelligent and competent business man, and knowing all about the amount and condition of the estate, and of the right of election given by the law to the widow, and is induced by him to forthwith make her choice to accept an annuity whose present worth, having regard to her age, was not more than \$3,500, and renounced her right to claim under the statute a sum nearly twenty times as large, and this without any information from the executor or any one else in regard to the amount of the estate or the proportion she would take under the statute. We think it would be safe to add that the executor designedly refrained from giving her any information on these subjects, and regarded it as his privilege to refrain from giving her any information which she did not ask; and he accomplished in a way profitable to himself and his brother and sister the object of his errand. And he left her the pittance of an annuity that would scarcely amount to more than a widow would be allowed out of such an estate by way of special and preliminary allowances and provisions pending a speedy settlement of it. He dealt with her courteously as far as good manners went. That was a good means to his end. But it was an extremely hard bargain.

We do not know on what grounds the court below dismissed the bill, but we gather from what was said at the hearing that it must have been upon the ground that the complainant had not within the year signified her election to take under the statute, and that the statute made this neglect a peremptory bar. It seems to us a case in which upon its merits the complainant is clearly entitled to relief by a court of equity. Whether she is precluded by the statute referred to we shall consider later on, in dealing with the several grounds taken in defense. If she had been let alone, and nothing had been done to induce her to a premature conclusion, or to conceal from her the facts which would be material for her choice, it might be that her neglect to dissent from the will within the year would operate to bar her claim. But this is not that simple case. She had known nothing of the provisions of the will and nothing of the provisions of the statute, or, indeed, that there was such a statute until Mr. Eddy came and the transaction was all done in a day. The statute gave her a year after the probate of the will in which to make her election. This was to give her time to learn the facts on which it would be exercised, for deliberation thereon, and to get removed from the influences of those sentiments which might unduly influence her. The executor stood, as to her, in the relation of a trustee. It did not matter that his appointment had not yet been confirmed. It was expected that it shortly would be, and he was then acting in that character and in behalf of the estate. Moreover, all the defendants obtained, and seek to preserve, the fruit of his negotiations and bargaining with the complainant.

The rule of equity applicable to such cases has long been settled, and there has been no variation in it within the bounds of which this case might fall. In *Cowen v. Adams*, 78 Fed. 536, 24 C. C. A. 198, which was a case where a legatee was seeking relief from an instrument obtained from him by an executor whereby he had released his claim to his share in the estate in circumstances which made it unjust and inequitable that it should be enforced, we said, at page 552 of 78 Fed., and page 214 of 24 C. C. A.:

"Equity will relieve the legatee in such transactions, where he has, under a misapprehension of his legal rights, surrendered to the trustee valuable interests without any adequate consideration, especially where the situation is such that no harm will come to the interests of others. Such would be the case where the claim relates to a fund which has not yet passed beyond control. These propositions are amply sustained by authority. 1 Story, Eq. Jur. §§ 307, 308; 2 Pom. Eq. Jur. §§ 948, 951, 955, 956, 958, 1088; *Taylor v. Taylor*, 8 How. 183, 12 L. Ed. 1040; *Comstock v. Herron*, 6 U. S. App. 629, 5 C. C. A. 266, 55 Fed. 803, and the cases there cited; *Mills v. Drewitt*, 20 Beav. 632; in *re Ashwell's Will*, Johns. Eng. Ch. 122; *Snow v. Booth*, 2 Kay & J. 132; *Oil Co. v. Hawkins*, 20 C. C. A. 468, 74 Fed. 395, 33 L. R. A. 739."

And the relief prayed for was granted. This judgment was affirmed by the Supreme Court in *Adams v. Cowen*, 177 U. S. 471, 20 Sup. Ct. 668, 44 L. Ed. 851. This doctrine has been enforced in many other decisions, a number of which are collected in the briefs of counsel, and is laid down by writers of text-books of the highest authority. Other authorities than those cited in this foregoing passage are: *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260; *Griffith v.*

Godey, 113 U. S. 95, 5 Sup. Ct. 383, 23 L. Ed. 934; Comstock v. Herron, 55 Fed. 803, 5 C. C. A. 266, 6 U. S. App. 626; Story's Equity Jur. §§ 307, 308; 2 Pomeroy's Eq. §§ 951, 958, 1088; Bispham's Prin. of Eq. §§ 231, 232, et seq. And it has been the law in England from a remote period. Huguenin v. Baseley, 14 Ves. 273. Gibbs v. Guild, L. Rep. 8 Q. B. D. 296, and 9 Q. B. D. 39, on appeal, where the history of the doctrine is stated in the elaborate opinions of the Lord Chief Justice Coleridge and of Lord Justice Brett. Lord Justice Holker dissented in that case, for the reason that the action had been brought as an action at law.

We will next attend to the objections raised by counsel for the defendants.

1. It is urged that a Circuit Court of the United States has no jurisdiction to entertain a suit of this character. This position is stated in the brief in the following expressions:

"The courts of the United States have no probate jurisdiction, and must receive the sentence of the court to which the jurisdiction over testamentary matters is committed as conclusive of the validity and contents of a will; and an original bill cannot be sustained upon allegations that a probate of a will is contrary to law. If any error is committed in allowing the probate, the remedy is in the state courts according to their appropriate modes of procedure, and, if a federal question is raised in such proceeding, an appeal will lie from the state courts to the federal courts. See *Fouvergne v. City of New Orleans*, 18 How. 473, 15 L. Ed. 399; *Williams v. Benedict*, 8 How. 107, 112, 12 L. Ed. 1007; *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599.

"It is a rule of general application that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by any other court. This doctrine has been affirmed again and again by the Supreme Court of the United States. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Ellis v. Davis*, 109 U. S. 485, 498, 3 Sup. Ct. 327, 27 L. Ed. 1006; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; *Borer v. Chapman*, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532."

It is undoubtedly true that, when the matter in controversy is one within the exclusive jurisdiction of the probate court, the courts of the United States will not assume jurisdiction. They will not take cognizance of the purely administrative proceedings in the settlement of estates of deceased persons. Nor will they invade the possession of the assets taken by those courts for the purposes of administration. But when a citizen of one state has a claim upon the estate of a deceased person situated in another state, or a matter of controversy with a citizen of such other state who represents, or has an interest in, the estate, and whether such claim be of a legal or equitable nature, he has a right under the Constitution and laws of the United States to come into its courts for a remedy, and of this right he cannot be deprived by any law of the state. Such a right is the matter in controversy in the case before us. It is not necessary to its determination that the court should take the possession of any property out of the hands of the probate court. The complainant seeks the rescission of an instrument which she says these defendants have unjustly and by inequitable means obtained from her and the use of which will harm her in the probate court. That court has not plenary equitable jurisdiction whereby it could give her relief; and, if it had, that would

not exclude the jurisdiction of the federal court. It would simply establish it as a court of co-ordinate authority with the federal court, and the complainant, being a citizen of another state, would still have the right to go into the federal court for relief. The right and power to determine the controversy between the parties rested in the Circuit Court of the United States, and it could proceed to that extremity without exciting any conflict with the probate court. When that is done, the claim is presented to the probate court as one adjudicated, and upon the footing of the adjudication the court will respect it in ordering the disposition of the assets of the estate. Thus the rights of all the parties are in due form of law, and, without the invasion of the province of any court, enforced. This outline of the respective provinces of the federal courts and the probate courts of the states is deduced from a number of decisions of the Supreme Court, among which we may refer to: *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101. This contention of the appellees must therefore be overruled.

2. It is further contended that the instrument in question did not prevent the complainant from electing to take under the statute, and that she has lost her right by neglecting to signify her dissent from the will within the year after it was admitted to probate. Counsel say:

"This woman had a perfect right to file her written election with the probate court of Saginaw county at any time within one year, and this instrument signed by her had no effect whatever upon that right, as the statute required no election if she took under the will, and this paper did not affect her right to take under the statute if made within the year."

We do not admit, however, that the effect of the agreement was restricted in the manner stated. This brings us to the ground on which, as we have said, we suppose the court below dismissed the bill.

The theory of the bill is that the complainant supposed she was concluded from any further claim upon the estate by her transaction with the executor, and neglected to take any further action in regard to the will upon that understanding, and we think that she might reasonably guide her course upon the assumption that all her claims upon the estate of every sort, except the annuity, were gone. Nor have we any doubt that the executor understood that the instrument excluded her from all participation in the distribution of the estate except the reception of the annuity. She could not take both courses—that is, take the annuity and under the statute also; and he induced her to take that annuity, and continued to send it, until the wrong he put upon her was discovered.

But is the proposition sound that, whatever the conditions, whether brought about in the due course of things, or by the wrongful devices of the party profiting by their success, the right to election is gone with the lapsing of the year, and no court has the power to relieve the injured party from the consequences? To say this is to give to the other party, the fruits of their own misconduct, a result which must be always abhorrent to a court of equity. In 19 Am. & Eng. Encl. of Law (2d Ed.) 243, it is said:

"It has always been the rule in equity that the defendant's fraudulent concealment of a cause of action will postpone the running of the statute until such time as the plaintiff discovers the fraud; the defendant, having by his own wrongdoing prevented the plaintiff from instituting his suit, will not be permitted to take advantage of his own wrong by setting up the statute as a defense."

And, as we shall see, in several of the cases cited, the rule has been applied not only to statutes of limitation prescribing the time within which actions shall be brought, but to other cases where the neglect of the party would have precluded him from a valuable right. *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636.

Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839, was a case where the plaintiff had neglected to redeem within the year prescribed by the statute; and she was relieved from the consequences. Several of the justices dissented, but that was upon the view which they took of the facts. They said:

"In our opinion there is no evidence of such misconduct on his part as afforded any ground, in law or equity, to justify appellee in her failure to redeem from the sale."

This was said by the same justice (Miller) who delivered the opinion in *Bailey v. Glover*.

Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721. This also was a case of failure to exercise the right of redemption within the time prescribed by law. And in *Allen v. Conklin*, 112 Mich. 74, 70 N. W. 339, where a bill was filed by a ward against the executors and heirs of a deceased guardian to establish a lien upon the decedent's lands in the hands of his heirs for the satisfaction of the liability of the guardian for moneys belonging to the ward which he had converted to his own use. There was a statute of Michigan which required all claims against deceased persons to be presented to commissioners appointed by the probate court for the hearing of claims within a certain time prescribed by the statute. The complainant had not done this. The estate was long since closed, and the statute would cut her off. But she alleged that the facts had been concealed from her, and that she had only recently discovered them. The court held that the defendants could not set up the statute to bar her claim, and granted her the relief she prayed. This case shows very clearly that in Michigan the statutory limitations in regard to claims against estates, while they are applied constantly in ordinary cases, do not exclude the jurisdiction of a court of equity to prevent a defendant from using the statute to protect himself in the enjoyment of the fruits of wrongdoing. In *Rankin v. Big Rapids*, 133 Fed. 671, 66 C. C. A. 568, we reviewed the decisions of the Supreme Court of Michigan upon this subject, and, as we hoped, made it clear that while that court had inflexibly enforced these statutes of limitation under ordinary conditions, yet had recognized the right of a court of equity to prevent defendants from setting up such statutes to accomplish an inequitable purpose.

The case is free from any difficulties in granting proper relief. No new rights have been acquired, nor old ones lost. The complainant can be restored to her position before she gave her release to the ex-

ecutor. The administration of the estate is still pending in the probate court. The complainant has been receiving the annuities. She proposes in her bill to give credit to the estate on the accounting for what she has received. The facts came to her knowledge May 25, 1907. The bill was filed about two months later. On February 6, 1908, the complainant filed in the probate court formal notice of her election in writing. We do not think this was necessary. The filing of the bill was an election of which all parties had notice.

The order of this court will be that the decree of the Circuit Court be reversed, and that a decree be entered that the instrument mentioned in the bill purporting to be executed by the complainant of date September 4, 1901, wherein she relinquished all her rights and interests in the estate, except an annuity of \$500 per annum, and agreed to accept the provisions of the will of her said husband as entirely binding upon her, be set aside, canceled, and in all respects held for naught, and that the said complainant is well entitled to her proper share of the real and personal estate of her said husband such as she would have had if no provision had been made in her behalf in said will; that an account be taken of the amount and value of her said share in the personal property and of its just liabilities to the rest of the estate, and that, upon the adjustment of such account and the ascertainment of the balance due to her, she be declared duly entitled to recover it from the executors, and, further, that she recover her proper share of the real estate of her deceased husband from the defendants, who are also sued as devisees under said will. It is contended by counsel for the appellees that the accounting should not be undertaken by the federal court, but should be left to the probate court. We are, however, of a different opinion. The duty of the federal court in such cases is not discharged by the mere declaration of the rights of parties in general terms which are abstract and reach no concrete result. Having jurisdiction to determine the validity of a claim, it has authority to settle and determine its scope and limitations, and, if the claim is for money, the amount which the plaintiff is entitled to recover. To this extent, at least, the power of the federal court is as ample as that of the state court, and, when the former is invoked by a citizen of another state, its exercise cannot rightfully be denied.

The decree which we propose is, in this respect, substantially the same as that made in *Byers v. McAuley*, supra, and by this court in *Comstock v. Herron*, and in *Cowen v. Adams*; and the judgment in the latter case was affirmed by the Supreme Court.

The accounting is a simple matter, and might have been had in the court below if some further evidence had been taken upon that subject. But the attempt to do this was resisted before the examiner when counsel for the complainant was examining witnesses and sought the production of the books of the company for the purpose of ascertaining its financial condition. Counsel for the defendant directed the witnesses not to answer the questions and not to produce the books of the company. The view of counsel seems to have been that the testimony was not relevant to the issue then being proceeded with. We think the counsel was mistaken in supposing the testimony was

not competent upon the direct issue. It had a bearing upon the question of the disparity between the value of what the complainant lost and what she received. It was not so far remote as to deprive it of any value. The witnesses obeyed the counsel's directions, and the testimony was not obtained. This was wholly unauthorized. The counsel ought not to have undertaken to dominate the proceedings in this way. The proper course, if he deemed the testimony objectionable, was to state his objections on the record. Then the questions should have been answered, and the examiner should have taken down the answers. The court would then at the hearing determine for itself in regard to the competency and relevancy of the proof and the sufficiency of the objection. By the course pursued counsel anticipated the court's decision and substituted his own. This is by no means the first occasion of the kind which we have had in our experience, and we acquit the counsel of any wrong purpose. The practice often leads to great inconvenience. It leaves the court below and the appellate court to the necessity of hearing the cause without full proof. If it turns out that the objection was not well taken, it involves the necessity of going back and taking the omitted testimony, and the delay of the judgment, as well as the increase of the cost and expenses of the proceedings, follow. Only recently we had a similar experience, and restated our objection to the practice. *Hardesty Mfg. Co. v. Yesbera* (C. C. A.) 166 Fed. 120. Rule 67 of the equity rules prescribed by the Supreme Court reads as follows:

"Any question or questions which may be objected to shall be noted by the examiner upon the depositions: but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

Decree reversed, with costs, and the cause remanded with direction to decree for the complainant as indicated in the foregoing opinion.

HITCHNER WALL PAPER CO. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. February 10, 1909.)

No. 33.

1. EVIDENCE (§ 539½*)—OPINION EVIDENCE—SPECIAL KNOWLEDGE AS TO SUBJECT-MATTER.

A question to a witness, testifying as an expert locomotive builder, as to how far a spark, going through a spark arrester, such as was used on defendant's railroad engines, would carry on a windy day and be capable of setting fire to inflammable material, was not one relating to the knowledge of such witness as an expert, and its exclusion was not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539½.*]

2. RAILROADS (§ 481*)—FIRES—EVIDENCE—ADMISSIBILITY—RELEVANCY TO ISSUES.

On the trial of an action against a railroad company to recover damages resulting from a fire alleged to have been caused by sparks from an engine, a statement, volunteered by a witness, that engineers some-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

times punched holes in the spark arresters, was properly stricken out as irrelevant and improper, where there was no evidence or claim of its having been done on defendant's road.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 481.*]

3. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

Where, in an action against a railroad company to recover for damage to plaintiff's factory, alleged to have been caused by sparks from an engine on defendant's road, plaintiff had introduced the testimony of a number of witnesses, including its manager, to the effect that no smoking was permitted or had ever occurred in the building to the knowledge of the witnesses, it was within the scope of legitimate cross-examination to show by such manager that a fire had occurred in the building within a year, which was reported to him as having been caused by a lighted cigarette, where such was the fact.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 935-936; Dec. Dig. § 268.*]

4. RAILROADS (§ 485*)—FIRES—ACTION FOR INJURY BY FIRE—INSTRUCTIONS.

In an action to recover for damage from fire alleged to have been caused by sparks from an engine on defendant's railroad, where there was evidence that sparks might escape from an engine properly equipped and without negligence on the part of those in charge, it was not error to instruct the jury that in that connection they might consider evidence of the exposed condition of plaintiff's property, although contributory negligence was not an issue.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 485.*]

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

For opinion below, see 158 Fed. 1011.

Alexander Simpson, Jr., for plaintiff in error.

John Hampton Barnes, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The Hitchner Wall Paper Company, the plaintiff below and plaintiff in error, conducted a wall paper factory at Holmesburg, in the state of Pennsylvania. The factory building, of which the plaintiff was lessee, was a two-story and basement brick building, situate immediately west and alongside of the New York Division of the defendant company, its front running for about 200 feet parallel with the railroad and about 41 feet from the west rail of the west track thereof. Sometime in the forenoon of May 5, 1906, a fire occurred in said factory, which destroyed a large quantity of the paper, paper material and machinery of the plaintiff. In the suit thereafter brought in the court below, plaintiff claimed that the fire was caused by a spark or sparks from an unidentified locomotive engine passing the plaintiff's factory, and that such sparks were emitted and escaped from said locomotive, by reason of the defective condition in which the spark arresters of its locomotives were allowed to remain by the defendant, and by reason of the unskillfulness and want of care with which they were managed by those in charge of them, and that the most approved spark arresters in general use were not used on said locomotives.

At the trial, plaintiff was not able to prove by direct testimony that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a spark from any locomotive engine of the defendant had occasioned the fire. It was allowed to prove, however, a great number of independent circumstances, from which it is claimed that the jury could infer, both that the fire was so occasioned, and that it was due to the negligence of defendant, either in not providing suitable spark arresters, or in not maintaining them in such repair as to prevent the emission of sparks capable of setting fire to the inflammable material upon which they might alight. The scope permitted to this testimony by the court below went to the verge of what was allowable in such cases, and there seems to be no adverse criticism by the plaintiff in error as to the general action of the court in this respect, objection being confined to the special grounds upon which particular offers of testimony were rejected by the court. In the absence of direct testimony to that end, therefore, plaintiff undertook to satisfy the jury, by a process of exclusion, that nothing else than a spark from defendant's locomotives could have caused the fire. Testimony was offered and admitted, tending to show that other fires in the vicinity had been caused in this way, within a short time prior to the burning of the factory, and negative testimony was admitted to eliminate (with what success was a question for the jury), one after another, all the possible causes for the fire except the sparks from the defendant's locomotives. The theory upon which the case was tried by the plaintiff, was, that a spark from a locomotive entered the cellar or basement door opening on a level with the roadbed, and fell into a bin just inside the door, into which waste paper was dropped from the floor above. The verdict and judgment were in favor of defendant.

There are ten assignments of error, referring to the admission or rejection of testimony and to certain portions of the charge of the court to the jury. The questions raised by these assignments, however, as pressed at the trial, are few in number. The first of these to be noticed, relates to the refusal of the court to allow a so-called expert to testify how far, in his opinion, a spark would go on a windy day. This witness was the proprietor of a machine shop, and in 1880 was an apprentice in the Baldwin Locomotive Works, where he continued until 1894. Several years of this time, he was out upon railroads in different parts of the country, testing engines and carrying on experimental work. He had helped build locomotives for the Pennsylvania Railroad, and was familiar with the type of engines used on that road, but he had ridden only once on a Pennsylvania engine, from Jersey City to a roundhouse, and, as the court below said, had not been in touch with engines upon that road for 13 years. He was admitted as an expert by the court and testified at great length as such. He had observed sparks thrown from engines of the Pennsylvania Railroad at night, when there was no unusual wind, and was permitted to say, over objection, that under normal conditions sparks "that have passed through a 2½ mesh, I presume would go about 15 feet above the locomotive," but that they would not set fire to anything. He was also permitted to say, over objection, from general observation, that such sparks die before they reach the ground, when they come through such a mesh as was used on the Pennsylvania Railroad. Then the question was put to him by plaintiff's counsel:

"How far, if you can tell me, would a spark on a windy day, going through the mesh of the arrester used on the Pennsylvania Railroad, carry and be capable of setting fire to paper or other objects of that character?"

The objection to this question was sustained by the court, and exception noted for plaintiff. The assignment of error based upon this exception was strongly pressed at the bar by counsel for the appellant.

We think the testimony offered by this question was clearly objectionable, and was properly ruled out by the trial judge. The qualifications of an expert witness, and the limitations to his testimony, are wholly within the sound judicial discretion of the trial judge. This witness had been admitted as an expert, in regard to the construction and operation of locomotive engines, and a sufficiently wide scope had been given to his testimony. He had given important testimony as to how far a spark would rise under normal conditions through a standard spark arrester, and also testified that a spark so emitted under such conditions would not carry, so as to set fire to inflammable material, such as paper, on the side of the road; but the question as to how far a spark would carry on a windy day clearly did not relate to his knowledge as an expert locomotive builder, and as a matter of ordinary observation, the elements of the strength and character of the wind were too uncertain to make his opinion of use in determining any issue in the case.

The next question arises out of the assignment of error to the order of the court, striking out a volunteered statement of this expert witness, that engineers would sometimes, when the engines steam badly, punch holes in the spark arrester themselves, to make up steam. The witness had no knowledge of this being done upon the engines of the defendant company, and it was clearly irrelevant and improper, in the absence of such knowledge, to suggest to the jury that this was done, or might have been done, to the engines on the defendant's road passing the plaintiff's factory at the time of the fire.

The third matter to be considered relates to a question asked Frank G. Hitchner, the general manager of the plaintiff company and owner of two-thirds of its stock, in the course of his cross-examination by defendant's counsel. The theory upon which the case of the plaintiff was tried, as we have already said, was that a spark emitted from an unidentified locomotive of the defendant company, passing the plaintiff's factory, was carried by the wind through the open cellar door of the factory and into the bin of waste paper situated nearby, and the method of proof, by exclusion, above referred to, made necessary the testimony of many witnesses, including Hitchner himself, of a negative character, as to the absence of any conditions in the building itself from which the fire could have originated. Prior to calling Hitchner, the plaintiff called a number of witnesses, who testified that no smoking was permitted or had ever, within their knowledge, occurred in the building; that notices were posted in the factory, forbidding smoking. The general superintendent testified, on direct examination, that this rule against smoking was rigidly enforced, and, on cross-examination, was asked and testified, as follows:

"Q. What do you mean by saying that the rule against smoking was rigidly enforced? What punishment did you inflict? A. Discharge. Q. When had

there been a report made to you of the breach of that rule, before the fire? A. I never had any report of anybody smoking."

Hitchner had testified to the same general effect, and also, that he had filed proofs of loss with the insurance company, stating that the cause of the fire was unknown, and, on cross-examination, he testified, without objection, as follows:

"Q. You knew, or at least your witnesses have so testified, that there was no smoking in that building? A. Yes. Q. Did you attribute the fire to smoking when you first heard of it? A. No, sir. Q. Did you attribute it to fire communicated from the boilers? A. That was the general supposition, the very first thing. Q. That was the general supposition. And for how long did that supposition prevail? A. On the day of the fire. Q. Did it prevail on the day of the fire? A. Yes. Q. And how did you remove that supposition from your mind before you brought this suit? A. I did not say that it was my supposition. It was a general supposition. Q. What led you to make that supposition? A. Talk among some of the people."

After questioning further on this line, he was asked, on further cross-examination, as follows:

"Q. As a matter of fact, was not there a fire in your building within a year prior to this time, which was reported to you to have been caused by a lighted cigarette? (Objected to. Objection overruled, and exception noted.) A. Yes, sir. * * * Q. Where did that fire start? A. Down in the same place. Q. In the waste bin? A. Yes."

After some further questions, counsel for plaintiff moved to strike out this evidence, on the ground that plaintiff's witnesses were limited in their testimony to fires that occurred within six months of the one in question. The motion was overruled by the court, and exception taken and noted for plaintiff. The principal objection, however, urged before this court, has been that this came within the rule prohibiting hearsay testimony. Passing the suggestion, that this ground of objection was not stated to the court below, we come to its merits. The question is a close one, but the better opinion seems to be that, in view of what had preceded, the question objected to did not transcend the legitimate scope of cross-examination. It is to be observed that the gist of the testimony given by plaintiff's witnesses on this point, was negative in character; that they had no knowledge of any one smoking on the premises, and that the rule against smoking was strictly enforced, and yet Hitchner had testified, without objection, on cross-examination, that at the time of the fire in question, the supposition, not of himself but of others, "the talk" of others, presumably of those in his own employ at the time it occurred, was that the fire had been caused by boilers in the factory, and that this was "the general supposition, the first thing." The question objected to was, whether a former fire in the same place had not been attributed to a lighted cigarette. In both cases, this attribution of the fire—in the one case to the boilers and in the other to a lighted cigarette—by those present at the time and interested therein, was not far removed from being part of the res gestæ. But, in the light of the testimony of both Hitchner and Compton, and other witnesses, that the rule against smoking was efficiently enforced, the question was pertinent, as directed to the value of the testimony in respect to the exclusion of smoking and all other causes

of fire, save in connection with sparks from defendant's locomotives. To this end, it was a legitimate probing as to the value of Hitchner's opinion in this respect. It was not seeking to introduce evidence tending to prove, either that the former fire originated from the boilers and the fire in question from a lighted cigarette, but the attribution on both occasions of the fire to such a cause, was an ultimate fact properly inquired about on cross-examination, in the discretion of the trial judge. We do not think that the wide discretion exercised by the court below in this matter has been abused, and the assignment of error in this regard is therefore overruled.

For the rest, after a careful reading of the charge of the learned trial judge, we are of opinion that all the main questions in the case were impartially, clearly, and fully submitted to the jury, and with great fairness to the plaintiff. While the questions as to what caused the fire, and whether defendant was guilty of negligence in not equipping its locomotives with approved spark arresters, or in not keeping such in repair, or subjecting them to proper inspection, were submitted for determination by the jury, all question as to contributory negligence on the part of the plaintiff, in leaving the inflammable material of waste paper so near an open door and but a short distance from the tracks of the defendant's road, was properly withdrawn from the consideration of the jury.

Only one other point raised by the plaintiff requires our attention. The plaintiff complains, in the ninth assignment of error, that the court instructed the jury, as requested by the defendant, as follows:

"In ascertaining the cause of the fire, the jury may, under the evidence that sparks may be emitted from locomotives without negligence of the defendant, consider the evidence of the way in which the plaintiff used its property, and particularly the evidence of the cellar door having been open just prior to the fire, and of the existence of the waste in and about the bin, and baling press near the door at the point where the fire is said to have started."

We see no objection to this statement. Undoubtedly, the jury, under the evidence, were required to consider whether the fire could have been caused by a spark emitted from a locomotive equipped with a proper spark arrester. In doing so, it seems entirely reasonable that they should consider the fact that this inflammable material of waste paper was stored near the open door in the side of the building, within a few feet of the tracks of the defendant company. Owing to such a condition, a fire might have been caused by a spark thus emitted, which, under other conditions, would have been impossible. The evidence certainly did not exclude the possibility of a fire under such circumstances from sparks emitted from a properly equipped locomotive, and the court was clearly right in instructing the jury, by its general charge, as to the measure of care and vigilance which the law imposes upon a railway company, and in saying that, if it has placed on its locomotives the most approved spark arresters, and keeps them in good repair, it cannot be held responsible for the emission of sparks which they cannot prevent.

In what we have said, we have covered the principal points urged at the bar by counsel for the plaintiff in error. As to the other assign-

ments of error, we content ourselves with saying that they do not commend themselves to our judgment, and do not require specific discussion.

The judgment of the court below is therefore affirmed.

CITY OF DETROIT et al. v. GUARANTY TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1909.)

No. 1,851.

APPEAL AND ERROR (§ 324*)—NECESSARY PARTIES—SUMMONS AND SEVERANCE—EQUIVALENT PROCEEDINGS.

It is essential to the maintenance of an appeal from an order granting a preliminary injunction that a party directly affected by such order should be made a party to the appeal, or detached by summons and severance, or equivalent proceedings; and it is not sufficient that the appeal was allowed in open court, unless the record shows that such party was in fact present and had actual notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1806-1809; Dec. Dig. § 324.*]

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

Otto Kirchner and P. J. M. Halley, for appellants.

E. G. Stevenson and Brainard Tolles, for appellee.

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

COCHRAN, District Judge. This is an appeal from an interlocutory order granting a preliminary injunction. The suit in the lower court, in which it was made, was brought by the appellee, Guaranty Trust Company of New York, against the appellants, city of Detroit, William B. Thompson, Timothy E. Tarsney, Patrick J. M. Halley, George T. Gaston, the Detroit Legal News Company, the Evening News Association, and the Detroit United Railway. At that time, William B. Thompson was mayor, Timothy E. Tarsney and Patrick J. M. Halley were, respectively, corporation and assistant corporation counsel, and George T. Gaston was city clerk, of the city of Detroit, and the Detroit Legal News Company and the Evening News Association were publishers of papers in which the ordinances of the city of Detroit were officially published. The other defendant to the suit, the Detroit United Railway, operated a line of street railroad in that city. The plaintiff therein, Guaranty Trust Company of New York, appellee here, was trustee in a mortgage made by the Detroit United Railway on its line of railroad and other property to secure certain bonds issued by it.

The suit was brought March 3, 1908, and the relief sought was an injunction to prevent the publication of an ordinance passed by the common council of that city on that date, it being the duty of the city clerk to cause same to be published in the official papers, the enforcement or the taking of any steps looking to the enforcement of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

provisions thereof, and, in the event of its publication, the commission by the railway of any act that might or could be construed as an acceptance of the ordinance, and, in particular, the operation by it of cars over certain specified portions of its line, which by the terms of the ordinance amounted to an acceptance thereof. The right to this relief was based upon the claim that the ordinance, within the meaning of section 10, art. 1, of the Constitution of the United States, impaired the contract rights of the railway with the city covered by the mortgage, and was beyond the powers of the common council.

In previous litigation between the city of Detroit and the Detroit Citizens' Street Railway Company, predecessor in title of the Detroit United Railway, carried to the Supreme Court of the United States, it was held that by virtue of an ordinance, enacted November 14, 1879, that railway company had a contract with the city as to the fares it might charge for 30 years from that date, and that an ordinance adopted in 1899, attempting to reduce the fares thus fixed, was invalid as an impairment of the obligation of that contract. This was so held in the case of *Detroit v. Detroit Citizens' Street Railway Company*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592. After this litigation had terminated, and the Detroit United Railway had acquired the rights of the Detroit Citizens' Street Railway Company, it was claimed on behalf of the city that certain comparatively small portions of its line, the same above referred to, were not covered by that contract, and that the right to operate over those portions thereof had expired.

In this condition of things, the ordinance of March 3, 1908, was enacted. This ordinance provided, amongst other things, that, if any street railway company in the city of Detroit should operate any street car on any street in the whole or any part of which its right to operate cars had expired, it should operate all of its cars over the whole of the line or route of which that street was a part upon certain terms as to fares, making them considerably less than those fixed by the contract referred to, and that the operation of a single car by such company on any street over that portion where its right to operate street cars had expired should constitute an acceptance by it of those terms. As the Detroit United Railway was the only company operating a street car line in the city, the ordinance applied to it, and to it alone. It was the publication and enforcement and the doing of any act that might or could be construed as an acceptance of this ordinance that was sought to be enjoined.

A temporary restraining order was granted immediately upon the filing of the bill, and, after hearing on April 14, 1908, the preliminary injunction was granted. By it the defendants, except the Detroit United Railway, appellants here, were restrained, pending the final hearing of the cause, from publishing or enforcing said ordinance, and the defendant Detroit United Railway from doing any act or thing that would directly or indirectly constitute an acceptance thereof.

A motion has been made to dismiss the appeal, and, as we think it is well taken, there is no other question to be considered by us. The ground of the motion is that the Detroit United Railway is not a party to the appeal, and since the granting of the preliminary injunction has not been detached from the litigation here by summons and severance,

or what is equivalent thereto. There can be no question that it is essential to the maintenance of the appeal that either the railway should be a party thereto or should have been so detached. It will appear as we proceed that, in the absence of summons and severance, it could not have been detached, except by its own act or neglect. That it should be here or should have been so detached is because it has a direct interest in each part of the preliminary injunction, that part which restrains the publication and enforcement of the ordinance, as well as that part which restrains it from doing any act or thing that would constitute an acceptance of it, and in the disposition to be made thereof by this court. Concerning the necessity of such being the case with a mortgagor, where there has been a decree of foreclosure and a confirmation of a sale had thereunder, and an appeal has been taken therefrom, Mr. Justice Brewer had this to say in the case of *Davis v. Mercantile Trust Company*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563:

"The setting aside of one sale and the ordering of another may affect prejudicially or beneficially his interests, and because of that he has a right to be heard upon the question of setting it aside."

And, further:

"It is not necessary in any given case to determine that his interests would or would not be promoted by the setting aside of the decree. It is enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense."

The railway is not a party to the appeal. This is certain. It did not join in the petition for the allowance of the appeal, or in any other way join in the appeal. The citation and bond given upon the allowance of the appeal ran to the plaintiff below, appellee here, the Guaranty Trust Company of New York, and to it alone. The sole possible question is as to whether, after the granting of the preliminary injunction, it was detached from the litigation here. It was not detached by summons and severance. Was it detached by their equivalent?

Before answering this question, we would note what the Supreme Court has said is equivalent to summons and severance. In the case of *Masterson v. Herndon*, 10 Wall. 416, 19 L. Ed. 953, Mr. Justice Miller said:

"We should have held appeal good if it had appeared in any way by the record that *Maverick* had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal in the petition of appellants does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it as to his own interest."

In the case of *Inglehart v. Stansbury*, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 76, Mr. Justice Gray said:

"This could only be shown by a summons and severance, or by some equivalent proceeding such as a request to the other defendants and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so; and this must be evident upon the record of the cause appealed from in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed and to prevent him and the appellate court from being vexed by successive appeals in the same matter."

In the case of *Beardsley v. Arkansas & Louisiana Railway Company*, 158 U. S. 123, 15 Sup. Ct. 786, 39 L. Ed. 919, Mr. Chief Justice Fuller said:

"This appeal was taken by John D. Beardsley alone, and there is nothing in the record to show that his codefendants were applied to and refused to appeal, nor was any order entered by the court on notice granting a separate appeal to John D. Beardsley in respect of his own interest. The appeal cannot be sustained."

And in the case of *Winters v. United States*, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340, Mr. Justice McKenna said:

"The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding or by their renunciation, is firmly established."

According to this last statement, the equivalent of the proper proceeding is what may be properly characterized as a "renunciation."

These quotations, we think, justify us in taking the position that, in order that one who has the right to appeal from a decree along with others may be detached from such right, it is essential, at least, that he should have had an actual opportunity to have availed himself thereof, and that fact must be shown by the record of the court rendering the decree, so that it may be said that his not being a party to the taking of the appeal is due to his own act in refusing to unite in its taking or his neglect in not doing so. In the case of *Johnson v. Trust Company*, 104 Fed. 174, 43 C. C. A. 458, Judge Sanborn said:

"This appeal was taken by and allowed to the appellant alone, in open court, in the presence of the parties, at the same time that the decree was rendered, and all the parties to the suit have appeared by counsel in this court upon the appeal. These facts constitute sufficient evidence that the defendants to this suit who did not join in it had notice of the appeal and declined to join, and, as all the parties to the suit are now represented by counsel in this court, the motion to dismiss the appeal is denied."

According to this it would seem that it is sufficient that the nonjoining party was present in court at the time the appeal was allowed. That the presence here referred to is an actual and not a constructive presence is evident from the statement of the case by Judge Sanborn, where it is said that the appeal was prayed and allowed "in open court and in the presence of all the parties to the suit." If this is sufficient, and we will not say that it is not, such is the irreducible minimum of what may be the equivalent of summons and severance to detach one from his right of appeal.

We are now prepared to answer the question as to whether the Detroit United Railway has been detached from the right to unite with the appellants in the taking of the appeal, assuming, for the sake of the argument, that it had such right. It is not claimed that the record shows that it had any actual notice that the appeal was to be taken, or that it refused or failed after such notice to unite in its taking. Nor is it claimed that it was actually present at the time the appeal was taken, and in this way had an opportunity to unite in the appeal, and did not avail itself thereof. The sole thing relied on as effecting its detachment is the fact that the record of the lower court shows that the petition for the allowance of the appeal was filed and the allowance

made in open court, and that, therefore, it had constructive notice that the appeal was allowed.

We have failed to find any decision of the Supreme Court, nor has a decision of any other court been furnished us, holding that such constructive notice is sufficient; and it would seem to be negatived that it was by the language used in the above quotations from certain decisions of the Supreme Court. All that is relied on by appellants is the holding that where such is the case—that is, where the appeal is prayed and allowed in open court—no citation is required; the constructive notice which the other party has of the allowance of the appeal being sufficient notice to him of the pendency of the appeal. It is so held in the cases cited on behalf of appellants, to wit: *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Sage v. Central Railway Company*, 96 U. S. 712, 24 L. Ed. 641; *First National Bank v. Omaha*, 96 U. S. 737, 24 L. Ed. 881; *Chicago Railroad v. Blair*, 100 U. S. 661, 25 L. Ed. 587; *Dodge v. Knowles*, 114 U. S. 430, 5 Sup. Ct. 1197, 29 L. Ed. 144; *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581.

These cases are limited, however, to the necessity of a citation, and no case has been cited, nor have we been able to find any, where this doctrine has been applied to the matter of detaching a party from his right of appeal. Indeed, it is not to be expected that it would be. The regular procedure of summons and severance involves actual notice, and for any other course to be its equivalent it must also involve such notice.

But it may be said that the interest of the railway was not against the order granting the preliminary injunction, but in having it stand, and that, therefore, it had no right to appeal therefrom, or to unite with appellants in the appeal they took, and there was nothing from which it could be detached. We do not find it necessary to consider and determine this position. All that follows from it, if it be correct, is that the railway should have been made a respondent to the appeal. However it may have been, had not the citation and bond run to the appellee, Guaranty Trust Company, alone, as they do, there is no possible room for the appellants to claim that the railway is here as a respondent to the appeal. Appellants have ignored the railway entirely. They have treated it as if it had no interest in the order appealed from. It has not appeared here, and it is by no act or neglect on its part that it is not here.

The motion to dismiss is sustained.

In re SWEENEY.

(Circuit Court of Appeals, Sixth Circuit. March 22, 1909.)

No. 1,859.

1. BANKRUPTCY (§ 223*)—REFEREES—COMPENSATION.

A bankruptcy proceeding may be referred to the referee by a special order, or to him as referee on special issues, his power depending on the order of reference; but there is no authority for converting a referee in bankruptcy into a special master, nor for allowing him compensation as such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under Bankr. Amend. Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 (U. S. Comp. St. Supp. 1907, p. 1033), declaring that neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized by the act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888-894; Dec. Dig. § 223.*]

2. BANKRUPTCY (§ 467*)—REFEREE'S FINDINGS—APPROVAL BY COURT—REVIEW.

Where a referee's report and finding in bankruptcy, involving deduction and inferences from conceded facts and from correspondence and evidence, had been concurred in by the trial court, a contrary conclusion would not be arrived at on appeal unless it plainly appeared that the finding or conclusion was based on some error of law or plain mistake of fact.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

3. BANKRUPTCY (§ 140*)—SALES—RESCISSION—RIGHT TO RETAKE PROPERTY—EVIDENCE.

Evidence held to sustain findings that sellers of merchandise to the bankrupt did not give full credit to a financial statement submitted by the bankrupt before delivery of the goods, but that the sellers delivered the goods with knowledge that the bankrupt was unreliable and in failing circumstances, and were therefore not entitled to rescind the sale after bankruptcy had intervened and recover the property as fraudulently procured.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219; Dec. Dig. § 140.*]

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

Grafton Green, for appellant.

Charles C. Trabue, for appellee.

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

LURTON, Circuit Judge. On December 13, 1907, E. E. Sweeney became voluntarily a bankrupt, and in due course Chas. C. Trabue was selected as trustee. There came into the possession of the trustee a stock of vehicles, including buggies, surreys, etc. Many of these vehicles had been purchased by the bankrupt, who was a dealer in such articles, carrying on business at Nashville, from a copartnership engaged in the manufacture and sale of vehicles at Cincinnati, doing business under the name and style of Ratterman & Luth. This copartnership filed an intervening petition in the bankruptcy proceeding for the purpose of reclaiming such of the vehicles in the hands of the trustee as had been sold by them to the bankrupt. The ground for rescinding the contract of sale was that the sale had been made upon a credit in consequence of fraudulent representations made by Sweeney as to his solvency. The trustee answered and denied the right of reclamation. Thereupon the court referred the issues to the referee "to hear proof and report upon the matters in controversy." Upon a stipulation as to facts and certain exhibits, including the sworn statement of the bankrupt as to his financial status and certain correspondence, there was a report filed by A. L. Childress, styling himself "special master,"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

denying the right of rescission. To this exceptions were filed. These were overruled, and the findings of the "special master" sustained, and the petition of the intervener dismissed. From this they have appealed.

The issues presented by the intervention were properly referred by the court to the referee for the purpose of hearing evidence and making a report. The referee was Mr. A. L. Childress, who afterwards filed a report as special master. This was doubtless an inadvertence. There is no authority for converting the referee into a special master. The bankruptcy proceeding may be referred to the referee by a general order, or to him as referee upon special issues, his power depending upon the order of reference. Loveland on Bankruptcy, § 29 (3d Ed.); section 22, Bankr. Act 1898 (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]). For the most part the duties of a referee are those of a special master, and we know of no authority for the appointment of a special master to do the proper business of the referee. Nor do we know of any power to allow a referee the compensation of a special master. The fees and compensation of that officer were enlarged by the amendments of the act passed February 5, 1903. Section 40 (U. S. Comp. St. 1901, p. 3436) amended by Act Feb. 5, 1903, c. 487, § 9, 32 Stat. 799 (U. S. Comp. St. Supp. 1907, p. 1029). By section 72, added by that amendatory act, it is provided:

"Neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." U. S. Comp. St. Supp. 1907, p. 1033.

In re Mammoth Pine Lumber Company (D. C.) 116 Fed. 731, compensation for investigating and reporting upon liens claimed by the interveners was disallowed. So, also, In re Barker (D. C.) 111 Fed. 501. Both of these cases were before the very stringent provisions limiting their compensation in the act of 1903, set out above. But the parties, as well as the court below, treated this report as the proper report of the referee, under the very correct order making the reference to the referee as such, and we shall do the same.

Coming now to the merits. From a stipulation of facts it appears that the bankrupt had for some years prior to the transactions here involved been a customer of the petitioners. Between November 26, 1906, and April 9, 1907, he made four orders aggregating \$3,607.12. The shipments under these orders were made as follows:

February 9, 1907.....	\$1,134 20
March 5, 1907.....	1,295 33
March 13, 1907.....	124 85
May 24, 1907.....	1,052 74

\$3,607 12

The vehicles sought to be reclaimed are parts of each of the four shipments. For these orders notes were executed so as to divide each order into several notes maturing at varying dates. Five of these notes maturing between May 5, 1907, and July 5, 1907, aggregating \$1,247.15, were paid at maturity. A sixth note, maturing July 20, 1907, was paid partly in money and partly by two small renewal notes, which

were paid at maturity. Another note was renewed and paid. The other notes were renewed, and small payments made from time to time. On December 13, 1907, petitioners held six renewal notes aggregating \$1,370.79, on which date Sweeney filed his petition in bankruptcy. From the evidence it appears that Ratterman & Luth were not satisfied of the solvency of Sweeney and held up his orders for consideration. They had therefore received reports from sources not disclosed to the effect that Sweeney's financial condition was unsatisfactory. They then sent an agent to Nashville for the purpose of investigation. Brewer, the agent, reported by letter of January 14, 1907, that he had seen Sweeney and told him of the bad reports. That Sweeney had said, "Some one has been lying on me, as I am now nearer out of debt than since I went into business." That he said his total indebtedness was about \$6,000, and that he had on hand a \$12,000 stock. Brewer then added significantly:

"By to-morrow morning you will get a complete statement from Mr. Sweeney and his financial standing and just how much he owes; so from the way he is fixing up his repository and painting he does not expect to break this year, anyway, so now it is all left for you to decide after you hear from Mr. Sweeney."

Under date of January 18, 1907, Sweeney wrote Ratterman & Luth, inclosing financial statement and complaining of his delay in shipping goods ordered. From that statement it appeared that his resources aggregated \$20,319.01 and his liabilities \$8,165.55. This being satisfactory, his orders were filled. It was stipulated that in fact Sweeney was insolvent then and throughout the year 1907, and that his liabilities were then between \$15,000 and \$20,000, instead of \$8,000, as stated. The assets which came into the hands of his trustee, including those sought to be reclaimed by petitioner and the Courtland Company, another manufacturer, aggregated in value about \$8,000, while the debts scheduled amount to \$22,000.

Sweeney's statement bore date of December 28, 1906. That it exaggerated resources and suppressed the truth as to his liabilities must be conceded. That he was desperately insolvent when he made it, and throughout the year 1907, is evident. The referee, upon the stipulations as to facts and upon the exhibits, which included a large number of letters which passed between Sweeney and petitioners and between petitioners and their representative, Brewer, was of opinion, in substance, that the interveners had lost, by their delay after discovering the unreliability of Sweeney, any right which they originally might have had to rescind.

This conclusion involved deductions and inferences from conceded facts and from the correspondence in evidence, which tended to show the falsity of the bankrupt's financial report and his general unreliability. This report and finding was concurred in by the court below. To justify us in a contrary conclusion, it should plainly appear that the finding or conclusion was based upon some error of law or plain mistake of fact. Conceding, as we may, that the falsity of Sweeney's financial statement made a prima facie case for rescission, we are, nevertheless, of opinion that there is no sufficient ground for reversing the action of the court below. The reasons which incline us to this result

may be shortly stated, though for the most part they appear in or are suggested by the report of the referee.

(1) It is not likely that the interveners gave full credit to the financial statement of Sweeney. They had before that, from sources which they do not disclose, bad reports about him.

(2) Brewer's letter reporting upon Sweeney to a certain extent discounts the bankrupt's financial statement. He reports him as claiming his indebtedness to be about \$6,000 and his stock on hand as worth \$12,000. The statement received the next day after this confidential report represented his liabilities as \$8,000, and that an invoice of stock showed about \$15,000. Which was true? There was a difference of 25 per cent. Business men must have taken notice of such a discrepancy. Again, this report flippantly observes "that from the painting and fixing up" of Sweeney's repository "he does not expect to break this year, anyway." This carries with it the idea that there is a chance that the "fate" of one about whom they had had bad reports might be or was likely to be postponed for the year.

(3) Almost at once after getting these goods Sweeney began to ask for extensions of credit, and to make partial payments by means of a system of kiting, aided by petitioners. Thus several times he made payments by means of his own check, and then drew against the appellants to put himself in funds to meet his own check. So importunate did Sweeney become in his requests for extensions, and so unreliable about his assurances that he would promptly meet renewals of paper or paper not yet due if a renewal of past due paper was granted, that in September, 1907, Ratterman & Luth had another investigation made, with the result that his standing and responsibility was reported as "Got to be very bad." This report seems to have been sent on a printed form entitled "Salesman's Investigating Report," and is dated September 5, 1907. It is unsigned. Neither Brewer, who made the report of January 14th, nor the salesman who made that of September 5th, were examined as to the sources of their information or the extent of their investigation. After this information a number of renewals were allowed and some small payments received.

From all the facts we have a strong disposition to accept the conclusion of the referee and the court below that the appellants had, certainly after the report of September 5th, knowledge of the unreliable character of Sweeney's promises and statements, and ample evidence for discrediting his original financial statement and for deeming him then in a failing condition. They were at least put on notice. If they had wished more knowledge of his real assets and resources, they should have made a deeper investigation. That Sweeney had little hope of extricating himself is evident from the fact that once before September 5th and once afterwards he insisted upon shipping back some of the unsold vehicles. This they refused, doubtless relying upon the chance to do better by other means. When bankruptcy came, they knew no more than upon September 5th. Having knowledge of facts which strongly tended to show the falsity of the financial statement upon which they say they were induced to give credit, they were bound to elect whether they would stand in their original attitude of vendees

and endeavor to collect the purchase price as creditors, or at once disaffirm the sale and reclaim the goods. They had no right to speculate by taking the chance of collecting their money after knowledge of evidence which tended to show that they had been deceived. Instead of at once disaffirming the sales, they proceeded to exact performance of the agreement for payment, and made renewals even after their private investigation of September 5th had made them aware of a condition incompatible with the truth of the statement of December 28, 1906. In *Simon v. Goodyear Rubber Shoe Company*, 105 Fed. 573, 581, 44 C. C. A. 612, 620, 52 L. R. A. 745, we said that:

"Full knowledge of a fraud does not mean that the party defrauded shall have knowledge of all of the evidence tending to prove the fraud. If he have knowledge of the material facts which go to make up the case of deceit as practiced upon him, it is sufficient to make him elect whether he will go on with the contract, or stop short and sue for the loss he has already suffered."

This applies peculiarly to cases of mercantile sales where the misrepresentation has been as to the solvency of the buyer. The whole course of dealing between Sweeney and Ratterman & Luth after these sales had been made and the debts began to mature was pregnant with evidence of falsity of the representations upon which credit was obtained.

The judgment dismissing the intervening petition must be affirmed.

WESTHUS et al. v. UNION TRUST CO. OF ST. LOUIS.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1909.)

No. 2,654.

COURTS (§§ 90, 91*)—PREVIOUS DECISIONS AS CONTROLLING OR AS PRECEDENTS—AFFIRMANCE BY DIVIDED APPELLATE COURT.

A judgment of affirmance by an equally divided appellate court conclusively settles the rights of the parties in the particular litigation, but does not establish a precedent in the court which renders it, and does not control inferior tribunals in other cases.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 314, 325; Dec. Dig. §§ 90, 91.*]

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

On petition for rehearing.

For former opinion, see 164 Fed. 795.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

PER CURIAM. It is now urged that we are bound by the judgments of the Supreme Court in *Eidman v. Tilghman*, 203 U. S. 580, 27 Sup. Ct. 779, 51 L. Ed. 326, and the other cases like it. In other words, it is claimed that, when an affirmance of a judgment results from an equal division of the Justices of the Supreme Court who participate in the hearing, it not only conclusively settles the particular

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

case as between the parties and their privies, but also establishes a principle of law to be followed by inferior courts in subsequent cases.

That seems to be the rule in England. In *Regina v. Millis*, 10 Cl. & Fin. 534, 8 Jur. 717, an indictment for bigamy involved the validity of a marriage without the presence of a person in holy orders. A jury at the assizes found a special verdict setting forth the facts, and the cause was then removed by certiorari to the Court of Queen's Bench in Ireland. The Justices of that court were divided in opinion, but to obtain a review in the House of Lords one of them withdrew, and the accused was thereupon acquitted. In the House of Lords the question put, according to the custom, was whether the judgment complained of should be reversed, and it appeared the votes were equal. "Whereby, according to the ancient rule in law, 'Semper præsuntur pro negante,' it was determined in the negative. Therefore the judgment of the court below was affirmed and the record remitted." Shortly afterwards *Regina v. Millis* was recognized in the Court of Exchequer as binding authority for the doctrine that a valid marriage can be contracted only in the presence of a clergyman in holy orders. *Catherwood v. Caslon*, 13 M. & W. 261. Later the House of Lords had occasion again to consider the question, and also whether the only clergyman present, being the bridegroom, could perform the ceremony. The former decision in *Regina v. Millis*, so far as it went, was recognized as establishing a principle binding not only upon all inferior tribunals, but upon the House of Lords itself, and it was said that to change it the house would be arrogating to itself the right of altering the law and legislating by its own separate authority. *Beamish v. Beamish*, 9 H. L. Cas. 274.

In *London Tramways Co. v. London County Council*, 67 L. J. 559, 561, *Beamish v. Beamish* was again approved in the House of Lords. The Lord Chancellor, in answering what he termed a very ingenious argument of counsel that the prior decision might have proceeded upon an omission to notice an act of Parliament, or the court might have acted upon an act of Parliament afterwards found to have been repealed, said that would be a case of a mistake of fact, and that the case subsequently arising would not be embarrassed by the mistake of fact in the prior one. That answer could not be made in this country.

It is an interesting coincidence that the same question, whether there could be a valid marriage contract *per verba de præsenti*, arose in the Supreme Court of the United States about the same time *Regina v. Millis* was decided in England, and the Justices of that court were also equally divided in opinion. The judgment of the Circuit Court was reversed because of the erroneous exclusion of evidence, but it was said that because of the division no opinion could be given upon the other question above mentioned. The weight of opinion in this country is that a judgment of affirmance by a divided appellate court conclusively settles the rights of the parties in the particular litigation, but does not establish a precedent in the court which renders it, and does not control inferior tribunals in other cases.

In *Etting v. United States Bank*, 11 Wheat. 59, 78, 6 L. Ed. 419, Chief Justice Marshall, speaking for the court, said:

"In the very elaborate arguments which have been made at the bar, several cases have been cited which have been attentively considered. No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it."

In *Durant v. Essex Company*, 7 Wall. 107, 19 L. Ed. 154, it is said that the result of a divided court is due to the fact that it is the appellant or plaintiff in error who is the moving party, and that it is affirmative action which he seeks. The question presented is whether the judgment or decree shall be reversed, and if the judges are divided no order can be made, and the action of the court below must remain in force. It was also said that the settled practice in such a case was to enter a judgment of affirmance, but that it was only the most convenient mode of expressing the fact that the cause was finally disposed of in conformity with the action of the court below, and that that court could proceed to enforce its judgment. "The legal effect would be the same if the appeal or writ of error were dismissed." In referring to the statement, which always accompanies such a judgment, that it is rendered by a divided court, Mr. Justice Field said:

"It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character."

Hanifen v. Armitage (C. C.) 117 Fed. 845, arose in the Eastern district of Pennsylvania, and involved the validity of a patent which had been previously sustained by the Court of Appeals of the Third Circuit, of which Pennsylvania is a part. The same patent had been declared invalid by the Court of Appeals of the Second Circuit. The latter case was removed to the Supreme Court by certiorari, but, that court being divided in opinion, the result was an affirmance of the decision that the patent was invalid. Judge Archbald, sitting in the Circuit Court for the Eastern district of Pennsylvania, who was confronted by this decision, said:

"Such an affirmation establishes no precedent or principle, and, so far as this court is concerned, the decision of the Court of Appeals of this circuit sustaining the patent therefore remains."

In *Bridge v. Johnson*, 5 Wend. (N. Y.) 342, 372, it was said:

"But such a formal affirmance, although it leaves the law of the Supreme Court undisturbed, cannot be considered as settling the law in this court, except so far as relates to the particular cause in which the decision is made. The maxim *stare decisis et non quieta movere* cannot be applicable to such a case, where the question never has in fact been decided by this court."

In *Morse v. Goold*, 11 N. Y. 282, 285, 62 Am. Dec. 103, the court, in referring to a prior judgment in another case involving the same question, said:

"Although the judgment of the Supreme Court * * * was affirmed by this court, yet, as the judges were equally divided in opinion, the determination cannot be regarded as a precedent, but the question must be regarded as entirely open."

In *McFarland v. Railway Officials*, 5 Wyo. 126, 147, 38 Pac. 677, 27 L. R. A. 48, 63 Am. St. Rep. 29, it was said:

"The effect of such an affirmance has long been settled by the Supreme Court of the United States. In such case the court hands down no opinion, and the decision is not to be considered as settling any principle. *Benton v. Woolsey*, 12 Pet. 27, 9 L. Ed. 987; *Etting v. Bank*, 11 Wheat. 59, 6 L. Ed. 419. This court cannot be expected to give to such affirmance by the Supreme Court of the United States greater weight as authority than that court gives it, and that court has not yet given an opinion upon the limitation clause of the policy."

In *Bank v. Brownell*, 9 R. I. 168, 175, 11 Am. Rep. 231, the case of *Etting v. Bank* was referred to as not having decided the question of law involved.

In addition to the cases in England, counsel for petitioner refer to some in this country which will be noticed.

In *Lessieur v. Price*, 12 How. 59, 13 L. Ed. 893, all that was held was that, where the highest court of a state affirmed the judgment of an inferior state court by an equal division of the judges, the judgment of affirmance is considered when the case is brought to the Supreme Court as an affirmance of the rulings of the trial court, for, as was said—

"to hold otherwise would be declaring that nothing had been decided in the state court of last resort, and thereby a second writ of error to this court would be defeated."

State Tax Law Cases, 54 Mich. 350, 417, 445, 20 N. W. 493. The constitutionality of a tax law of Michigan had been upheld by a divided Supreme Court of the state. Afterwards cases involving the same question were brought in the local courts of two counties, in one of which the trial court sustained the law, and in the other the law was held unconstitutional notwithstanding the prior affirmance in the Supreme Court. Both cases came before the Supreme Court of Michigan, and, the judges again dividing equally, both judgments were affirmed. The reference of counsel is to the opinion of Chief Justice Cooley, whose view, which did not prevail, was that the first affirmance established a precedent for the guidance of inferior courts, and for the Supreme Court itself until duly overruled.

City of Florence v. Berry, 62 S. C. 469, 40 S. E. 871, was controlled by a constitutional provision providing for an affirmance upon an equal division of the judges, in connection with an attempt in the constitutional convention to limit the effect of the judgment to the particular case thus determined. The court, after observing that the proposed amendment was not adopted, said that the attention of the framers of the Constitution was specially directed to the very point under consideration, and that fact should be regarded in construing the intent of the provision.

Birckhead v. Brown, 5 Sandf. (N. Y.) 134, was decided by a court of inferior jurisdiction, and is not in harmony with the other cases from that state.

The other matters relied on have already been considered.

The petition for rehearing is denied.

NEWCOMER & LEWIS v. SCRIVEN CO.

(Circuit Court of Appeals, Sixth Circuit. February 23, 1909.)

No. 1,847.

1. TRADE-MARKS AND TRADE-NAMES (§ 17*)—MARKS—SUBJECTS OF OWNERSHIP—COLOR.

Color, except in connection with some definite arbitrary design, such as when impressed upon a circle, star, cross, or other figure, or employed in definite association with some characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 20; Dec. Dig. § 17.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 3*)—ORIGIN AND ADOPTION OF MARK.

The right to an exclusive trade-mark can only be acquired by its adoption for the very purpose of pointing to the origin or ownership of the article to which it is attached, and it must be designed to indicate the manufacturers or sellers, and to distinguish the article from like things made or sold by others.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 5; Dec. Dig. § 3.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 17*)—MARKS SUBJECT OF OWNERSHIP—COLOR.

Complainant *held* to have no trade-mark right in the yellow or buff color of a strip inserted along the seams of men's drawers, which is the natural color of Egyptian yarn, originally used in making the elastic seam of drawers made under a patent which has expired.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 20; Dec. Dig. § 17.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 3*)—MARKS OR NAMES SUBJECTS OF OWNERSHIP—DESCRIPTIVE WORDS.

The words "Elastic Seam," used to denote men's drawers having a knitted strip inserted along the seams, are descriptive, and not subject to monopoly as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 6; Dec. Dig. § 3.*]

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to *Searle & Hereth Co. v. Warner*, 50 C. C. A. 323.]

5. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—EVIDENCE TO ESTABLISH.

Evidence *held* insufficient to establish unfair competition by intentionally representing goods made by others as those of complainant, or by actually deceiving any purchaser.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.*]

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

This is a bill to enjoin infringement of complainant's trade-mark and trade-name in the manufacture and sale of men's drawers, and to restrain an alleged unfair competition in the sale of men's drawers, not made or sold by complainant, as and for drawers made and sold by complainant. The complainant is a corporation organized under the laws of West Virginia, but carrying on business in the city of New York. The defendants are copartners, carrying on business at Knoxville, Tenn.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The bill avers that the complainant has since 1891 been engaged in the business of making and selling men's drawers, and "that for the purpose of more clearly distinguishing the goods of its manufacture from those of other manufacturers, it applied to the men's drawers made by it certain peculiar and distinguishing features, to wit a buff or yellow colored strip down each side and the back thereof, said buff or yellowish colored strip extending down from the waistband to the ankles, being so conspicuous as to readily distinguish such drawers from others sold by competitors in the market; the remainder of said garment being of a color contrasting with that of said strip and usually white. * * * The use of the said buff or yellowish strip was particularly, arbitrarily, and solely for the purpose of identifying your orator's product. * * * That complainant also applied to the said drawers and the boxes in which they were sold and in the advertisements of said drawers the further distinctive and distinguishing marks, appellations and symbols, to wit, the words 'Elastic Seam,' or 'Scriven's Elastic Seam.' * * * That the said buff or yellowish colored strips and the said words 'Elastic Seam' and 'Scriven's Elastic Seam,' as applied to men's drawers, and used therewith, came to be recognized by dealers therein and the public generally as indicating and distinguishing the goods of the manufacture of your orator, which were known as 'Scriven's Drawers,' and that dealers and consumers relied upon the said buff or yellowish colored strips and upon the said words 'Elastic Seam,' or 'Scriven's Elastic Seam,' as indications that the goods were of the manufacture of your orator." It is then charged that the defendants are engaged in selling "men's drawers not made by or for your orator, which have been made in fraudulent imitation of your orator's said product; * * * that is to say, the said defendants have made or caused to be made or procured, and caused to be offered for sale and sold, men's drawers having the body portion thereof white and down the sides and back a buff or yellowish strip of substantially the same length, width, and color of strip as the buff or yellowish colored strips made use of by your orator, and have advertised and sold, or caused to be advertised and sold, said imitation drawers as Scriven's Elastic Seam Drawers, * * *" and "have caused those to whom they sell the said drawers to believe that the said articles are Scriven's drawers, made by your orator, deceiving the public and securing to the said defendants the profits. * * *"

The answer puts in issue all the material facts upon which the complainant seeks relief. It asserts that the complainant originally made and sold the elastic seam drawers, described in the bill and the subject of this controversy, under a patent, being No. 243,498, issued January 28, 1881, to one C. A. Brown, for certain improvements in undergarments, which said patent has long expired. They admit that they deal in men's drawers, and that they buy and sell the drawers made by the complainant, as the Scriven's elastic drawers, at 75 cents per pair; that they also buy from jobbers a style of drawers having the elastic seam feature of the Brown patent and in a general way resembling the garment made and sold by the Scriven Company, but deny that they represent or sell them as or for garments made or sold by the complainant, but as drawers like the Scriven drawers in style and quality, asking for the same only 24 cents per garment, and that customers are enabled and offered a choice, without deception. The answer denies that the Scriven Company ever adopted the said "buff or yellowish" strip for the purpose of indicating the origin, or that they adopted the color as a mark of origin; but, in fact, the color of the strip is the natural color of the unbleached cotton used in the fabric composing the strip. They deny that the term "Elastic Seam" was adopted as a term to indicate origin, but was adopted and used as words descriptive of the character and style of the drawers so marked and advertised."

Upon the pleadings and evidence there was a decree in accordance with the prayer of the bill.

L. M. G. Baker, for appellants.

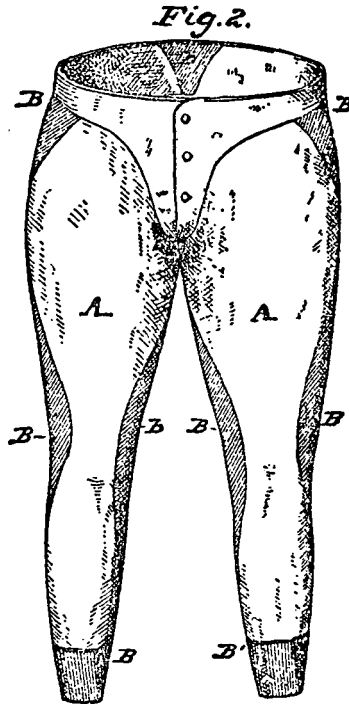
G. W. Case, Jr., for appellee.

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

LURTON, Circuit Judge (after stating the facts as above). The characteristic feature of the men's drawers here in question is that a strip or seam of an elastic fabric is inserted down the sides and back. This is the feature covered by a patent to C. A. Brown, which expired in 1898. We insert below Figure 2 from that patent:

The specifications of that patent say that the parts marked "A" are made of woven fabric, while the parts marked "B" are made of knitted fabric. The knitted fabric may be either sewed to "or inserted within the garment, or may be loosely woven or worked in the formation of the drawers material." The first claim of the patent was for the combination in undergarments of the woven body fabric, A, and the knitted insertions, B, when constructed and arranged substantially as described. Down to 1898 only the Scriven Company, as assignees of this patent, could make men's drawers having such an elastic strip or seam down the sides or back. Since that time the monopoly has ceased, and the public are at liberty to use the method of the patent. Neither the color nor the material of this elastic seam was an element of the patent, nor does it appear from any competent evidence that this inserted strip or elastic fabric has always been of the same shade or color. There is evidence that for many years that strip has been made from the yarn of Egyptian cotton, and that the so-called "buff or yellowish" color is the undyed, natural color of the grade of unbleached cotton from which the fabric is made. The averment of the bill that the makers of these elastic seam drawers adopted the use of said buff or yellowish colored strip "particularly, arbitrarily, and solely for the purpose of identifying your orator's product" is not borne out by the evidence. There is some hearsay and some opinion evidence which tends to show this, but no sufficient evidence of any such distinct purpose or object. The long elastic Egyptian fiber was suitable for the elastic strip, but that the color of the commercial variety of such cotton was the cause of its adoption is not established.

Color, except in connection with some definite, arbitrary design, such as when impressed upon a circle, star, cross, or other figure, or employed in definite association with some characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trade-mark. *Diamond Match Company v. Saginaw Match Company*, 142 Fed. 727, 74 C. C. A. 59; *Regensburg*



v. *Portuondo Cigar Mfg. Company*, 142 Fed. 160, 73 C. C. A. 378; *Leschen Sons' Rope Company v. Broderick & Bascom Rope Company*, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710. In a very clear and satisfactory opinion by Judge Morris, of the Maryland district, this conclusion was reached about this very contention. *Scriven Company v. Morris (C. C.)* 154 Fed. 914. The color of this seam or strip is not artificial, but the natural color of the material used in making the fabric. Neither was it impressed upon any particular design which in itself was the subject of appropriation as a trade-mark. The patentable feature of the men's drawers of the Brown patent was the insertion of a strip of elastic fabric between the seams of the garment. When the patent expired it was open to all the world to insert just such a seam. *Singer Mfg. Company v. June Mfg. Company*, 163 U. S. 185, 16 Sup. Ct. 1002, 41 L. Ed. 118.

The right to an exclusive trade-mark can only be acquired by its adoption for the very purpose of pointing to the origin or ownership of the article to which it is attached, and must be designed to indicate the manufacturers or sellers, and to distinguish the article from like things made or sold by others. This elastic seam, having the natural color of the cotton yarn from which the fabric was made, was inserted in men's drawers made by the Scriven Company, because such an inserted piece constituted a structural difference constituting the invention covered by the monopoly of the patent. As assignees of the patent, no one else could insert such an elastic seam without infringement. But when the patent expired the public was free to use it. To give that inserted strip, with or without its inartificial color, the effect of a trade-mark thereafter would be, in effect, to extend the monopoly of the patent. That others may make and sell drawers constructed according to the design of the patent is not denied; the contention being that the elastic seam shall not be of the color used by Scriven. But, as that color is not an artificial color, Scriven has no monopoly. The color of the strip in the drawers sold by the defendants has not been artificially produced, but is shown to be the natural color of undyed and unbleached cotton yarn from which the strip is made. We may therefore dismiss the claim that the Scriven Company has established a trade-mark in the color of the inserted piece.

Neither is there anything misleading in the use of the inserted piece made from undyed cotton yarn. The evidence shows beyond dispute that the Scriven Company stamped every garment with the words "Scriven's Drawers," "Scriven's Elastic Seam Drawers," or "Scriven Company," and sometimes with more than one of these marks of origin. So long as others refrain from the use of the word "Scriven" in such a sense as to imply that the garment bearing that name was made or sold by Scriven or the Scriven Company, and from representing by advertisement or otherwise that articles not made or sold by the Scriven Company had been made or sold by the Scriven Company, that company has no right to complain. In the case of *Coats v. Merrick Thread Company*, 149 U. S. 562, 572, 13 Sup. Ct. 966, 37 L. Ed. 847, where a patent for an embossed number impressed upon a spool head had expired, the court, after saying that thereafter others were

at liberty to use the design, said, in answer to the suggestion that a purchaser might be thereby misled into believing he was getting thread made by the Coats Company:

"If the purchaser of such thread desires a particular make, he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself the lettering on the spools. He is chargeable with knowledge of the fact that any manufacturer of six-cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer."

Neither are the words "Elastic Seam" capable of exclusive appropriation by the Scriven Company. The word "seam" does ordinarily describe a line formed by sewing two parts together. But it also refers to any line of juncture. Another and common meaning is that of a thin layer or stratum, as a seam of coal or other mineral lying between strata of different kind. When the noun is associated with the adjective "elastic," it plainly means a line of juncture which is elastic or capable of being stretched. The words are aptly descriptive of the structure of garments made according to the design of the Brown patent. Neither is there any satisfactory evidence that the phrase has, aside from associations, acquired any such secondary meaning as to become an exclusive trade-mark.

But has the appellant company been guilty of selling garments made according to the design of the patent, representing them as made or sold by the Scriven Company? The appellants did issue a circular advertising a particular "Mill End Sale" in June, 1906, in which, among hundreds of other articles noticed, was the statement:

"Scriven's elastic seam style drawers, made with draw strap; mill end price, 24 cents."

This was also reproduced in the Sunday edition of a Knoxville daily paper. The Newcomer Company carried the elastic seam drawers made by the Scriven Company, and they also carried elastic seam drawers made by others; for, after the expiration of the Brown patent in 1898, such elastic seam drawers were made by other manufacturers freely and were largely sold in the open markets of the country. The garments made by the Scriven Company, costing a much higher price, were sold by the Newcomer Company at 75 cents per pair. Those not made by them were sold at 24 cents per pair. Each class were in stock, and were kept in boxes having the name of the Scriven Company upon the packages containing their manufacture. Those not bought from that company contained no reference calculated to mislead. It is also shown that the Newcomer Company stamped their own name on the garments made in the style of the Scriven's drawers, though in one or two instances this precaution was not observed; but this, we think, was accidental, and not intentional.

It is insisted that this advertisement was calculated to convey the idea that drawers made or sold by the Scriven Company were being sold at 24 cents. Upon the other hand, the contention is that, fairly read, it only advertised the fact that drawers on the style of the Scriven drawers were for sale at 24 cents. The Scriven Company have a right to the trade they have built up and the good name they have acquired as

manufacturers of men's drawers of this style, and others must not do anything which will probably mislead a purchaser into buying articles made by others than the Scriven Company upon the assumption that they are getting the product of that company. The right to make drawers of the style of the expired patent, which, during the life of the patent, came to be known as "Scriven's Drawers," or "Scriven's Elastic Seam Drawers," does not carry with it the right to deceive any purchaser into buying such drawers as drawers made or sold by the Scriven Company which were not so made or sold.

The purchaser is conclusively presumed to know that the Scriven's drawers were made according to a patent which expired 10 years since, and that since that time it has been free to anybody to make drawers of that construction or style. But if, as we have no doubt upon the evidence, there are many people who desire that style of drawers of the make of the Scriven Company, that good will may not be taken from them by deceit or unfair means. The right to advertise and sell drawers made on the style of the Scriven's drawers is the right of all. But, if the name of Scriven is to be connected or associated in such advertisement with that style, the advertisement should plainly show enough to advise the average purchaser that they were merely made on that style and by somebody else. It is not necessary to say, in so many words, that they are not made by Scriven, or the Scriven Company, for that would be to compel the carrying of a Scriven advertisement, provided the name of Scriven is not used at all, or, if so, in a descriptive way, that the articles are the product of some other. This advertisement was not sufficiently explicit upon this point and was calculated to mislead.

But it is not shown that any customer was misled into buying garments as made or sold by the Scriven Company which were made by others. An agent of the Scriven Company, attracted by the advertisement referred to, did endeavor to get evidence of specific oral misrepresentations. It is to be mentioned with reluctance that through his active efforts he did induce a young clerk to change a sale ticket so as to represent the articles sold as Scriven's drawers. But this agent was not deceived or misled. He knew exactly what he was getting, and the sale ticket was only marked wrongly at his suggestion. One or two other persons were sent by the same agent to buy the elastic seam drawers advertised at 24 cents, with directions to call for Scriven's drawers. The imitation drawers were delivered; the clerk explaining that the drawers made by the Scriven Company could be had at 75 cents. There was, therefore, no deception.

We see no such evidence of an intention to deceive or mislead as to require the injunctive process of the court now. The advertisement referred to was not sufficiently explicit, and more care is required. If repeated, the complainants should have leave to renew their application; but, as the case stands, the Newcomer Company have not been convicted of any such purpose to deceive or mislead as to justify the stricture implied by an injunction.

Decree reversed, with directions to dismiss the bill.

LOWE BROS. CO. v. TOLEDO VARNISH CO.

(Circuit Court of Appeals, Sixth Circuit. March 22, 1909.)

No. 1,873.

TRADE-MARKS AND TRADE-NAMES (§ 73*)—UNFAIR COMPETITION—INJUNCTION.

The words "High Standard," as applied to paints or varnishes, are in themselves descriptive of quality, and cannot be monopolized as a trade-mark; but where they have been used for a number of years by one manufacturer exclusively for a trade-mark, and have thereby acquired a secondary meaning with the trade and public as designating and identifying the products of such maker, their use by another in connection with similar goods in a way which may probably deceive purchasers will be enjoined as unfair and fraudulent competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to *Searle & Hereth Co. v. Warner*, 50 C. C. A. 323.]

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

H. A. Toulmin and R. J. McCarty, for appellant.

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

LURTON, Circuit Judge. This is a bill to restrain infringement of an alleged trade-mark, said to consist in the words "High Standard" as applied and used by complainants in connection with paints and varnishes made and sold by them and used in advertising their products. Upon general demurrer the bill was dismissed, upon the ground that the words indicated quality, and the right to their exclusive use could not be acquired.

It must be conceded that the primary meaning of the words "High Standard" denotes quality, and in that sense they are not capable of an exclusive appropriation. But the bill contains certain averments, which, if true, would show that these words have come to have a secondary meaning denoting, when applied or used in connection with paints and varnishes, the manufacturer of the paint or varnish to which the words were directly applied. Thus it is averred:

"That 25 years ago your orator's predecessors adopted as their trade-mark the words 'High Standard' to designate the origin and ownership of their liquid paints and leading products. That for a period of 25 years your orator and its predecessors have employed this distinguishing trade-mark * * * in various forms of advertising to distinguish its liquid paints. * * * That your orators and its predecessors have expended half a million dollars or more in advertising its liquid paints and products under said trade-mark."

Again it is averred:

"That said trade-mark has been and is universally known and recognized as indicating that the said liquid paints having such trade-mark were made by your orator and were of superior quality. That your orator's sales amount

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to more than 8,000 tons per year, all of which liquid paints and products are known and designated to the trade by said trade-mark, 'High Standard.'"

It is only necessary to determine whether, on the allegations of the bill, complainants have stated a case entitling them to protection in the use of the words "High Standard." The effect of the demurrer is to concede the truth of every averment of fact for the purpose of determining whether, assuming the facts to be as stated, the complainant has made a case. Conceding that the broad right to appropriate the words "High Standard" cannot be appropriated as a trade-mark, if it is a fact that the use of the words by the complainants and their predecessors in the same business has come "to be known and recognized" as indicating that the products in connection with which they have been so used were made by complainants, and that such products "are known and designated to the trade by said trade-mark 'High Standard,'" complainants have a right to restrain the use of the same words in this secondary sense; and defendants should be required, if they use them descriptively, to use them in such a way as will prevent their product from deceiving the public into the belief that it is the product or manufacture of complainants. In the case of Computing Scale Co. v. Standard Computing Scale Co., 118 Fed. 965, 967, 55 C. C. A. 459, 461, this court said:

"But when the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has by long use come to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his article as the product of another."

The same general principle is recognized by the court in American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609, and in Plant Co. v. May Co., 105 Fed. 375, 44 C. C. A. 534, and in Newcomer v. Scriven Co. (C. C. A.) 168 Fed. 621.

It may be that complainants will be unable to show that they have used these words in a nondescriptive way as indicating origin or manufacture, or, if so, that the defendants have used them in their secondary meaning so as to deceive the public.

Decree reversed and remanded, with direction to overrule the demurrer.

BOSTON ELEVATED RY. CO. v. SMITH.

(Circuit Court of Appeals, First Circuit. March 16, 1909.)

No. 807.

1. CARRIERS (§ 298*)—CARRIAGE OF PASSENGERS—INJURIES—STARTING WITH JERK.

The possibility that an electric street car will start with more or less of a jerk is an incident of travel in such conveyance which every passenger must expect and of which he assumes the risk; and the mere fact that a car started with a jerk and that a passenger fell and was hurt does not make out a case of negligence in starting the car, but the proof must go further and show that the start was unusually sudden or violent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1205; Dec. Dig. § 298.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CARRIERS (§ 298*)—ELECTRIC STREET RAILROADS—CARRIAGE OF PASSENGERS—INJURIES—STARTING WITH JERK.

Plaintiff, who was a robust woman weighing nearly 200 pounds, entered an electric street car at a regular stopping place, carrying in one hand an umbrella and a small hand bag. When she was fully upon the floor of the vestibule the conductor gave the starting signal, and as plaintiff was about stepping into the body of the car it started, and she fell and was injured. *Held*, that there was nothing in her appearance to require the conductor to exercise special or unusual care, and that, under the settled rule in Massachusetts that under ordinary circumstances it is not negligence for a conductor to give a starting signal after a passenger is fully and fairly upon the car, the conductor in such case was not chargeable with negligence which rendered the street railroad company liable for plaintiff's injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1205; Dec. Dig. § 298.*]

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

M. F. Dickinson and Walter Bates Farr, for plaintiff in error.

Julian C. Woodman, for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This is an action of tort to recover damages for personal injuries. The plaintiff was a passenger on an electric street car operated by the defendant. She had just boarded the car, when, upon the sudden movement of the car in starting, she fell upon the floor, inflicting the injuries complained of. The jury returned a verdict for the plaintiff.

At the close of the evidence the defendant requested the court to rule as follows:

"(1) Upon all the evidence in the case the plaintiff is not entitled to recover.

"(2) There is no evidence in this case sufficient to warrant the jury in finding that the plaintiff's injuries were due to the negligence or carelessness of the motorman in the way and manner in which he started the car.

"(3) Nor is there sufficient evidence to warrant the jury in finding that the conductor was negligent or careless in giving the signal to start the car when he did, under all the circumstances in this case."

These rulings the court declined to make, and the defendant duly excepted. There were also other requests for rulings which we find it unnecessary to consider.

The material facts are as follows:

On November 15, 1906, about 8 o'clock in the evening, when returning home from her work, the plaintiff boarded one of the defendant's inward-bound cars at the corner of P and third streets, South Boston. She was carrying in her hand at the time an umbrella and a small hand bag. The night was stormy. The car had just left the carhouse, and the only other persons on the car except the motorman and conductor of the car were three conductors employed by the defendant, who were returning home after their day's work. The car was a vestibuled closed car, and the threshold of the door leading into the car was 6½ inches above the floor of the platform, and on this threshold were two small projections on which the door runs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff was a German woman, 52 years of age, 5 feet 5 inches in height, and weighed about 198 pounds. She was a stout woman in appearance, and she was slow in her movements. She was accustomed to riding on electric cars. According to her story, she had mounted the platform, and was about to enter the car door, with her umbrella and bag in one hand, and holding her dress in the other, when the car was started with a sudden jerk, which threw her to the floor, injuring her leg, abdomen, and arm.

In her testimony the plaintiff says:

"I got onto the platform, and as I was trying to get inside the car, holding up my dress, the car started with a sudden jerk, unusually quick. I was slightly thrown back and forward before I had a chance to put my foot on the threshold of the door. I came down on my shin on the threshold with my knee. I fell on my shin, and with my left leg I went down on my knee, and I tried to reach forward to catch the door or something to hold myself, but I couldn't. I was thrown forward, and my arm came under me. One of the employes assisted me up. I had my bag and umbrella, which flew halfway in the car.

"I was seated on the corner seat on the right-hand side after the accident. One of the carmen came and asked my name and asked me if I was badly hurt and I said, 'Yes.' I could scarcely speak, but I managed to get home, but it was very hard, and I tried to go to work the next morning, but I was unable to work. I went home and sent for the doctor. I stayed home between five and six weeks, and I have not fully recovered to-day. I was out of work between five and six weeks. I was obliged to go to work in order to support myself and my aged sister. There was no trouble about finding a seat in the car. There were five carmen inside the car. They sat one near each door and two on each side up above. I had an umbrella and bag in one hand, and lifted up my skirt in order to avoid stepping on it. It was raining; it was snowing; it was a very stormy night. The car windows were covered with snow. I was thrown back a little first and then forward. When I fell I hit both my shins, both my knees, and landed very heavily on the lower part of my stomach and my arm. The car was on a straight track. My experience is that if a car is on a straight track and starts with a sudden jerk it will throw a person backward.

"Q. You did step on your skirt when you were entering? A. I did not step on it.

"Q. You say that you had got on the platform of the car and were going inside and putting your foot on the step of the floor of the car, and that is the time the car started? A. Yes.

"Q. Which foot did you put upon the floor? A. Right foot.

"Q. You say that you were thrown back a little? A. Thrown back a little, and then forward.

"Q. How was it you were thrown forward if you didn't step on your dress? A. The sudden jerk of the car.

"Q. Sudden jerk of the car forward you mean? A. The car started suddenly.

"Q. With a jerk. A. With a jerk, before I had a chance to get inside."

In addition to her own evidence, the plaintiff called as witnesses two physicians who testified as to her injuries. Dr. Hayes, her attending physician, said that he called on the plaintiff on November 15, 1906; that he found, among other injuries, transverse abrasions of the right shin, about junction of the middle and lower third, with indentation of bone at that site; just above these were two smaller abrasions, similar, but not so pronounced; that the indentation was still to be found at the time of the trial. The plaintiff also called, as a witness, John W. Sullivan, an expert in the operation of electric cars, who testified as

to the manner of starting cars gradually and slowly, or with a jerk. This comprises the entire evidence of the plaintiff.

The defendant called as witnesses the conductor and motorman of the car, and the three other conductors who were aboard at the time. All these witnesses testified that the car started in the ordinary way, or with no unusual jerk; and they all, except the motorman, further testified that the plaintiff was inside the car door about two feet, when the car started, and she fell upon the floor, and that she seemed to fall by reason of tripping on her skirt.

Upon the foregoing facts the question of the defendant's negligence involves two inquiries:

(1) Was there any evidence sufficient to warrant the jury in finding that the motorman started the car with an unusually sudden jerk?

(2) Was there any evidence sufficient to warrant the jury in finding that the conductor was guilty of negligence in giving the starting signal too soon?

1. While the evidence shows that the plaintiff's fall and consequent injuries were caused by the movement of the car in starting, there is no substantial evidence that the car was started with any unusual jerk. The statement of the plaintiff in her declaration that she "was violently thrown down * * * in starting the car" is not supported by the proofs. While she testifies that the car was "started with a sudden jerk, unusually quick," this is immediately qualified by the statement that she "was slightly thrown back and forward"; and this statement is repeated with a slight change in form: "I was thrown back a little first and then forward"; and in her cross-examination, although she says "the car started suddenly," this is again qualified by the statement that she "was thrown back a little and then forward." This evidence is consistent with the ordinary jerk of the car in starting, and is inconsistent with any sudden or violent jerk. Again, according to her own story, her position was such, as she was about stepping from the platform upon the threshold of the car, with her umbrella and bag in one hand and holding her dress in the other, that any ordinary jerk of the car in starting would be likely to throw her down, unless she braced herself in some way against the side of the door.

There is also the evidence that her "bag and umbrella flew halfway in the car," and that there was an indentation in the shin bone caused by her fall. While this evidence has a bearing on the degree of suddenness with which the car started, we do not think it is sufficient to make out a case of negligence, in the absence of other clear evidence that the start was unusually sudden or violent. The bag and umbrella would naturally be thrown from her hand in trying to save herself from falling, while the indentation might be caused by the simple fall of a heavy woman in striking her shin against the projections on the threshold of the car door.

It is well understood by persons accustomed to ride on electric cars that the cars are liable to start with more or less of a sudden movement or jerk. Since this is one of the known and common incidents of traveling by this mode of conveyance, the ordinary passenger may be said to assume this risk. He expects that the car may start with a greater

or less degree of jerk, and he realizes that he must exercise due care to protect himself against such a movement. The mere fact, therefore, that the car started with a sudden movement or jerk, and that the plaintiff was hurt, does not make out a case of negligence in the manner of starting the car, but the proof must go further and show that the start was unusually sudden or violent.

In *McCann v. Boston Elevated Railway Company*, 199 Mass. 446, 85 N. E. 570, the plaintiff was thrown from the defendant's car and injured, and the court below refused to direct a verdict for the defendant, or to rule that there was no evidence of negligence on the part of the motorman or on the part of the conductor; and the exceptions to these rulings were sustained by the Supreme Court. There was evidence in that case that the car "made a sudden jump," that the car "gave a jerk," and that the car "started with a sudden jerk or jump." The court in its opinion, which was drawn by Mr. Justice Loring, said:

"A plaintiff does not make out a case by proving that an electric car made a jerk or similar motion, and that he was hurt. * * * The possibility of an electric car giving a jerk is an incident of travel which every passenger must expect. To make out a case of negligence on the part of a defendant railway company in such a case, the plaintiff must go further and introduce evidence that the jerk in question was due to a defect in the track or to negligence in the operation of the car."

In the earlier and leading case of *Byron v. Lynn & Boston Railroad Company*, 177 Mass. 303, 305, 58 N. E. 1015, the plaintiff's intestate was on the rear platform of the car when the car, on passing over a switch, gave a sudden swing or jerk, which threw him from the car. In the opinion, Mr. Justice Barker, speaking for the court, said:

"Upon full consideration of the evidence, we are of the opinion that it would not justify a finding that the defendant was negligent. * * * The plaintiff's intestate was thrown to the ground by a swaying, or jolt, or lurch of the car, as it returned to the main track from a siding. Such motions of street cars are of common and frequent occurrence, and are to be expected to a greater or less degree whenever the car passes from one track to another, and so are of the class of usual and unavoidable incidents in the use of cars upon the streets. * * * Unless they are unusual in degree and caused by some defect in the car or the track or by some unusual or dangerous rate of speed, they furnish no evidence of negligence on the part of the carrier or of its servants. * * * There was no evidence that the jolt was due to any defect in the car or in the track, or that the car was proceeding at an extraordinary speed. * * * The jar felt by the different witnesses was not so great as to be unusual, or as to justify a finding that it was due to negligence of the defendant or of its servants."

In *Jameson v. Boston Elevated Railway Company*, 193 Mass. 560, 562, 79 N. E. 750, 751, there was testimony that the plaintiff's intestate had boarded the car, and that "it started suddenly and threw him his length, and he put his hand in a woman's handbox up to his elbow." In the opinion in that case, the court said:

"These statements did not go far enough to show that he was in the exercise of due care, or that the defendant's servants were negligent. All that the plaintiff proved was that in some way her testator, who was feeble on his legs, fell on the defendant's car starting apparently in the usual way, with something of a jerk."

In *Timms v. Old Colony Street Railway Company*, 183 Mass. 193, 66 N. E. 797, where the plaintiff was standing near the edge of the

platform, and was thrown off the car and injured, the court uses the following language:

"There is nothing in the evidence to show that there was any defect in the car or in the condition of the rails, and jerks in the motion of street cars are not unusual."

In *Sanderson v. Boston Elevated Railway Company*, 194 Mass. 337, 341, 80 N. E. 515, 517, the plaintiff was thrown off the car and injured, and there was evidence that the car made a "plunge," a "kind of a lurch," a "jar ahead to a considerable extent," a "movement such as you feel when the power is applied." In the opinion, Mr. Justice Hammond, speaking for the court, said:

"Even if the plaintiffs' theory of the accident be adopted, the evidence discloses no negligence of the defendant. There does not appear to have been any evidence of defect in the car or tracks, or of incompetency of the defendant's servants. * * * There may be movements of a car so severe that a mere description of them and their results may justify the inference that they were attributable to some negligence on the part of the carrier, but the movement described in this case is not of that character. It was not due to any defect, and the possibility of such a movement is a thing which every one who gets upon a street car must be taken to contemplate."

Under these decisions the plaintiff's evidence in the case at bar is clearly insufficient to warrant the finding that the motorman was negligent in the way in which he started the car.

2. The remaining question is whether there was any evidence sufficient to justify a finding that the conductor was negligent in giving the starting signal too soon.

It is settled law in Massachusetts that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly upon the car. *Sauvan v. Citizens' Electric Street Railway Company*, 197 Mass. 176, 177, 83 N. E. 405. The practical reasons underlying this rule are obvious. The public demands as rapid transportation on street cars as conditions will permit. To this end it is necessary that there should be as little delay as possible in the frequent stopping of the cars to take on passengers. If, therefore, it were the duty of the conductor to wait until each passenger is seated before giving the starting signal, it would result in much delay, and consequently the running time would be much slower; and hence it has become the common practice, under ordinary circumstances, for the conductor to ring the starting bell as soon as the passenger is fully on the car; and it may be said that the ordinary passenger anticipates this as one of the usual incidents in the operation of street cars, and is accordingly on the lookout to protect himself from any serious consequences resulting therefrom.

In the case at bar the plaintiff was fully upon the car when the conductor gave the starting signal. She says:

"I got onto the platform, and as I was trying to get inside the car, holding up my dress, the car started * * * before I had a chance to put my foot on the threshold of the door."

The conductor must have given the signal to start a moment before this, and therefore the plaintiff had fully boarded the vestibule of the car at the time the signal was given. Nor does it appear that

there were any extraordinary or exceptional circumstances in this case, such as might be held to take it out of the general rule laid down in *Sauvan v. Citizens' Electric Railway Company*. The plaintiff was a woman of mature years and apparently in good health, and she had had experience in riding upon electric cars. That she was a stout woman, slow in her movements, and carrying a small bag and an umbrella in one hand, does not, in our opinion, take her out of the class of ordinary persons who travel on electric cars. In other words, there was nothing in her appearance of such an unusual or exceptional character as to make it the duty of the conductor to exercise special care in her case by waiting until she was seated in the car before giving the starting signal.

The facts in the *Sauvan* Case very closely resemble those in the case at bar. In that case the plaintiff was "a large robust woman, weighing about 170 pounds," who "looked and was in perfect health." She got upon the car at a regular stopping place when the car was standing still. She was proceeding to her seat when the car started, causing her to fall against the woodwork inside the car. According to her evidence, she had stepped up over the steps into the vestibule, and was fully and fairly on the floor of the vestibule of the car before the conductor rang the starting bell. Her complaint was that the starting bell was rung when she had put one foot on the floor of the car, had thrown her weight onto that foot, and was in the act of bringing the other foot up and forward; and she contended that on this evidence the jury could have found that the conductor, in giving the signal to start the car when he did, did not use the care which is owed by a common carrier to one of its passengers.

In the opinion of the court, Mr. Justice Loring said:

"If the starting signal was given when the plaintiff contends that it was given, it seems hardly possible that the car could have started before the second foot had reached the car floor, or, at any rate, it might well be contended that the conductor could not have anticipated such an instantaneous response to his signal. But apart from that, it is settled in this commonwealth that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly on the car."

We think the case at bar comes clearly within the Massachusetts rule laid down in the *Sauvan* Case; and it follows that, the plaintiff being fully and fairly upon the car, the conductor was not guilty of negligence in giving the starting signal.

The judgment of the Circuit Court is reversed, the verdict set aside, and the case remanded to that court with directions to order a new trial, and the plaintiff in error recovers costs in this court.

HADDOX, Warden, v. RICHARDSON.

(Circuit Court of Appeals, Fourth Circuit. March 13, 1909.)

No. 813.

1. CRIMINAL LAW (§ 1218*)—PUNISHMENT—TERM OF IMPRISONMENT—IMPRISONMENT FOR FINE—PLACE—"JAIL."

Revised St. §§ 1042, 5296 (U. S. Comp. St. 1901, pp. 724, 3608), provide that when a poor convict, sentenced to imprisonment, or to pay a fine, or a fine and costs, has been confined in prison 30 days solely for the nonpayment of such fine, or fine and costs, such convict may apply to take a poor debtor's oath, on which he shall be discharged, and the commissioner shall give to the keeper of the "jail" a certificate setting forth the facts. *Held*, that the word "jail" did not imply that no prisoner should be held in a penitentiary for nonpayment of a fine or a fine and costs, but was used merely to indicate the place of confinement, and hence a federal prisoner could be properly retained in the same institution where he had served his term of imprisonment for the nonpayment of a fine, or a fine and costs, assessed as a part of the sentence, until the fine was paid, or the prisoner applied to take the poor debtor's oath after the expiration of 30 days from the completion of his term.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1218.*

For other definitions, see Words and Phrases, vol. 4, pp. 3801-3802; vol. 8, p. 7694.]

2. HABEAS CORPUS (§ 117*)—IMPRISONMENT—TERM—SERVICE—DISCHARGE ON HABEAS CORPUS—RECAPTION.

Where a prisoner in the penitentiary, after having served the imprisonment part of the sentence, was erroneously discharged on habeas corpus because it was supposed that his incarceration could not be continued for nonpayment of the fine assessed, the United States, on reversal of such order, could retake and return him to the penitentiary from which he had been released, and hold him therein until he had been lawfully discharged by payment of the fine, or by taking the poor debtor's oath after 30 days' additional imprisonment, as authorized by Rev. St. §§ 1042, 5296 (U. S. Comp. St. 1901, pp. 724, 3608).

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 117.*]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg.

Reese Blizzard, U. S. Atty., and William R. Harr, for appellant.

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

BOYD, District Judge. This case presents the question whether a person convicted in a court of the United States and sentenced to imprisonment in a penitentiary at labor and to pay a fine can, after the expiration of the term of imprisonment, and failure to pay the fine because of inability, be detained in the penitentiary under the provisions of sections 1042 and 5296 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 724, 3608). The appellee, Frank S. Richardson (with another) was indicted and convicted in the Supreme Court of the District of Columbia for conspiracy under section 5440. Rev. St. (U. S. Comp. St. 1901, p. 3676). Richardson

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was sentenced to imprisonment at labor for two years in a penitentiary to be designated by the Attorney General of the United States, and to pay a fine of \$10,000, and, in default of payment of the fine, to stand further committed until paid. The penitentiary of the state of West Virginia at Moundsville, in said state, was designated by the Attorney General for the execution of the sentence. Richardson was delivered to the penitentiary authorities on the 17th day of February, 1906, on which date his term of imprisonment began, and he continued in the said penitentiary undergoing the sentence until the 25th day of September, 1907, on which last-named date the term expired (credit being extended to the prisoner under the statute for good behavior). Richardson was still detained in the penitentiary after the 25th day of September, 1907, until October 3, 1907, when he filed his petition before the Honorable Alston G. Dayton, District Judge of the United States for the Northern district of West Virginia, sitting in Circuit Court of the United States for the said district in term at Clarksburg, in said state, for habeas corpus. The petition alleged that Richardson, the petitioner, was imprisoned and unlawfully restrained of his liberty by Charles E. Haddox, warden of the West Virginia penitentiary. The alleged illegality of the imprisonment is particularly set forth in the petition as follows:

"That your petitioner is now, and ever since September 25, 1907, has been, held in custody by the said warden in the said penitentiary solely for default of payment of said fine; that the said fine is the maximum prescribed by the said section 5440; that the said term of imprisonment which your petitioner has fully suffered is the maximum prescribed by the said law; that your petitioner is utterly unable to pay the fine in whole or in part, and has no prospects of ever being able to do so; that his suffering of the said maximum term of imprisonment is a bar to the collection of said fine, even if your petitioner were able to pay it; that the said court had no jurisdiction whatever to sentence your petitioner to be further confined in the said penitentiary or any penitentiary, either with or without labor, merely for default in the payment of said fine; that there is not now and never has been any law whatever authorizing the said court or any federal court to sentence any person to the penitentiary except for the sole purpose of serving the term of imprisonment as such prescribed by the statute in question, but never merely for default in payment of a fine imposed, and the said term of imprisonment as such must be for a term longer than one year (unless the statute requires hard labor), and not otherwise; that the said sentence that your petitioner stand committed at labor in the said penitentiary further than the said maximum term of two years for default in payment of said fine is null and void, because it is in violation and excess of the laws of the United States, and subjects your petitioner to an infamous punishment at hard labor for the mere nonpayment of a fine; that the said section 5440 is silent as to labor, but nevertheless the said court, without authority, sentenced your petitioner to be 'kept at labor' in said penitentiary for the whole of the said maximum term of two years, and further until the said fine be paid, and your petitioner has in fact been subjected to and kept at hard labor therein for the said term, and ever since the said September 25, 1907, your petitioner has been and still is subject to and kept at hard labor in the said penitentiary solely for default in payment of said fine; that the said sentence that your petitioner stand further committed at labor in the said penitentiary until the said fine be paid is also null and void for indefiniteness, in that the term of such commitment is unlimited, but is in effect for the term of his natural life, because there is no law under which he can be discharged from the penitentiary on account of his inability to pay the said fine by reason of his poverty, the law relating to such charges being restricted exclusively to the cases of imprisonment in jails, and not extending to cases of imprisonment in a penitentiary, for the

reason that imprisonment in a penitentiary, either with or without labor, for the mere nonpayment of a fine, is wholly unauthorized by the law of the United States."

The writ was issued as prayed for by Richardson in his petition, and served upon the appellant, Charles E. Haddox, warden of the West Virginia penitentiary. Haddox made return and answer to the writ as follows:

"Comes now the respondent, Charles E. Haddox, warden of the West Virginia penitentiary, and, submitting to the jurisdiction of this court in the premises, for answer to the petition of Frank S. Richardson in the cause filed, certifies and says that the true cause of the respondent's detention of the petitioner is the original paper writing, a correct copy of which is set out in the ninth paragraph of the said petition, and that under the said paper writing the respondent now detains the petitioner solely for his default in payment of the fine imposed upon him by the sentence of the Supreme Court of the District of Columbia, which sentence is recited in the said paper writing, and the several facts, matters, and things in this cause presented, the respondent hereby respectfully submits to the judgment of this court.

"C. E. Haddox,

"Warden of the West Virginia Penitentiary.

"Subscribed and sworn to before me this 1st day of October, 1907.

"[Notary's Seal.]

C. G. Dawson,

"Notary Public."

On the 7th day of October, 1907, upon a hearing of the matter, the court entered the following order:

"This 7th day of October, 1907, came again the petitioner, Frank S. Richardson, by his counsel, Charles McCamic and respondent, Charles E. Haddox, warden of the penitentiary of the state of West Virginia, by E. M. Showalter, Assistant United States District Attorney for the Northern district of West Virginia, and the court proceeds to a hearing of the matters and things involved in this proceeding; and it appearing to the court that the petitioner is now restrained of his liberty and is at present confined in the penitentiary of the state of West Virginia by the said Charles E. Haddox, warden of said institution, solely for the nonpayment of a fine imposed, and the court being of opinion that it is illegal to confine in the penitentiary solely for the nonpayment of a fine, and that the said petitioner, Frank S. Richardson, is illegally restrained of his liberty, it is therefore considered by the court that the said Charles E. Haddox, warden of the West Virginia penitentiary aforesaid, on service upon him of a certified copy of this order, do immediately release the said petitioner, Frank S. Richardson, from confinement in the said West Virginia penitentiary; and, nothing further remaining to be done, this proceeding is ordered to be dropped from the docket.

"Oct. 7th, 1907.

Alston G. Dayton, Judge."

Richardson was thereupon discharged from the custody of the penitentiary authorities, and Haddox, the warden, appealed to this court.

We have stated above the grounds upon which Richardson alleges that his imprisonment was illegal, and have also given in full the return of the warden, together with the order of the court that the points involved might clearly appear. The assignment of errors relate in substance to two propositions: (1) That the court erred in holding that it was illegal in this case to confine in the penitentiary, solely for the nonpayment of the fine, and that therefore the petitioner, Richardson, was unlawfully restrained of his liberty; and (2) that the court erred in holding substantially that the judgment rendered by the Supreme Court of the District of Columbia was null and void and beyond the power and jurisdiction of the said court; that it

deprived the petitioner of his liberty without due process of law, because in effect the court had imposed the maximum term of imprisonment in its sentence, and had added thereto an additional imprisonment, at labor, for the nonpayment of the fine.

Although the second grounds assigned as error were set up by Richardson in his petition, the court seems not to have considered them in rendering its decision. We do not therefore deem it necessary to pass upon the validity of the sentence entered by the Supreme Court of the District of Columbia in this case. We may say, however, that section 5440, Rev. St., as amended by Act May 17, 1879, c. 8, 21 Stat. 4, under which Richardson was convicted, provides for punishment by penalty of not more than \$10,000, or by imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court. The court imposed the maximum of imprisonment and fine in Richardson's case. We shall, therefore, leave this assignment of error without further discussion, for we do not understand that the question it presents is before us on this appeal.

The important question, and the one which arises upon the order of the Circuit Court, is involved in the first assignment of error: Was Richardson, after the expiration of the term of imprisonment, unlawfully detained by the prison authorities at Moundsville? In case of sentence of a person for the violation of the criminal laws of the United States to a term of imprisonment, together with payment of a fine, at the end of the term of imprisonment the law provides two methods of release from prison. The one is to pay the fine imposed; the other, in case of a poor convict unable to pay the fine, that he remain in prison for the space of 30 days solely for the nonpayment of the fine, and then upon application to a United States commissioner take the insolvent oath provided by law. The latter relief is obtained under the provision of section 5296 or section 1042, Rev. St. U. S.

Section 5296 reads as follows:

"When a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and costs, such convict may make application in writing to any commissioner of the United States court in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil process for debt by the laws of (naming the state where oath is administered;) and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.' Upon taking such oath such convict shall be discharged; and the commissioner shall give to the keeper of the jail a certificate setting forth the facts."

Section 1042 of the Revised Statutes, the other section which is referred to, contains practically the same provisions as section 5296, though in the first paragraph there is a somewhat different arrangement of the language employed.

The Circuit Court, as will be seen, was of the opinion that Richardson could not be legally detained in the prison at Moundville after the expiration of the specific term of imprisonment, and this opinion was based on the ground that the statute did not authorize imprisonment in a penitentiary for the nonpayment of a fine. We cannot concur in this interpretation of the law. The sections which we are considering are not criminal statutes, and therefore the courts are not confined in passing upon them to a strict rule of construction. These statutes are administrative in their character and purposes; they do not create any criminal offense, nor empower the courts to inflict punishment. They simply provide a method by which a convict who is in prison for the nonpayment of a fine or costs, or both fine and costs, and who, on account of his poverty, cannot pay, may be released. The power of a court of criminal jurisdiction to order a convicted person into custody as a means of compelling the payment of a fine imposed by the court as punishment is inherent, otherwise the courts would be impotent to enforce such punishment. It is true that in the ordinary administration of the criminal laws, both of the United States and of the several states, no person sentenced to pay a fine, or fine and costs without imprisonment, would in default of payment be imprisoned in a penitentiary. In the federal courts, when a fine is imposed or a convicted person adjudged to pay cost or both fine and costs without imprisonment, it is the usual and orderly course for the court to commit the person required to pay the fine, or fine and costs, to the custody of the marshal until the same is paid, and the marshal retains the custody by placing the person in the prison or jail, which is being used in connection with the court, there to remain until the fine, or the fine and costs, or both as the case may be, are paid, or until the person seeks advantage of the sections of the law to which we have above referred.

The proceedings in the state courts in similar cases are practically the same, at least, to the extent that the court orders a person sentenced to pay fine, or fine and costs, into the custody of the sheriff or to prison until the judgment of the court is complied with. This comment on the practice of the courts may be something of a digression, but we are led to it by reason of the fact that, in support of the decision of the Circuit Court, stress is laid upon the word "jail," which is used in the last clause both of section 1042 and of section 5296, and from the use of this word it is argued that the law contemplates that no person can be imprisoned for the nonpayment of a fine or costs, or both fine and costs, elsewhere than in a jail.

It will be observed that the last clause of the statute is not in any sense a part of its substance; for it only provides that after the convict has remained in the prison for the 30 days for the nonpayment of fine or costs, or fine and costs, he may make the application to take the oath of insolvency, and if upon the hearing the commissioner administers the oath the convict is discharged. That is the end of the proceeding so far as the convict is concerned. The statute then provides that the commissioner shall certify the facts to the keeper of the jail, intending thereby, no doubt, simply to give notice to the jailer that the prisoner had been discharged, in order that the former might enter the facts upon the roll of the prison: and in this connection,

construing the statutes according to what we must conclude was the intention of Congress, we think it entirely consistent with their meaning and purpose to hold that this clause also contemplates that if the poor convict was in a prison, other than a jail, the certificate should be furnished to the authorities of that prison. The word "prison" used in the body of the statutes is descriptive of the place of confinement in which the poor convict is held, whether it be a jail or a penitentiary, and to say that because Congress in the last clause of the statute, which, as we have before said, is unimportant as affecting the rights of the convict, has used the word "jail," that that is to be construed in a strict sense and control the whole operation of the statute, would, as we think, ignore the substance and stick in the letter of the law. "Qui hæret in litera hæret in cortice."

So far as we are advised, the practice has been uniform in the execution of the judgments of the courts of the United States that where a person is sentenced to a term of imprisonment, and also to pay a fine or cost, or fine and costs, that at the expiration of the term of imprisonment, and in default of the payment of the fine or cost, or the fine and costs, according to the terms of the sentence, such person is required to remain in the prison in which he has undergone his imprisonment for the time required by the statutes before he can take the insolvent oath, and this practice is in accordance with our understanding of the law. We cannot agree with the view that where a sentence of imprisonment, coupled with a fine, is adjudged by a court of the United States, the person sentenced is to serve the term of imprisonment in one prison, and if that should be a penitentiary, then to be transferred to some other prison, to remain the time required before the insolvent oath can be taken, or, as in the case before us, discharged altogether at the end of the term of imprisonment.

A case involving the same principle as that we are considering arose in the state of New York, and the Appellate Division of the Supreme Court of that state, in *People v. Sage*, 13 App. Div. 135, 43 N. Y. Supp. 372, 375, rendered a decision which so aptly expresses our views that we quote from it as follows:

"As already stated, I can find no provision of law before the Code of Criminal Procedure prescribing where imprisonment for default in the payment of fines, either in the case of felonies or misdemeanors, should be ordered. As far as I have been able to ascertain, the practice has been uniform, where there has been imposed both imprisonment and fine, to direct the imprisonment, in default of the payment of the fine, to continue in the same prison; that is to say, where the imprisonment was in the state prison, the defendant was directed to stand committed in that prison. It would plainly be unfair to commit to the state prison a defendant convicted of a misdemeanor, and subject him to the disgrace of association with felons and hardened criminals, for whose punishment state prisons are instituted; but there is no impropriety in directing that a felon properly incarcerated in a state prison for his offense shall serve out his fine in the same institution. As there is nothing unreasonable or unfair in continuing the imprisonment of felons in state prison, and there is no express statutory enactment on the subject, I think we should not disturb a practice which has so long prevailed."

It is our opinion that at the expiration of the term of imprisonment to which Richardson was sentenced, and in default of payment of the fine, if it be true that he was unable to pay it, the law required that he remain in the prison at Moundville, where he had served

his term, for 30 days, at the end of which time he could have made application to take the insolvent oath as provided by the law and be discharged.

The order of the Circuit Court, therefore, upon the writ of habeas corpus discharging the petitioner, Richardson, is reversed, and we further hold, in accordance with this decision, that, if the authorities of the United States so elect, it is within their power to retake Richardson and return him to the prison at Moundville, there to remain until such time as he can be lawfully discharged.

Reversed.

MUIR v. GREGORY.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 151.

GIFTS (§ 19*)—INTER VIVOS—COMPLETION BY DELIVERY.

A testatrix, who had provided in her will for a gift of \$50,000 in bonds to her brother, when in Europe, some two years before her death, wrote him that in lieu of such bequest she transferred to his personal account certain described bonds of the par value of \$50,000. The bonds were at that time in a safety deposit box in New York City, to which the brother had access, and he thereupon removed them. *Held*, that the gift was one in præsent, which became complete when the donee reduced the bonds to possession, and was not affected by a subsequent attempt of the donor to give them to another.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 19.*]

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

For opinion below, see 158 Fed. 122.

Lanier McKee (William H. Thitchchener, of counsel), for appellant.

Marshall, Moran & Williams, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The suit involved the ownership of certain bonds, par value \$50,000; complainant claiming their proceeds which are in the possession of defendant. As presented on the argument his claim of title is as follows: The original owner was Edla J. McPherson, a widow. On March 30, 1900, she executed an assignment of all her right, title, and interest in the bonds to her daughter, Edla McPherson Muir, the wife of complainant. The mother had for some time been estranged from her daughter, because of her marriage, and had expressed herself with great bitterness when commenting on her daughter's conduct; but before the assignment they had become reconciled. The assignment gives a detailed description of the bonds, adding:

"All of which were in my safe deposit box in the Jersey City Safe Deposit Company, and should be there now, unless removed by George W. Gregory, who has access to said safe deposit box."

Gregory, now deceased, was Mrs. McPherson's brother and the husband of defendant. Mrs. McPherson did not physically deliver the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 168 F.—41

bonds to her daughter. It is conceded that at the time they were not in her possession, having been removed from the box by Gregory. Mrs. Muir subsequently died, leaving a will in favor of her husband, who brings this suit.

The answer to his claim is that at the time of the assignment Mrs. McPherson had no right, title, or interest in the bonds, which had theretofore become the property of George Gregory by gift fully completed. The evidence in support of this contention is as follows: The box was rented by the mother in March, 1898; it being arranged that herself, her daughter, and Gregory should have access to it, but she and Gregory alone qualified. Gregory had been in her husband's employ for some years before the latter's death (in 1897), and thereafter became her confidential man of business and attended to her affairs, for which services she continued to pay him. His principal support was the money thus received from the McPhersons. On March 28, 1898, she executed a codicil to her will which contained the following clause:

"First. I give and bequeath fifty thousand dollars in bonds of which I shall die possessed, at their actual market value at the time of my decease, irrespective of their par value, to my brother George W. Gregory for his own use.

"In lieu of \$2000 income."

She retained this codicil in her own possession, and it may be inferred that it was subsequently destroyed by her. It has never been probated. At this time the relations of the mother and daughter were friendly. Early in July, 1898, the daughter eloped with complainant. The mother was greatly displeased, revoked her daughter's authority over the safe deposit box, and at once sailed for Europe. The record contains many letters written by Mrs. McPherson from abroad, and many hearsay statements as to what she said at different times. We do not express any opinion as to the competency of much of this testimony, which was put in by complainant, preferring to dispose of the case upon the record as he has made it.

On August 11th Mrs. McPherson wrote to Gregory:

"London, August 11, 1898.

"If you die first, I will provide for your wife. She shall have furniture, etc., also from 1014 Vermont Ave. That clause must be put in my will when I return. The \$50,000 now invested in the commission business must be put at interest when the business is closed out, the interest to be yours for life, as well as the money left you absolutely. After your death the principal will be given in charity—unless Edla lives, remarries in her own rank and has children. We will arrange that unless you think it had better be done immediately when I return.

Edla J. McPherson."

Three subsequent letters are as follows:

"Paris, November 24, 1898.

"Dear George: I wish to transfer to your account the following bonds:

3d Ave. R. R.....	\$15,000
Brooklyn Trolley.....	10,000
Standard Gas Co.....	10,000
Edison Electric (Brooklyn).....	10,000
3d Ave. R. R.....	5,000

\$50,000

"Yours very truly,

Edla Jean McPherson."

"Nov. 28th.

"Dear George: In looking over my note book where I have recorded the bonds sent you I find I have written 3d Ave. R. R. twice, one for 15,000 and again for 5,000. I may not have made the same mistake in the transfer sent to you, but I have got it in mind that I have blundered as I was so ill that I could barely sit up to transact the necessary business, and so hasten to send you a second paper, which you can destroy, if the original is all right. I have made over all the bonds to you in a paper which dated before my death will be yours after I die—and will be valid—giving you the use of all the money invested in that way. I shall trust to your honor to leave anything outside of the 50,000 which is yours outright—to be left to your wife if she outlives you—in some form of memorial to John or Gregg as you see fit. They have been so outraged my poor dead their money used so scandalously and criminally that you and I who really loved and honored them must make amends. If I live to return I shall reduce the fund that goes to her under my will to a narrow sum and give the rest to you for life—afterwards in memoriam.

"Yours hastily,

E."

"Nov. 28th, 1898. Paris."

"Dear George: I transfer to your personal account the following bonds—the total:

15,000 Chicago, Mil. & St. Paul.
5,000 3d Ave. R. R.
10,000 Brooklyn Trolley.
10,000 Standard Gas Co.
10,000 Edison Electric (Brooklyn).

\$50,000

"Fifty thousand dollars which I give you instead of that sum named in my will. I have revoked the bequest by codicil made here the 26th of November 1898.

"Yours very truly,
"To George W. Gregory."

Edla Jean McPherson.

These documents evidence a gift of the bonds enumerated. At that time they were contained in a box to which donor and donee both had access. If the donee made the delivery complete by reducing the bonds to his individual possession before the donor revoked the gift or herself removed the bonds, his title to them would become perfect, and subsequent transactions could not operate to defeat it. Whether he removed the bonds at once, or allowed them to remain for a considerable time, is immaterial, so long as he did remove them before revocation. The testimony leaves no doubt in our minds that he did so remove them. The defendant, Mrs. Gregory, testified that in December, 1898, her husband returned home one day bringing with him some 50 bonds, which she put in a bureau drawer overnight. On the following morning she and her husband went to the deposit vaults of the Fifth Avenue Bank and placed them in a box. She is corroborated by a clerk of the bank, who testified that its records show that on December 12, 1898, Mr. and Mrs. Gregory surrendered a box they had rented prior thereto and secured a larger one. Mrs. Gregory testified that thereafter from time to time she cut the coupons, and sold the bonds through her brokers on March 5, 1900, reinvesting the proceeds. Mrs. McPherson returned to this country in August, 1899, and went at first to the Hotel Endicott, where the Gregorlys lived. In the fall of 1899 she became reconciled with her daughter. In November, 1899, Gregory had a paralytic stroke and became unfit to transact business. Mrs. McPherson became estranged from him, and, being a

woman of violent temper, thereafter used abusive language to and about him, as she had about her daughter. That, however, is immaterial, if he had already reduced the bonds to his possession.

The only testimony tending to contradict Mrs. Gregory is given by plaintiff and one of his lawyers, who state that Mrs. McPherson told them that when she returned from Europe in August, 1899, she went to her box and found these bonds there. Waiving all question as to the competency of such testimony, it is wholly unpersuasive, because according to these same witnesses she coupled her statement with the further one that, after she became reconciled with her daughter, she again visited the box and found that the bonds had been removed; that thereupon she went to the Endicott, where Gregory was seriously ill (which fixes the date as not earlier than November, 1899), and demanded a return of the bonds, which he refused, telling her that he had turned them over to Mrs. Gregory. There is not a scintilla of evidence to show that between her first and second visits to the box—if she made them—she had undertaken in any way to revoke the gift.

The original theory of the complaint was that these bonds were delivered to Gregory in trust to pay the income to Mrs. McPherson, and to use the principal in sustaining her will, should it be attacked after her death, and if not needed for that purpose they were to be returned to her estate. The only testimony to support this proposition is found in the statements of plaintiff and his lawyer that Mrs. McPherson told them that when she was in Paris she wrote Gregory, giving him instructions that, in case her daughter should contest her will, the proceeds of these bonds should be used to support it. Waiving any objection to the competency of this testimony, it is of no probative value, since it is wholly at variance with the letters which she concededly did write. Either the witnesses misunderstood her, or she misrepresented the facts, whether from defective memory or otherwise. Two days after the transfer of November 24th, she wrote to Gregory, saying:

"I send the transfer. * * * If I find myself getting any worse I shall transfer the rest of the bonds to you and have the transfer sealed up to be sent on to you—so you will have a fighting fund if necessary."

It is manifest that the clause in the second paragraph of the letter of November 28th refers to bonds other than the \$50,000 already transferred. The correspondence plainly indicates that such transfer was a gift in præsentis in substitution of the bequest by codicil, which was at the same time revoked.

Finally, it is contended that, if there was a gift, it was induced by the undue influence and misrepresentations of Gregory, and therefore void. Here, again, there is a complete failure of proof. Mrs. McPherson's letters indicate that she was being continually advised that Muir was an unfit person for her daughter to associate with, and that her daughter was being abused to her; but there is nothing to show that Gregory was the writer of any such letters—no letter of his to her is in evidence—or that he inspired them. Indeed, she writes on January 10th:

"I send a letter of Henry's—burn after reading and of course never refer to it. After abusing E. [the daughter] in such terms that even hardened as I am I was revolted by the cruelty, etc."

Whatever others may have done to turn the mother against the daughter, nothing of that sort is brought home to Gregory, while the gift itself was but a variation in the method of making provision for her brother and his wife which she had contemplated and undertaken to make effective by a codicil long before any estrangement began.

The decree is affirmed, with costs.

CO-OPERANT TELEPHONE CO. v. ST. CLAIR.

(Circuit Court of Appeals, Second Circuit. March 16, 1909.)

No. 61.

1. MASTER AND SERVANT (§ 102*) — INJURIES TO SERVANT — DUTY OF MASTER — "REASONABLE" CARE.

A master is bound to use reasonable care in securing the employé a reasonably safe place to work and to be reasonably careful in warning the servant of any special and peculiar dangers incident to some particular locality concerning which the master is advised, or should be advised, if he has been reasonably careful; the word "reasonable" being one of no precise definition, but varying in signification with the circumstances of each particular case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. § 102.*

For other definitions, see Words and Phrases, vol. 7, p. 5953.]

2. MASTER AND SERVANT (§ 217*) — INJURIES TO SERVANT—ELECTRIC LINEMEN—ASSUMED RISK.

While a lineman, engaged in working on poles carrying wires heavily charged with electricity, assumed the risk of encountering, on a clear day without moisture, wires carrying such current, with such insulation as might be expected on wires so placed and which had been in service and exposed to ordinary wear and tear, he did not assume a risk, of which he was ignorant, that, by the act or with the assent of those in charge of such wires, insulation had been intentionally removed and never replaced.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 584; Dec. Dig. § 217.*

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

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for death of an electric lineman by coming in contact with a heavily charged wire from which the insulation had been removed and not replaced, whether decedent was negligent in failing to detect the removal of the insulation when he stood at the foot of the pole, or as he was climbing it, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1106; Dec. Dig. § 289.*]

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

This cause comes here upon appeal from a judgment entered upon the verdict of a jury in favor of defendant in error, who was plain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiff below. The action was brought under the New York statute to recover for the death of Nelson J. St. Clair, a lineman in the employ of defendant, who was killed by coming in contact with a wire or wires carrying a high voltage current.

O. M. Barber (J. Sanford Potter, of counsel), for plaintiff in error.
T. W. Moloney, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The telephone wires upon which deceased was working carried a current not sufficiently strong to injure him. The wires with which he came in contact belonged to a light and power company and were strung along a street in Whitehall, N. Y., above a line of telephone wires. About two years before the accident, which happened July 27, 1905, the wires of the light company sagged at the locality in question and thus approached the lines of the telephone company. The latter complained to the light company; but, its complaints not being attended to, defendant erected a framework on its pole, extending above its own wires, and on the top of this frame it fastened the light wires. The pole thereafter carried two cross-arms, on which were strung 16 or 17 telephone wires. These cross-arms were about 20 inches apart, and above, at a distance variously estimated by the witnesses at from 21 inches to 2½ feet, was the top of the framework, carrying 5 light wires, of which, on the day of the accident, two were carrying current. Deceased was directed to climb the pole and fasten 2 of the telephone wires, recently strung, to pins on the lower cross-arm near its outer end. He climbed the pole, using spurs, reached and placed his feet on the lower cross-arm, straddled over the wires on the upper cross-arm, and bent down and over to reach the wires he was to fasten. In some way, not clearly indicated, while engaged in that work he straightened up so as to come into contact with the two light wires and received the current which killed him.

In the winter before the accident—January or February—in order to thaw out a frozen water pipe, the insulation was removed from these two wires for a distance of 2 or 3 inches, and copper wires were fastened to them and were led into an adjoining building. When the pipe was thawed out these copper wires were clipped off, but nothing was done towards restoring the insulation. The places where it was removed were distant from the pole about as far as the man who removed the insulation could conveniently reach. Subsequently, the wires being tightened, they were drawn somewhat nearer to the line of the pole. There was evidence from which the jury was fully justified in finding that the denuded places were plainly visible to any one who looked at them from the street when standing near the foot of the pole, although if he were close to the pole, as he would be when about to climb it, they might not be apparent, being hidden by the pole or cross-arms. There was no regular periodical inspection of the poles and wires, but all linemen were instructed to be careful and to report any defects they might discover when working on the line.

The general manager of the defendant, who put the deceased to work, testified that he did not himself know before the accident of these two denuded places on the light wires.

Deceased had worked as lineman for the defendant at other places, but this was his first job in Whitehall. The general manager testified at some length as to a warning he gave him. From his various statements the jury were justified in finding the facts to be as follows: At about 10 a. m. (the accident happened in the afternoon) deceased was working on a pole near the footbridge fixing a street arc light which the witness had taken pains to find out was carrying no current. That wire he had to "cut around the pole and place in a better position, so that the wires would be arranged more systematically and that would be a safer place when the current was turned on." Prior to this time current was not run through the light wires at Whitehall in the daytime, but shortly before July 27th a day current had been started through two of the five wires. It occurred to the general manager that the men might be misled as to the situation by reason of the circumstance that there was no current in the light wire on which deceased was then working. He therefore called to the deceased as he was splicing the wire, pointed up to the wires overhead, and said:

"Those wires are carrying a day current now, and you must be careful about them."

He further testified that he again said the same thing to deceased and another lineman; but there is nothing to warrant the conclusion that this warning was given at the pole where the accident happened, or was other than a general warning that the light wires, or some of them, were carrying current.

Such being the facts, it seems unnecessary to discuss the numerous authorities cited on the briefs. Well-settled principles of law determine the conclusion. It is the duty of the master to use reasonable care in securing the employé a reasonably safe place to work, and to be reasonably careful in warning the servant of any special and peculiar dangers incident to some particular locality, about which the master is advised or should be advised if he has been reasonably careful; the precise definition of the word "reasonable" varying, of course, with the circumstances of each particular case. When the defendant fastened the light wires to its own pole and maintained them there for two years, it made them a part of the place where it put its own employés to work. Quite probably the light company was negligent, first in letting its wires sag so near the telephone poles as to interfere with work on them, and afterwards in removing insulation and not replacing it; but the circumstance that plaintiff might have recovered, had he sued the light company, is no bar to his recovering against defendant if he can show negligence on its part. Upon the uncontradicted testimony the jury was warranted in finding that the denudation of the light wires was so obvious, even from the street, and had continued so long—five months at least—that defendant was charged with knowledge of its existence, and that reasonable care for the safety of its employés required it to notify

them of the existence of this especial danger to which workers on that pole would be exposed.

It is contended that, when deceased climbed the pole after being warned that there was current running in the two wires, he assumed all risks. No doubt he did assume the risk of encountering on a clear day, without moisture anywhere, wires carrying a high current, with such insulation as might be expected on wires so placed and which had been in service and exposed to ordinary wear and tear; but he did not assume the further risk, being ignorant of it, that by the act of or with the assent of those in charge of such wires insulation had been intentionally removed and never replaced. The jury were justified in finding, as they did, under the charge, that:

"This was an extraordinary danger, that was not a part of the risks that were assumed by the employment."

We cannot say upon the evidence that as matter of law the deceased was negligent, either in failing to detect the denudation when he stood at the foot of the pole, nor as he climbed it, when, as one of defendant's witnesses testified, he would naturally be looking down, nor in trying to tie on the telephone wires by stooping over the second tier of wires, instead of trying to stretch out in the 20 inches between the two cross-arms. All these matters were properly for the consideration of the jury, which has found on this question in his favor.

We do not find any errors in the charge, nor in the refusal of certain of defendant's requests.

The judgment is affirmed.

KINDRED et al. v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1909.)

No. 2,671.

1. PUBLIC LANDS (§ 92*)—RIGHTS ACQUIRED BY ALLOTTEES.

The treaty of 1860 (12 Stat. 1129) with the Delaware Indians, which provided that 80 acres of the Delaware Diminished Reservation in Kansas, as defined by prior treaty, should be assigned to each member of the tribe, and the remainder, with specified exceptions, disposed of for their benefit, merely converted the tribal or communal right of occupancy in the lands assigned into a several one, and did not vest the assignees with the title to the land; and it was within the power of Congress to subsequently grant right of way over the same to a railroad company.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 278; Dec. Dig. § 92.*]

2. PUBLIC LANDS (§ 92*) — GRANT TO RAILROAD OF RIGHT OF WAY—CONSTRUCTION.

Act July 1, 1862, c. 120, 12 Stat. 489, which granted a right of way 400 feet wide to the Leavenworth, Pawnee & Western Railroad Company over the public lands on its prescribed route, included such right of way over the lands of the Delaware Diminished Reservation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 278; Dec. Dig. § 92.*]

3. ADVERSE POSSESSION (§ 7*)—RAILROAD RIGHT OF WAY—PUBLIC LANDS.

No part of the right of way granted by Congress to a railroad company over public lands can be alienated without the consent of Congress, nor

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lost by laches or acquiescence, and private persons encroaching thereon can acquire no right by lapse of time.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 7.*]

4. RAILROADS (§ 73*)—RIGHT OF WAY—RIGHT TO PROTECTION BY INJUNCTION.

Equity has jurisdiction of a suit by a railroad company to enjoin owners of adjoining lands from encroaching upon or interfering with its use of its right of way.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 73.*]

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

Frank Doster (A. M. Harvey and Edward D. Osborn, on the brief), for appellants.

R. W. Blair (N. H. Loomis and H. A. Scandrett, on the brief), for appellee.

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

HOOK, Circuit Judge. This was a suit by the Union Pacific Railroad Company as the successor of the Leavenworth, Pawnee & Western Railroad Company, against L. P. Kindred and others, to enjoin them from entering upon and interfering with its right of way in Wyandotte and Leavenworth counties, Kan., along the north side of the Kansas river, through lands within what was once the Delaware Indian Diminished Reservation. The railroad company claims a right of way 400 feet in width under a congressional grant to its predecessor in title. The defendants, who are owners of adjacent lands, concede a right of way 100 feet in width, founded, however, only on adverse possession, and are not interfering therewith; but they deny the construction of the act of Congress contended for by the railroad company. The trial court gave the railroad company a decree, and the landowners have appealed. Three questions are presented: Had Congress power to grant any right of way across the lands? If so, did it exercise it? Is the case of equitable cognizance?

The grounds of the contention that Congress had no power to grant a railroad right of way across the lands in question may be briefly stated as follows: By the treaty of 1829 made with the Delaware Nation of Indians (7 Stat. 327) it was provided that the country in the fork of the Kansas and Missouri rivers within defined limits "be conveyed and forever secured by the United States to the said Delaware Nation as their permanent residence," and the United States guaranteed "the quiet and peaceable possession and undisturbed enjoyment of the same against the claims and assaults of all and every other people whatsoever." By the treaty of 1854 (10 Stat. 1048) the Delawares relinquished a part of the reservation to the United States for an expressed consideration, and another part was given up to be sold for their benefit. The remainder, which was retained for their "permanent home," was known as the "Delaware Diminished Reservation." It was provided by article 11 of this treaty that whenever the Delawares

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

desired it the reservation retained should be surveyed, and there should be made a uniform assignment of portions thereof to each person or family as designated by the principal men of the tribe, and by article 12 that railroad companies should have a right of way on payment of a just compensation. The desire of the Delawares for an assignment in severalty led to the treaty of 1860 (12 Stat. 1129), which provided that 80 acres of the reservation should be assigned to each member of the tribe, and the remainder, with some specified exceptions, should be disposed of for their benefit.

The contention is that the effect of this treaty was to vest in the individual assignees an equitable title in fee, and that it was, therefore, beyond the power of Congress thereafter to grant a right of way across the lands so assigned without the consent of the assignees and without the existence and due exercise of the right of eminent domain. It does not appear that after the assignment in severalty the assignees individually assented to the grant of the right of way by Congress, nor does it appear that proceedings in condemnation were instituted. The right of way rests upon a direct grant to the Leavenworth, Pawnee & Western Railroad Company contained in Act July 1, 1862, c. 120, § 9, 12 Stat. 489. The inquiry is therefore directed to the character of the right or title obtained by the individual Indians by the assignment to them of portions of the reservation in accordance with the treaty of 1860. "Was it a mere right of occupancy, with no power to convey the land, except to the United States, or by their consent? Or was it substantially a title in fee simple, with full power of alienation?" That was the test applied in *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, and *Francis v. Francis*, 203 U. S. 233, 27 Sup. Ct. 129, 51 L. Ed. 165. It was held in those cases that a title in fee may pass to an individual Indian by the operation of a treaty, without the aid of an act of Congress, and without the evidence of a patent. But it is not doubted that, if the right secured was merely one of occupancy, and did not differ from the previous right of the tribe, except that it was several, instead of communal, the United States retained the title, and the dominion and control customarily exercised over Indian reservations and lands.

We think the treaty of 1860 evidences a studied purpose not to vest title in the Indians severally and place it beyond the control of the government, but merely to convert the tribal or communal right of occupancy into a several one. It was an experimental step towards developing a capacity for individual ownership. The usual indicia of transfer of title are wholly absent, except the provisions "that the tracts are set apart for the exclusive use and benefit of the assignees and their heirs," and that prior to the issue of the certificates of assignment "the Secretary of the Interior shall make such rules and regulations as he may deem necessary or expedient, respecting the disposition of any of said tracts, in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased persons." But the inference that might otherwise be drawn that those provisions imported something more than a mere right of occupancy is dispelled by the further provision that,

"should any of the Indians, to whom tracts shall be assigned, abandon them, the said Secretary may take such action in relation to the proper disposition thereof as in his judgment may be necessary and proper." While a title may pass by a treaty, and neither an act of Congress nor a patent is essential to its vesting, yet an expression of an ultimate purpose to give a patent has been relied on as significant evidence of the intention in cases otherwise doubtful. But that evidence is lacking here. By the treaty of 1860 the title of the United States was neither added nor promised to be added in the future to the right secured by the assignments. On the other hand, specific provision was made in the same treaty for the allotment to four chiefs and the interpreter of the Nation of certain quantities of land in the reservation to be selected by them, and, as if to distinguish the title they were to have from the rights of the ordinary assignees, it was provided they should "receive a patent in fee simple therefor from the President of the United States." The intention to vest in the chiefs and interpreter a right and title different from that assigned in severalty to the other members of the tribe is quite apparent. It was also provided by the treaty that the tracts assigned should not be alienable in fee, leased, or otherwise disposed of, except to the United States or to members of the Delaware tribe, and they were to be exempt from levy, taxation, sale, or forfeiture until otherwise provided by Congress.

We do not doubt that Congress could convert a tribal right of occupancy into an individual one, with right of succession in the heirs and of transfer between the members of the tribe, and yet withhold the title and the same power of dominion it possessed before the assignment in severalty; and we think that is what was done by the treaty of 1860. Though more uniform and equitable, it was similar to the custom of individual occupancy without ownership which other Indian nations had themselves established. Further evidence of this intention is found in the treaty of 1866 (14 Stat. 793), entered into as the result of an expression by the Delawares of a desire to remove to the Indian country between Kansas and Texas. This treaty contemplated the disposition of all of the lands of the Delawares in a body, with an exception in favor of those who should elect to dissolve their relations with the tribe and become citizens of the United States. For those who desired to remain proceedings in court as in naturalization cases were prescribed, and it was provided that "there shall be granted to each of the Delawares who have thus become citizens a patent in fee simple for the lands heretofore allotted to them." But before this treaty was entered into Congress had granted the right of way to the railroad company. By the terms of this treaty the improvements upon the lands to be sold were to be appraised and the value paid to the Indians to whom they belonged, respectively; but there was no such provision as to the proceeds of the lands, nor other recognition of an individual title therein.

The case here is clearly distinguishable from *Jones v. Meehan*, supra, and the other cases relied on. Congress could have prescribed condemnation proceedings for the acquisition of the right of way, as was the case in *Cherokee Nation v. Kansas Railway Co.*, 135 U. S.

641, 10 Sup. Ct. 965, 34 L. Ed. 295, or, as was done here, it could grant the right of way by legislative act assuming for the government the extinguishment of such Indian title as there was, as well as the payment of compensation. The Supreme Court of Kansas, in *Grinter v. Railway Co.*, 23 Kan. 655, held that the individual Indians secured a mere right of occupancy under the treaty of 1860, and that in 1862 Congress had full power to grant the right of way across the lands so held. The power in Congress is clear. *Railway v. Roberts*, 152 U. S. 114, 116, 14 Sup. Ct. 496, 38 L. Ed. 377.

We are also of the opinion that Congress, by sections 2 and 9 of the act of July 1, 1862 (12 Stat. 491, 493, c. 120), granted the right of way in question 400 feet in width. The grant of the right of way in section 2, adopted for the Leavenworth, Pawnee & Western Railroad Company by section 9, applied to all public lands in respect of which Congress could so legislate. That the term "public lands" included those in the Delaware reservation is shown, we think, by the final clause of section 2, wherein the United States assumed the duty of extinguishing the Indian titles. The exceptions and reservations found in section 3 of the act related to the donation of lands in aid of the construction of the railroad, and doubtless included Indian reservations like that of the Delawares. They are the customary exceptions and reservations in such cases, but it is apparent they have no relation to the right of way granted by the second section. The application of them exclusively to the land grant indicates the intention of Congress to give a right of way across all lands, without exception, so far as it was within its power to do so.

There are obvious reasons why the government should have refrained from donating in aid of railroad enterprises specific lands within reservations previously set apart by treaty to Indian tribes, and yet, having the power, should have granted a right of way through them, taking upon itself the duty of adjusting claims for compensation. It is not to be supposed that Congress, in prescribing a route for the construction of a railroad that would in all probability run through an Indian reservation, intended that the railroad company should deal with individual Indians, to whom the right of occupancy had been assigned in severalty, in securing the necessary right of way, especially when the Indians were still in a state of pupilage and the government, as their guardian, still retained the title and dominion over the lands set apart for their use. There were no provisions in the act of 1862 conferring upon the railroad company the power of eminent domain, and those of the later act of July 2, 1864 (13 Stat. 356, c. 216), were intended to apply, not to lands like those of the individual Delawares, but to those held by persons whose rights and titles were ordinarily judicable in proceedings in courts of justice. That a right of way 400 feet in width across the lands in question was granted by the act of Congress was held in *Grinter v. Railway*, 23 Kan. 655, and was assumed without dispute in *Union Pacific Railway Company v. Kindred*, 43 Kan. 134, 23 Pac. 112. It is shown by stipulation in the record before us that Mr. Justice Brewer, when United States Circuit Judge, referred to the *Grinter Case* in *Union Pacific Railway Compa-*

ny v. Shannon, here published in the margin,¹ and said that as a member of the Supreme Court of Kansas he took part in the decision and had no reason to doubt its correctness.

It was conclusively determined by the act of Congress that a right of way 400 feet in width was essential to the performance of the public duties assumed by the grantee upon its acceptance of the grant. No part of that right of way could be alienated without the consent of Congress, nor lost by laches or acquiescence. *Northern Pacific v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; *Northern Pacific v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; *Northern Pacific v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639. It became in a sense a national public highway, and private encroachments upon it could be neither strengthened nor confirmed by lapse of time.

¹*Union Pac. Ry. Co. v. Shannon et al.*
(Circuit Court, D. Kansas.)

BREWER, Circuit Judge. This is a bill to restrain defendant and his successors in office from entering upon the right of way of complainant, and from prosecuting any suits, civil or criminal, against the complainant or its employes on account of their quarrying stone on said right of way. The defendant insists that a public highway exists over said right of way and parallel to complainant's track, and his efforts and actions are simply to protect such public highway. That the complainant owns a right of way 200 feet in width on either side of its track has been decided by the Supreme Court of Kansas. *Grinter v. U. P. Ry. Co.*, 23 Kan. 642. I, as a member of that court at the time of that decision, took part therein, and have no reason to doubt its correctness or its binding force on this court. That the proceedings of the county commissioners of Leavenworth county for the opening of a public highway at the place in question were insufficient has also been decided by that court. *State v. Horn*, 34 Kan. 556, 9 Pac. 208. And that no public highway exists by prescription has likewise been decided. *State v. Horn*, 35 Kan. 717, 12 Pac. 148. While proceedings have been instituted before the county commissioners to correct the record of the highway proceedings, and the county commissioners have attempted to make such correction, yet an appeal has been taken from their order, and such appeal vacates their action, and leaves the matter now as though no such action had been had. *Blackshire v. Railroad Co.*, 13 Kan. 514.

Of course, with only these facts presented, the complainant would be entitled to protection in the peaceful enjoyment of its right of way. But defendant further insists upon an estoppel. I do not think this claim of an estoppel is made out. This alleged highway, the Duncan road, as it is called, runs on the north side of the railroad track at the point in question. Years ago it crossed to the south of the track, about one mile and a half east, and ran on such south side for some distance. At the instance of the superintendent of the complainant's road this part south was changed to the north side, and in consideration thereof complainant built two bridges on the line of the new road. But all this change and this work on bridges was made more than a mile and a half distant from the land in dispute. Why complainant's action as to a piece of road a mile and a half distant should estop it from pleading the truth as to this is not apparent. Nothing was represented expressly or impliedly as to this by complainant. Defendant had equal knowledge with complainant. He was not misled by complainant's action. He did not rely thereon and parted with nothing on the faith thereof. Scarcely a single element of estoppel can be found.

Equally immaterial is the fact testified to of complainant working out its road tax on a part of this highway, or the alleged convenience in opening a road elsewhere. The public has had ample notice and time to open a new road. I see nothing to justify interference with complainant's rights, and a decree must go as prayed for.

Possession of portions thereof by individuals was not adverse, in the sense that it might ripen into title; nor, however long it was permitted to continue, did it preclude the railroad company from performing its duty by asserting its right thereto whenever the necessity for the full use arose. That for a long time it maintained its right of way fences within the exterior limits of the strip gave the adjacent landowners nothing more than a permissive use of the uninclosed portions, and when it became inconsistent with the public use to which the right of way was dedicated by Congress the railroad company properly removed its fences and resumed possession. Under such circumstances it cannot be said, when it applied to a court of equity to protect the right of way from continued encroachments, that it came with unclean hands. The title of the railroad company, which is said to be that of a limited fee (*Northern Pacific v. Townsend*, supra), is not so dissimilar from an easement as to render inapplicable the remedy appropriate to the latter (*Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 1).
 Affirmed.

REARDON v. ROCK ISLAND PLOW CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909.)

No. 1,501.

1. SALES (§ 476*)—CONTRACT—CONSTRUCTION—RETAKE OF PROPERTY.

Where a contract of sale provided that the right of possession of all goods ordered or which might be ordered and shipped to the buyer should remain in the seller to hold or retake and subject the same as security to the indebtedness contracted by the contract until full payment, without, however, releasing the purchaser from payment as stipulated in the contract, the bankruptcy of the buyer justified the seller in retaking the property as between them.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 476.*]

2. BANKRUPTCY (§ 207*)—LIENS—PRESERVATION.

Under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564, 565 [U. S. Comp. St. 1901, pp. 3449, 3450]) § 67 b, c, f, providing for the preservation of liens in favor of the bankrupt's estate when obtained by any creditor through legal proceedings or otherwise, which are set aside by the bankruptcy proceedings, and subrogating the trustee to the rights of the creditor for their enforcement, execution liens existing in favor of creditors at the time of the intervention of bankruptcy proceedings are thereby rendered inoperative as a preference, but are retained in favor of the trustee that the liens may be distributed among the whole body of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 207.*]

3. BANKRUPTCY (§ 196*)—LIENS—WHAT LAW GOVERNS.

Whether a lien was obtained on personal property in the hands of the bankrupt by the delivery of the executions to the sheriff before the intervention of bankruptcy proceedings, and whether such lien was applicable to property held by the bankrupt under conditional sale contracts, was governed by the law of Illinois, where the executions were issued.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 196.*]

4. EXECUTION (§ 110*)—LIEN—STATUTES—EFFECT.

Rev. St. Ill. 1874, c. 77, par. 9, declaring that no execution shall bind the goods and chattels of the person against whom it is issued until it is de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

livered to the sheriff to be executed, is a modification of the common-law rule by which a lien was created from the issuance of the writ.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 213-215; Dec. Dig. § 110.*]

5. SALES (§ 473*)—CONDITIONAL SALES—RIGHT OF SELLER—EXECUTION CREDITORS.

Where a chattel is delivered to the buyer under a conditional sale so as to clothe him with an apparent ownership, a bona fide purchaser or execution creditor of the buyer is entitled to protection as against the claim of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1371-1390; Dec. Dig. § 473.*]

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois, in Bankruptcy.

The appellant, as trustee of the estate of Frank Brown, a bankrupt, filed his bill in the District Court—and later an amended bill on leave of the court—against the appellee, Rock Island Plow Company, for accounting and recovery for personal property obtained by the appellee from the bankrupt, two days prior to the bankruptcy adjudication, in alleged derogation of rights thereto now vested in such trustee; and this appeal is from a decree dismissing the bill, as amended, on the hearing of a plea interposed by the appellee and sustained by the trial court, the appellant electing "to file no reply to the said plea."

The facts averred in the bill are (in substance) that on November 27, 1907, Frank Brown filed his voluntary petition in bankruptcy in the trial court, and on the same day was adjudged a bankrupt; that the complainant (appellant) was elected and is acting as trustee of the estate therein; that on November 25, 1907, the bankrupt, for a pre-existing indebtedness of \$406, transferred to the Rock Island Plow Company property in payment thereof valued at \$500; that the bankrupt was then insolvent, and such company then had notice and reasonable cause to believe him to be insolvent; and that such transfer was an unlawful preference of that company as a creditor over other creditors of the bankrupt of the same class. In the amended bill two executions are averred as issued and in the hands of the sheriff of Tazewell county in favor of judgment creditors of the bankrupt—one in favor of Peoria Cordage Company, for \$247.15, delivered to the sheriff November 13, 1907; and the other in favor of D. M. Sechler Carriage Company, for \$282.25, delivered November 24, 1907—each of which was wholly unsatisfied, and therefore alleged to constitute a lien upon all real and personal property of the bankrupt on and after delivery to the sheriff; and proceedings in bankruptcy are further averred setting aside the liens so obtained as to the execution creditors, but preserving them for the benefit of the estate in bankruptcy, with the trustee subrogated therein.

The plea of the appellee, Rock Island Plow Company, which was sustained by the trial court, avers (substantially), in justification of such taking of property from the bankrupt, that the property was obtained from the appellee and held by the bankrupt exclusively under the terms and conditions of three written contracts, signed by the bankrupt in the name of his then copartnership, dated, respectively, (1) December 15, 1905, (2, 3) March 7, 1906, whereof copies are annexed to the plea; and the following terms contained in each are set forth as the conditions relied upon, viz.:

"It is agreed that the delivery of all goods sold, and the time of payment granted to purchaser by terms of this contract, are in reliance upon the credit standing and prospects of business of purchaser as now engaged, communicated direct or through usual commercial channels, and that if the status of the purchaser be not as communicated, or if it be changed hereafter before full payment by mortgage, loss by fire, sale out of usual course of trade, dissolution, assignment, bankruptcy, attachment or the like then any and all of such indebtedness shall be at our election, without notice, immediately due, or we may treat the same, whether in notes or on account as if the original purchases had been contracted for cash on delivery.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"It is agreed that the right to the possession of all goods ordered or described generally or specifically in this contract or which may be ordered and shipped to purchaser hereafter during the life of this contract as herein provided, and the proceeds (in case of sale of same) shall remain in and inure to us, with the effect that we may hold or retake and subject same as security (in the manner described by law for the subjection of chattels and foreclosure of chattel liens of like nature) to the indebtedness hereby contracted until full payment shall have been made by purchaser to our acceptance; and to this end the moneys and notes received on such sales shall be kept separate and apart from other moneys, papers and transactions, but nothing in this shall release purchaser from making payment as stipulated in this contract."

And it is further averred: That the goods mentioned remained at all times the property of the appellee, until paid for by the bankrupt; that he had not paid the purchase price therefor on November 25, 1907; that the appellee then "lawfully retook and repossessed itself of the same"; and that it was not therein "a creditor of said bankrupt within the meaning of the" bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The plea also states that no levy was made by the sheriff upon any of these goods; that the alleged order of subrogation in favor of the trustee "was illegal and void," and made without notice to the appellee; that theretofore, on November 29th, one of said executions was "indorsed and returned" by the sheriff, and "filed back" in the county court December 3, 1907, and on February 21, 1908, the other of said executions was returned by the sheriff, indorsed "No property found."

Ira J. Covey, for appellant.

Walter H. Kirk and B. D. Connelly, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The sufficiency of the bill and amended bill filed by the appellant, as trustee in bankruptcy, to charge the appellee with accountability for receiving a preference within the terms of the bankruptcy act, is unquestioned; and the only issue for review is whether the facts set up in the appellee's plea are sufficient to avoid such charge, as the trial court ruled thereupon. That the contracts and defaults averred in the plea justified the taking or retaking of the property in question, as between the appellee and the bankrupt, may not be doubted. Under the provisions of the bankruptcy act, however, the facts averred in the bill and admitted by the plea raise a different question, as to the import and force of such contracts in reference to the rights set up by the trustee; and we are impressed with no theory of the contract conditions on which the plea can be upheld.

The contentions on behalf of the appellee, in support of the plea, rest upon the premise that these contracts were conditional-sale contracts—not chattel mortgages or liens upon personal property, within the provisions of paragraph 1 of the chattel mortgage act of Illinois (2 Starr & C. Ann. St. 1896, c. 95, p. 2743)—and so recognized as valid under authorities cited. On the other hand, the twofold contentions for the appellant are: (1) That no conditional sale appears, for want of contract terms retaining title in the seller, so that the several contracts are without force as liens under the Illinois act above mentioned; and (2) that, treated as conditional sale contracts, they furnish no defense against the right of action vested in this trustee, through the paramount liens of execution creditors, under the established rule in Illinois in reference to such contracts. So, it is not claimed

on the part of the appellee that its taking of the property in controversy can be upheld by way of the enforcement of a lien thereon in any form; and it clearly appears from the above-cited statutory provision in Illinois and the decisions thereunder that the contracts furnish no support for a lien to bar recovery under the bill.

The contract terms or conditions set out in the plea and relied upon in the argument for the interpretation sought as a conditional sale make no express provision in reference to the title—neither for retaining it in the seller, nor for its transfer to the purchaser on delivery, although the parties are so named therein—and no direct provision for title to the property delivered to the purchaser appears elsewhere in the contracts exhibited with the plea. Each contract is in the twofold form of an order (by the purchaser) for the goods specified, and an invoice (by the seller) stating prices and terms of payment, which plainly intends delivery to the purchaser for unrestricted sale, on his own account, in the usual course of business, subject only to the express terms referred to. While those terms distinctly provide, not only that delivery is made “in reliance upon the credit standing and business prospects of the purchaser,” with “indebtedness” for purchase money immediately due, at the seller’s election, for causes stated, but that “right to the possession of all goods” and proceeds of sale “shall remain in and inure to” the seller, “with the effect” that the seller “may hold or retake and subject same as security in the manner described by law” for “the indebtedness hereby contracted,” we are not satisfied that terms appear under which the contract can rightly be interpreted as one of conditional sale, within the authorities, and thus distinguished from a contract of sale with apt terms reserving a purchase-money lien. In view, however, of the conceded averments of fact in reference to liens preserved in favor of the estate under prior executions, we are of opinion that the contracts and possession taken thereunder are equally without force to defeat recovery under the bill, whether the sale be interpreted as conditional or otherwise; and so proceed to considerations of such facts, on the assumption that conditional-sale contracts appear, without determining the actual character of the contracts.

The bankruptcy act provides (section 67 b, c, f) for the preservation of liens in favor of the estate, when obtained by any creditor of the bankrupt, through legal proceedings or otherwise, and set aside in bankruptcy, with the trustee subrogated therein for their enforcement; and the effect of this provision, in reference to an order in bankruptcy so preserving a lien obtained in legal proceedings, is not open to question (*First National Bank v. Staake*, 202 U. S. 141, 146, 148, 26 Sup. Ct. 580, 50 L. Ed. 967) as rendering it inoperative as a preference, while the statute recognizes its force otherwise, but “distributes the lien among the whole body of the creditors,” in conformity with the policy of the act. The executions described in the bill were issued in favor of judgment creditors of the bankrupt and in the hands of the sheriff for levy; and when bankruptcy intervened, liens being claimed, the court made this statutory order, on notice to the claimants—the only notice, as we believe, intended by the provision—so that the trustee became subrogat-

ed to any lien obtained by such creditors, as of the date of the adjudication of bankruptcy.

With the trustee thus entitled to the benefits of the executions, the remaining inquiries are: (1) Whether a lien was obtained upon personal property in the hands of the bankrupt upon delivery of the executions to the sheriff; and, (2) if so, whether such lien is applicable to property held by him under a contract of conditional sale. As the law of Illinois must govern the answer to both questions, and the rule there is well settled, as we believe, for an affirmative answer to each, no difficulty appears in the solution. Paragraph 9 of chapter 77, Rev. St. Ill. 1874 (2 Starr & C. Ann. St. 1896, p. 2336), provides:

"No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer to be executed."

This is a modification of the rule at common law which created a lien from the issuance of the writ, and its effect to create a lien in favor of the execution creditor is recognized in numerous decisions noted in Starr & C. Ann. St., supra. See *Frink v. Pratt & Co.*, 130 Ill. 327, 331, 22 N. E. 819, one of the citations in appellee's brief. The cases cited contra, declaratory of the rule that an officer receiving the execution has "no interest in the property itself" to maintain an action therefor "until after a levy," do not touch the present inquiry of lien in favor of the execution creditor, and are plainly inapplicable. Upon the second question, it is stated in *Gilbert v. Nat. Cash Register Co.*, 176 Ill. 288, 296, 52 N. E. 22, that "whatever may be the rule in other jurisdictions," this rule is established in Illinois:

"If a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with an apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor."

The authorities there cited for such rule are deemed sufficient reference; and we remark that no departure appears from the doctrine thus stated in any of the Illinois cases called to our attention.

The decree of the District Court is reversed, therefore, with direction to overrule the plea and proceed further in accord with this opinion.

HARDING et al. v. CORN PRODUCTS REFINING CO.

(Circuit Court of Appeals, Seventh Circuit. January 19, 1909. Rehearing Denied February 16, 1909.)

No. 1,497.

1. APPEAL AND ERROR (§ 874*)—SCOPE OF REVIEW—APPEAL FROM ORDER GRANTING INJUNCTION.

An appeal from an order granting an injunction *pendente lite* does not involve the merits of the suit; but the only questions for determination are whether the court had jurisdiction to entertain the motion, and, if so, whether the relief was improvidently granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3533; Dec. Dig. § 874.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COURTS (§ 508*)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.

A bill in a federal court by a stockholder against the corporation and others, in behalf of himself and all other stockholders similarly situated, which alleges a conspiracy to unlawfully transfer the property of the corporation and prays for a receiver, confers upon the court exclusive jurisdiction to determine all controversies with respect to such property, with or without its actual seizure, and it may protect such jurisdiction by injunction against subsequently instituted litigation by the parties or their privies in a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.*

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

3. EQUITY (§ 359*)—VOLUNTARY DISMISSAL OF SUIT—RIGHT OF COMPLAINANT.

A stockholder's suit, brought in a state court, was removed into a federal court, where defendants answered, denying complainant's right to maintain the suit, and a cross-bill was filed by one defendant for the cancellation of complainant's stock. Another stockholder brought a similar suit in a state court. Complainant in the removed suit asked leave to dismiss without prejudice to another suit, or to the granting of relief under the cross-bill, and defendants filed a petition for an injunction to restrain further proceedings in the second suit in the state court. No other parties had joined as complainants, and no evidence had been taken on the merits. *Held* that, under the general rule that a complainant is entitled to dismiss at any time before decree unless some plain legal prejudice would result to other parties, a dismissal was within complainant's right, which was not affected by the fact that its purpose was to secure the litigation of the questions involved in the state court, and that the denial of complainant's motion and the granting of the injunction was error.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 359.*]

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

In a suit brought by Chicago Real Estate Loan & Trust Company against Corn Products Refining Company and other defendants, originally in a state court, but pending in the Circuit Court of the United States on removal proceedings, the several appellants were enjoined from prosecution of a subsequent suit in the superior court of Cook county, commenced by the appellant, George F. Harding, against certain of the defendants in such pending suit, impleaded with others, and from other proceedings mentioned in the order. This appeal is from the injunctive order so granted by the trial court, entered December 26, 1907, but bearing date December 13, 1907, which reads as follows:

"[Title of Cause.] This day comes on to be heard the motion of the defendant, Corn Products Refining Company, entered of record herein, November 4, 1907, for an injunction restraining the prosecution of the suit of George F. Harding v. Standard Oil Company of New Jersey, Corn Products Refining Company, et al., filed in the superior court of Cook county, Illinois, on or about October 19, 1907, and bearing general number therein 263,565, and for an order to compel the dismissal of said last described suit; and there also now coming on to be heard the rule entered herein on November 12, 1907, against George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner, to show cause why they and each of them should not be attached for contempt of this court for violating the restraining order entered herein on June 8, 1907; and the court having heard and considered the answers to said rule, filed herein on November 13, 1907, by said George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner, and having considered the petition of said Corn Products Refining Company, filed herein on November 4, 1907, and the exhibits thereto, and all the records and files herein, and all the oral evidence given by and statements of said George F. Harding, George F.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Harding, Jr., William J. Ammen, and A. B. Joyner in open court; and the said George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner being now present in open court, in person and being also represented by said George F. Harding and William J. Ammen, as their solicitors; and the court having heard the arguments of Levy Maher, Esq., solicitor for said petitioner, and of said solicitors for said George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner, and being now fully advised in the premises: The court finds that by the institution of said suit of George F. Harding v. Standard Oil Company of New Jersey et al., the said George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner have, and each of them has, knowingly and willfully violated the order of this court, entered herein on June 8, 1907, but the court of its own motion hereby discharges the said rule of November 12, 1907, for contempt, without the infliction of any punishment on any of the said respondents to said rule; and the court further finds that the further prosecution of said suit of George F. Harding v. Standard Oil Company of New Jersey et al., and the institution by said George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner, of any action like or similar to the present cause should be enjoined. Wherefore the premises considered, it is hereby ordered, adjudged, and decreed that said George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner, and each of them, and their and each of their agents, attorneys, solicitors, and representatives, be, and they hereby are, jointly and severally, restrained and enjoined, until the further order of this court, from further prosecuting or taking any steps or proceedings of any kind in said case of George F. Harding v. Standard Oil Company of New Jersey, Corn Products Refining Company, et al., which was instituted in the superior court of Cook county, Illinois, on October 19, 1907, and was numbered therein 263,565, and which case was subsequently docketed in and is now pending in this court as case numbered 23,865. It is hereby further ordered, adjudged, and decreed that said George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner, and each of them, and their and each of their agents, attorneys, solicitors, and representatives, be, and they hereby are, jointly and severally, restrained and enjoined, until the further order of this court, from in any manner whatsoever, either directly or indirectly, instituting or prosecuting, or causing or inspiring to be instituted or prosecuted, in any court, forum, place, or jurisdiction whatsoever, any other suit, action, or proceeding making charges and seeking relief like or similar to the charges contained and the relief sought in the case herein of Chicago Real Estate Loan & Trust Company against said Corn Products Company et al.; but said George F. Harding, George F. Harding, Jr., William J. Ammen, and A. B. Joyner, jointly or severally, by an appropriate proceeding or petition, and upon a proper showing, may apply to this court for leave to intervene herein or become parties hereto. And "it is further hereby ordered that that part of said motion of said defendant Corn Products Refining Company, seeking an order compelling the dismissal of said suit of George F. Harding v. Standard Oil Company of New Jersey et al., be, and the same hereby is, continued and reserved for the future consideration of this court."

The transcript of record is voluminous, containing about 250 printed pages of "certificate of evidence," and many more pages of pleadings and proceedings in the primary suit, including the petition for the injunctive order. In so far as these matters are deemed material for the purposes of review, they are mentioned in the opinion.

William J. Ammen and George F. Harding, for appellants.

Levy Mayer, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The injunctive order (*pendente lite*) from which this appeal is prosecuted arose in a suit in equity, pending in the trial court, brought by Chicago Real Estate Loan & Trust Company, as complainant, against the ap-

pellee and various other corporations and persons named, as defendants. Under the well-settled doctrine, therefore (for which citations of authority are needless), review of such order does not involve the ultimate merits of the controversy presented by either of the bills in question, nor the major part of the great array of proceedings and evidence contained in the transcript of record and discussed in the briefs and argument submitted by counsel. The only questions for determination are: (1) Had the trial court jurisdiction to entertain the application for an injunction? And, jurisdiction appearing, (2) was the injunctive relief improvidently granted?

1. The bill was originally filed in the circuit court of Cook county, and removed to the Circuit Court of the United States, on petition filed by one of the corporation defendants, averring, with other matters, that the petitioner (Corn Products Refining Company) and all of the other corporations named as defendants were incorporated in and citizens of New Jersey, and not citizens elsewhere, while several of the individual defendants are mentioned as citizens of Illinois, and the complainant, Chicago Real Estate Loan & Trust Company, is an Illinois corporation and citizen. This petition purports to show two causes for removal—one that the controversy in suit is wholly between the petitioner and the complainant, and thus between citizens of different states; and the other that the bill tenders a federal question in such controversy. The contentions that the trial court acquired no jurisdiction under the removal are not clearly defined by counsel for appellants, either in printed brief or oral argument; but the bill distinctly avers, for the alleged cause of action, conduct and proceedings on the part of the defendants "in violation of the laws of the United States." So removal was authorized for that cause, although no ground may have appeared therefor under the other cause alleged in the petition and jurisdiction of subject-matter and parties to the bill was vested in the trial court.

The appellants George F. Harding and A. B. Joyner were cited to appear and show cause why an injunction should not issue, under a petition filed for that purpose in such pending suit, and both appeared and answered the petition. Personal jurisdiction thereupon is unquestionable, although Harding was not one of the parties to such prior suit, and Joyner had appeared therein only as solicitor of record for the complainant. Whether jurisdiction for the purposes of the order extends as well over the other appellants—George F. Harding, Jr., who was president of Chicago Real Estate Loan & Trust Company, and not otherwise a party to the proceeding, and William J. Ammen, as attorney representing both that corporation and the first-mentioned appellants in the litigation—neither made parties to the petition, nor ruled to show cause thereunder, is a question which may be passed, for the present at least, as secondary to the inquiry upon the rightfulness of the injunction against the alleged principals of record.

With jurisdiction thus vested in the trial court under the bill of the Chicago Real Estate Loan & Trust Company, the authority to entertain the application for injunctive relief against the subsequent suit of the appellant George F. Harding clearly appears, as we believe, from

mere inspection of the bills respectively in each. The primary suit purports to be a stockholders' bill, filed by the complainant, as owner of shares of stock in the defendant Corn Products Company, for the benefit, as well, of all other holders of stock having like interest, charging conspiracy and illegal combinations on the part of the several constituent corporations and individuals, named as defendants, to merge the corporations, create the Corn Products Refining Company (appellee) as an unlawful trust, and transfer all the corporate properties to such new corporation, thereby depriving the complainant and other stockholders, "not parties to said conspiracy," of their rights and interests. Relief is sought in seizure of all the corporate properties described in the bill, appointment of a receiver, injunction against transfers and other acts, together with general equitable relief, so that exercise of jurisdiction under this bill necessarily extends over all the property and controversies referred to. This doctrine thereupon we believe to be well settled: That the court of equity first acquiring jurisdiction of such cause, with or without actual seizure of the res, obtains the power to hear and determine all such controversies; that its jurisdiction becomes exclusive for determination of the issues and administration of equitable relief; and that, pending complete administration, such jurisdiction may be protected by injunction against litigation of the same controversies by parties or privies in other courts.

The subsequent suit, commenced by the appellant George F. Harding in the superior court, as exhibited by the bill filed therein, is alike in subject-matter and relief sought, with the main averments of conspiracy and injury mere duplications of the prior bill, differing only in these particulars: That Harding is substituted as complainant (described as a resident of California), with alleged individual ownership of shares in the same defendant corporation (Corn Products Company); that averments are inserted charging "Standard Oil Company of New Jersey" as another party to the conspiracy, together with three other individuals, each named as additional parties to the bill; and the averment of violations of the federal statute, contained in the former bill, do not appear in the Harding bill.

2. Were no facts involved, therefore, in the present inquiry, beyond those above recited, the priority of the bill pending in the trial court and unmistakable attempt, in the Harding bill, to litigate the same questions for like relief in another forum, would plainly appear to justify a restraining order against prosecution of the second bill, as fairly within the judicial discretion of the court. The record, however, establishes another state of facts in reference to the suit and proceedings in the trial court, which we believe to be material for testing the discretionary powers of the court to that end. While a large portion of the matters certified in the transcript is deemed irrelevant for any purposes of this appeal, the evidence referred to tends to establish, not only repeated motions and efforts on the part of the complainant in the prior suit to dismiss its bill, but that well-founded objections were there raised to the right of such complainant to sue for any form of relief in the premises, for want of interest cognizable in equity; and we are impressed with the force of this evidence, as bearing upon the is-

sue of judicial discretion, raised by the several motions submitted for dismissal prior to the entry of the injunctive order. The contentions on behalf of the appellee, that these facts must be disregarded, and that the ultimate motions to dismiss were made too late to entitle them to consideration, we believe to be untenable.

For the present inquiry, the various complications which appear in proceedings and pleadings, in the suit of Chicago Real Estate Loan & Trust Company—referred to as the "Real Estate Company"—after removal to the trial court, do not require mention. It is sufficient to state: First, that issues were distinctly raised by answer, among other defenses, upon the complainant's right to maintain the bill, (1) that its alleged ownership of stock in the Corn Products Company (defendant) was ultra vires its charter as an Illinois corporation, and (2) that it became a party to, was engaged in, and accepted benefits under the transactions complained of, pleading such facts by way of estoppel; and, second, that a cross-bill was filed by one of the defendants, averring that the complainant was not entitled to the shares of stock mentioned in the bill, and praying for cancellation of the stock, stay of "prosecution of the bill," and other relief. On the part of the appellants, the objection of ultra vires so raised is conceded to be well founded, under the incorporation of the Real Estate Company and authorities cited; and the certificate of evidence shows an affidavit, purporting to be made by the president of the Real Estate Company—offered on behalf of the appellants in the trial court, in support of motions then made (as hereinafter mentioned) for dismissal of the bill filed by that corporation—which states that its attorneys were instructed accordingly, in September, 1907, to dismiss such bill. It further states that a motion for that purpose was filed in the trial court, October 1, 1907, of which a copy appears, and notice served on counsel for the defendants, describes two appearances thereupon without obtaining a hearing, and then states that counsel for the defendants agreed to waive further written notice and attend on oral notice, whenever such motion could be heard. No effort was made, however, to press this motion, nor does further mention of it appear, except as hereinafter stated. As filed, it reads, for dismissal "without prejudice to right of cross-complainant to prosecute his cross-bill in said cause."

The Harding suit, enjoined under the order appealed from, was commenced in the superior court October 19, 1907, and the rule under which this injunction issued was entered November 4, and came on for hearing November 12, 1907. Such hearing, however, was interrupted by the entry of a rule against all of the appellants to "show cause why they should not be attached for contempt" for violation of a pre-existing stay order. Examination of the parties proceeded immediately under the last-mentioned rule, and all of the testimony preserved in the "certificate of evidence" in the present record appears to be directed thereunder, but (as certified) was applied as well for the hearing upon the petition for an injunction. These examinations closed (after several postponements) on December 13th, and the oral opinion then announced by the court, as we understand the

record, related alone to the contempt rule, which was then disposed of; but it was followed by remarks in reference to an injunction under the other rule, and an adjournment was directed for its consideration. While the contempt proceedings are otherwise independent of the injunction, and not reviewable under this appeal, the method of hearing referred to, together with the colloquies reported between court and counsel thereafter, tend to confuse the import of such adjournment; but the object of adjournment was thus stated by the court: "I want to consider the question further before I enter the order" for an injunction. So we are impressed with no doubt that final decision remained open for the adjourned day, and the contention otherwise on the part of counsel for the appellee we believe to be untenable in fact, if not without force in any view of the record.

The established facts are: That the hearing was adjourned; that all parties appeared on December 26th as the (ultimate) adjourned day; that the appellants forthwith tendered motions (in several forms), made on behalf of the Real Estate Company to dismiss its bill of complaint in the pending cause—each without prejudice to the rights of the cross-complainant to prosecute his cross-bill—together with the affidavit of its president, referring to the previous motion of October 1st and stating the grounds of dismissal, as before mentioned; and that such motions were opposed by counsel for the appellee, and denied by the court, prior to the consideration or entry of the injunctive order appealed from. Each of the motions referred to was made by the proper party to accomplish dismissal of the bill then pending in the trial court; was neither objectionable in form and substance, nor was objection raised for insufficiency of one or the other to preserve any rights set up in the cross-bill; and the purpose of the appellants in their introduction, to remove the only tenable ground for enjoining prosecution of the Harding bill, was distinctly stated and obvious. That such motions were in apt time, on the adjourned day of the hearing, appears from the foregoing recitals. We are of opinion, therefore, that the subsequent injunctive order was unauthorized in the face of those tenders, unless the evidence establishes just cause for denial of the motions to dismiss the prior suit of the Real Estate Company, without prejudice to relief under the cross-bill filed therein.

The jurisdiction of the trial court over the parties, subject-matter and controversies involved in that suit, inclusive of the well-recognized authority vested in courts of equity to protect such jurisdiction throughout its course against interference, is (as before mentioned) undoubted. But the fact that such jurisdiction is established in the federal court, either primarily or through removal, affords no ground for contention that the complainant in such suit may not dismiss his bill, within the rules applicable to all courts in reference to voluntary dismissals. The general rule, that a complainant retains entire dominion over his suit up to a decree, so that he may dismiss it as of course, with the well-settled qualification of such right, in favor of defendants or parties who have joined as complainants, to save rights which may have been acquired under the suit (*Pullman's Car Co. v. Trans-*

portation Co., 171 U. S. 138, 145, 18 Sup. Ct. 808, 43 L. Ed. 108; 2 Bates on Fed. Eq. Prac. §§ 658, 659), is upheld alike in all courts of equity, federal and state. To authorize denial of such right to discontinue "there must be some plain, legal prejudice" to the other parties, which "must be other than the mere prospect of future litigation" as its result (*Id.*); and it is equally free from doubt, under the federal system and authorities, that no departure from this rule is authorized for persistent efforts on the part of the suitor, either before or after removal to the federal court, to obtain standing for litigation of his controversy in a state court. The complainant is not only entitled to his choice of forums, in bringing his suit within coordinate jurisdictions—subject only to the contingency of removal to the federal court for statutory cause—but he is equally free to dismiss the suit on removal, irrespective of any purpose to have another one brought in the state court, which may be so framed as to avoid removal. Under the foregoing propositions, which we believe to be well-settled and elementary, the contentions in the argument in reference to the conduct and purposes of the appellants in their various proceedings in evidence, are neither within the reviewable issue nor applicable in any sense for its solution. Laying such contentions out of view, therefore,—with their acrimonious discussion in the briefs submitted by counsel, respectively—we proceed to the inquiry under which we believe the discretion vested in the trial court must be tested, namely, whether the status of the suit pending in such court justified denial of the motions there made on behalf of the complainant to dismiss its bill.

The pleadings in that case are set out in the record. No testimony appears to have been taken under the issues, nor proceedings had beyond such framing of the issues, and the Real Estate Company remained sole complainant in the suit, with no other stockholder intervening for the relief sought. Thus the solution is free from the complication which arises when a suit has progressed beyond such preliminary stage, so that legal prejudice may result from dismissal without decree upon the merits—as exemplified and discussed in the various authorities cited in the appellee's brief—and rests alone on the effect which may be presumed from the pleadings. Under the saving clause expressly stated in each motion in favor of the cross-complainant, it is unquestionable that allowance of the motion for dismissal would leave undisturbed jurisdiction and rights acquired through the cross-bill for affirmative relief. The inquiry of prejudice, therefore, is narrowed to the above-stated issues raised by the several answers of the defendants, and we are of opinion that the authorities are harmonious in upholding the general rule in such case; that no sanction appears, under either line of cases cited in the argument, for denying leave to dismiss the suit because of defensive issues so raised by the pleadings alone. The utmost effect of discontinuance in reference to either issue is to leave such controversy open for future litigation, between the same or other parties, which is not legal prejudice; and it may well be noted that both answers challenging the complainant's right to maintain its bill furnish strong ground in favor

of discontinuance. For the doctrine which thus becomes applicable and controlling, we deem it sufficient to cite the exhaustive opinions in three of the cases referred to in the appellee's brief: *C. & A. R. Ry. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 713, 3 Sup. Ct. 594, 27 L. Ed. 1081; *Pullman's Car Co. v. Transportation Co.*, 171 U. S. 138, 146, 18 Sup. Ct. 808, 43 L. Ed. 108; *Detroit v. Detroit City Ry. Co.* (C. C.) 55 Fed. 569, 572. The motion was rightly made for dismissal "without prejudice," as that is the settled practice in equity whenever a bill "is dismissed without a consideration of the merits." *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 612, 13 Sup. Ct. 691, 694, 37 L. Ed. 577.

We are of opinion, that the motion for dismissal of the Real Estate Company's bill was not only seasonably made, but that it was entitled as well to leave of court to dismiss, so as to remove cause for enjoining the prosecution of the new bill, filed by a stockholder, setting up ownership free from the challenge of title to maintain the original bill, and that the order appealed from was therefore unauthorized, and must be reversed.

The proceedings discussed in the argument in reference to an attempted removal of the Harding suit to the trial court are not involved in this appeal, nor properly included in the transcript of record, and we are without authority for their consideration.

The order of the Circuit Court, from which this appeal is brought, is reversed, accordingly, with direction to that court to dismiss the bill of the Real Estate Company, in conformity with one or the other motion filed therefor, and that the petition for an injunction be thereupon dismissed.

NATIONAL HOLLOW BRAKE BEAM CO. v. CHICAGO RY. EQUIPMENT CO.

(Circuit Court of Appeals, Seventh Circuit. January 19, 1909.)

No. 1,506.

COURTS (§ 280*)—FEDERAL COURTS—DETERMINATION OF QUESTIONS OF JURISDICTION.

Although a bill by a stockholder in a federal court against the corporation and another corporation of the same state alleged facts which, if true, gave the court jurisdiction on the ground of diversity of citizenship, where the bill was not verified, and such allegations were promptly denied by the first corporation, which denied that complainant was a bona fide stockholder, and alleged that the suit was brought collusively in the interest of its codefendant to enable the latter to litigate matters between the two corporations in the federal court, which allegations found support in the averment in the bill of facts not germane to the cause of action stated, the joinder of unnecessary parties, and the filing of a cross-bill by the other corporation against the first defendant, a jurisdictional issue was presented, which the court was required to determine before granting an injunction on the cross-bill restraining further proceedings in a pending suit in a state court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 280.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

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

This appeal is from an interlocutory injunction granted by the Circuit Court, in a suit pending therein, under (1) a bill filed by Henry Graham Brown, as complainant, against the appellant, National Hollow Brake Beam Company, and other defendants, including the appellee, Chicago Railway Equipment Company, and (2) a cross-bill thereunder, filed by the appellee. The injunction was allowed on application of the appellee and reads as follows:

"[Title of Causes.] This cause having come on to be heard on the motion of the cross-complainant, the Chicago Railway Equipment Company, for an interlocutory injunction, and having been heard upon said motion, and upon the pleadings herein, and upon the affidavits filed on behalf of the cross-complainant, as well as the affidavits filed on behalf of the defendant, the National Hollow Brake Beam Company, prior to the first day of April, 1908, and counsel for the respective parties having been heard, and all having been duly considered by the court; and it appearing to the court that the status quo of the affairs of the National Hollow Brake Beam Company should be preserved to the extent and in the manner hereinafter ordered, until the further order of the court in this cause: Now, therefore, it is hereby ordered, adjudged, and decreed that an interlocutory injunction be issued, strictly commanding and enjoining the defendant, National Hollow Brake Beam Company, its officers, clerks, agents, servants, and attorneys, that they forthwith, and until the further order of this court, desist from manufacturing or selling, or endeavoring to manufacture or sell, 'National Hollow Brake Beams,' engaging in any new business, making any contracts imposing financial obligations upon said National Hollow Brake Beam Company, or distributing any part of the assets of the National Hollow Brake Beam Company, except that said National Hollow Brake Beam Company may make such engagements and disbursements as may be necessary or proper in the ordinary conduct of its affairs, including all litigation in which it is or may be involved; and the said National Hollow Brake Beam Company, its agents and attorneys, are further enjoined and restrained from prosecuting the action brought by the National Hollow Brake Beam Company against the Chicago Railway Equipment Company in the municipal court of the city of Chicago, being case No. 1,045 on said municipal court calendar, until the further order of this court, conditioned, however, that said Chicago Railway Equipment Company, within ten (10) days from the date of the entry of this order, deposit into the registry of this court a certificate of deposit of the American Trust & Savings Bank, payable to the order of the clerk of this court, for the sum of twenty thousand dollars (\$20,000), together with five per cent. (5%) interest thereon from January 1, 1908, to January 1, 1909, being the sum of one thousand dollars (\$1,000), making an aggregate of twenty-one thousand dollars (\$21,000), and that from time to time hereafter it deposit such additional sums as may be necessary to have at all times deposited hereunder in the registry of this court a sum equal to twenty thousand dollars (\$20,000), plus interest thereon at the rate of five per cent. (5%) per annum, from January 1, 1908, to a date beyond the date of each of said deposits, provided, however, that said Chicago Railway Equipment Company shall not be required to deposit at any one time a sum less than five hundred dollars, such sum of twenty-one thousand dollars (\$21,000), together with the said additional deposits, to be subject to and to be paid out under the order of this court. It is further ordered that the cross-complainant, Chicago Railway Equipment Company, give bond in the sum of twenty-five thousand dollars (\$25,000) to the National Hollow Brake Beam Company, for the payment of any profits or damages that may be decreed against the Chicago Railway Equipment Company between the date of this order, and before or in the final decree in this cause. And it is further ordered that if the cross-complainant fails to execute and file with the clerk of this court, such bond within ten (10) days from the entry of this order, this injunction shall be and stand as dissolved. Leave is hereby granted the National Hollow Brake Beam Company to at any time, and from time to time, apply to the court for an increase in the amount of the above-mentioned bond."

The pleadings, controversies, parties, and circumstances involved in the appeal are sufficiently described in the opinion.

Joseph H. Defrees and Randolph Laughlin, for appellant.
Frederick N. Judson and M. S. Oppenheim, for appellee.
Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The controversies in litigation between the parties, as disclosed in the pleadings and proceedings before the trial court, under which the injunctive order appealed from was granted, involve numerous complications of law and fact, both under the averments of the bill, cross-bill, and supporting affidavits, and in the appellant's answering averments, setting up (among other matters) prior litigation and adjudication of the subject-matter between the actual parties in interest. This appeal, however, does not involve the merits of these controversies, nor solution of any of the complex questions which may arise under the issues raised by the pleadings; nor do we understand that it presents a question of want of jurisdictional averments in the original bill. The test of authority, therefore, to grant the injunctive order, alike with the case of *Harding v. Corn Products Refining Company* (No. 1,497, decided herewith) 168 Fed. 658, is whether such allowance was within the exercise of judicial discretion under the issues and circumstances presented.

The original bill is filed in the name of Henry G. Brown, as complainant, alleged to be a citizen of Pennsylvania and owner of 825 shares of stock in one of the defendant corporations, and all of the defendants impleaded therein are either citizens of Illinois or of other states than Pennsylvania, so that the jurisdictional requirements of diversity of citizenship and amount involved are plainly averred. The controversies and transactions alleged to constitute the cause of action, however, are mainly, if not wholly, between the two defendant corporations, parties to this appeal, the appellee, Chicago Railway Equipment Company (which is hereinafter mentioned for brevity as the "Equipment Company") and the appellant, National Hollow Brake Beam Company (referred to as the "Beam Company"), and the alleged corporate representatives of each, with both of these corporations stated to be citizens of Illinois.

Upon averments thus appearing in the bill, and others of record in the proceedings, it was and is contended (in effect) on behalf of the appellant that the "suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court" (vide Act March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. p. 511]), but discloses a controversy between these corporation defendants only, citizens of Illinois; that a fraudulent attempt thus appears on the part of the complainant to invoke federal jurisdiction for the benefit of the alleged defendant Equipment Company, and escape litigation pending in the state courts over such controversies; that the complainant and such appellee must, therefore, be arranged on the same side, leaving no authority for the injunction granted in favor of the Equipment Company (as cross-complainant) against the Beam Company. These deductions from the premises of fact stated are indisputable, under the well-settled limitations of federal jurisdiction and au-

thorities referred to (see *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 180, 25 Sup. Ct. 420, 49 L. Ed. 713 and cases cited), and if the facts are as contended, neither the bill nor the (dependent) cross-bill can be maintained for any form of relief in the trial court. If the record, therefore, distinctly presents such facts, or a well-defined jurisdictional issue thus raised, which could readily and speedily be determined, we believe the exercise of judicial discretion would require hearing and determination thereof as a condition precedent to this allowance of injunctive relief under the cross-bill.

On reference to the original bill, averments clearly appear of complainant's interest as stockholder of the Beam Company, disputed on the part of the corporation, and of conditions in reference to the obligations, control, and assets of such corporation, which state prima facie cause for adjudication thereupon for some form of remedy in favor of the complainant against the Beam Company. It is contended, however, that this alleged cause of action is plainly remediable at law, and neither authorizes equitable cognizance and relief nor making the Equipment Company, or other parties named, defendants to such controversy, nor introduction of the major portion of the averments of fact. Passing for present consideration the challenge for want of equity—which is unaffected by either of the objections so raised for excess of averments or parties—the entire scope of the averments in the bill, both as to subject-matter and parties, must be ascertained, for the purposes of the test of bona fides, under the above-mentioned statutory provision, when federal jurisdiction is thus invoked. Whenever suspicion arises, through motion or otherwise, that the prima facie averments of the bill to that end are merely colorable—that the alleged controversy “is not really and substantially between the parties” of diverse citizenship, as arranged in the bill, but is in truth between one and another defendant of like citizenship—we believe it to be the duty of the court to make such reasonable examination as may be needful to settle the bona fides.

In that view, a summary of the main facts and controversies stated in this bill is pertinent and instructive, namely: That the Beam Company was organized in 1887, erected works for the manufacture of brake beams and other railway appliances, and was extensively engaged in such business until 1892; that it then entered into arrangements with the Equipment Company, for discontinuance thereof, and transferred to the Equipment Company all its business, patents, and good will, becoming “essentially an investment company,” to receive semi-annual payment of the purchase price, to be made by the Equipment Company during a period expiring December 31, 1907; that such arrangement provided for dissolution of the Beam Company at such expiration period, and distribution of its assets; that such purchase-money consideration was \$975,000, to be paid to the Beam Company in semiannual installments; that such payments, after deductions stated for expenses and dividends to stockholders, were to constitute “a sinking fund, for the purpose of redeeming the stock” of the Beam Company, at par, together with 8 per cent. dividends, at the end of the 15 years, and any excess thereof to be paid to the Equipment Company;

that the shareholders of the Equipment Company were all shareholders of the Beam Company when such transfer was made; that the business was accordingly discontinued by the Beam Company, and it has conducted no business beyond keeping up its organization and making the semiannual collections and payments above mentioned; that under a subsequent arrangement for commutation of the semiannual payments, the Equipment Company has made all such payments, and the assets of the Beam Company are more than sufficient to redeem all outstanding shares of stock at par, and pay the dividends thereon as provided; that "there is no reason for the continuance of the Beam Company, and its business should be liquidated and its stock redeemed, as provided in the plan of organization"; that the Beam Company has been controlled by the defendant Laughlin since such arrangement; that said Laughlin has committed various "acts of maladministration" therein, in appropriation of assets, taking shares of stock which should have been canceled under the arrangement, and in causing a mortgage to be executed by the Beam Company in his own favor for claims which should be canceled, which mortgage is alleged to be void; that the complainant purchased 825 shares of the Beam Company stock in 1902, under circumstances stated, and the defendant Laughlin, as president of the company, has denied such ownership; and that the directors of the company have joined with such president in refusing to recognize the complainant as stockholder, and denied him either return of the purchase money or recognition as stockholder. The relief prayed for is to have complainant's status declared as a stockholder of the Beam Company, the mortgage upon the property set aside, the affairs of the corporation wound up and assets distributed, together with accounting and recovery for the alleged transactions between the corporation and Laughlin.

The complainant thus avers "a justiciable claim of right made by a citizen of one state against a citizen of another state"—namely against the Beam Company—which is prima facie "a controversy or dispute between the parties within the meaning of the statute." *Re Metropolitan Railway Receivership*, 208 U. S. 90, 107, 28 Sup. Ct. 219, 223, 52 L. Ed. 403. Such view, however, does not impress us as decisive of the present inquiry of bona fides in filing this bill for equitable relief, with an array of averments and parties named as defendants which may appear neither needful nor proper for adjudication of the alleged claim as stockholder. Under these averments, the sole interest of the complainant in the subject-matter is (a) the sufficiency of assets remaining in the Beam Company to pay or redeem the alleged outstanding shares of stock at par, together with the dividend agreed upon, and (b) such relief as may be needful to establish his ownership of shares in dispute and recovery accordingly. As the bill expressly avers that the assets "are more than sufficient" to make such payments or redemption, no accounting for assets is needful to ascertain the amount recoverable, which is fixed under the alleged "plan of organization." For accounting and recovery beyond this liquidated amount in favor of stockholders, the only party alleged in the bill as having a beneficial interest is the Equipment Company, named as defendant; and its cross-

bill appears filed accordingly, with averments which repeat and amplify those of the original bill, supplemented by other averments, of acts and threats on the part of the Beam Company in violation of the agreements between them which tend to injure the interests and business of the Equipment Company, and of prior "extended litigation" in various state courts over portions of the subject-matter.

With the averments of the bill, therefore, assumed to authorize equitable relief in favor of the complainant Brown, the issues which are germane to such relief do not involve the complications of law and fact which are stated in reference to alleged equities of the Equipment Company, and are all comparatively within narrow compass; so that the extended recitals of fact therein, which are not otherwise needful, are fairly attributable to the purpose (as appellant contends) of enabling the Equipment Company to litigate thereunder its alleged equities. The suspicion thus arises on the face of the bill that the averments and arrangement of parties were, as described in *Dawson v. Columbia Trust Company*, 197 U. S. 178, 181, 25 Sup. Ct. 420, 422, 49 L. Ed. 713, "merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist"; and on reference to the cross-bill, which was promptly filed by the Equipment Company, and to the further fact (brought to the attention of the trial court) that the original bill was signed by Mr. Ahrens, who was both director and general counsel for the Equipment Company, we believe sufficient ground appeared for notice and inquiry by the court, under the statutory provision and authority above cited.

On the part of the Beam Company, however, jurisdiction was expressly challenged in various forms—through averments in its answers respectively to bill and cross-bill and by motion and supporting affidavits—with prompt application for special reference to a master "to ascertain the truth or falsity of all averments touching the jurisdiction of this court," under the issues so made, for speedy determination thereof. The issue is distinctly raised, not only of mere contrivance, through the filing of the bill in the name of Brown, to enable the Equipment Company to litigate thereunder controversies with the Beam Company which had long been in litigation between them in the state courts (vide *Dawson v. Columbia Trust Co.*, supra), but upon the bona fides of the claim set up that Brown either owned or claimed to own the shares of stock of which ownership is averred in the bill. While the bill is neither signed by Brown, nor verified by affidavit, and no affidavit appears in the record in support of the alleged ownership of stock, an affidavit of Laughlin is of record denying such ownership, and stating facts and exhibiting purported correspondence with Brown in support of such denial, which call for explanation, to say the least.

We are of opinion that the jurisdictional issue so presented should be determined before proceedings or hearing in reference to the merits; that the doctrine upheld in *Dawson v. Columbia Trust Co.*, supra, must govern such determination when the facts are ascertained; that the facts in issue appear to be readily and speedily ascertainable; and that the exercise of judicial discretion, under the circumstances of record, required postponement of the appellee's motion for injunctive relief until determination of such issue.

The further contentions, on the part of the appellant, that the original bill furnishes no support for the cross-bill—and therefore no ground for the injunctive relief in favor of the appellee, as cross-complainant—for various objections urged to the sufficiency of the bill for equitable cognizance, do not affect jurisdiction of the cross-bill, as we believe, and in the absence of the complainant, Brown, and full hearing thereupon, should not be determined. We neither express nor intimate opinion upon such questions, therefore, leaving them open for consideration, when at issue between all parties in interest.

The injunctive order granted by the Circuit Court is therefore reversed, with direction to proceed further in conformity with the foregoing opinion.

GILBERTSON v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909.)

No. 1,510

1. BANKRUPTCY (§ 491*)—DEFENSES—CONCEALMENT OF PROPERTY FROM TRUSTEE.

A charge against a bankrupt of concealing property belonging to the estate from his trustee cannot be sustained without a bankruptcy adjudication, though the proof establishes a flagrant concealment of the property from the trustee de facto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 491.*]

2. BANKRUPTCY (§ 49*)—ORDER OF REFERENCE—SIGNING BY DEPUTY CLERK.

Under Rev. St. § 558 (U. S. Comp. St. 1901, p. 452), authorizing the appointment of a deputy district court clerk, such clerk has power to perform all ministerial acts of the clerk as his principal, including the power to make an order of reference on the filing of a voluntary bankruptcy petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 49.*]

3. BANKRUPTCY (§ 51*)—ADJUDICATION—COLLATERAL ATTACK.

Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420), providing that federal District Courts for the exercise of bankruptcy jurisdiction are always open, without special terms, the jurisdiction of a court in voluntary cases completely attaches on the filing of the debtor's petition, stating a cause for adjudication within the act; and hence a reference of such proceedings to and adjudication by the referee, though erroneous and voidable on review, is not subject to collateral attack or contradiction or impeachment of the record.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 51.*]

4. BANKRUPTCY (§ 49*)—JURISDICTION—ABSENCE OF JUDGE—RECITALS.

A recital in an order of reference in a voluntary bankruptcy proceeding that the District Judge was absent from the district when the petition was filed did not affect the jurisdiction of the court, which attached on the filing of the petition to adjudge the petitioner a bankrupt, but related only to the course of procedure within such jurisdiction, and was therefore not open to collateral attack.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 49.*]

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

E. E. Higbee, for plaintiff in error.

William G. Wheeler, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

*For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SEAMAN, Circuit Judge. The plaintiff in error was convicted, on trial in the District Court, under a charge of concealing from his trustee in bankruptcy, while a bankrupt, property belonging to the estate in bankruptcy, in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), and reversal of the judgment is sought by this writ of error. In various forms the assignment of errors states two grounds of complaint—first, that the adjudication of bankruptcy in evidence was invalid; and, second, that prosecution for the charge was barred by limitation. No ground for limitation is mentioned in brief for argument, and none appears in the record. The other assignment, however, distinctly raises the question whether the bankruptcy adjudication, on which the criminal charge rests, is void for either cause set up on behalf of the plaintiff in error. It is so contended, upon undisputed premises of fact, and the trial court denied a motion for acquittal predicated thereon. Without adjudication as a bankrupt within the meaning of the statute, the conviction cannot be upheld, notwithstanding the proof of flagrant concealment of property from the trustee (*de facto*), and the single inquiry for solution is the legal effect of the bankruptcy record in evidence—whether it is conclusive in the case at bar of such adjudication.

The record of the District Court in bankruptcy—"In the Matter of L. Gilbertson, Bankrupt"—appears in evidence, commencing with the petition of the plaintiff in error, dated and filed June 19, 1906, in the prescribed form, entitled "Debtor's Petition" to be adjudged a bankrupt. It exhibits (1) an order entered the same day, reciting that "the judge of said court was absent from said district at the time of filing said petition," and referring the matters thereof to one of the referees in bankruptcy, which order is in the form prescribed by rule in such case, and signed, "Alford Harrison, Clerk, by John F. Doherty, Deputy;" and (2) an adjudication of the petitioner as a bankrupt, entered by the referee on the same day. Subsequent proceedings appear as well, including the election and qualification of a trustee and various appearances by the bankrupt. On the face of this record adjudication clearly appears in conformity with sections 18f, 18g, and 38 of the bankruptcy act. The only objection raised upon its introduction was to the order of reference—that it was signed by a deputy, and not by the clerk personally; and such objection impresses us to be without merit, in any view of the effect to be given the adjudication. The appointment of a deputy clerk is expressly authorized by section 558, Rev. St. (U. S. Comp. St. 1901, p. 452), in general terms, and the powers of a deputy, as recognized at common law, are thereby implied. The appointee in such case is empowered to perform all ministerial acts of the clerk, as his principal (*Throop on Public Officers*, § 583; 7 Cyc. 248), and thus to make the order of reference, as the statute directs to be made of course, when the petition is filed in the absence of the District Judge. The clerk is given no discretion nor authority to pass upon the sufficiency of the petition, and performance of the statutory duty is thus made ministerial, not judicial.

On behalf of the plaintiff in error, however, the clerk of the court was called as a witness and testified: That the District Judge, referred to in the above-mentioned bankruptcy record, was "at Superior, Wis.,

holding a term of court," on June 19, 1906, and thus appears to have been within his district, not absent therefrom, as recited in the order of reference. The contention, therefore, that the adjudication by the referee was void, rests upon the twofold assumption that this testimony is admissible and that it invalidates the adjudication.

We are of opinion that such adjudication in bankruptcy is not open to this collateral attack to impeach its validity. The jurisdiction of the District Court, under the bankruptcy act, is completely established in voluntary cases, when the prescribed "debtor's petition" is filed stating cause for adjudication within the act. Under section 2, alike with the provisions in the bankruptcy act of 1867 (*Sandusky v. National Bank*, 23 Wall. 289, 293, 23 L. Ed. 155), "the District Court, for all the purposes of its bankruptcy jurisdiction, is always open," without separate terms. In *re Lemmon & Gale Co.*, 112 Fed. 296, 50 C. C. A. 247; *Brandenburg on Bankruptcy* (3d Ed.) § 28. So the District Court acquired jurisdiction of person and subject-matter for all the proceedings in evidence, on the filing of the petition by the plaintiff in error. Having such cognizance for all purposes of adjudication, the subsequent proceedings were clearly within the bankruptcy jurisdiction of that court. The office of referee, created by the act as an arm of the bankruptcy court, is invested with certain judicial powers (section 38), "subject always to a review by the judge," and his proceedings, after the court acquires jurisdiction, are those of the court. Hence the reference to and adjudication by the referee in the case at bar, however erroneous and avoidable on review, are neither void, nor subject to collateral attack, for contradiction or impeachment of the record. This doctrine is fundamental in reference to adjudications of courts of general jurisdiction—see *Van Fleet on Collateral Attack*, §§ 16, 17, 526; 1 *Freeman on Judgments*, c. 8; 23 *Cyc.* 1055—and is like applicable, as we believe to the adjudication of the District Court in bankruptcy, having unlimited and exclusive jurisdiction in the matters thereof. In *Edelstein v. United States*, 149 Fed. 636, 638, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236, the rule referred to is not only so applied to an adjudication of bankruptcy (with citation of ample authorities), but upheld as well in reference to such adjudication under a creditors' petition mentioned in the opinion as defective and demurrable—an extension of the rule not involved for consideration in the present case.

The contention that "recitals of fact in a decree may be contradicted as to the facts necessary to give the court jurisdiction," for which numerous authorities are cited—exemplified in *Bell v. Bell*, 181 U. S. 175, 177, 21 Sup. Ct. 551, 45 L. Ed. 804, and cases there referred to—is without force under the adjudication in question. Neither the rule so stated, nor the cases cited, are inconsistent with the elementary doctrine, recognized therein, that jurisdiction actually acquired by the court bars such impeachment collaterally. In the absence of jurisdiction to entertain a cause, it goes without saying that there can be no valid adjudication beyond dismissal, and that recitals of fact in the record can neither confer jurisdiction nor validate a judgment, although presumptive thereof. So the presumption in favor of the record in such case is distinguished under the authorities referred to from

the rule of conclusiveness which applies when the judgment is within the jurisdiction of a court, and rebuttable by evidence aliunde disproving jurisdiction. The recital of fact, in the present record, of absence of the District Judge, does not affect the jurisdiction of the District Court (acquired on the filing of the petition) to adjudge the petitioner a bankrupt, but relates alone to the course of procedure to that end, within such jurisdiction, and, therefore, not open to collateral attack.

The assignments of error are overruled accordingly, and the judgment of the District Court is affirmed.

SIMMONS MFG. CO. v. ESKRIDGE

(Circuit Court of Appeals, Seventh Circuit. January 19, 1909.)

No. 1,514.

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ELEVATORS—NEGLIGENCE—QUESTION FOR JURY.

Where the only safety appliance provided for an elevator, by the fall of which plaintiff was injured, was a "cable safety," which served only for protection when the cable broke or tangled, and another device called a "speed governor" was well known, effective, and frequently used in elevators to provide against falls from breakage of machinery or other causes, and its efficiency was well recognized, whether defendant was negligent in failing to provide such appliance was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1012-1014; Dec. Dig. § 236.*]

2. MASTER AND SERVANT (§ 102*)—INJURIES TO SERVANT—SAFETY APPLIANCES—DUTY OF MASTER.

A master's duty to exercise ordinary care for the safety of his servants extends to provisions for reasonably safe working places, machinery, and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. § 102.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—PROXIMATE OR CONTRIBUTING CAUSE.

Where a servant was injured by the fall of an elevator, whether the fact that he retained hold of the brake rope unnecessarily, and was thus suspended above the car when it struck bottom and broke or released the rope, was the proximate or a contributing cause of the injury, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1039-1132; Dec. Dig. § 289.*]

4. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

Where, in an action for injuries to a servant by the fall of an elevator, an inspector for an insurance company testified on defendant's behalf as an expert with reference to the operation and the extent of the use of certain safety appliances in his territory, the court properly permitted plaintiff to ask him on cross-examination whether the insurance company was interested in the case, and permit his answer to stand, that he supposed it was to a certain extent, but that he knew nothing about the company's business outside of his own part, as legitimate cross-examination.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

It is not error to refuse requests to charge which, so far as correct, are embodied in instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

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

The Simmons Manufacturing Company, plaintiff in error, was defendant below in the suit of John R. Eskridge, defendant in error, to recover for injuries suffered in the operation of a freight elevator in such defendant's factory, and this writ of error is brought for review of a judgment, rendered upon verdict of a jury, in favor of the plaintiff below, awarding \$2,250 as damages. The parties are referred to as plaintiff and defendant respectively, as designated in the suit below; and the following facts are undisputed:

The plaintiff was in the employ of the defendant, and was so engaged in taking up a load of brass material, when the worm shaft broke and the elevator dropped from the fourth to the ground floor, thus causing the personal injuries for which damages were awarded. This elevator car was open at the top and operated by means of a cable, passing around a drum at the top of the shaft, together with belt power, stopped and started by means of a brake. Its only safety device was one known as the "cable safety"—protecting only against breaking or slacking of the cable—although another safety appliance was well known, called a "speed governor," which protected as well against other mishaps causing the car to fall. When the car dropped, the plaintiff had hold of the brake rope to stop it, and retained such hold during the fall, thus dropping to the car floor through the fall of the brake rope when the car struck the bottom of the shaft. The plaintiff was not acquainted with the construction of the elevator, aside from his experience in its operation for two weeks; and negligence was charged against the defendant in the complaint (1) for use of worn and defective machinery, (2) failure to equip with known and usual safety appliances, and (3) failure both of inspection and to furnish plaintiff "a reasonably safe place to work."

At the close of the evidence, counsel for the defendant moved for direction of a verdict in its favor, and the trial court sustained such motion, in so far as defects in the machinery operating the elevator were charged in the complaint. The motion was overruled, however, in respect of the charge for failure to equip the elevator with reasonable safety appliances, and that issue was submitted to the jury, together with the issues of proximate cause and contributory negligence, under instructions accordingly, which are referred to in the opinion.

The errors assigned for review are 51 in number, but they are grouped in the opinion, with special mention of such assignments as seem to require specific discussion.

Charles A. Vilas, for plaintiff in error.

Calvin Stewart and Wallace Ingalls, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The judgment against the defendant below rests upon the verdict of a jury, under instructions by the court which clearly limited and defined the issues of fact to be considered therein, and, in reference to such narrowing of the issues and the moderate amount assessed for recovery, it is plain that the defendant has no cause for complaint. While the errors assigned, upon which reversal is sought, are numerous, the main contention for reversible error in the argument is predicated upon denial of the defendant's motion for direction of a verdict

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in its favor. The various complaints of error in the instructions to the jury, either given or denied, are involved, as well, in some measure in the consideration of that motion; and we believe that all of the assignments, aside from the alleged insufficiency of evidence to authorize submission to the jury, may rightly be embraced, in general terms, under two classifications respectively, as exceptions to rulings (a) upon testimony received or offered, and (b) upon instructions given or refused.

1. Was an issue of fact presented by the testimony for submission to the jury? The plaintiff was injured in the service of the defendant corporation while operating a freight elevator in the defendant's factory, through the fall of the car caused by a breakage of the machinery, without fault on the part of the plaintiff in such operation. His complaint in the suit alleged (in effect) twofold negligence on the part of the defendant as the cause of such injury: (1) That the breakage was due to defective machinery which should have been discovered and replaced; and (2) that it failed to provide a safety appliance, which was well known and commonly used for such elevators, to prevent fall of the car under like conditions. On motion of the defendant, the trial court excluded the first-mentioned charge of negligence and the testimony thereunder from consideration by the jury, but overruled such motion in reference to the other alleged breach of duty. The case was then submitted to the jury, with instructions which are not open to question, for plain limitation of the issue of negligence on the part of the defendant accordingly, namely, that they were to ascertain from the testimony whether the duty of the defendant to exercise ordinary care for the safety of its servants (as defined in the instructions) was violated by the failure to provide another safety appliance for the elevator, described in the testimony as a "speed governor," or its equivalent.

The contention that the court erred in overruling the motion on the branch of the case thus submitted to the jury is pressed under these propositions, in substance: (a) That the evidence was insufficient to raise such issue of negligence; and (b) that the safety device used by the defendant "was conclusively shown to be in general use, as much as, or more than, the device which the plaintiff claimed should have been used." On reference to the testimony, however, we are satisfied that neither of these premises of fact is tenable. It was undisputed that the only safety appliance provided by the defendant was one known as the "cable safety," serving alone for protection when the cable breaks or tangles, and that another device, called a "speed governor," was well known, effective, and frequently used in elevators serving four or more floors in a factory, which provided as well against fall of the elevator from breakage of machinery or other causes. The testimony clearly tends to establish that the efficiency and superiority of the "speed governor" is well recognized for such purposes, and the only substantial dispute appears upon the inquiry of general use in like factories of four and five stories. While the testimony is conflicting as to the generality of such use, ample support appears, as we believe, for submission of that question to the jury and for their finding thereupon.

The doctrine is well settled that it is the duty of the master to exercise ordinary care for the safety of his servants, to be measured by the known hazards of the service, and that such care extends to provision for reasonably safe working places, machinery, and appliances for use of the servants. *Armour & Co. v. Russell*, 144 Fed. 614, 615, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602, and authorities cited. While the master incurs no obligation as insurer, either against the risks of such service, or that the means so provided are sufficient for protection, he does assume, in the employment of servants, the obligation to exercise care to that end, as above stated. Thus the issue was distinctly presented by the testimony referred to, whether the defendant exercised ordinary care, under conditions which were known, in providing the "cable safety" alone for protection against accidents—plainly an issue of fact for determination by the jury, under instructions upon the limits of duty above mentioned.

In the oral argument, we understood counsel for the defendant to urge, as another proposition for support of the motion to direct a verdict in its favor, that this fact was undisputed: That the plaintiff retained hold of the brake rope unnecessarily, and was thus suspended above the car when it struck bottom and broke or released the rope, so that plaintiff's injuries are attributed to the fall thus occasioned, either as the proximate cause, or as a contributory cause, for which recovery is unauthorized. The inferences of fact, however, from that and other circumstances in evidence, were for the jury to ascertain, and were rightly submitted, as we believe, under the instructions.

2. On examination of the record referred to in each of the assignments of error for rulings in admitting or rejecting testimony, we are of opinion that each must be overruled, and that the only one which raises a question of sufficient merit or interest, either to require or justify special reference and discussion, is assignment No. 23. In that instance a witness (Chapman) on behalf of the defendant testified (in part as an expert) in reference to the operation and extent of use of the "cable safety" and "speed governor" appliances in his Wisconsin territory, as inspector for the Travelers' Insurance Company. On cross-examination on the part of the plaintiff, he was asked "whether the Travelers' Insurance Company is interested in this case or not"? The defendant's objection, as immaterial, was overruled, and the witness answered, "Why, to a certain extent I suppose they are," with the remark that he did not know, as he knew nothing about their business outside of his own part. Motion to strike out this answer was also denied. We may well assume (as counsel contends) that evidence on the part of a plaintiff in such actions is inadmissible for the purpose of establishing the fact that the defendant is insured against the risk in suit; but such rule is nevertheless without force, as we believe, to exclude the above-stated inquiry and answer, upon cross-examination of this witness, who had so testified in reference to the controverted facts in issue. Its tendency to show that his testimony may not be that of an impartial witness is obvious, and thus may affect its credibility, within the legitimate object of cross-examination.

3. The instructions which the trial court gave to the jury are preserved in the bill of exceptions, and their careful examination con-

vinces us that error is not well assigned thereupon. Their limitation of the issues, in conformity with the previous ruling above mentioned under the defendant's motion, appears in clear terms; and the rules applicable for determination of the issues are well defined, leaving no just ground for complaint, either of indefiniteness or misdirection.

On behalf of the defendant, numerous propositions were tendered for instructions to the jury, of which some were incorporated in terms in the instructions, and those not so adopted in the terms of the request were noted as denied, with allowance of an exception. Error is assigned upon each of the propositions thus denied. We are of opinion, however, that the essence of all thereof, in so far as the request stated correctly a proposition of law directly involved for consideration in the case, was embraced in the instructions which were given, and that no reversible error appears thereunder.

The assignments of error respectively for review of the judgment are therefore overruled, and the judgment is affirmed.

In re ASHLAND STEEL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 16, 1909.)

No. 1,862.

1. BANKRUPTCY (§ 350*)—CLAIMS—PRIORITIES UNDER STATE LAWS—TIME FOR CLAIMING PRIORITY.

Claims proved against the estate of a bankrupt, which from their nature are entitled to priority under a state statute, may be allowed such priority, although it is not claimed until more than a year after the date of the adjudication, when the question of distribution of assets first arises.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 350.*]

2. BANKRUPTCY (§ 345*)—CLAIMS—PRIORITIES—WAIVER OR ESTOPPEL.

While Bankr. Act July 1, 1898, c. 541, § 56b, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), provides that creditors holding claims which have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, the fact that such a creditor does vote on the election of a trustee by inadvertence or mistake is not a waiver of his right of priority; nor does it estop him from claiming the same, where no other creditor has been prejudiced thereby.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*]

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

S. S. Willis, for petitioners.

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

SEVERENS, Circuit Judge. This is a petition for the review of an order of the District Court, made in a bankruptcy proceeding in the matter of E. M. Roberts Company, which was adjudicated bankrupt December 6, 1906. The petition is by six of the creditors of the bankrupt, who within six months after the adjudication established claims giving them a preference in the distribution of the assets by virtue of a statute of Kentucky giving priority to those who shall have furnished

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

materials or supplies to manufacturing companies doing business in the state. Section 2487, Ky. St. 1903. The E. M. Roberts Company was such a company. These creditors did not vote at the election of the trustee. Other creditors having similar claims proved them before the referee and voted at the election without objection. The trustee was elected by the unanimous vote of all the creditors voting, and the election was approved. But these other creditors did not make any special claim of priority until after the expiration of one year from the date of the adjudication of bankruptcy. Shortly thereafter they severally filed amended petitions praying for the establishment of their claims to priority in the distribution of the assets, which had not yet taken place. The six creditors, who are the petitioners here, and who had, as above stated, established priority for their claims within the year allowed for proving claims, objected to the allowance of the claims of priority made by the other creditors after the expiration of the year, upon grounds presently to be stated. The referee overruled the objections and admitted the claims of the other creditors to priority, in common with the objecting creditors. Upon a petition for review, the District Judge confirmed the order of the referee. The grounds of the objection taken by the present petitioners against the allowance of priority to the other creditors before the referee, and renewed here, are these:

"First. Because said claims were not filed as preferred, prior, or lien claims, based upon section 2487 of the Kentucky Statutes, until more than one year after December 7, 1906, on which date the said E. M. Roberts Company was adjudicated a bankrupt, which was too late, under section 57n of the bankruptcy act of 1898, to file an amended proof of claim setting up a new cause of action and making a different demand.

"Second. Because each and every one of said creditors named filed their proofs of claim as unsecured debts and voted as general creditors in the election of the trustee, and elected Calvin S. Weakley, trustee in bankruptcy of the said E. M. Roberts Company, and thereby waived any and all claim they had or might have had to priority or lien, and are thereby estopped from claiming or asserting a lien herein."

1. It is to be observed that the claims of the other creditors (as we are calling them) carried with them an inherent privilege of priority. The privilege was not a detached right, which could only be fastened by special proceedings taken to enforce it, as by an attachment or an execution or the enforcement of a mechanic's lien. It needed only to be proved, when the time should arrive for distributing the assets. According to the report of the referee to the District Judge, nearly all of these claims showed on their face that they were claims to which the Kentucky statute gave priority. A few of them did not; but the referee reported that these latter were proven to be claims of that character. We think that, the substantive claims having been proven within the time allowed by the act, it was within the power of the court to allow the claims priority, and give them the preference to which by law they were entitled, notwithstanding no definite claim of the kind had been made during the year. It was not the allowance of a new claim, as counsel for petitioners insist, but the giving full scope to one already proved. It was essentially the ascertainment of its rank to be regarded in the distribution of the assets.

The word "claim," in section 57n (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), we should suppose, refers to the substance of the obligation, rather than to any mere attribute of it. The lien being inherent in the debt, it would have been allowable in an action at common law to permit an amendment which would give cognizance of it without violating the statute of limitations. And the decisions which have been made upon the effect of section 57n seem to be generally that such amendment as this (if it is to be termed an amendment) is permissible. Several of them are collected and commented upon in *Loveland on Bankruptcy* (3d Ed.) 404, 405.

2. The other ground of objection is that, by section 56b, "creditors holding claims which are secured or have priority, shall not, in respect to such claims, be entitled to vote at the creditors' meeting, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amount of such claims exceeds the value of such securities, and then only for such excess"; that the other creditors were present at the first meeting of creditors and voted for the trustee; and that by this they signified their intention to "waive or surrender their security," or, rather, that they should thereafter be estopped from asserting it, which is another form of stating what in the circumstances are equivalent propositions. It is the assertion of the principle of an estoppel by conduct. The statute does not say that such a consequence shall follow the voting by a creditor who is disqualified, or that he shall surrender his preference before he can vote; and in order to lay the foundation of an equitable estoppel it must be made to appear that the other party has lost some right or has been led into some course of conduct whereby he will suffer injury if the act or representation of the party to be estopped is revoked or held for naught; and within the scope of its jurisdiction, the court of bankruptcy is a court of equity, as well as of law.

It does not appear that any creditor objected to the voting by these creditors, and the referee accepted their votes, although it appeared that, in very many of the cases, the claims were such as had priority by force of the statute of Kentucky. The trustee was elected by a unanimous vote, and there was no objection to the fitness of the trustee. It is to be inferred that he was approved by the referee, for his election would not have been complete without such approval. In short, there is nothing tending to show that any one was injuriously affected. As those creditors did nothing else to signify that they intended to surrender so valuable a right, and the circumstances being such as we have described, we think the fair inference is that their voting was an inadvertence on their part, as well as on that of the referee, and without any declaration of intention to surrender their priority in the bankrupt's assets in order to qualify themselves to vote for a trustee. It was a mutual mistake, against the consequences of which equity would relieve. Nor is a party bound by an election made under a misapprehension of one's rights, especially where the other party suffers no injury from its revocation. No harm was done, or is suggested as possible to have occurred, to any one. Nor do those creditors seek to gain any advantage over the petitioners in seeking to establish their priority over general creditors, except that the peti-

tioners may lose the increase in dividends which they would gain by shutting the others out; and the sum of the whole matter is that those creditors are put on the same plane with the petitioners, a position to which they are equally entitled, unless by some slip, which the law treats as fatal, they have lost it. The petitioners have no equity which requires a reversal of the order of the District Court.

We think these views are in accord with prior decisions upon the subject in other jurisdictions, where similar circumstances existed, and like principles were applicable. Loveland on Bankruptcy (3d Ed.) 45, and cases cited in note 14. The case of *In re Eagles* (D. C.) 99 Fed. 695, is relied upon by counsel for petitioners, and some expressions of the District Judge would seem to support their contentions. But that case involved only the question of the qualification of creditors to vote for a trustee. The consequences of their voting, in so far as they concerned the ultimate disposition of the assets, was not before the court.

The order appealed from will be affirmed, with costs to be paid by the petitioners.

MORRIS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1909.)

No. 2,677.

1. CRIMINAL LAW (§ 970*) — ARREST OF JUDGMENT — GROUNDS—OBJECTIONS TO INDICTMENT.

While the better practice is to raise objections to an indictment by demurrer in advance of the trial, accused cannot be convicted and punished unless the indictment, even if not attacked until by motion in arrest of judgment, states the substance of an offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2445; Dec. Dig. § 970.*]

2. FOOD (§ 20*) — OLEOMARGARINE — PACKAGES—STATUTES—CONSTRUCTION—INDICTMENT—"EVERY PERSON."

Act Cong. Aug. 2, 1886, c. 840, § 6, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230), declares that all oleomargarine shall be packed by the manufacturer in packages not used before, and that all sales made by manufacturers and wholesale dealers shall be in original stamped packages, that retail dealers must sell only from original stamped packages, and pack the oleomargarine sold by them in suitable wooden or paper packages, and "every person" who knowingly sells or offers for sale any oleomargarine in other form, or who packs in any package any oleomargarine in any manner contrary to law, will be imprisoned, etc. *Held*, that the manufacturer and dealer were the subject of regulation by the section, and that the words "every person" should be construed to refer solely to manufacturers and dealers previously mentioned, so that an indictment for violating such section, failing to charge that accused was either a manufacturer or dealer in oleomargarine, and as such packed product in a manner violative of the act, stated no offense.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 21; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 3, p. 2516.]

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Shepard Barclay (Thomas T. Fauntleroy, on the brief), for plaintiff in error.

Jesse W. Barrett, for defendant in error.

Before SANBORN, VAN DEVANTER, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This cause is submitted on a rehearing concerning the sufficiency of the eighth count of the indictment. Our opinion on all other phases of the case (161 Fed. 672) remains unaffected. This second consideration would probably have been unnecessary, if our attention had been attracted to the particular defect of the eighth count which is now urged upon us. The former opinion discloses that the only consideration given to this count related to its sufficiency in matter of averment to apprise the defendant of the nature and cause of the accusation against him; but we are now called upon to answer the question, raised for the first time by the motion in arrest of judgment, which was addressed generally to all the counts of the indictment, whether the eighth count states facts sufficient to constitute a crime or offense against the laws of the United States.

The defendant was indicted and convicted on various counts for violating the statutes of the United States respecting the manufacture and sale of oleomargarine. The eighth count was laid under section 6 of the act of August 2, 1886 (24 Stat. 210, c. 840 [U. S. Comp. St. 1901, p. 2230]), and charged that the defendant, without specifying his vocation or business, did "unlawfully pack colored oleomargarine in firkins, tubs, and other wooden packages, which had theretofore been used for that purpose, * * * well knowing that said packages had theretofore been so used." Does this disclose a defect fatal on motion in arrest of judgment? In other words, is there such want of averment in matter of substance descriptive of the offense itself as may be availed of for the first time by such motion?

We have heretofore expressed our disapproval of the practice of postponing a challenge to the sufficiency of the indictment until after an expensive trial has been had. *Clement v. United States*, 149 Fed. 305, 313, 79 C. C. A. 243. The better practice is to raise such questions by demurrer in advance of the trial. But, however this may be, no defendant in a criminal case can be found guilty and punished unless the indictment, even if not attacked until by motion in arrest of judgment, states the substance of an offense. The defect now claimed is that the count does not disclose that the defendant was either a manufacturer or dealer in oleomargarine, and it is claimed that section 6 of the act of 1886, supra, denounces offenses against manufacturers and dealers only. That section reads as follows:

"That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, * * * and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages. * * * Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new

wooden or paper packages as above described or who packs in any package any oleomargarine in any manner contrary to law * * * shall be imprisoned not more than two years."

A careful analysis of the fore part of the section discloses that certain obligations or duties are imposed upon manufacturers and wholesale and retail dealers in oleomargarine. Manufacturers are required to pack their product in a certain way. They and wholesale dealers are required to make their sales in a certain way, and retail dealers are required to pack and sell the product in the way prescribed for them. So far the section does not concern any other person or class of persons. The user or consumer is not mentioned. Immediately following this particular enumeration of those upon whom duties are imposed comes the denunciation of offenses:

"Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine," etc.

These words are clearly applicable to a manufacturer or dealer and inapplicable to any others. Then follow in the disjunctive the words constituting the offense charged in the eighth count, "or who packs in any package any oleomargarine in any manner contrary to law." This last clause, commencing with the words "every person," considered by itself alone, is comprehensive enough, and is claimed by learned counsel for the government in the case to include any and every person, whether he be a manufacturer, wholesale or retail dealer, the housewife who may desire for her own convenience to repack the oleomargarine after purchasing it into other more convenient vessels or packages for preserving it at home, or any other person who may have anything to do with it. But this, we think, does not express the legislative intent manifest by the entire section. The "manufacturer" and the "dealer" afford the subject-matter of the section. They are the only persons upon whom the duty of packing in the manner required by the act is imposed, and for that reason would naturally and reasonably be the only persons against whom the penalty would be imposed for violating that duty by packing in some other way.

Congress, in the absence of a clearly manifested contrary intent, must be presumed to have contemplated this ordinary and reasonable construction—the one in harmony with the subject of legislation, rather than the other unnatural and discordant one. In *Market Co. v. Hoffman*, 101 U. S. 112, 116, 25 L. Ed. 782, it was said:

"To understand the true meaning of the clause, it is necessary to observe what the subject was in regard to which Congress attempted to legislate. In *Brewer's Lessee v. Blougher*, 14 Pet. 78, 10 L. Ed. 408, it was said to be the undoubted duty of the court to ascertain the meaning of the Legislature from words used in the statute and the subject-matter to which it relates."

In *Petri v. Commercial Bank*, 142 U. S. 644, 650, 12 Sup. Ct. 325, 326, 35 L. Ed. 1144, it was said:

"The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled."

In *United States v. Freight Association*, 166 U. S. 290, 320, 17 Sup. Ct. 540, 551, 41 L. Ed. 1007, it was said:

"While it is the duty of courts to ascertain the meaning of the Legislature from the words used in the statute and the subject-matter to which it relates,

there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so in order to carry out the legislative intent."

In harmony with the foregoing observations and authorities, we are of opinion that the words "every person," found in the act of 1886, are referable solely to the manufacturers and wholesale and retail dealers just before them mentioned and whose business afforded the subject-matter of the legislation. The indictment in this case, therefore, to be good as matter of substance, should have contained an averment that the accused was either a manufacturer or a dealer in oleomargarine, and as such packed the product in a manner violative of the act. There is a total lack of such averment either in direct language or by reference to other counts, and for that reason the eighth count fails to state facts which constitute an offense.

The judgment rendered on it must be reversed, and the cause remanded to the trial court, with direction to sustain the motion in arrest so far as that count is concerned. It is so ordered.

STEWART v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fifth Circuit. March 16, 1909.)

No. 1,769.

1. APPEAL AND ERROR (§ 1040*)—PREJUDICE—RULINGS ON PLEADINGS.

Rulings on pleadings will be regarded as academic, and not reviewed on a writ of error, where the counts of the complaint and the pleas which escaped or survived the demurrers were sufficient to justify all the evidence which could naturally and reasonably bear on the conditions and incidents of the cause of action sought to be presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

2. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff, at the time he was injured, with other employes, was engaged in raising a heavy pine stringer from a platform to a trestle on skids. About a month before a piece of plank three feet long and six or seven inches wide had been fitted into a hole in the platform, but had not been nailed down; but its insecurity was not obvious to casual inspection. As plaintiff and his fellow employes got the stringer partially up the skids, it became evident that they were losing control of it, when word was given to let go and get out of the way. Plaintiff turned and ran back to escape, but tripped on the piece of plank, fell on his face, was overtaken by the falling timber, and injured. Plaintiff had no knowledge of the condition of the platform, except such as he acquired in working on it on the day of the injury, and had not observed any defect therein. It also appeared that, but for plaintiff's tripping on the plank, he would have escaped. *Held*, that plaintiff did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

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 Northern District of Alabama.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

S. S. Pleasants, for plaintiff in error.

Milton Humes and Paul Speake, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This is an action for damages for personal injuries received by plaintiff in error in the service of defendant in error. The complaint contained counts based on the failure of the master to discharge the common-law duty of furnishing the servant a reasonably safe place in which to work, a count under subdivision 3 of section 1749 of the Code of 1896 of Alabama, averring the injury to have been caused by the negligence of a person in the service of defendant to whose orders plaintiff was, at the time of the injury, bound to conform, and did conform, and that his injuries resulted from his having so conformed, and a count based on subdivision 1 of section 1749 of the Alabama Code, supra, averring the injuries to have been caused by defects in the condition of the ways, works, machinery, or plant connected with or used in the business of defendant. The trial judge sustained demurrers to all counts of the complaint, except counts A and C. Count A averred the defect in the ways, works, and machinery, and count C averred as the proximate cause of the injury negligent failure to furnish a reasonably safe place for plaintiff to work.

We do not deem it necessary to notice in detail the action of the court on the pleadings, or its effect on the introduction of proof, because, in our view of the case as presented by the whole record, these questions are largely academic. The counts and pleas which escaped or survived the demurrers proved sufficient to let in all the testimony which could naturally and reasonably bear upon the conditions and incidents of the work in which the injury was received. When the proof was all in, the defendant moved the court for an affirmative charge in its behalf, which motion the court granted in these words:

"I charge you, gentlemen of the jury, to find a verdict for the defendant, if you believe the evidence in this case."

The assignment of errors contains 23 specifications, of which we notice only the last, to the effect that the court erred in giving the affirmative charge to find for the defendant.

The undisputed evidence shows that the plaintiff, with six others, one of whom was acting as "boss" of the work, were engaged in repairing a trestle leading up to a coal chute at a point on the line of the defendant's road; that this trestle, the width of the railroad track, ran up over a platform which was about 300 feet long and 60 feet wide. The work which the gang were engaged in, at the time of the accident which resulted in the injury, was raising from the platform to the trestle, which at that point was about 7 feet above the platform, a stringer, being a heavy piece of yellow pine timber, 25 feet long, 12 inches thick, and 16 inches wide. This stringer was being rolled up or slid up on two skids. One end of each skid rested on the platform, and the other end rested on the trestle. Before getting it fully up to its place, the gang discovered that they were losing control of it (a condition which it is shown was liable to oc-

cur), and that it was slipping back on them, and the word was given to let go and get out of the way. The others all succeeded in getting out of its way, and were uninjured. The plaintiff, whose position, with some others, was between the skids and facing the trestle, turned and ran back to make his escape, but tripped on a piece of plank about 2 feet in the rear of the lower ends of the skids, and fell on his face, and was overtaken by the falling timber, and injured. This piece of plank on which the plaintiff tripped had, a month or more previously to this time, been fitted into a hole in the platform, but had not been nailed down. This hole was about 3 feet long and 6 or 7 inches wide. The plank so fitted in was not quite as thick as the other flooring of the platform; but when it was resting in the hole it was not obvious to casual inspection that it was a loose plank, not nailed down, and not part of the substantial flooring of the platform. The plaintiff had no knowledge of the condition of the platform, except such as he acquired in doing the work at which he was engaged the day he was injured, and had not observed that there was any defect in the platform. How the plank got jostled out of its place in the hole, so as to have one end of it sufficiently above the rest of the platform to trip a person running over it, the proof does not directly show. The evidence tends to show that, but for his tripping on this plank, the plaintiff could and would have made his escape from the falling timber, and would not have been injured.

We think it appears from the record that the trial judge considered that the plaintiff was charged with the assumption of the risk resulting from the condition of the platform as just indicated, and that therefore the defendant was entitled to the affirmative charge. In support of this view, counsel for the defendant relies largely on the decision of this court in the case of *Texas & Pacific Ry. Co. v. Rogers*, 57 Fed. 378, 6 C. C. A. 403. But the cases are very different. In that case we quoted with approval *Wood on Railway Laws*, §§ 377 and 386:

"A servant is bound to see patent and obvious defects in appliances furnished him, and assumes all patent and obvious risks as well as those incident to the business; and where he knows or ought to know of the defect in the appliances, and continues to work with the same, and receives injuries therefrom, he is treated as guilty of contributory negligence and cannot recover. * * * The servant, in order to recover for the defects in appliances in business, is called upon to establish three propositions: (1) That the appliance was defective; (2) that the master had notice thereof or knowledge, or ought to have had; (3) that the servant did not know of the defect, and had not equal means of knowing with the master."

All of which was applicable as it was applied to the case of *Texas & Pacific Ry. Co. v. Rogers*, but is clearly not applicable to the case now before us, as we have recited its conditions.

For this error of the learned trial judge, the judgment of the court below must be, and hereby is, reversed and remanded, with instructions to that court to award the plaintiff a new trial.

ROOT et al. v. MILLS et al.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909. Rehearing denied February 19, 1909.)

No. 1,477.

1. WORDS AND PHRASES—"HEARING IN EQUITY."

Act Cong. April 14, 1906, c. 1627, § 7, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 209) provides that where, on a "hearing in equity" in a District or Circuit Court or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, an appeal may be taken within 30 days from the entry of the order. *Held*, that the phrase "hearing in equity" technically means the trial of the case, including the introduction of evidence, the argument of solicitors, and the decree of the chancellor, resulting in a final decree; but that, as applied to proceedings resulting in an interlocutory order, within section 7, it means the hearing of the motion, the introduction of evidence thereon by affidavit or otherwise, the argument of solicitors, and the order of the chancellor.

2. COURTS (§ 407*)—INTERLOCUTORY ORDER—EQUITY PROCEEDING—TIME FOR APPEALING—"HEARING."

Act Cong. April 14, 1906, c. 1627, § 7, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 209), provides that where, on a hearing in equity, a receiver is appointed by an interlocutory order, an appeal may be taken within 30 days from the entry thereof. A bill for the removal of trustees under a will and for the appointment of a receiver was filed October 25, 1907, and on the same day on an ex parte hearing a receiver was appointed. On November 2d defendants moved to modify such order of appointment to permit the trustees to collect certain income, which motion on November 9th was argued and denied. On December 5th defendants moved to discharge the receiver and dissolve an injunction incidental to the receivership, which was denied on February 21st, whereupon on March 2d defendants applied for permission to appeal. *Held*, that defendants, by their motion of November 2d to modify the order appointing the receiver, acquiesced therein, such application constituted a "hearing," within section 7, and hence defendant's application for appeal was too late.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 407.*

For other definitions, see Words and Phrases, vol. 4, pp. 3236-3238.]

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

B. H. Canby and A. W. Hope, for appellants.
James P. Dawson, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The bill in the court below asked that appellants, trustees under the will of Augustin K. Root and executors thereof, be removed, and that pending action of the court upon such bill, a receiver be appointed to take charge of the assets of the estate until other trustees might be appointed. The bill was filed October 25, 1907, and upon the same day, upon an ex parte hearing, a receiver was appointed, who took possession of the property therein named.

November 2d, following, the defendants by their solicitors, moved the court to so modify the foregoing order that, pending the final determination of the case, the trustees might be permitted to collect, re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceive and distribute to the parties entitled thereto under the will, the income of the securities belonging to the estate; which motion was, on the 9th day of November following, after argument of counsel, duly denied, the defendants on the preceding day having entered their general appearance in the cause.

December 5th, following, defendants filed their motion to discharge the receiver and dissolve the injunction (an injunction merely incidental to the receivership), which motion was overruled on the 21st day of February, 1908; and thereupon, on the 2d day of March following, defendants filed their application for appeal. The motion under consideration is to dismiss this appeal upon the ground that it was not taken within thirty days after the entry of the decree appealed from.

Section 7 of the Act approved April 14, 1906 (34 Stat. 116, c. 1627 [U. S. Comp. St. Supp. 1907, p. 209]) provides:

"That where upon a hearing in equity in a district or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed, by an interlocutory order or decree, in any case, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals: provided that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court."

This section, in the interest of a more liberal right of appeal, is a distinct departure from the policy of Appeals under the older Chancery rules; but is intended to be safeguarded against abuse by the provisions looking to promptitude of action—a provision that is intended to be strictly enforced.

The contention of appellee is that the date of "entry of the order appointing the receiver" is October 21st, 1907. *Joseph Dry Goods Co. et al. v. Hecht*, 120 Fed. 760, 57 C. C. A. 64 (Circuit Court of Appeals, 5th Circuit). The contention of appellants is, that the date of such "entry" is February 21st, 1908, the day when the motion to dissolve the order was overruled.

We cannot concur in either of these views. What constitutes the "entry" of the order within the meaning of Section 7, the date of which determines the time for the appeal, depends, it seems to us, upon what meaning is to be attached to the preceding phrase "Where, upon a hearing in equity"—a phrase that determines the conditions on which the order is to be entered.

A "hearing in equity," technically, is the trial of the case, including the introduction of evidence, the argument of the solicitors, and the decree of the chancellor. 10 *Encyclopædia Pleading and Practice*, 8.

This, however, is the "hearing in equity" that results in a final decree.

Now it seems to us that within the proceedings that, taken as a whole, constitute a hearing in equity resulting in a final decree, there is recognized by Section 7 to be other proceedings, interlocutory with reference to the final decree, but complete for the purposes of the appeal allowed, viz.: the particular proceedings out of which grow an interlocutory order; and that in such particular proceeding, within the larger proceeding, the "hearing in equity" provided in Section 7, was

meant to be the hearing of the motion, the introduction of evidence thereon by affidavit or otherwise, the argument of solicitors, and the order of the chancellor. Nothing short of that, it seems to us, can be said to be a "hearing in equity" upon the particular proceeding leading up to the appealable order; and nothing beyond that, it seems to us, could have been contemplated by this section.

Let us apply that view, then, to the case in hand. Undoubtedly the court has power, *ex parte*, to enter an order granting an injunction in the nature of a stay, or appointing a receiver, which becomes at once an enforceable order in the case. But such order is not, in our judgment, "upon a hearing in equity" within the meaning of Section 7. There has in fact on such order been no "hearing"—no opportunity on the part of one of the parties affected to introduce evidence, or to argue the cause. But none the less it is an order—an order substantially ripening into one "upon a hearing in equity," whenever the parties affected have been brought, or have come, into court, and an opportunity has been given them either to acquiesce in the order or to oppose it—the order to be considered "entered" within the meaning of the statutes the moment that it has been acquiesced in, or has been unsuccessfully opposed. Indeed any other interpretation of this Section, enacted in the interest of a more liberal policy of appeal, but upon the strict condition of promptitude, would have the effect either of enabling a party to cut off his antagonist's right of appeal by not advising him for thirty days of the order entered, or of enabling the party proceeded against to cut off the moving party from his right of having the appeal promptly taken, by not moving for a dissolution of the order until it suited his purposes to do so. And applying the section as we here interpret it, the appeal must be dismissed, as appellants, in their motion of November 2d, seem to have clearly acquiesced in the order appealed from as a standing interlocutory order in the cause.

The appeal is dismissed.

CHICAGO, B. & Q. R. CO. v. MUNGER.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1909.)

No. 2,833.

RAILROADS (§ 327*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Decedent, who was familiar with a city railroad crossing, rapidly approached it on a foggy morning and continued to cross the tracks without stopping, until he was struck by an engine and killed. From a point about 60 feet north of the main track to the crossing of the track for a quarter of a mile was an open view to a pedestrian approaching as decedent was, except for the dense fog. Several witnesses who were standing near the crossing testified that the noise of the approaching train was heard by them for a minute or more before it reached the crossing, or while the engine was a half mile away, and that notwithstanding the fog an engine could be discerned a distance variously estimated at from 50 to 200 feet. *Held*, that decedent was negligent in not stopping as he approached the track and making sure that he could cross in safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1044; Dec. Dig. § 327.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

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

George A. Mahan (O. M. Spencer and N. O. Borders, on the brief), for plaintiff in error.

C. T. Hays and Reuben F. Roy (J. W. Hays, on the brief), for defendant in error.

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

ADAMS, Circuit Judge. Mrs. Munger, the defendant in error, sued the railroad company for damages alleged to have been sustained by her by the death of her husband, Emil P. Munger. He was walking rapidly south on Lindell avenue, a public street in the city of Hannibal, Mo., and as he stepped upon the defendant's main track, crossing Lindell avenue in an easterly and westerly direction, he was struck and killed by the engine of a freight train just then approaching that avenue from the east. Plaintiff in her petition charged that the railroad company failed to ring a bell or sound a whistle or otherwise advise of the approaching train, that defendant's train was moving at an excessive and dangerous rate of speed, and that as a result of these acts of negligence the decedent met his death. The defendant relied on contributory negligence as its defense.

We may assume for the purposes of this case that the railroad company was guilty of all the acts of negligence charged against it. It is the settled law of this jurisdiction that such negligence would afford no ground for recovery in this action, if decedent's own negligence contributed to his death. The defendant's counsel contend that contributory negligence so clearly appears from the proof that it was the duty of the trial court to instruct the jury as a matter of law that plaintiff could not recover. The failure to give a requested instruction to that effect is the main error assigned and relied upon by the defendant for a reversal of this judgment.

What are the facts? The following are uncontroverted: The decedent was familiar, by reason of long experience and observation, with Lindell avenue and the railroad tracks which cross it. He had crossed the tracks twice a day, morning and evening, for years in going to and returning from his place of labor to his home. Lindell avenue was a well-traveled street 60 feet wide. On the morning of the fatal accident decedent was walking rapidly southwardly along Lindell avenue in the direction of the crossing tracks and did not come to a stop until after he was struck by the engine. From a point about 65 feet north of the main track continuously down to the crossing all the railroad track extending for a quarter of a mile east of Lindell avenue was, except for a heavy and dense fog which prevailed that morning, in open and plain view to any pedestrian going south on Lindell avenue. There were no natural or artificial obstructions to prevent hearing or seeing an approaching train. The decedent reached the track and stepped upon it so immediately in front of the approaching engine that he, although walking fast, was struck and killed before crossing the track, which, as is well known, is not over 4 or 5

feet wide. Several witnesses standing near to the crossing testified that the noise of the approaching train which ran over decedent was heard by them for a minute or more before it reached the crossing as some put it, or when the engine was half a mile away as others put it. The fog was unusually heavy that morning, but so that an engine could be discerned a distance variously estimated from about 50 to 200 feet. So much for the uncontroverted facts of the case. Witnesses differ as to whether the decedent looked to the east in the direction of the approaching train as he walked towards the track. Some say he did, and some say he did not. All agree that he was walking unusually fast with his head down.

On the foregoing state of facts there can be no doubt that, apart from the effect to be given to the fog of the morning, the decedent was guilty of contributory negligence fatal to recovery by his widow in this action. He rapidly approached a much-operated railroad track, stepped upon it, undertook to pass over it, and was overrun by an engine before he was able to get across. The physical facts conclusively show that either he did not look and listen for an approaching train, or that, if he did so, he undertook to cross in front of an immediately threatening danger, which he must have both seen and heard. In the one case he was guilty of inexcusable negligence, and in the other of inexcusable recklessness. In either, according to well-settled authority, he was guilty of such contributory negligence as precludes recovery in this action. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, *Rich v. C., M. & St. P. Ry. Co.*, 78 C. C. A. 663, 149 Fed. 79, and cases cited.

Does the heavy fog which prevailed that morning modify this result? The following authorities, we think, conclusively answer this question in the negative. *Railroad Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65; *Garlich v. Railroad Co.*, 67 C. C. A. 237, 131 Fed. 837; *Tomlinson v. C., M. & St. P. Ry. Co.*, 67 C. C. A. 218, 134 Fed. 233; *C., M. & St. P. Ry. Co. v. Donaldson*, 85 C. C. A. 185, 157 Fed. 821; *Davis v. Railway Co.*, 83 C. C. A. 488, 159 Fed. 10, 16 L. R. A. (N. S.) 424; *Denver City Tramway Co. v. Cobb* (C. C. A.) 164 Fed. 41.

In the *Andrews Case* this court said:

"The amount of care which will satisfy this requirement is necessarily adjusted to and varies with the danger to be guarded against. * * * If, therefore, when plaintiff approached the crossing, smoke interfered with the view along the tracks to the west, and prevented him from readily or plainly determining whether a train was coming from that direction, he was at once apprised of the increased danger, and it became his duty to exercise greater caution and vigilance for his own safety than would have been required otherwise."

In the *Davis Case*, supra, this court observed on the same subject as follows:

"If the view is obstructed, interfering with the sense of sight, then he must bring into requisition the sense of listening carefully and attentively."

In view of these authorities, and in the application of common sense to the situation, we entertain no doubt that the decedent, however dense and thick the fog may have been, was guilty of culpable

negligence in not stopping as he approached the railway track and making sure that he could safely venture upon the enterprise, dangerous at best, of crossing the track.

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

THE ANTHRACITE.

THE WILLIAM E. CLEARY.

(Circuit Court of Appeals, Second Circuit. March 16, 1909.)

No. 208.

TOWAGE (§ 11*)—INJURY TO TOW—TUGS ACTING JOINTLY—LIABILITY.

Where two tugs acted jointly in towing a barge, which was brought in contact with a rock by negligent steering, both tugs are responsible, though one of them was only acting as a helper; her master submitting her entirely to the commands of the master of the other.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 12; Dec. Dig. § 11.*]

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

This cause comes here upon appeal from a decree holding the tugs Anthracite and William E. Cleary both liable for negligent towage of the barge Sylvia, which, while being towed by them, was brought into contact with Mill Rock. The opinion of the District Judge, which sets forth the facts, is reported in 162 Fed. 384.

Amos Van Etten, for appellant.

Carpenter, Park & Symmers (James K. Symmers, of counsel), for the Anthracite.

Alexander & Ash, for appellees Hammond and others.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The Anthracite was in charge of the tow—five boats on a hawser. The Cleary was a helper, cutting boats out of the tow and taking them to their individual destinations; but at the time when the accident happened she was lashed alongside the Anthracite with a hawser of her own to the tow, both tugs furnishing the motive power. Appellant contends that she should be held free from fault, because the steering was done by the Anthracite, whose master directed the proceedings on the part of the Cleary. Reliance is had upon our former decision in *The Mason and Babcock*, 142 Fed. 913, 74 C. C. A. 83.

We concur with the District Court in the conclusion that the facts in that case differ so much from those in the case at bar that the decision above cited is not controlling. In the former case the *Mason*, which was the pilot tug, was held in fault because she did not give to the steamer in tow a timely signal to start up her own motive power just as a critical turn was about to be made in a narrow and tortuous channel. The *Babcock* was operating with the stern line of the tow.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

She was generally under the direction of the Mason as to course, etc.; but as to the choice of her own heading, the strength of pull she was giving, and the details of navigation necessary to move the stern, so as to supplement and assist the Mason's work at the bow, she was, as we said, "exclusively under the control of her own master, and, although both tugs were co-operating in the same general undertaking, each was acting independently of the other in doing her part of the work." The Mason was held because, in doing her part of the work, she committed fault. The Babcock was exonerated, because she had nothing at all to do with that part of the work (the signaling to the tow) in which the fault was committed.

Here the facts are different. The fault was in steering, rounding to so carelessly as to bring the tow against the rock. The master of the Anthracite directed the steering, and the master of the Cleary submitted herself entirely to his commands. There was no independent action. In the steering both participated. The master of the Cleary testified that about Eighty-Sixth street he took the wheel out of the becket to be prepared to put it wherever the captain of the Anthracite wanted it, first putting it to starboard; that it was the same as if there were two wheelmen in the tugs and one mind directing them both. Practically, for the time being, the master of the Anthracite was the master of the Cleary, and the latter vessel participated in the act—improper steering—which caused the catastrophe. This in no way resembles the case of *The Mason and Babcock*, nor that of *The Connecticut*, 103 U. S. 710, 26 L. Ed. 467, where that vessel was held in fault for not giving timely warning by whistle of a change of course, and the Stevens, her helper, was exonerated, because "it was not her duty to signal the movements of the Connecticut."

The decree is affirmed, with interest and single bill of costs.

ASSMANN v. TRAVELERS' INS. CO.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1909.)

No. 2,734.

INSURANCE (§ 171*)—ENDOWMENT POLICY—CASH SURRENDER VALUE—MISTAKE.

A ten-year endowment policy provided that, if insured should survive the endowment period, the company would pay \$2,000 in successive annual installments of \$200. The policy gave to insured an option to take the computed value of the annuities at any annual payment day after the first, and contained a table showing that the amount due in 1904, when the first annuity fell due, would be \$1,653.76. The policy as delivered also contained a table of cash surrender values for each \$1,000, which would be allowed by the insurer at the end of each five-year period from the date of the policy in 1894. Opposite the figure 5 denoting the five-year period were the figures \$266, indicating that the cash surrender value payable on each \$1,000 of the policy at the expiration of five years would be \$266, but opposite the figure 10, were the figures \$1,653.76. *Held* that, whether the option was designated as "commuted annuities" or "cash surrender value," the parties intended that the insured might at his election take the present value of the annuities, rather than payment in installments, and hence the figures indicating the surrender value at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the expiration of the tenth year were a mutual mistake and indicated the surrender value of the full policy, and not the surrender value of each \$1,000 thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 357; Dec. Dig. § 171.*]

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

F. J. McMaster (Carter, Collins & Jones, on the brief), for appellant.

Tyson S. Dines (M. F. Watts and Mr. W. M. Williams, on the brief), for appellee.

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

ADAMS, Circuit Judge. This was a bill to reform a policy of life insurance, and pending its determination to enjoin an action at law on the unreformed policy. In 1894 Assmann procured from the insurance company a 10-year endowment policy, whereby the insurance company agreed to pay him, if he should survive the endowment period, the sum of \$2,000 in successive annual installments of \$200 each. The primary obligation therefore of the company was to pay the insured 10 annuities of \$200 each, beginning in the year 1904 and ending with the year 1914, amounting in all to the sum of \$2,000 only, whenever paid. The policy gave to the insured an option, however, to take the commuted value of the annuities at any annual payment day after the first one. A table appeared on the back of the policy stating the amount of commuted annuities which the insured might at his option take at different periods during the 10 years while the annuities were falling due. According to this table, the amount due in 1904, when the first annuity fell due, was \$1,653.76. From that table it appears that if Assmann had lived, as he did, to the end of the endowment period, and had desired to avail himself of the option reserved to take the commuted value of his 10 prospective annuities, he was entitled to receive from the insurance company in all the sum of \$1,653.76. The policy as delivered to the insured also contained a table specifying the cash surrender value for each \$1,000 which would be allowed by the company at the end of each five-year period from the date of the policy in 1894. The policy being only for a period of ten years limited the application of this table to the surrender values payable at the end of five years and at the end of ten years. Opposite the figure 5, indicating the five-year period, were placed the figures \$266, indicating that the cash surrender value payable on each \$1,000 of the policy at the expiration of five years after its date would be \$266. Opposite the figure 10, denoting the tenth year after the issue of the policy, there were placed the figures \$1,653.76, indicating that the cash surrender value payable on each \$1,000 of the policy at the expiration of the endowment period of ten years would be \$1,653.76, or a total on the policy of \$2,000 of \$3,307.52.

It is the contention of the insurance company that a mutual mistake

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was made in placing the figures \$1,653.76 opposite the figure 10; that that amount was in fact and was intended to be the full amount that would be paid as the cash surrender value of the full \$2,000 policy, and not as the cash surrender value of each \$1,000 thereof.

Whether the option allowed the insured was to take the commuted annuities or the cash surrender value at the end of the endowment period, it is evident that both parties must have intended that the option of the insured was, in substance and effect, to take the then present worth in the year 1904 of 10 prospective successive annuities of \$200 each. Whether the option or privilege was designated as "commuted annuities" or "cash surrender value," it is clear that the purpose of the parties was to permit the insured at his election to take the then present value of the annuities, rather than to take them in installments of \$200 for 10 successive years. It is axiomatic that the net present worth of such annuities in the year 1904 could not exceed the aggregate of all of them irrespective of the times they were to mature. It is manifest that it must have been less than the total amount ultimately payable to the extent, at least, of reasonable interest on the deferred payments.

The policy as issued, instead of conforming to these most obvious arithmetical calculations and results, gave to the insured the right to accept as the cash surrender value of his policy of \$2,000 payable in annuities for 10 years the total sum of \$3,307.52. This is substantially twice the amount of any fair cash surrender value based on any reasonable rate of interest. It takes but little familiarity with the principles governing insurance to demonstrate that here was a plain and mutual mistake. The commuted value of all the annuities when the first annuity fell due was agreed to be \$1,653.76, while the cash surrender value, which if at all applicable at the period of maturity of the endowment, which is denied by the insurance company, is stated to be exactly twice that sum. As already stated, whether we call it "commuted annuities" or "cash surrender value," the obvious and plain purpose of either or both of them was to give to the insured the right to take the net present worth of his annuities, rather than to wait and collect them from year to year until the last fell due. We fail to see why upon principle the amount should not be exactly the same in either case. If the conclusion which we have just reached from the figures employed and obvious principles of insurance needed reinforcement, such reinforcement is abundantly found in the proof. No pretense is made by any witness that upon any sound principles of insurance an amount of \$3,307.52 could under any circumstances be the cash surrender value at the end of the endowment period of the policy of \$2,000 issued to Assmann.

During the progress of the trial below the insurance company was allowed to deposit the sum of \$1,653.76 in the registry of the court for the benefit of the insured. The learned trial court entered a decree reforming the policy as prayed for and ordering the amount of the deposit to be paid to the insured if he should elect to take it, or if he should elect to take the accruing annuities of \$200 a year, rather than avail himself of the right to commuted annuities, then that the deposit of \$1,653.76 be returned to the insurance company.

The court further enjoined the prosecution of the action at law on the unreformed policy. Certain provisions were made with respect to the interest which need no comment.

We are satisfied that the decree was substantially correct, and that any other result would not only have thwarted the manifest purpose of both parties in the contract as originally made, but would have worked a gross injustice.

The decree is affirmed.

KELLER v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1909.)

No. 1,521.

1. LARCENY (§ 5*)—SUBJECTS OF LARCENY—BLANK CHECKS—"PROPERTY."

Six blank checks, with stubs attached, each of the value of one cent, the personal property of the United States, constituted "property," the subject of larceny, under Rev. St. § 5456 (U. S. Comp. St. 1901, p. 3683), making it a felony to steal any kind or description of property belonging to the United States.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 11; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

2. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—EXPRESSION OF COURT'S OPINION.

It is permissible in federal courts for the judge to review the evidence and express his opinion with reference thereto, provided the jury are instructed that the decision of questions of fact must be made by them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731; Dec. Dig. § 762.*]

3. CRIMINAL LAW (§ 1129*)—WRIT OF ERROR—ASSIGNMENTS OF ERROR—RECORD.

Where the record on a writ of error showed that defendant's counsel stated the grounds of his motion for a new trial, presented his argument in support thereof, and that the court, having heard such argument and on consideration, overruled the same, an assignment that the court, when a motion for a new trial was made, summarily refused to allow a motion to be set for argument, but overruled it without consideration, was not sustained.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1129.*]

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

William A. Adams and Walker M. Yeatman, for plaintiff in error.
Edwin W. Sims and Harry A. Parkin, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. The indictment charged plaintiff in error with feloniously taking and carrying away "six blank checks with stubs attached, each of the value of one cent, of the goods and personal property of the United States." Section 5456, Rev. St. (U. S. Comp. St. 1901, p. 3683), makes it a felony to steal "any kind or description of property belonging to the United States." In support of the assignment that the court erred in overruling the demurrer to the indictment,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the contention is made that "blank checks" do not constitute property. While the promise or the grant or the obligation that may be expressed on paper is not a subject of larceny, it seems to us as futile to claim that "blank checks" are not within section 5456 as it would be to say that the "legal blanks" in a lawyer's office or at a stationer's are not susceptible of ownership.

Respecting the charge, no claim is made that the questions of law involved in the case were not fully and accurately stated to the jury. The exceptions rest on the mistaken assumption that it was error for the judge to review the evidence and express any opinion in relation thereto. Such expression is permissible in the federal courts, provided the jurors are instructed that the decision of questions of fact must be made by them. *Allis v. U. S.*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

The assertion that the court, "when the motion for a new trial was made, summarily refused to allow said motion to be set for argument, but, on the contrary, overruled it, without any consideration whatever," is not sustained by the record, which shows that counsel for plaintiff in error stated the grounds of the motion and presented his argument in support thereof, and that the court, "having heard said argument, and upon consideration," overruled the motion. Compare *Gourdain v. U. S.*, 154 Fed. 453, 83 C. C. A. 309.

The judgment is affirmed.

KARR et al. v. AMES et al.

(Circuit Court of Appeals, Seventh Circuit. January 26, 1909.)

No. 1,460.

STIPULATIONS (§ 14*)—EFFECT—RESTRICTION OF REFERENCE.

A cause having been referred to a master on defendant's motion, plaintiffs filed a supplemental bill attacking a new claim of title acquired by defendant K. *pendente lite*, after which a stipulation was signed agreeing that the court might refer the cause with respect to the supplemental bill, answers, and replications to the master for the same purposes as the original bill, and agreeing that the master might include, in his report of the case made by the original bill, his report of the case made by the supplemental bill, etc. *Held*, that the stipulation, instead of broadening the master's authority conferred by the original order of reference, confined his jurisdiction over the supplemental issues within the limits of the authority given him over those originally raised, and that it was therefore proper for the judge, when his authority was invoked for that purpose, to examine the evidence and determine the facts and law.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 14.*]

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

William Burry, for appellants.

Edward Peirce and Charles M. Peirce, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. Appellees, as heirs at law of Alexander Hannah, successfully prosecuted this suit to set aside certain deeds from Hannah to appellant Phillip A. Karr.

The record fails to support appellants' contention that the reference to the master was by consent, and therefore that the court was bound to let the report stand unless it clearly involved error of law or misapprehension or oversight of facts. *Kimberly v. Arms*, 129 U. S. 524, 9 Sup. Ct. 355, 32 L. Ed. 764. The recital is that:

"On motion of defendants, by their solicitors, this cause is referred to Walter McClellan Allen, one of the masters of this court."

Some months later appellees filed a supplemental bill attacking a new claim of title (from Hannah to Henry Karr and from Henry to Phillip Karr) acquired by Phillip Karr *pendente lite*. Thereafter a stipulation was signed that:

"The parties hereby consent and agree that the said court may enter an order instantan referring the said cause, with respect to said supplemental bill, answers, and replications, to the said master in chancery, for the same purposes as the original bill, answers, and replications now stand referred to said master, and further consent and agree that the said master may include, in his report of the case made by the original bill, answers, and replications, his report of the case made by the said supplemental bill, answers, and replications."

Clearly, it seems to us, the stipulation, instead of broadening the original order of reference, confined the master's authority over the supplemental issues within the limits of the authority given him over the original issues. It was, therefore, proper for the judge of the Circuit Court, when his authority was invoked for that purpose, to examine the evidence and determine the issues of fact and law.

An extended examination of the case has led us to conclude that the trial judge's findings of fact should not be disturbed; and on those facts there are no propositions of law that require reiteration.

The decree is affirmed.

UNITED STATES v. NEW YORK, C. & ST. L. R. CO.

(Circuit Court of Appeals, Second Circuit. March 16, 1909.)

No. 66.

1. CARRIERS (§ 37*) — TRANSPORTATION OF LIVE STOCK—FOOD AND REST—STATUTES—CONSTRUCTION—PENALTY.

Act Cong. June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibits a carrier from confining animals longer than 28 consecutive hours without unloading for rest, water, and food, but provides that on the written request of the owner, or person in custody of the particular shipment, the time may be extended to 36 hours, and imposes a penalty for each violation of the act. *Held* that, where several shipments of live stock belonging to different owners are carried in the same train in violation of the act, each shipment, and not the train load, is the integer for the purpose of ascertaining the number of offenses committed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PENALTIES (§ 40*)—ACTIONS—RIGHT OF REVIEW—NATURE OF PROCEEDINGS.

An action against a carrier to recover penalties for violation of Food Rest Act Cong. June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. 1907, p. 918), is civil, though the statute is penal; and hence the government is entitled to have a judgment in such a proceeding reviewed by a writ of error.

[Ed. Note.—For other cases, see Penalties, Dec. Dig. § 40.*]

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

This is a writ of error to review a judgment of the Circuit Court, Western District of New York, which held defendant liable for a penalty of \$200 under Act Cong. June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), forbidding railroads and certain other carriers from transporting cattle and other live stock confined in cars for a period longer than 28 consecutive hours without unloading. The train whose management was complained of contained shipments by two different owners, and each shipment was assigned as calling for a separate penalty. Violation of the provisions of the statute is admitted. The judge at circuit held that but a single penalty could be imposed for all shipments by the same train, and the government has appealed.

Lyman M. Bass, U. S. Atty., and J. O. Moore, Asst. U. S. Atty. Hoyt & Spratt (Thomas D. Powell, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Since the decision below the Court of Appeals in the Sixth Circuit has held that each shipment not transported in conformity with the statute constitutes a separate offense. U. S. v. Baltimore & Ohio S. W. R. R., 159 Fed. 33, 86 C. C. A. 223. We concur in its reasoning and conclusion.

Defendant in error also objects that there can be no review of the judgment by the government on the ground that this is a criminal action. This point has been overruled in U. S. v. Baltimore & Ohio S. W. R. R., supra, and in the Circuit Court of Appeals for the Ninth Circuit in Montana Central Ry. v. U. S. (C. C. A.) 164 Fed. 400.

The judgment is reversed.

COOK et al. v. KLONOS et al.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1909.)

No. 1,510.

MINES AND MINERALS (§ 29*)—ASSOCIATION PLACER CLAIMS—FRAUDULENT LOCATION—RIGHTS OF INNOCENT LOCATORS.

Where the location of an association placer mining claim is invalid for fraud on the part of some of the locators, if the work has been kept up and the law and district regulations complied with, locators who were not implicated in the fraud, but acted in good faith, may individually select and hold their proportionate part of the land within the limits of the association claim.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 29.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On rehearing. Denied.

For prior opinion, see 164 Fed. 529.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. The petition for rehearing is denied. We are satisfied with what is said in the opinion in respect to Barnette and the six absent locators; but a further examination of the record does not satisfy us that Cook and Ridenour were parties to the fraud. If they were not, and they joined in the location in question in good faith, and the ground was open to location, we think they are entitled to select 20 acres each within the exterior boundaries of the associated claim, provided they have continued to conform to the requirements of the statute and the local rules of the mining district. We accordingly modify our judgment so as to read:

The judgment of the court below is affirmed as to the appellants A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, and A. R. Armstrong, and as to the appellants Henry Cook and J. C. Ridenour it is reversed, and the case remanded, with leave to them to file a supplemental bill, should they so elect, and in that event for further proceedings in accordance with the views here expressed.

CAZIER v. MACKIE-LOVEJOY MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909.)

No. 1,499.

PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—CONTEMPT PROCEEDINGS FOR VIOLATION OF INJUNCTION—RULINGS APPEALABLE.

In contempt proceedings instituted in a suit for infringement of a patent, and in which the defendant was adjudged in contempt for violating an injunction and a fine imposed payable to the United States, the refusal of the court to permit the complainant to introduce evidence of his damages on account of the new infringement, and to recover such damages and costs in the contempt proceeding, related to a matter of procedure, within the discretion of the court, and is not reviewable by appeal.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 326.*]

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

See, also, 157 Fed. 88, 84 C. C. A. 591.

Joseph Cummins, for appellant.

Thomas F. Sheridan and George L. Wilkinson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The appeal is by the party in the court below in whose favor the decree was entered. The ground of the appeal is that although by a former decree, the appellee was found to be an infringer of patent No. 696,940, issued to appellant April 8th, 1902 (Cazier v. Mackie-Lovejoy Mfg. Co., 71 C. C. A. 104, 138 Fed. 654; Mackie-Lovejoy Mfg. Co. v. Cazier, 157 Fed. 88, 84 C. C.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. 591), and by this decree appellee was found guilty of contempt on account of a new infringement of appellant's patent, for which a fine of fifty dollars was imposed, to be paid to the United States, the Court erred in denying appellant's motion to take evidence, in connection with the contempt proceedings, as to his damages by reason of the new infringement, and his costs and expenses, in the contempt proceedings—the contention of appellant being that he was entitled, as a matter of right, to a hearing, in the contempt proceeding, not only of the question whether there had been a contempt, but also of the question of whether there were damages by reason of the infringement constituting the contempt, and the amount thereof, and to have such damages made a part of the decree.

Whether appellant can appeal at all from a decree that finds the appellee guilty of contempt and imposes a fine to be paid to the United States, is a question we do not decide, for that is not the part of the decree appealed from that is assigned as error. We dismiss this appeal because, limited as it is by the assignments of error to the alleged error of the Circuit Court in not broadening the hearing and the decree so as to cover damages and costs, as well as the fine, the portion of the decree thus complained of is not appealable.

Substantive rights are one thing, procedure or the way to attain substantive rights, is another. A decree disposing of substantive rights is usually, in some way or other, appealable; the exercise of discretion by a court as to the procedure, or way of attaining those rights, is not usually appealable. True when the validity of a patent has been established, and the defending party decreed to be an infringer on account of certain specific devices brought before the court, the infringing party may not, by mere colorable changes, avoid the effect of the decree as an adjudication between the parties; and the offending party may be reached either by separate suit or by a supplemental bill. *Murray v. Orr & Lockett Hardware Co.*, 153 Fed. 369, 82 C. C. A. 445. But whether the procedure be by separate suit or by supplemental bill, the party in one way or the other securing his substantive right, is a matter in the discretion of the court, and therefore not appealable.

The denial to appellee of his motion for damages, costs and expenses to be decreed to him in the contempt proceedings, is not a denial of his substantive right to have, in some form or other, damages, costs and expenses. The only thing denied him is a particular method of obtaining his damages, costs and expenses. And if the court may choose, as above pointed out, the procedure or method whereby a substantive right shall be pursued, and such choice is a matter of judicial discretion (*Murray v. Orr & Lockett Hardware Company*, *supra*), we see no reason why the court may not, also, as a matter of discretion, determine that the method shall not be in connection with, or a part of, the contempt proceedings; from which it follows that that portion of the decree upon which error is assigned, is not appealable.

The appeal is dismissed.

PAGE MACH. CO. v. DOW, JONES & CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909. On Rehearing, March 25, 1909.)

No. 147.

1. PATENTS (§ 328*)—INFRINGEMENT—PRINTING TELEGRAPH INSTRUMENT.

The Joy patent, No. 780,664, for a printing telegraph receiver, as to all claims except claim 12, *held* valid and infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 324*)—SUIT FOR INFRINGEMENT—DISCLAIMER—EFFECT OF DECISION OF PARTIAL INVALIDITY BY TRIAL COURT.

Where a Circuit Court, in a suit in equity for infringement of a patent, has held certain claims of the patent invalid, as too broad, but has entered an interlocutory decree granting an injunction and accounting for infringement as to other claims, from which defendant has appealed, the Circuit Court of Appeals, on an affirmance of the same, will not require complainant to enter a disclaimer, under Rev. St. § 4922 (U. S. Comp. St. 1901, p. 3396), as to the claims adjudged invalid by the Circuit Court, until by the entry of a final decree he has had the opportunity to appeal and have such adjudication reviewed by the appellate court.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 324.*]

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

For opinion below, see 166 Fed. 473.

Emerson R. Newell (Brown & Seward, of counsel), for appellant.
Gifford & Bull, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decree of Circuit Court affirmed, with costs, on opinion of Judge Hazel.

On Rehearing.

LACOMBE, Circuit Judge. The Circuit Court, *inter alia*, held that all of the claims of the Joy patent, No. 780,664, were valid and infringed. Upon a rehearing this decision was modified by giving to claim 12 of that patent a broader construction than at first, and, as thus construed, finding anticipation in a prior patent. Interlocutory decree for injunction and accounting on the other claims was entered accordingly. Defendant appealed from so much of the decree as held these claims valid and infringed. Complainant could not appeal from so much of the decree as dismissed the bill as to claim 12, because the decree was not final. This court, after argument of the appeal, affirmed the Circuit Court. Defendant contends that this court should instruct the Circuit Court that no decree should be granted—or, at least, that no injunction should issue—upon this patent until a disclaimer of claim 12 has been filed in the Patent Office and a certificate thereof lodged in the case. Reliance is had on sections 4917 and 4922, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 3393, 3396).

The practice indicated in the motion apparently originated in this circuit, and has been there followed in a large number of cases. enu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merated in the brief as follows: *Myers v. Frame*, Fed. Cas. No. 9,991; *Burdett v. Estey*, Fed. Cas. No. 2,145; *Christman v. Rumsey*, Fed. Cas. No. 2,704; *Schillinger v. Gunther*, 17 Blatchf. 66, Fed. Cas. No. 12,458; *Atwater v. Beecher* (C. C.) 8 Fed. 610; *Tyler v. Galloway* (C. C.) 12 Fed. 567; *Brainard v. Cramme* (C. C.) 12 Fed. 621; *Matthews v. Spagenberg* (C. C.) 19 Fed. 823; *Hake v. Brown* (C. C.) 37 Fed. 783; *Union Paper Bag Co. v. Waterbury* (C. C.) 39 Fed. 389; *Electric Accumulator Co. v. Julien* (C. C.) 38 Fed. 117; *Steam Gauge Co. v. Kennedy* (C. C.) 41 Fed. 38; *Smead v. Union* (C. C.) 44 Fed. 614; *Williams v. Barnard* (C. C.) 41 Fed. 360; *Brush v. Electric Acc. Co.* (C. C.) 47 Fed. 48. In the case last above cited Judge Coxe said:

"The rule which obtains in this circuit requiring a disclaimer of invalid claims as a condition of a decree has always seemed an arbitrary one. It certainly seems inequitable that the court, at nisi prius, should compel the patentee to renounce forever a claim which may be held valid upon appeal. It is possible that this rule may be modified by the Circuit Court of Appeals."

And in *Ballard v. McCluskey* (C. C.) 58 Fed. 880, the same judge said:

"The claim is too broad, and under the arbitrary, and to my mind unjust, rule which obtains in this circuit must be disclaimed."

This is the last reported case in this circuit, but for the past 15 years the writer, sitting at circuit, has repeatedly refused to follow this practice on the expressed ground that it was grossly inequitable and that no decision of the Supreme Court constrained any judge to enforce it. In no case was such refusal brought up for review before the Court of Appeals. It should be borne in mind that the Supreme Court decisions referred to and relied on were rendered at a time when there was but one appeal in a patent cause, taking the whole case on appeal from final decree direct from the Circuit to the Supreme Court. The act of 1891, and its construction by the Supreme Court (*In re National Enameling Co.*, 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707), had not made it necessary, when a trial judge held some claims to be valid and infringed and other claims to be invalid, to have two appeals on practically the same record—sometimes years apart—to secure a determination of the controversy.

The Supreme Court decisions referred to in the brief are these:

O'Reilly v. Morse, 15 How. 120, 14 L. Ed. 601. In that case the Circuit Court held the eight claims of the patent to be valid and issued an injunction. The Supreme Court affirmed as to the other claims, but held that the eighth claim was void and should be then disclaimed; there being no unreasonable delay in filing the disclaimer up to that time when the case was decided by the Supreme Court on appeal, because until then complainant had no reason to think the claim was void.

In *Seymour v. McCormick*, 19 How. 106, 15 L. Ed. 557, the court said:

"In respect to the question of unreasonable delay in making the disclaimer, as going to the whole cause of action, the court are of opinion that the granting of the patent for this improvement, together with the opinion of the court below maintaining its validity, repels any inference of unreasonable delay in correcting the claim, and that, under the circumstances, the question is one

of law. This was decided in the case of the telegraph (*O'Reilly v. Morse*, 15 How. 121, 14 L. Ed. 601). The Chief Justice, in delivering the opinion of the court, observed that "the delay in entering it [the disclaimer] is not unreasonable, for the objectionable claim was sanctioned by the head of the office. It has been held to be valid by a Circuit Court, and differences of opinion in relation to it are found to exist among the justices of this court. Under such circumstances, the patentee had a right to insist upon it, and not disclaim it until the highest court to which it could be carried had pronounced its judgment."

Silsby v. Foote, 61 U. S. 378, 15 L. Ed. 953, is to the same effect.

In *Gage v. Herring*, 107 U. S. 646, 2 Sup. Ct. 825, 27 L. Ed. 601, the court says:

"Considering that the question of the validity of the new claim in the reissue is a question of law upon the face of the patent, and that its validity has been sanctioned by the Commissioner of Patents in granting the reissue and upheld by the Circuit Court, there has been no unreasonable delay in entering a disclaimer; for the plaintiffs were not bound to disclaim until after a judgment of this court on the question."

But it required complainant to file disclaimer before entering a decree of the Supreme Court, and under the section of Revised Statutes, supra, refused him costs. To the same effect is *Yale Lock Co. v. Sargent*, 117 U. S. 536, 6 Sup. Ct. 934, 29 L. Ed. 954.

There is nothing in these decisions which, by requiring disclaimer to be filed upon a partially adverse decision in the Circuit Court, practically makes the single judge who first hears the cause a final arbiter, with no opportunity to review his decision in any appellate tribunal. Such an interpretation of the section seems unreasonable, and the so-called "rule of practice" in the Second circuit, which is the subject of the present motion, will no longer be followed.

The motion to instruct is denied, but, of course, under the Revised Statutes, the Circuit Court can give no costs.

EMPIRE CIRCUIT CO. et al. v. CHANNON.

(Circuit Court of Appeals, Seventh Circuit. January 19, 1909.)

No. 1,498.

1: PATENTS (§ 167*)—CONSTRUCTION—LIMITATION OF CLAIMS BY SPECIFICATION.

A claim of a patent calling in general terms for a "noncombustible and nonconducting material" cannot be limited by construction to a particular noncombustible nonconducting material named in the specification, either to avoid anticipation or infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—INVENTION—FIREPROOF DROP CURTAIN.

The Channon patent, No. 769,788, for a fireproof drop curtain for theaters, consisting of a double curtain, one wall of sheet metal and the other of a noncombustible and nonconducting material, with an air space between, is void for lack of invention in view of the prior art, which disclosed a double drop curtain, with an air space between the walls, and also a double fireproof window shutter, one wall of which was of noncombustible nonconducting material.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The bill in the Circuit Court was to restrain infringement of Letters Patent No. 769,788, issued September 13th, 1904, for a fireproof drop curtain used in theatres, and the decree appealed from is a decree sustaining the validity of the patent, and finding that the appellant was an infringer.

The invention is described by the patentee as follows:—

“My invention relates to a novel construction in a fireproof drop-curtain for theaters, the object being to provide a curtain of light and durable construction capable of withstanding high temperatures; and it consists in the features of construction and combinations of parts hereinafter fully described and claimed.

“In the accompanying drawings, illustrating my invention, Figure 1 is a fragmentary rear elevation of a curtain constructed in accordance with my invention, the rear wall being partly broken away. Fig. 2 is a fragmentary plan section of same on the line 2 2 of Fig. 1. Fig. 3 is a sectional view of the inner or stage wall of the curtain.

“My said invention consists, primarily, in providing a curtain the outer wall (or that which faces the auditorium) of which is composed of sheet metal, preferably corrugated sheet-steel, and the inner or stage wall of which is composed of a non-conducting non-combustible material, such as asbestos, such vitrified asbestos consisting of asbestos sheets which, so far as the writer is informed, are impregnated with a fireproof cement or other composition and baked, such cement or other substance acting as a binder for the fiber and rendering the sheets very hard and stiff, so that they become far more durable and better adapted for this purpose. The said inner wall is substantially hollow and is separated from the front wall by an air-space, the said curtain being thus relatively reinforced and the steel outer wall being thoroughly protected from the heat, so as to prevent warping during its operation and efficiently protecting the auditorium not only against the direct entrance of flames and smoke, but also against rapid heating to a degree dangerous to life.

“To these ends my said curtain consists of an outer wall A, of sheet metal, preferably corrugated, and an inner wall B, of a non-conducting non-combustible material, preferably vitrified asbestos, such inner and outer walls being secured together by means of bolts C and held apart by means of washers D inserted over said bolts C and interposed between said walls A and B, said washers being also composed of a non-conducting non-combustible material, the free space E between said walls A and B forming an insulating air-chamber. The said wall B is preferably hollow, being composed of two sheets F and G, between which a corrugated sheet of vitrified asbestos is interposed, such corrugated sheet being the equivalent of a plurality of longitudinally-disposed strips, thus providing a large number of vertical air-spaces H, which serve to render such rear walls still further impenetrable to heat.

“Owing to the large area of such curtains, it is essential that the same should be thoroughly reinforced and braced, and to this end I secure to the inner face of the metal wall or screen A a plurality of vertically-disposed parallel T-irons J and connect the same together by means of a plurality of inclined cross-braces K, such T-irons and cross-braces forming substantially a frame which carries the walls or screens A and B.

“The edges of the curtain are secured in channel-beams L, and to the outer faces of the webs of the channel-beams inclosing the vertical edges are secured U-shaped guides M, which receive the flanges of Z-bars N, secured to the stage side of the proscenium-wall O at each side of the opening, such interfitting guides serving to prevent flame and smoke from issuing into the auditorium.”

Claims 1, 2, 3, and 5 (the only claims sued upon) are as follows:

“1. A fireproof drop-curtain comprising a wall of sheet metal and a wall of non-conducting, non-combustible material secured to said steel wall, there being an air-space between said walls.

“2. A hollow fireproof drop-curtain having one wall composed of sheet metal and its other wall composed of a layer of non-conducting, non-combustible material.

"3. A fireproof drop-curtain consisting of a wall of corrugated sheet metal, a wall of non-conducting, non-combustible material secured to said sheet-metal wall and separated therefrom by an air-space."

"5. A fireproof curtain comprising two screens of fireproof material, one of which is a non-conductor of heat, bolts securing said screens together, and means interposed between said screens at intervals for holding same apart to provide an air-space between the same."

It is admitted by appellee that unless claims 1 and 2 can be sustained, claim 3 cannot be sustained—the only distinction between that claim and claims 1 and 2 being that in the latter "corrugated sheet metal" is substituted for "sheet metal" as used in the preceding claims. It is also conceded by appellee that unless claims 1, 2 and 3 are sustained, claim 5 does not bring the appellant's device within the patent, for the means used in appellant's device to separate the walls, are different from the means described in claim 5. And it is conceded by appellant that if claims 1, 2 and 3 are sustained, appellant's device is an infringement.

The following patents were cited at argument:

No. 187,140, Feb. 6, 1877, J. W. Hoyt.

No. 223,401, June 6, 1880, W. D. Smith.

No. 228,548, June 8, 1880, H. McDonald.

No. 238,182, Feb. 22, 1881, W. Swindell.

No. 251,528, Dec. 27, 1881, G. L. Damon.

No. 298,281, May 6, 1884, C. F. Brigham.

No. 363,905, May 31, 1887, J. G. Merrill.

No. 551,704, Dec. 17, 1895, A. Younger.

No. 653,976, July 17, 1900, Verdel & Saino.

No. 675,955, June 11, 1901, W. R. Kinnear.

Specification forming part of Letters Patent No. 751,664, dated Feb. 9, 1904.
English Patent No. 2,601 of 1883, A. Clark.

Dwight B. Cheever and Howard M. Cox, for appellants.

Walter H. Chamberlin, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). Channon's principal claim of invention is that, for the first time in theatre fire proof curtains, he introduces a structure, one of the walls of which (that wall being the one next to the fire) is composed of non-conducting, non-combustible material described in the patent as "asbestos and the like." Laying aside for the time being, the fact that such wall was to be used in connection with a theatre curtain, we find in patent No. 223,401 issued to W. D. Smith, June 6th, 1880, a fire proof shutter or screen, one wall of which was of sheet metal, and the other of non-conducting, non-combustible material (in the Smith patent bricks made of any refractory material) the wall of the shutter exposed to the fire being the wall composed of such non-conducting, non-combustible material. The sole difference then between the Smith shutter and the Channon drop curtain consists, first, in the fact that one is a shutter for a window, and the other a drop curtain for the stage of a theatre; and secondly, that the non-combustible, and non-conducting material in the one is refractory bricks, and in the other "asbestos or the like"; or, to state it in another way, the three claims sued upon in the Channon patent, literally and unquestionably include the Smith shutter, unless the words "non-conducting, non-combustible material" in the Channon claims are by reference back to the de-

scription, to be read as excluding refractory bricks, and except, also, for the fact that they relate to different uses.

We cannot limit the language of the claims thus contended for. *Carnegie Steel Co., Ltd., v. Cambria Iron Co.*, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968, is no authority for such limitation. In that case the question was not whether the claim should be limited by decree of court to the specific things mentioned in the specification, but whether the claim had been "illegally expanded beyond the specification." No such question is presented in this case. The question presented to us is, whether under a claim including on its face "non-combustible, and non-conducting material" we may say, by judicial decree, that it does not mean this or that non-conducting, non-combustible material, but only such non-conducting, non-combustible material as is named in the specification. Were conditions reversed—the alleged infringing device having a non-combustible non-conducting material, but not asbestos, such for instance as mineral wool,—would this power of the court to limit by decree the claims of the patent to the particular material specified be admitted? And if not, at what specific non-conducting non-combustible material are we to draw the line? Appellee clearly has not meant to limit itself to asbestos. Where, then is the limit, short of anything non-conducting and non-combustible? Clearly, it seems to us, the concept of fireproofing, though not as a stage curtain, by a double wall, one wall of which (the one exposed to the fire) should be non-conducting and non-combustible, so as to prevent, among other things, the warping of the fire proof structure when exposed to the fire, is a concept set forth in the Smith patent, which to that extent, at least, anticipated the Channon patent.

Now does the fact that the Channon patent is for a use different from the Smith shutter, save the Channon patent from the Smith patent as an anticipation? Is there invention in the transference of the concept involved from use as a window shutter to use as a stage curtain? The new use of an old concept is often invention. But Channon did not introduce the old concept into what, when his patent was applied for, was a new use. As long ago as 1883, Alexander Clark took out an English patent "for an improved fire proof screen or shutter for separating the stage from the audience of theatres, together with means and apparatus for working the same" which described "a rigid structure made of iron or steel parts, riveted to suitable channel and angle iron framing, the curtain, screen or shutter being constructed double, a sufficient air space being left between the two skins to prevent the rapid transmission of heat." And on the 18th of January, 1904, twenty days before Channon's application for a patent was filed, the City Council of Chicago, following the great fire in the Iroquois Theatre in Chicago in the December preceding, in which several hundred persons perished, passed an ordinance requiring that all theaters be equipped with fire proof curtains of the following description:

"The main proscenium opening shall have a substantially vertically operated steel curtain, fire proofed on the stage side, which shall be raised and lowered by mechanical power and which shall be in constant use as the regular curtain and act drop."

Indeed, it was to meet the requirements of this ordinance, as well as to safeguard the patrons of theatres, doubtless, that Channon took out the patent sued upon. In other words Channon got his concept out of the prior art and the city ordinances, that is to say, the thought of fireproofing theatre curtains; and also got the mechanical means employed out of the prior art, that is to say, the use of two walls, with an air chamber between them, the wall exposed to the fire being of non-conducting, non-combustible material—leaving no ground, of any kind, on which to sustain the patentability of his curtain.

The decree is reversed, with instructions to dismiss the bill for want of equity.

NOTE.—After the filing of the opinion in this case, the court denied a motion by appellee (complainant below) for leave to file a disclaimer in respect to the patent.

TRUMBULL ELECTRIC MFG. CO. v. CONNECTICUT ELECTRIC MFG. CO.

(Circuit Court, D. Connecticut. March 19, 1909.)

No. 1,232.

PATENTS (§ 328*)—ANTICIPATION—ELECTRICAL SWITCH AND CUT-OUT.

The Trumbull patent, No. 820,076, for a panel switch and cut-out, if conceded to disclose invention, which is very doubtful, is void for anticipation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. On final hearing.

George B. Ward and John W. Joy, for complainant.

Thomas F. Ryan and Hubert Howson, for defendant.

PLATT, District Judge. This is a suit in equity, based upon letters patent No. 820,076, dated May 8, 1906, owned by complainant as assignee of John H. Trumbull, for panel switch and cut-out. There are five claims in the patent and all at issue.

The specifications set forth two objects of invention: First, to form a compact, simple device, which may be arranged in several combined units, for controlling various circuits, capable of use with either a two or three wire system; second, to combine in a single structure an automatic cut-out and manually operated switch for controlling an electric circuit, and to arrange the line wire connections for said combination so that they will lie in parallelism. Figs. 2 and 3 of the drawings show the devices referred to in this latter-stated feature of invention, and may be used to exploit the other feature of invention, and are so shown in Fig. 1, which pictures that object, but other forms might be used. The first three claims are directed at the first feature of invention, and claims 4 and 5 at the second feature.

The defenses to which this memorandum will be confined are: (1) Lack of invention. (2) Prior invention.

To understand the situation it is only necessary to take a running

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

glance at the prior art. It had long been a common expedient in the electrical art to apply fuse blocks to either the main or branch line wires, so that in case the wire became too heavily loaded with electricity, or other abnormal situations arose, the fuse would become ignited and thereby produce a short circuit, and these fuse blocks were generally known as "automatic cut-outs." Manual switches were common and well-known devices upon both main and branch line constructions. It was also well understood how to combine in one structure the manual switch and the main line automatic cut-out.

When boiled down it would seem that the patentee, with all that light shining upon him, only claims to have shown how to combine in one structure, or mount upon one base, the well-known manual switch and the well-known branch line cut-out. It is true that he claims to have done it in such a way that a large number of the unitary combined structures can be mounted, side by side and end to end, and touching each other, and that when so mounted the complete device is compact, satisfactory, easily produced, and comparatively inexpensive; but he says that it is essential in getting this result to put in the "barrier, 12," between the wires. This expedient was ready at hand in the art. The combining upon a panel of a plurality of the original combinations was also foreshadowed in a variety of ways, and particularly in the Hornsby & Anger patent, No. 718,460, January 13, 1903. We have no means of knowing that the patentee's conception travels back of that.

When studying the doings of the Patent Office in respect to different claims of invention, I am every now and then impressed with the mysterious things which occasionally come forth from its recesses, and I am bound to say that the reason for finding invention in the claims of this patent escapes me. In the first three claims the inventive thought is to build up a panel board from units, and the units are described in very general terms. It may be fair to assume, however, that the thought was directed to the units described in the next breath in claims 4 and 5. We must make that assumption in order to get even a hint of novelty, and even then I cannot find any invention in the thought. The ordinary mechanic could not help doing what the patentee has explained to us so minutely and diffusely, and in truth in such a cumbrous way as to almost disguise any thought whatever.

I could place my decision there if it were necessary; but I appreciate the uncertain foundation upon which the dividing line between mechanical skill and invention rests, and am aware that, although to my mind the things which the patentee claims to have discovered would have been obvious to the average mechanic in the electrical art, to another mind invention may be labeled upon his disclosure. Assuming, then, the existence of the spark divine, it seems too plain to demand extended comment that the same spark twinkled in other brains before it appeared in the patentee's. The letter of E. G. Bernard of October 29, 1901 (Defendant's Exhibit 68), shows beyond peradventure that the patentee's conception was at that time clearly defined in Mr. Bernard's mind, and that it covered, not only the individual blocks, but the assembling of such units upon a panel. Nothing is omitted, except the "barrier, 12," of claim 5, which is obviously

nothing more than adding to the combination a well-known safety device, which performs no new function and adds no new result. Placing the switch and fuse on one panel does not give "barrier, 12," anything to do that it had not been doing before the combination of the separate old devices.

The proofs further establish clearly that Bernard's conception was followed by a working wooden model, produced some time in September, 1902, and by a completed drawing in October, 1902, from which a completed device was approved in October, 1903, and sales of the device were made and the goods actually shipped in January, 1904. Here is plain proof of invention and of its practical use prior to even the application for the patent in suit, viz., May 25, 1904, forgetting, as we must, the date of the patent, because, for some reason or other, it did not come out of the office until May 8, 1906. For the sake of brevity, I refrain from commenting upon the testimony as to earlier invention and reduction to practice by parties having to do with the Banner device.

In this situation the obligation upon the patentee to carry his date of conception and reasonably prompt reduction to practice back of the others who have told their plain tales bears down with tremendous force. That he has failed to carry that burden must be obvious to an unprejudiced reader of the testimony. As against the G. E. Bernard device he has no standing. As against the Banner device it is possible that the Wheeler drawing may carry his date of conception back of Harvey's disclosure. It is not necessary to my final conclusion to discuss the value of that drawing as a bit of evidence, because, if it is given full probative force, the fact remains that the Harvey conception was embodied in practical form as early as November, 1903, at which times the devices had been made and sold, catalogued, and pictured in trade journals.

All this, it will be noticed, was prior to the application for the patent in suit, and opens wide a possibility that patentee's conception had reservoirs to draw upon other than his own individual inventive genius. Furthermore, all this has to do with single combination switch and cut-out branch blocks, and the first sign that the assembled panel idea was in the patentee's mind appears in the leaflet, Exhibit F, dated March, 1904; whereas, there is much testimony that Bernard and Harvey knew at the outset how the single combined blocks could be assembled on a panel.

Such in the rough are some of the thoughts which force me to my final conclusion. The gist is this: There is the gravest doubt whether there is any invention in the patent; but, granting that there is invention, it is so plain that he who runs may read the fact that other people had the thought before the patentee had it. If they looked at the matter as I do, it is not strange that they did not consider it worth the trouble and expense of asking for a patent.

It is obvious that the view taken of this controversy renders it unnecessary to discuss many of the contentions presented by counsel, both orally and in printed briefs.

Let the bill be dismissed, with full costs to the defendant.

CENTRAL OIL & GAS STOVE CO. v. SILVER & CO. et al.

(Circuit Court, E. D. New York. April 8, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—OIL BURNERS.

The Wilder patents, No. 653,893 and reissue No. 11,905 (original No. 595,231), both for improvements in oil burners of the wickless type, where the combustion takes place at the surface of the oil, the improvements consisting of raising and lowering the oil in the holder to facilitate ignition, are valid as limited to the particular means shown, but not as covering the result by whatever means accomplished. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity.

William Wallace White (C. H. Duell, of counsel), for complainant.
Stephen J. Cox, for defendants.

CHATFIELD, District Judge. The complainant is the assignee of the rights of one William H. Wilder, who, on the 17th of July, 1900, took out a patent, No. 653,893, for what he declares to be new and useful improvements in oil burners, designed to provide a burner for an oil stove, in which vapor is generated from the surface of the oil, in a suitable holder, thus avoiding the necessity of a combustible wick, which would supply the oil by capillary attraction, and thus also avoiding the use of a burner having as its fuel vapor generated in a vapor holder, as distinguished from a holder in which the burning takes place at or immediately above the surface of the oil.

Three styles of burners or oil stoves, as classified according to the above-named divisions, will be explained more at length later in the opinion. The Wilder patent, in its specifications and claims, covers not only the particular form of burner designed for combustion upon the surface of the oil itself, but also means for quickly filling or flooding the burner of the kind described, and then for withdrawing this extra supply of oil, thus making ignition easy. In a large number of the claims Wilder describes different styles of combustion chambers, and other elements of what may be called the burner and stove, with which we have nothing to do in this suit.

Claim 5 of the particular patent in question is as follows:

"In an oil burner, an oil holder and an oil supply with means for causing the oil to flood the holder for igniting purposes while maintaining the feed of oil."

Claims 15, 16, 17, and 18 also call for a valve controlling the supply of oil, to be used in conjunction with a burner of the kind and description previously stated in the patent.

Upon the 9th of April, 1901, William H. Wilder and Helen M. Wilder, his assignee, obtained a reissue, under No. 11,905, of another patent, issued under date of December 7, 1897, No. 595,231, and this reissue patent was later registered in the name of the Central Oil & Gas Stove Company, as assignee; the Central Oil & Gas Stove Company having obtained by assignment the rights to the invention therein described.

This second patent, as reissued, states that the object of the invention

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is to provide a stove in which the burner and oil reservoir are adjustable in relation to each other, so that the oil level in the fuel holder of the burner may be raised or lowered. The patent relates to a burner of the nature described in the earlier patent above referred to, and both in the drawings and in the specifications of this reissue patent a valve is inserted, adjoining the oil burner, or each oil burner, if more than one is employed, which valve is substantially the same as that described in the earlier patent. In the reissue patent, also, it is stated that the oil chamber may be made adjustable with relation to the burner, or that the burner may be adjustable in relation to the oil chamber, for the purpose of raising or lowering the oil level in the fuel holder of the burner, for the purpose of using the invention claimed in the patent, and Mr. Wilder further states that "oil" is intended to include any kind of liquid fuel.

Claims 9, 10, and 11 are shown by the pleadings and the testimony to be those with reference to which the defendant's stoves are alleged to be an infringement, and claim 9, which for the purposes of this suit raises substantially the same questions as claims 10 and 11, is as follows:

"9. An oil stove, comprising a reservoir having a maintained oil level, a liquid fuel holder in communication therewith in which the fuel freely rises, said parts having movement to secure a proper adjustment for normal burning, where in the oil level in the reservoir will be the level of the oil in the fuel holder, and means intermediate of the oil reservoir and fuel holder for controlling the depth of oil in the holder below its level at said normal burning, substantially as described."

The defendant has been in the business of manufacturing and selling oil stoves for a period commencing before the issue of either of these patents, and, as appears by the testimony, was defendant in a previous action, in which it was shown that a certain type of stove, in which both the oil burner and the oil reservoir could be raised or lowered, then manufactured by the defendant, was an infringement of one of Wilder's patents, and by consent the complainant had a decree therefor. It further appeared from the testimony that during the interval between December 7, 1897, and April 9, 1901, an interference proceeding in the Patent Office, brought by one Blackford, resulted in substantial changes in the claims of the Wilder patent as finally issued, and the defendant here maintains that new and additional claims were inserted, making the reissue an abandonment of certain features of the original application, and thus estopping Wilder, or his assignees, from claiming patentability or actionable infringement, so far as the abandoned details are concerned.

A description of the Wilder patent and of the defendant's stoves must be made at the outset, and it must be borne in mind, when considering these descriptions, that the defendant claims not only to be manufacturing an oil stove with burners of an old and well-known type, and with valves of a well-known and hence unpatentable design and use, but also that the defendant charges that the Wilder patent, while attempting and purporting to describe particular devices, is in reality seeking to patent the idea or theory made use of in the application of those devices, and that the complainant's patent is, therefore, invalid

in this respect, under the authority of such cases as *Bradford v. Expanded Metal Co.*, 146 Fed. 984, 77 C. C. A. 230, and *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

But to return to the description of the patents and stoves of the parties to the action. The first Wilder patent, that of July 17, 1900, shows a reservoir from which oil is fed into a chamber containing a piston or plunger, in which chamber the oil normally stands at the same level as the oil in the burner or oil holder before ignition. The oil holder or burner is so constructed that by means of the plunger or piston the supply of oil can be quickly increased and as quickly drained or withdrawn; the amount of oil left in the burner after such movement of the plunger being sufficient to cause immediate vaporization, for the purpose of ignition. After ignition, the level of the oil in the burner will normally adjust itself, according to the supply of the oil, upon the student lamp principle; but this supply can be further regulated and controlled, or entirely shut off, by means of a valve, which, as has been said, is shown in the drawings and specifications.

Neither of the Wilder patents ascribes any particular function, in the process of flooding the oil burner, to this valve, and its use is not stated or shown to be any different from that of the valves which earlier patents disclose to have been in common use in stoves of this character. The reissue patent, as well as the patent on which the reissue was asked, shows a method of raising the oil reservoir or holder by means of ratchets or serrated triangular pieces, affixed to the storage chamber of the reservoir, or other similar means, by which this storage reservoir can be arbitrarily raised or lowered, thus raising or lowering the level of the oil in the oil burner, and thus accomplishing the flooding purpose made use of in the former patent, and therein caused by the movement of the plunger.

Wilder also claimed the right, as has been said, to raise or lower the burner relatively to the reservoir, for accomplishing the same purpose, and this alternate method of construction furnished the basis upon which the stove previously made by the defendant was admitted to be an infringement in the action then brought. It will be seen that Wilder has thus, in his second or reissue patent, sought to protect the idea of furnishing quickly a large supply of oil to the burner, thus obtaining sufficient vaporization for ignition without delay, by raising and lowering the level of the oil in the oil holder, through the change in the level of the oil in the reservoir, or vice versa, and accomplishing exactly the same result as in the first patent was obtained by a separate device, which he called and which we have described as a plunger.

It is apparent that a valve controlling the supply of oil to the burner will to a certain extent allow the passage of a quantity of oil into the oil chamber or burner by the opening of the valve, and that if the level which would be maintained when the valve is opened is such that the burner would be substantially or entirely flooded, and then after ignition the valve should be closed, and by combustion the level of the oil in the oil burner reduced, the ultimate adjustment of the flame and the supply would leave the level of the oil in the burner substantially the same as that which would be maintained in a burner constructed un-

der the Wilder patent, with the use of either the plunger or the device for raising and lowering the oil supply.

Mr. Wilder, because of his considerable experience in making and experimenting with oil stoves and burners, was called as a witness by the complainant, and testified most fluently both as to the details of the patent in question and as to experimentation in relation to the devices referred to in these patents. One portion of Mr. Wilder's testimony is especially instructive, and that is the part relating to the development of the industry of manufacturing gas stoves through the various stages of (1) a stove with a combustible wick; (2) a stove with no wick, but having a large flame ignited in the combustion chamber, from vapor produced by introducing the oil or burning fluid into the vaporization chamber in small quantities; and (3) a burner by which this vaporization could be caused immediately in connection with the surface of the oil, with much better results than by the other methods. Wilder's statements of the progress of the art would seem to follow more closely the commercial or practical development of stove making than any theoretical experimentation, except as such experimentation followed the commercial necessities; and his testimony, while very complete and enlightening, does not have the same effect upon the mind of the reader as the testimony of an expert who has gained his knowledge solely from the documents or from direct experiments in the laboratory.

It is apparent from Mr. Wilder's testimony that his opinions and ideas have been continuously formed from a large number of sources, and how much has been derived from business, and how much from the study of patents, it is impossible to determine. The general effect, however, of his testimony, would seem to be that, combining the needs and desires of the manufacturer with the technical knowledge acquired from study, he endeavored to obtain the essential principles of the stove which he was placing upon the market, without reference to whether the particular idea which he was using was patentable; and thus, without confining his claims to a combination which should produce a certain result, he has rather attempted to patent the result, and thereby all means for its production, and it would seem that the state of the prior art was such as to hinder him from obtaining more than the right to control the particular methods by which he in practice found that he could produce the result desired.

The complainant has introduced in evidence a stove, called the "Pilgrim stove," which combines the principles of these patents in an original way, but one which has some features that would throw doubt upon its commercial success. In the Pilgrim stove the student lamp principle is used, in the form of an oil reservoir connected with the burner by a fixed pipe, and with a valve in this pipe near each burner; the burners themselves being of the form described in the patent, namely, a trough, in which the oil, with the valves open, would normally stand at the same level as in the oil reservoir, when the stove is unlighted. In order to change the oil level, a flexible pipe, with a siphon leading into the oil reservoir, runs to a tank substantially on a level with the oil reservoir, and maintained in position by a spring, giving more or

less vertical freedom of motion. The flow of oil into the oil reservoir is controlled by a weight, which is moved along the flexible pipe, and thus the tank is raised or lowered. If the tank be raised, the supply of oil into the reservoir will increase, the level of the oil in the burner will be raised, and the burner flooded, while a lowering of the tank would cause the draining of the burner by the opposite process. The flexible pipe and spring, with the movable weight, appears to be a clumsy and easily broken device, and there is no evidence to show whether it has succeeded in commerce; but it is a plain illustration of the principles of the Wilder patents.

The defendant's stove, on the other hand, makes use of many of the same principles, most of which are not only well known, but old, in connection with both gas stoves and lamps, and the points in which this stove is said to infringe the Wilder patent are easily ascertained. In the first place, the defendant's stove makes use of the student lamp principle, by having the oil reservoir fed from a tank which is placed immediately above the reservoir. The pipe leading to the burners is stationary, and the burners are of substantially the same type as the burner used in the Wilder stove, in which the burners are intended to operate by the ignition of the oil vaporization in the burner, at the surface of the oil supply, as maintained by the repelling force of the flame and gas, at a somewhat lower level than would be the case if the burner were unlighted. The stove has a valve in connection with each burner, and the only method of regulating the supply of oil to the burners in the defendant's stove is by means of those valves, with the exception that the stoves are accompanied by directions to the effect that they should be caused to stand level before lighting. Thus the proper oil level, as it is called, is maintained, and the complainant suggests that a tilting of the stove itself would accomplish the result of flooding, and that thus the Wilder patents would be infringed. Such an accidental happening cannot be called infringement, nor can it be imagined that any practical usefulness could be made of the suggestion that a stove should be tilted and the oil slopped around, in order to lubricate the surfaces which are to be ignited.

Another suggestion of the complainant is that, if the valves were open, the burners would fill; but there seems to be no apparent method of draining them, and, while it is stated in the testimony that the burners could be lighted with safety while the oil holder is filled, the resultant smoke and smell would greatly interfere with the success of the stove. The defendant's own instructions in the pamphlet which accompanied the stove are to the effect that before lighting the valves should be turned open for two or three turns, and thus the asbestos ring, which in these so-called wickless stoves assists in ignition by giving a more or less absorptive wick, even with a noncombustible surface, receives a greater quantity of oil than is maintained when the valve is closed and the constant flow properly adjusted.

As has been said, the idea of a valve is old. The idea of the student lamp is not patentable. The wickless burner—that is, the burner which has just been described—seems to have been determined in other litigation to be either unpatentable, and open to the use of every one, or not the property of the complainant; and the only question which we

must consider is whether the idea of flooding such a wick was originated by Mr. Wilder, and whether he in his claims has stated a device so generic in its use that the result or the object attained by the device should belong to him during the lifetime of his patent, whether produced by one combination or another.

The patent granted to Frank R. Fennessy, on the 21st of April, 1896, No. 558,643, for an invention relating to the automatic feeding of a proper quantity of oil to the oil burner, showed the construction of a float in the supply chamber, into which oil was fed from a tank, and which allowed the passage of the oil to the burner, with the insertion of a valve between the tank and the burner, under the student lamp principle. The float was operated by a stem and knob, and in the specification Fennessy says:

"In starting the ignition at the burner, it is preferable to provide an excess of oil, so that the wick will be thoroughly saturated, and for this purpose the float through its stem may be pushed downward in the chamber, causing a portion of the oil thus displaced to rise in the burner."

This device is much like the plunger in the Wilder patent, but is like defendant's device only in that it recognizes the principle that, upon first lighting, an increased quantity of oil will ignite more easily than a dry wick, be the wick combustible or asbestos. In fact, the Fennessy patent would seem to have been intended for use with a combustible wick, and its lack of practical value was due to the fact that combustible wicks did not need the flooding process, and the idea patented by Fennessy was of no great utility until the wickless burners came in, and the flooding or increased supply of oil before lighting completed the process. In this respect Wilder's testimony seems to be true, and his patent seems to show and fix in point of time an advance in the art. In the same way, even if he is not entitled to the rights over the wickless burner, his patent would seem to be valid, in that it first applied the combination of a forced flooding by such a device as the plunger to these "wickless" stoves.

But, assuming that his patent is valid in this respect, he is making claims which are broader than the use of any particular device, when he attempts to patent as a combination the use of a wickless burner and any increased supply of oil, whether supplied by an old device or not. The defendant makes use of an old device. It takes advantage of the result of any such device, and, if Wilder could patent that result, the defendant's stoves would necessarily infringe. But, in the view which the court has taken, his patent goes only to the extent of protecting for him the methods of flooding in connection with such a burner, by means of the ratchet or other mode of lifting and lowering the oil supply, or of accomplishing the same results through a plunger, and the defendant's structure does not infringe.

Other patents introduced in evidence show various applications of similar ideas, but need not be specifically stated, and the conclusion reached makes it unnecessary to consider whether, by the changes in his reissue patent from the devices contained in its original form, any particular idea was abandoned, and hence lost. Walker on Patents, § 244; Russell v. Dodge, 93 U. S. 460, 23 L. Ed. 973.

The bill will be dismissed.

In re VON BORRIES.

(District Court, El. D. Wisconsin. April 7, 1909.)

BANKRUPTCY (§ 404*)—DISCHARGE—FAILURE TO APPLY—RES JUDICATA.

Failure of a bankrupt to apply for a discharge during the statutory period constitutes a conclusive determination, as between the parties then before the court, that the bankrupt is not entitled to a discharge, and precludes the bankrupt in a subsequent proceeding from obtaining a discharge, except as to debts incurred since the commencement of the former proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 690; Dec. Dig. § 404.*]

In Bankruptcy. On objections to discharge of bankrupt.

This is an application for a discharge in a voluntary case, wherein the petition was filed November 16, 1908. No assets were scheduled, except what were covered by the exemption laws of the state. December 15, 1908, these exemptions were allowed by the referee. No trustee was appointed, and the case was closed. The usual certificate was filed by the referee February 1, 1909. On January 19, 1909, the bankrupt filed a petition for a discharge. Objections to a discharge were filed by a creditor on the ground that in March, 1906, Von Borries filed a voluntary petition in the Northern district of Illinois, disclosing no assets, and had made no application for a discharge, and that after the lapse of the statutory period the right to a discharge was barred by the doctrine of res adjudicata. On the hearing the facts appeared as set out in the objections, and the question raised is whether the petitioner is barred by the record in the former case.

Thos. E. D. Bradley, for objecting creditors.
Leo Torbe, for bankrupt.

QUARLES, District Judge. The Circuit Court of Appeals of the Eighth Circuit, in Kurtz v. Young, 131 Fed. 720, 65 C. C. A. 477, lays down the rule that the failure of the bankrupt to apply for a discharge during the statutory period of one year amounts in law to a conclusive determination as to the parties then before the court on the principle of res adjudicata. This doctrine has been followed by several of the federal courts, among which are In re Weintraub (D. C.) 133 Fed. 1000; In re Elby (D. C.) 19 Am. Bankr. Rep. 734, 157 Fed. 935.

At first blush it would seem that the doctrine of res adjudicata cannot logically be applied in a case where no application for a discharge had been made by the bankrupt, and therefore no opportunity furnished for judicial consideration; but a broader view of the scheme embodied in the present act seems to remove the difficulty. A voluntary petition under the act of 1898 (Act July 1, 1898, c. 541, § 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) is virtually a bill in equity, praying, first, a distribution of assets; second, a discharge of the bankrupt. In the instant case there were no assets for distribution, and therefore the sole scope and purpose of the petition was to secure such discharge. The jurisdiction to award a discharge rested upon the petition, while the formal motion for a discharge had no other function than to fix a time for the exercise of such jurisdiction. The same statute that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

confers the power to grant a discharge limits its exercise to a period of one year, unless by special order such period is enlarged for six months. At the end of the eighteen months the jurisdiction of the court has lapsed. *In re Fahy* (D. C.) 116 Fed. 239; *In re Wagner* (D. C.) 139 Fed. 87. Therefore reason and authority seem to concur that as to the parties who were before the District Court for the Northern district of Illinois on the original petition the question of a discharge was practically and conclusively settled when the statutory period had expired, and cannot now be considered or reviewed in this court, and as to such claims the petition must be denied.

But by a comparison of the two schedules that are in evidence it appears that during the interval of about 2½ years between the two voluntary petitions the bankrupt has incurred additional debts. Four new creditors are listed, with claims aggregating about \$300, and certain of the claims listed in the original schedules appear to have been disposed of in some way. As to the debts incurred since the proceedings in the Northern district of Illinois, and as to the creditors who were not before that tribunal, the bankrupt is entitled to a discharge; there appearing no objection which reaches such claims. *In re Kuffer*, 18 Am. Bankr. Rep. 16, 151 Fed. 12, 80 C. C. A. 508.

An order may be entered for a qualified discharge in accordance with this opinion.

In re BURBANK CO.

(District Court, D. New Hampshire. March 16, 1909.)

No. 1,381.

BANKRUPTCY (§ 61*)—CORPORATION—ACTS OF BANKRUPTCY—ADMISSION BY OFFICER.

A corporate officer, such as a treasurer, cannot create an act of bankruptcy on the part of the corporation through admission, nor can his unauthorized admission be made effective by ratification by the board of directors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 61.*]

In Bankruptcy. On involuntary petition.

Matthew J. Ryan, for petitioning creditors.

Streeter & Hollis and Robert A. B. Cook, for answering creditors.

ALDRICH, District Judge. In this case I am inclined to accept the principle of *In re Bates Mach. Co.*, 91 Fed. 625, decided in this circuit by Judge Lowell, as having application to the situation here, and as controlling against the proposition that a corporate officer, like a treasurer, may create an act of bankruptcy through admission. It is true the cases are not quite the same, because in the case at bar the admission was by a treasurer, and the act was sought to be ratified by a vote of the directors, while in *Re Bates Mach. Co.* the admission of insolvency was by the board of directors. But if, as decided in *Re Bates Mach Co.*, there was no authority in the directors to create the act of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankruptcy through admission, it is difficult to see how in the case at bar the directors could add anything to the unauthorized act or admission of the treasurer. In *re* Quartz Gold Mining Co. (D. C.) 157 Fed. 243, and *Van Emon v. Veal*, 158 Fed. 1022, 85 C. C. A. 547, apparently sustain the same general principle.

The petition is dismissed, and the petitioning creditors except.

If my conclusion upon the question as to the act of bankruptcy is sustained, all questions about the disputed creditor claims and their provability are doubtless immaterial; but, if my conclusion in that respect should be overruled, the question as to claims might become material. I therefore make a ruling upon that branch of the case, and it is this:

That the report of the master as to the indebtedness and its provability is affirmed, and I hold that the intervening creditors are in for the purpose of proving their claims. This is subject to exception by the responding creditors.

In re ARKANSAS RAILROAD RATES.

(Circuit Court, E. D. Arkansas, W. D. April 19, 1909.)

1. **INJUNCTION (§ 167*)—PRELIMINARY INJUNCTION—MODIFICATION.**
A preliminary injunction may be modified at any time when the ends of justice require it, either by the trial court or the appellate tribunal.
[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 167.*]
2. **INJUNCTION (§§ 153, 154*)—PRELIMINARY INJUNCTION—TERMS.**
In granting or refusing a preliminary injunction, proper consideration must be given to the comparative injury which will be sustained by the defendant if the injunction is granted, and by complainant if it is refused, and in order to prevent such injury the court in the exercise of its discretion may impose terms and conditions on the parties at whose instance it proposes to act.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 338, 339; Dec. Dig. §§ 153, 154.*]
3. **CONSTITUTIONAL LAW (§ 70*)—RATES—REGULATION—INJUNCTION.**
Though the making of carrier's rates is a legislative and not a judicial act, within the jurisdiction of the courts, and courts cannot make rates on a final hearing, a court, for the purpose of requiring complainant, who has obtained a preliminary injunction against alleged confiscatory rates, to do equity, and prevent the imposition of extortionate rates for carriage, may fix maximum rates beyond which complainant shall not go during the pendency of the litigation, and make the compliance with such maximum a condition on which the temporary injunction will be continued.
[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 70.*]
4. **CARRIERS (§ 18*)—RATES—PRELIMINARY INJUNCTION—EFFECT.**
The effect of a preliminary injunction restraining the enforcement of freight rates prescribed by the Arkansas Railroad Commission and the two-cent passenger rate imposed by Act Ark. Feb. 9, 1907 (Acts 1907, p. 10), was to leave the railroads in the state without any legal limitation so far as the laws of the state were concerned as to the freight rates chargeable, and to permit a return to the three-cent passenger rate in force prior to the act of 1907.
[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. CARRIERS (§ 12*)—RATES—BRANCH LINES.

Where large railroad corporations construct extensive branch lines within a state through new and unsettled sections at great expense, principally to serve as feeders for the main line, and also to enable the roads to obtain shorter lines for interstate traffic, such railroads are not entitled to charge rates on intrastate traffic sufficiently high to enable them to earn a specified percentage on their investment in such lines.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

6. CARRIERS (§ 18*)—RATES—INJUNCTION.

Rates established by the Arkansas Railroad Commission and the two-cent passenger law (Act Ark, Feb. 9, 1907 [Acts 1907, p. 10]) having been enjoined pendente lite as confiscatory, the railroads returned to a three-cent passenger rate and raised freight rates within the state from 50 to 200 per cent., the average raise on a revenue-producing basis being 77 per cent. *Held*, such raise was extortionate, and that the court, as a condition to retaining the injunction, would leave the passenger rate at three cents and require a freight tariff not exceeding 33½ per cent. higher than the rates enjoined.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

On Motion for Modification of Preliminary Injunctions.

See, also, 163 Fed. 141.

John M. Moore, Buzbee & Hicks, Reid & McDonough, and B. R. Davidson, for complainants.

Hal L. Norwood, Atty. Gen., Joseph M. Hill, James H. Harrod, and Wm. F. Kirby, for defendants.

TRIEBER, District Judge. Upon application for a temporary injunction made by the railroads of this state, and heard by Judge Van Devanter, one of the Circuit Judges of this circuit, preliminary injunctions were granted restraining the enforcement of the intrastate rates then prescribed by the Railroad Commission of the state of Arkansas for the transportation of freight and the two cents a mile passenger act of the General Assembly of the state of Arkansas, approved February 9, 1907 (Acts 1907, p. 10), the contention on the part of complainants being that they were unreasonable, noncompensatory, and confiscatory. At that hearing the learned judge found from the evidence submitted that the additional cost of intrastate traffic exceeds that of the interstate of the complaining roads 100 per cent. on freight, and 15 per cent. on passenger traffic, and, applying this rule to the earnings of the roads and their values, decided that "the rates in question are noncompensatory and unreasonable, and that their enforcement, although not so intended, is nothing other than a taking of the property of the railroad companies without due compensation, which is confiscation." The opinion on that hearing will be found in 163 Fed. 141.

The State Railroad Commission now applies for a modification of these temporary injunctions, alleging that "since the granting of the preliminary injunctions the railroad companies have established freight and passenger rates on all intrastate business which are unreasonable and exorbitant and are destroying many of the industries of the state." It is charged that the passenger rate has been raised to three

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 168 F.—46

cents a mile, and the freight tariffs put into effect increased those prescribed by the commission, and in force at the time the temporary injunctions were granted, as follows: Fifty per cent. on grain; on cotton, 140 per cent.; on packing-house products, 100 per cent.; on coal, 35 per cent.; on brick, stone, and sand, 75 per cent.; on lumber, 107 per cent.; and other various lines of merchandise about 75 per cent.—that the average increase on the principal commodities of the state on a revenue producing-basis is over 77 per cent., which rates it is claimed are unreasonable, extortionate, and oppressive to the shippers and consumers of the state. It is therefore asked that the preliminary injunction now in force be modified so as to prevent this injustice.

That a preliminary injunction may be modified at any time whenever the ends of justice require it is beyond question. Not only may it be done by the trial court, but upon appeal by the appellate tribunal. *Denver & Rio Grande R. Co. v. United States*, 124 Fed. 156, 59 C. C. A. 579. Judge Sanborn, who delivered the opinion of the court in that case, said that:

"A preliminary injunction may be modified when by such modification the injury or inconvenience of one or more of the litigants may be decreased without increasing the danger of loss to their opponents."

And, accordingly, he modified the temporary injunction which had been granted by the lower court. There can be no doubt that a temporary injunction cannot be claimed as an absolute right, but is within the sound discretion of the court; that discretion, of course, to be controlled by the established principles of equity jurisprudence. *Shubert v. Woodward* (C. C. A.) 167 Fed. 47. In the headnote of that case, prepared by the court, it is said:

"The specific performance of contracts and the issuance of injunctions are not matters of right; they rest not in the arbitrary or whimsical will, but in the judicial discretion of the court, informed and guided by the established principles, rules, and practice in equity, which are advisory rather than mandatory."

See, also, *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

In granting or refusing a preliminary injunction, proper regard must be had for the comparative injury which will be sustained by the defendant if the injunction were granted, and by complainant if it were refused, and, in order to prevent great injury to the defendant when the complainant is prima facie entitled to a temporary injunction, the court, in the exercise of its discretion, frequently resorts to the expediency of imposing terms and conditions upon the parties at whose instance it proposes to act. *Russell v. Farley*, 105 U. S. 433, 438, 442, 26 L. Ed. 1060; *Meyers v. Block*, 120 U. S. 206, 214, 7 Sup. Ct. 529, 30 L. Ed. 644; *Ewing v. Filley*, 43 Pa. 384, 387; *Denver & Rio Grande R. Co. v. United States*, 124 Fed. 156, 161, 59 C. C. A. 579; *Mountain Copper Co. v. United States*, 142 Fed. 625, 73 C. C. A. 621; *Vogel v. Warsing*, 146 Fed. 449, 77 C. C. A. 199; *McElroy v. Kansas City* (C. C.) 21 Fed. 257, 264, 263; *McCaul v. Braham* (C. C.) 16 Fed. 37, 42; *Spring Valley Water Co. v. San*

Francisco (C. C.) 165 Fed. 667; Macon R. R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. Rep. 446; Kerr on Injunction (2d Am. Ed.) 30; Spelling on Injunction, 1031, 1033. The authorities cited by counsel for complainants all refer to permanent, and not preliminary, injunctions, and for this reason are not applicable to this proceeding.

In Denver & Rio Grande R. Co. v. United States, supra, it was said that:

"The purpose of a preliminary injunction is to protect and preserve the rights of all the litigants with the least injury to each until the controversies between them can be tried and finally decided."

In Spring Valley Water Co. v. San Francisco, supra, the question before the court was the terms upon which a preliminary injunction should be granted against the enforcement of an ordinance fixing water rates to be charged by complainant. Judge Farrington, in a very exhaustive and learned opinion, held that:

"This court cannot control the discretion of the supervisors; it cannot substitute its judgment for theirs. The power and duty of fixing water rates is cast by the Constitution on that board, and not on this court. The law nowhere provides an appeal to this court from an ordinance adopted by the board of supervisors, nor does it clothe this tribunal with any authority to review, revise, correct, or send back to that body for reconsideration an ordinance establishing the compensation to be collected for water. * * * It would seem, therefore, that the court is limited to the determination of a single question, namely, is the ordinance confiscatory?"

And coming to the question of a preliminary injunction, the learned judge says:

"It is an abuse of judicial discretion to issue an injunction which will permit one party to obtain any advantage by acting, while the hands of the adverse party are tied by the writ."

From these authorities it may be stated that a court, when called upon to grant a preliminary injunction, may impose such terms, on granting it, as will protect the rights of the defendant as well as those of the complaining party, and if, after the temporary injunction has been granted, and before a final hearing, while it is in force, it is shown to the court that great injustice is being done by reason thereof, that the acts of the plaintiff are unjust, oppressive, and unmindful of the rights of the defendants, the court may modify it by imposing terms which will prevent such injustice.

This leaves for determination another very important matter. Can the court, for the purpose of requiring the complainant, who obtained the preliminary injunction, to do equity and preventing the imposition of extortionate rates for the carriage of freight and passengers, fix maximum rates beyond which complainants must not go during the pendency of the litigation, and make a compliance with these rates a condition upon which the temporary injunction will be continued? That the making of carriers' rates is a legislative act and not judicial is frankly conceded by counsel for the defendants, and for this reason courts are powerless to make them. Upon final hearing the court must, if it is shown that the commission rates are compensatory within

the meaning of the law, dissolve the preliminary injunction or make it perpetual if they are found to be noncompensatory, and therefore confiscatory. The authorities are not only numerous, but harmonious, on this subject. A few of the leading and late cases is all that it is necessary to cite on the subject. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 400, 14 Sup. Ct. 1047, 1054, 38 L. Ed. 1014; *Interstate Commerce Commission v. Ry. Co.*, 167 U. S. 479, 499, 505, 17 Sup. Ct. 896, 42 L. Ed. 243; *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 226, 29 Sup. Ct. 67, 53 L. Ed. —. But when the application is for a temporary injunction, the rule is different. As was said in *Spring Valley Water Co. v. San Francisco*, *supra*:

"While it appears that the ordinance in question is probably confiscatory, and therefore invalid, the fact that complainant will suffer irreparable injury unless an injunction issues is not decisive. The court owes equal consideration to both parties; it must not issue an injunction which will do more harm to one party than good to the other; it should so preserve the matters in dispute as to protect each party as far as possible from harm. We have no means of knowing the plans of the company, whether it will raise the rates for the remainder of the fiscal year to the full amount of what is alleged to be reasonable—that is, so as to realize an income of more than \$3,000,000 net—or whether it will be content with something less. If the ordinance is finally adjudged valid, any collections made in excess of the rates specified therein must be repaid. Such repayment can be secured by a proper bond; but if the ordinance is adjudged confiscatory, and therefore invalid, there is no practicable remedy for the consumer, who, under the necessity of agreeing to the terms offered by the company or foregoing the use of water, contracts to pay, and does pay, more than is just. His injury is irreparable. It is not sufficient to say that courts will enjoin the unreasonable charges, or that this court will promptly dissolve the injunction, if, pending the suit, complainant abuses the process of the court. Whether the rates so fixed by the company are reasonable or unreasonable is a question of fact which no court would presume to decide without a hearing, and such a hearing may be long and expensive. Most consumers will consider water of any quality or price cheaper than litigation. Neither conception of the status quo is satisfactory. Neither, if maintained, will afford adequate protection but to one party. If the ordinance is confiscatory, complainant is entitled to an additional sum which will make its compensation just and reasonable. This sum will be lost to complainant if the injunction is denied. On the other hand, if the ordinance is confiscatory and the injunction is granted as prayed for, if complainant exacts a compensation in excess of what is just, the excess will be lost to San Francisco and its inhabitants. Equity, however, has no peculiar concern for the status quo, except that its preservation usually, if not always, accomplishes that which is the object of a preliminary injunction; that object is to preserve the fund, the property, the right or other thing in dispute, from waste, destruction, or disturbance until the rights and equities of the contending parties can be fully considered and determined. Notwithstanding the fact that the ordinance is probably confiscatory, and that its enforcement should be restrained pending suit in order to save complainant from irreparable injury, an interlocutory injunction, the effect of which is to give complainant the authority, practically without limit, to fix prices at which it will sell water, must be denied for the following reasons."

He then proceeds to state the reasons, which it is unnecessary to repeat here.

The effect of the preliminary injunctions is to leave the state without any regulating freight rates—it is otherwise as to the passenger rates, as the statute in force at the time of the enactment of the act of 1907, limiting them to three cents a mile, is undoubtedly effective if the later act is void (*St. Louis, etc., Ry. Co. v. State*, 86 Ark. 343,

111 S. W. 260)—and leaves the railroads without any limitation, so far as the laws of the state of Arkansas are concerned, to make them what they deem proper until the final determination of these causes. Assuming from the figures presented by the complainants, and as found by Judge Van Devanter, that the rates enjoined are confiscatory, or at least not sufficiently remunerative, the injunction, if the evidence at the final hearing is the same, would have to be made perpetual. In that event the rates collected during the pendency of these actions, no matter how excessive and unreasonable, and until the commission can make new rates, rates sufficient to enable the roads to earn a reasonable compensation, will be wholly lost to the shippers. It is true, the preliminary injunction specially provides that:

“Nothing recited in this order shall operate to prevent the said Railroad Commission of the state of Arkansas from establishing and enforcing any reasonable, compensatory, and lawful rates in place of those whose enforcement is hereby inhibited.”

But is it not very probable, nay, almost certain, that any rates which may be proposed by the commission, if less than those rates put in effect by the complainants, which they claim are as low as they can make them, will cause further litigation, as supplementary bills would be filed to enjoin them as confiscatory? Of course, the court could refuse to grant the injunction if the rates were not shown to be confiscatory, but in order to do that the court would necessarily have to determine what rates were compensatory and just, and, in all likelihood, from evidence identical with that submitted at this hearing. As the Railroad Commission contends, and no doubt every member thereof believes, that the rates now enjoined were compensatory, or, if not that, a very slight increase would make them so, the probabilities are that a number of suits would have to be filed by each of the railroads until a tariff would be prepared which would justify the court, acting upon the basis of apportionment of expense made in this case, and which will not be disturbed before there is a final hearing, if then, to refuse a preliminary injunction. In the meantime the rates, although they may be unjust and oppressive, would be collected.

Therefore, not only to prevent a multiplicity of suits, but to require complainants who seek equity do equity, this court is justified in prescribing such maximum rates as may be just to the railroads as well as the public. In *Spring Valley Water Co. v. San Francisco*, supra, Judge Farrington found that complainant would probably be entitled to a gross income of \$266,675.60 in excess of that afforded by the rates fixed by the supervisors, and thereupon he held that complainant was entitled to so much relief, but no more, and granted the preliminary injunction upon that condition.

It is true that in the *San Francisco Water Company Case* there were only a few rates to be fixed, while in these cases hundreds of different rates must be determined. This may necessitate a great deal more labor, and may require the assistance of a special master if the parties are unable to reach an agreement under the directions and instructions of the court, if the court finds that the rates put in force by the railroad companies since the granting of the preliminary injunctions are so ex-

orbitant as to be unjust and oppressive. But this ought not to prevent the court from doing justice and preventing a wrong. The difference is only one of degree, and not of principle. If it appears from the evidence that the rates now in force are unreasonable, enabling complainants to increase their earnings on intrastate rates to a much greater extent than is necessary to enable them to make a reasonable return on their investment, great damage will necessarily be sustained by the public, who pay these rates, for some of which there can be no redress, even if the injunction should be dissolved. For the court to refuse to act in such a case would be an injustice which no court of equity should ever be guilty of. The bond executed by the railroad companies and the provisions made by the orders granting the preliminary injunctions, providing for an ascertainment of the damages, will only become effective if, upon final hearing, the injunctions are dissolved; but if it should appear upon that hearing that the rates, while compensatory to some extent, are still not sufficient to enable complainants to earn as much as in the opinion of the court they are lawfully entitled to, the injunction would have to be made perpetual, although a small increase of the rates from 5 to 10 per cent. would be sufficient to have made the rates compensatory within the meaning of the law. In such a case no recovery could be had by the defendants, even if it should appear that the increase in the rates during the pendency of the temporary injunction exceeded 100 per cent. And even if the injunction should upon final hearing be dissolved, the only damages which the law would permit to be recovered would be the difference between the rates paid under the increased tariff schedules and what would have been paid under the rates enjoined. In the meantime industries may have been prostrated and wholesale houses driven from the state because, owing to the high rates in force during the pendency of these proceedings, they are unable to maintain their trade in competition with others located outside of the state and enjoying the benefits of lower interstate rates.

At the hearing of this application a great deal of testimony was introduced tending to show not only the extent of the increase of rates since the preliminary injunctions have been granted, but it was also shown that interstate rates from points outside of this state, on business competitive with that of the business men of this state, have not been increased. It appears from these affidavits that some branches of business have been practically suspended so far as intrastate business is concerned, by reason of the fact that the lower rates given to competitors doing business in other states prevented them from being able to deliver to retail dealers in parts of this state their articles of manufacture at the same prices. It is true the railroads claim, and no doubt justly, that although the new intrastate rates have been in force for over five months, and no changes in interstate tariffs have yet been made, they will soon put them in effect, and they will be as high as those now in force on intrastate business; they claim that the changing of these tariffs requires a great deal of time; that the last few months have been the busiest of the year; and that under the interstate commerce law, before new interstate rates can become effective, they must be filed with the Interstate Commerce Commission 30 days.

The court has no doubt that these statements are true, and that these complainants do not intend to discriminate against the people of this state whose welfare is necessary to their own existence; still the injury has been, and is still, being inflicted. While these facts would not be sufficient to justify this court in declaring the rates exorbitant and unjust, they are circumstances which should be taken into consideration, not so much for the purpose of determining whether their present tariff is exorbitant, as for the purpose of determining the propriety of the court, sitting as a court of equity, to exercise its power to prevent injustice to and oppression of the people of the state, if the proofs show that is being done.

This hearing was had on ex parte affidavits, testimony which can never be said to be conducive to obtaining exact facts; still, as the most important testimony is based upon documentary evidence, the tariffs in force at the different times, and the income and expenditures of the roads, it is comparatively easy to ascertain the effect of these new rates.

On the part of the Railroad Commission comparative statements of the freight rates in force when the bill was filed and those put in since the granting of the preliminary injunctions, and which are conceded to be correct, were introduced. These indicate that some rates have been raised over 200 per cent., and the average increase in the freight rates on a revenue basis, it is claimed, exceeds 77 per cent. On the other hand, it is claimed by the railroad companies that some of the rates of the commission were absurdly low, and that the increase of the new rates, as shown by the earnings for the month of November, 1908, the first month the new rates went into effect (for one of the roads it is based on the earnings for the months of November and December, 1908), the increase is as follows:

St. L., I. M. & S. Ry. Co.....	41.80%
St. L. & S. W. Ry. Co.....	41.59%
C., R. I. & P. Ry. Co.....	24.95%
St. L. & S. F. Ry. Co.....	17.77%
K. C. Southern Ry.....	38.31%

—or an average of the five roads of 36.75 per cent. These calculations are based on the actual sums collected, compared with what would have been collected upon the basis of the rates enjoined. No doubt this is the most satisfactory, if not the only correct, basis for ascertaining on a revenue basis the actual increase of the rates, especially as these actions are based solely upon the ground that the commission rates were so low as not to earn anything on the investment of complainants. But can it be said that the business of one or even two months, especially the first, after the new increased rates went into effect, is a proper criterion for the ascertainment of these facts? It is urged that during the winter months the rates which were raised the highest, fruit and vegetables, on which the average raise is from 100 to 200 per cent., grapes nearly 300 per cent., seeds from 150 to 200 per cent., lumber, the largest tonnage commodity of the state, over 100 per cent., do not move extensively during the months of November or December; and, in addition thereto, it is claimed, and so shown by the affidavits of a large number of merchants, that immediately after notice had been given of the new rates, and for the

several weeks before they went into effect, a great many merchants purchased all their goods on which the increase of rates was material, and had them shipped to their places of business, so as to obtain the benefit of the lower rates. These statements seem reasonable and fair; but, in any event, it is hardly reasonable, in view of the large variety of products of this state, to take the business of any one or two months as a proper standard for the year's business. This is fully shown by the fact that the revenue increase on a percentage basis of the different roads varies greatly; while the St. Louis, Iron Mountain & Southern Railway Company and the St. Louis Southwestern Railway Company report an increase of nearly 42 per cent., the St. Louis & San Francisco Railway Company shows an increase of only 17.77 per cent., and the Rock Island Railway an increase of less than 25 per cent. No doubt the fact that the industries, as well as the products, mineral, forest, and agricultural, along the line of the latter roads are different from those of the other roads, accounts for this difference. The fact that 40 per cent. of the entire tonnage of the intrastate business of the state is that of lumber and forest materials, for which the tariff has been raised over 100 per cent., is of itself sufficient to show that the business for the months of November and December would hardly be proper tests for the business of the railroads of the state for the year, for there are hardly any months during the year in which there is less building material used than during those months. In addition to this, it must not be overlooked that the rates are not raised horizontally, but run from 3 per cent. to over 200 per cent. Defendants have submitted some calculations based on a large number of freight bills paid during the five months the new rates have been in force. These show an average increase on a revenue basis of over 77 per cent. But they cannot be accepted as a proper test for several reasons. It has been shown that these bills constitute but a little over 1 per cent. of the freight earnings during that time, and there is nothing to show that these bills cover those rates which have been but slightly raised, say from 3 per cent. to 20 per cent., as well as those which were increased greatly. The probabilities are that shippers would pay but little attention to small increases, and furnish only such bills as indicated what they considered excessive rates. Taking the two tariff sheets, those in force at the time the injunction was granted, and those now in operation, with the percentages of increases as figured out by the experts of complainants, and admitted by defendants to be correct, it is reasonable to say that the increase will exceed on a revenue basis considerably over 50 per cent.

On behalf of complainants it is also claimed that these large increases are based on the commission rates, which were much lower than the rates in force before the commission was created, and the tariff then in force is offered in evidence to show that the present rates are but slightly, if any, in excess of those then in force. The tariff sheet offered is that of the St. Louis, Iron Mountain & Southern Railway Company, 1508-A, but it is shown that that tariff was only nominally in effect; that the real tariff was No. 3315, called the "Jobber's Tariff," on which most of the freight traffic was carried,

and, in addition to this, there were special rates for almost every commodity in the state, and that only a few small shippers who were ignorant of tariff schedules were charged rates under 1508-A; that the commission's tariff was but slightly lower than tariff No. 3315, and higher than many of the special tariffs in force at that time.

As to the special tariffs, the court is satisfied from the evidence that they were made very low, in many instances below the cost of carriage, for the purpose of aiding in the establishment of new industries along the lines of railroads, and by these means build up the country, and thus, indirectly, increase the business and earnings of the roads. Such rates, which were not illegal at the time, cannot be considered as a fair test for the purpose of determining what would be compensatory rates. That the commission did make material reductions, even from the "Jobber's Tariff," No. 3315, has been fully established, but it is doubtful whether they amounted to as much as 20 per cent., although the commission, in its first report, claimed credit for having made reductions exceeding 30 per cent. But in considering this claim of the commission, the court is satisfied that in making it they were influenced by the fact that many of the large shippers who had theretofore enjoyed special rates, and which were lost by the acts of the commission, which prohibited discriminations, had attacked the acts of the commission, and were urging the repeal of the statute creating it. A 20 per cent. reduction is a liberal estimate for the tariff of the commission.

On the part of the defendants it is also urged that these rates had been in force for eight years without any complaint on the part of the railroads, or any effort to restrain them, and for this reason it is claimed a strong presumption arises that they were not only not confiscatory, but were just and fair. It is true that, in the absence of any proof, such acts of the railroads would raise a strong presumption that the rates were compensatory, a presumption as strong as the rates made by legislative authority are fair and reasonable; still it is only a presumption, and may be rebutted. For that purpose it has been shown that the commission rates were only submitted to under vigorous and continuous protests, and after it had been fully established by fair trial that these rates were confiscatory did the railroad companies feel justified in invoking the aid of the courts to prevent what they consider a great injustice to them. In addition to that, it has been shown that since then there has been a continual increase in the operating expenses of the railroads in this state. The taxes have been more than doubled since the commission first established its tariff; the cost of materials, necessary for the operation of the trains and maintenance of the tracks, has increased largely; wages of all employes have been raised very materially; the legislation of the state, while no doubt prompted by the best motives, for the purpose of protecting the lives and property of its citizens, has greatly increased the operating expenses of all railroads in this state. The fellow-servant rule of the common law has been abolished; railroads are made liable for all losses sustained by fires caused by sparks from locomotives, regardless of any question of diligence or negligence; the hours of labor of some of their employes have been shortened by statute; additional brake-

men are required for freight trains; every locomotive is required to be provided with powerful electric headlights; many new stations have been established; in some of the cities, through which the roads run, they have been required to erect viaducts over some of the streets to prevent injury to persons using these streets; heavy penalties have been prescribed to secure prompt payments of wages of employes; and many other matters deemed necessary for the protection of property and the lives and comfort of the public are now prescribed by statute which were not required eight years ago. All of these add very much to the financial burdens of these companies. These facts must, of course, be taken into consideration for the purpose of determining what rates are compensatory. As stated by this court in *Kansas City Southern Railway Co. v. Board of Railroad Commissioners* (C. C.) 106 Fed. 353, 358, affirmed in *Hanley v. Kansas City S. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, in speaking of such additional expenses necessarily incurred by reason of the enactment of such laws by the different states:

"And perhaps in consideration of these additional burdens imposed on the railroads, it (the state) may allow a greater charge for the transportation of passengers as well as freight through its territory than neighboring states in which no such burdens are imposed."

That the large increase in their business caused by the development of the natural resources of the state, as well as the rapid growth of its population, the use of improved machinery and rolling stock, the improved condition of the roadbeds after they are used for a number of years, enable the companies to carry freight, as well as passengers, at a lower rate than formerly, cannot be doubted, but the proofs now before the court would hardly justify a finding that there has not been some increase in the cost of the operation of trains in this state within the last few years, since the commission rates went into effect, increases which were gradual but continuous.

Giving due weight to these facts, the next inquiry to be made is, what rates would enable them to earn reasonable returns on their investments? So far as the passenger rates are concerned, it is, of course easy to ascertain the increase, as the rate was raised from two cents to three cents a mile, an increase of 50 per cent.; but it is claimed that in view of the reduced rates received from the sale of mileage books, and the reductions usually offered the public as excursion rates, when it is sought to attract large crowds for certain occasions, usually of a public nature, and reduced rates furnished to ministers of the gospel, the actual increase in the gross receipts on passenger rates is only about 35 per cent.

A three cent a mile rate, in view of the fact that, comparatively speaking, this state is but sparsely settled, and that there are no large cities in it, is not so unreasonable that the court would feel justified, upon the showing made by the roads, indicating a considerable loss on its intrastate passenger traffic while the two cents a mile rate was in force, to disturb it while these proceedings are pending. Besides, it is well settled that for the purpose of determining whether rates are confiscatory or not all sources of revenue must be considered. *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46

L. Ed. 1151; *Seaboard Air Line Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175; *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933.

The increased earnings from one class of traffic will, therefore, justify a corresponding decrease in another class, if the net earnings from all sources are compensatory. For this reason, if the net earnings on passenger traffic are larger, that fact would be considered in determining whether the freight tariffs fixed by the complainants are too high, and also aid in determining what they should be. It is true that lower passenger rates are felt more generally, and for this reason are more fully appreciated by the large majority of the public than lower freight rates, which are not felt so readily by the consumer, the same as the collection of direct and indirect taxes. But so far as the interests of the public at large are concerned, it is of much more importance to them to enjoy the benefit of lower freight rates than passenger rates, provided the latter are not excessive or unreasonable. High freight tariffs not only directly affect the prices of commodities to the consumer, but may seriously cripple, if not totally destroy, manufacturing industries and the business of wholesale dealers, if higher than those charged from competitive points outside of the state, as it is the price at the place of delivery which will control the trade. As the injunction against the enforcement of the two cents a mile passenger rate as confiscatory, and therefore violative of the provisions of the national Constitution, leaves the three cents a mile statute (section 6611, Kirby's Digest of the Statutes of Arkansas) in full force, and this rate has been put in operation by the railroads since the granting of the temporary injunction, this change, therefore, adds to the net earnings of the complainants at least 35 per cent. without any corresponding increase of expenditures. Whether the railroad companies should not be charged with a 50 per cent. increase in these rates, in view of the fact that the reduction below three cents a mile is voluntary on their part, and not in pursuance of any act of the Legislature or the commission, need not be determined at this time, although, in view of the decisions of the Supreme Court, it is very doubtful whether the railroads, if they exercise this power, can be heard to complain if by reason thereof their earnings are not compensatory. In *Lake Shore, etc., R. R. Co. v. Smith*, 173 U. S. 684, 696, 19 Sup. Ct. 565, 43 L. Ed. 858, it was held that the state had not the power to enact such legislation without violating the national Constitution, and in *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. —, it was expressly held that, if the company sees proper to make reductions in special cases when not required to do so by law, the decrease by reason of such reduction cannot be considered by the courts in determining the reasonableness of the rates fixed by law. The court there said:

"The company, it is true, might, if it chooses, allow such a discount (a discount of 5 per cent. for prompt payments) from the ordinance rates; but the ordinance required no discount from the rate established by it, and the company, therefore, was bound to offer none. If it stood upon the letter of the ordinance, as it had the right to do, and exacted from the consumers the full charge prescribed by the ordinance, the amount which would have been realized would have been over \$4,000 more than that found by the master."

But as this case is not now before the court for final determination, and in view of the fact that the public is the beneficiary of these reduced special rates, they being general and uniform, and the further fact that in this motion to modify the injunction the court is asked to require a reduction of passenger rates, we will not, at this time, determine that question, but, for the purpose of ascertaining the earnings of complainants, only charge them with an increase of 35 per cent.

As to what constitutes a reasonable rate must depend upon the facts of each case, and cannot be determined without reference to the interests of the public. *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Farmers' Loan & Trust Co.*, supra; *San Diego Land Co. v. National City*, 174 U. S. 739, 755, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Chicago & Northwestern R. R. Co. v. Dey (C. C.)* 35 Fed. 866, 878, 1 L. R. A. 744.

In *Covington, etc., Turnpike Co. v. Sandford*, the court said:

"It cannot be said that a corporation is entitled of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock."

This was quoted with approval in *Smyth v. Ames*, and the court there added:

"It cannot, therefore, be admitted that a railroad corporation maintaining a highway under authority of the state may fix its rates with a view solely to its own interests and ignore the rights of the public. But the rights of the public would be ignored if rates of transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay interest on its obligations, and declare a dividend to its stockholders."

Another matter which is entitled to consideration is the fact which has been brought out at this hearing, that the St. Louis, Iron Mountain & Southern Railway Company and the Chicago, Rock Island & Pacific Railway Company have, within the last few years, and since the establishment of the commission rates, constructed extensive branch lines through new and unsettled sections of the state; that these lines were constructed at great expense, owing to the fact that the greater part of these branches runs through swampy country, some of it subject to overflows, which necessitated high embankments; that these roads were built principally to serve as feeders for the main line, and at the same time enable these roads to obtain shorter lines for that part of its interstate traffic which merely passed through the state. These are matters which must be taken into consideration in determining what would be proper net earnings on the investments. It would hardly be proper for the courts to say that such roads are entitled to as great a compensation on their investments from intrastate business as the ordinary roads built for the accommodation of the intrastate as well as the interstate business. As is well known, some of the Pacific roads traverse the desert for hundreds of miles through a strip of territory where there is practically no intrastate business, either freight or passenger. Would it be proper, in such cases, to

hold that the road should have the right to charge for its intrastate traffic in that section tariff rates high enough to enable it to earn a certain, fixed percentage on its investment? Would not, in such a case, the rates have to be so high as to be confiscatory of the property of the residents of that state? Must the public guarantee the railroads a certain income on their investment, regardless of the condition of the country traversed, or whether bad judgment was exercised in the selection of the route? We do not think so. New lines or branches to increase the business of the main line, or the exercise of bad judgment in the building of a railroad, are matters to be considered in determining what rates would be fair and just to the corporation as well as the public. That the railroads are entitled to reasonable profits on their investments, and the public to reasonable rates, or, to express it differently, that the rights of the public and railroad companies are reciprocal, is the correct rule of law.

In *Reagan v. Farmers' Loan & Trust Co.*, supra, Mr. Justice Brewer, speaking for the court, in the concluding part of the opinion said:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries; unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value. The road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road." 154 U. S. 412, 14 Sup. Ct. 1059, 38 L. Ed. 1014.

In *San Diego, etc., Co. v. Jasper*, 189 U. S. 439, 446, 23 Sup. Ct. 571, 574, 47 L. Ed. 892, it was held:

"If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return."

Nor is it required that the particular rate of compensation must in all cases and in all parts of the country be the same. *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. —.

Guided by these principles, the court is of the opinion that rates which will enable the complainants to earn 6 per cent. on their investment, if fairly entitled thereto by prevailing conditions, would be reasonable, especially in view of the fact that a large part of the money used in the construction of these roads was obtained from loans secured by mortgage, and these loans only bear from 4 to 5 per cent. interest per annum, thus leaving a larger return for the stockholder, who, of course, is unsecured, and in case of insolvency of the company would be postponed until the mortgage bondholders are paid in full. For these reasons, the risk of the investment of the stockholder being greater than that of the bondholders, he is entitled to a

higher rate of interest on his investment. In determining what rates would be just and reasonable, the court is relieved of passing upon conflicting evidence for the purpose of determining the value of the investment. Complainants in their bills only ask for compensatory rates on the value of the roads as determined by the State Board of Railroad Assessors, for the purpose of taxation. The assessments in this state are conceded to be upon the basis of 50 per cent. of the actual value of the property, and they therefore ask to be permitted to earn fair dividends on double the amount their roads are assessed for taxes. (This does not apply to the branch line of the Rock Island Road lately constructed, and which is assessed at a nominal value.) For the purpose of determining how much of that amount should be taken into consideration for the intrastate traffic, calculations were made by expert accountants under the direction of Judge Van Devanter, and their calculations, adopted by him for the purpose of passing upon the motions for preliminary injunctions, are here adopted.

While the revenues of the roads, and especially the increased earnings since the new rates, pending this litigation, have been put into effect, vary somewhat, it is impossible to make different rates for each road. The fact that in most of the larger cities of the state two or more of the roads compete for business, and therefore must carry freight at the same rates, would prevent making different rates, and the tariffs prepared by the roads themselves are practically uniform.

The values of the roads for the intrastate traffic, as ascertained by the accountants and adopted by Judge Van Devanter, are as follows:

St. L., I. M. & S. Ry. Co.....	\$12,880,982 44
St. L. & S. W. Ry. Co.....	4,774,880 82
C., R. I. & P. Ry. Co.....	5,200,422 39
St. L. & S. F. Ry. Co.....	3,519,791 41

The earnings of these roads for the last six months of the year 1907, calculated on a revenue basis, allowing for the greater cost of intrastate business 100 per cent. on freight, and 15 per cent. on passenger traffic more than for interstate business, as determined by Judge Van Devanter in these cases, are as follows:

Name of Road.	Gross Frt. Erngs.	Frt. Exp.	Gross Pass. Ergs.	Pass. Expenses.	Net Loss.
St. L., I. M. & S. Ry. Co.	\$640,248.17	\$800,041.29	\$836,542.20	\$865,423.66	\$188,674.58
St. L. & S. W. Ry. Co.	348,337.58	368,697.43	440,452.64	463,412.01	43,319.22
C., R. I. & P. Ry. Co.	210,813.57	372,913.48	253,395.52	220,750.00	129,454.39
St. L. & S. F. Ry. Co.	139,002.89	218,917.65	187,173.87	176,493.67	69,234.57

NOTE.—The returns of the St. L. & S. F. Ry. Co. were only for four months, and in order to make them uniform with the others this table shows the earnings and expenditures for six months. Fifty per cent. has been added and is included in the above. The returns of the St. Louis & Southwestern Railway Company include the earnings for the entire year ending June 30, 1908.

In addition to these earnings, each of the roads also showed the receipt of considerable sums from what is called "Miscellaneous Earnings," which are not included in the above tables. These earnings come principally from mail and express, but there is nothing in the evidence to show whether these items caused a net profit or not, as the auditors testified that it is impossible to divide them between intra and inter state business. These earnings were as follows, and constitute the percentages of the entire business of the roads as shown by the figures on the following table:

Miscellaneous Earnings.

Name of Road.	Gross Frt. Erngs.	Percentage.	Gross Pass. Erngs.	Percentage.	Tot. Gross Earnings.
St. L., I. M. & S. Ry. Co.....	\$122,814.41	2.51%	\$373,785.47	21.01%	\$496,599.88
C., R. I. & P. Ry. Co.....	19,033.43	1.48%	78,940.50	11.29%	97,940.50
St. L. & S. W. Ry. Co.....	46,228.88	1.43%	154,285.75	17.14%	200,514.63

NOTE.—The St. L. & S. F. Ry. Co. did not include this item in its statement, but it would probably average the same proportion to the entire business as that of the other roads.

For the purpose of these proceedings the court is of the opinion that an increase of 33 1/3 per cent. on the tariff of freight rates in force at the time these injunctions were granted, the increase to be calculated upon a revenue basis, will enable complainants to earn a reasonable compensation when added to the increased passenger rates, and at the same time prevent the exaction of unjust and unreasonable rates from the public. Calculating the increase of revenue upon that basis, the net earnings for a year, assuming that the business will be the same as it has been, will be as follows:

Road.	Incrs. in Frt. Earnings.	Incrs. in Pass. Earnings.	Total.	Net Income.
St. L., I. M. & S. Ry. Co.	\$426,833.12	\$585,579.40	\$1,012,412.52	\$635,063.36
St. L. & S. W. Ry. Co...	116,112.53	154,158.42	270,270.95	276,951.73
C., R. I. & P. Ry. Co....	140,542.38	177,376.85	317,919.23	59,010.45
St. L. & S. F. Ry. Co....	92,668.59	131,021.45	223,690.04	85,220.90

The net income will allow the companies a profit on their respective investments as follows:

St. L., I. M. & S. Ry. Co.....	over 5%
St. L. & S. W. Ry. Co.....	" 4.8%
C., R. I. & P. Ry. Co.....	a little less than 1 1/2%
St. L. & S. F. Ry. Co.....	about 2 1/2%

These figures indicate that some of the roads would earn but a very small dividend on their investment so far as the intrastate traffic is concerned, but it is impossible, for the reasons hereinbefore stated, to provide the same earnings for roads whose conditions differ so widely as these do. The St. Louis, Iron Mountain & Southern Railway Company, which does the largest proportionate intrastate business, will earn over 5 per cent. on its investment. In view of the fact that it has built two very extensive branches lately through a country having but few inhabitants and no industries, a line intended primarily for its through interstate business, so as to enable it to have a short line from the West to the Gulf of Mexico, this is a very reasonable and fair compensation. The St. Louis & Southwestern Railway Company, which does the next largest proportionate intrastate business, will earn nearly 5 per cent. on the basis of its earnings for the year ending June 30, 1908, which included the first six months of the year 1908, when confessedly traffic was the smallest. Lumber, which is its largest tonnage, was practically not moving at all during that time. At the final hearing the evidence will no doubt show what should be considered as earnings for ordinary times. The St. Louis & San Francisco Railway Company, although it has a large mileage in the state, does but a comparatively small intrastate business as shown by its statement hereinbefore set out, its gross earnings on both passenger and freight traffic being only about 9 per cent. of its valuation. The earnings of the Chicago, Rock Island & Pacific Railway Company seem to be the smallest in proportion to its investment, but a new branch line of 147 miles is included at a valuation of \$3,000,000, although assessed at less than \$300,000, by reason of the fact that it was but recently built through a swampy section of the state, has been but a short time in operation, and was intended principally for its through interstate business. A computation of the earnings of each of the roads from its intrastate business, as compared with its valuation, as shown by their statements, will show practically the same differences:

Road.	Net Loss for Year.	Percentage of Loss on Capital Invstd. in Intrastate Traffic.
St. L., I. M. & S. Ry. Co.....	\$377,439.16	About 2.9%
St. L. & S. W. Ry. Co.....	43,319.22	" .9%
C., R. I. & P. Ry. Co.....	258,908.78	" 5%
St. L. & S. F. Ry. Co.....	138,469.14	" 3.9%

As the country traversed by these new roads is being rapidly settled, and new industries and manufacturing plants are springing up along these lines, the intrastate business will, in all likelihood, increase rapidly. In any event, unless different rates should be made for each road according to its location, cost of building, judgment in selection of the line, it is impossible to fix any rates which will enable each of the roads to earn the same dividends. The tariffs which they have put

in effect are the same for all of the roads, and, for the reasons hereinbefore stated, it would be impracticable to do otherwise.

As these suits will necessarily require considerable time before the final decrees can be rendered, either party may at any time apply to the court for a modification of this order if, after a fair trial, it is found that the rates are unjust to either party. The Railroad Commission, the court is informed, has prepared a freight tariff which, in its opinion, would increase the net revenue of these roads from freight traffic $33\frac{1}{3}$ per cent. Copies of these schedules should be furnished immediately to the complainants, and the court has no doubt that if these tariff sheets are found to be inaccurate, and will not produce such an increase in revenue, the parties can agree among themselves to make such changes as will bring about that result. Should they be unable to do so, the court will refer the matter to a special master for the purpose of preparing such tariff rates.

A decree modifying the injunction now in force, in conformity with the views herein expressed, may be prepared by the parties and submitted to the court.

RISLEY v. CITY OF UTICA et al.

(Circuit Court, N. D. New York. April 1, 1909.)

1. CONSTITUTIONAL LAW (§§ 213, 254*)—FOURTEENTH AMENDMENT—APPLICATION.

The prohibition of the fourteenth amendment of the federal Constitution that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, while directed against the state, and not against individuals, citizens, or municipalities, nevertheless includes all the instrumentalities of the state, so that whoever by virtue of a public position under a state government deprives another of any right protected by such amendment is guilty of a violation thereof; his act being regarded as the act of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 735; Dec. Dig. §§ 213, 254.*]

2. CONSTITUTIONAL LAW (§§ 229, 283*)—DUE PROCESS OF LAW—TAXING POWER.

The state having vested the taxing power for municipal purposes of the city of Utica in its city council, a city ordinance imposing a water tax on a property owner within such city, without any corresponding benefit, or any opportunity to be heard in resistance of such tax, constituted a violation by the state of the fourteenth amendment of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 685, 891-906; Dec. Dig. §§ 229, 283.*]

3. COURTS (§ 255*)—FEDERAL COURTS—JURISDICTION.

The circuit courts of the United States have only such jurisdiction as Congress has conferred on them, except such as necessarily inheres in a court, such as power to punish for contempt, etc.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 792, 794, 805; Dec. Dig. § 255.*]

4. COURTS (§ 326*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Act March 3, 1875, c. 137, § 1, 18 Stat. 470, Act March 3, 1887, c. 373, § 1, 24 Stat. 552, Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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St. 1901, p. 508) declares that United States circuit courts shall have concurrent jurisdiction with the courts of the several states of all suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000 arising under the Constitution or laws of the United States, or treaties made or which shall be made, under their authority, and also in a case of diversity of citizenship. *Held* that where the case arises under the Constitution and laws of the United States, diversity of citizenship is not required to establish federal jurisdiction, though it is necessary that the matter in dispute shall be over \$2,000, but where the case does not arise under the Constitution or laws of the United States, there must be both diversity of citizenship and matter in dispute exceeding \$2,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 888; Dec. Dig. § 326.*]

Jurisdiction of circuit courts as determined by 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.]

5. COURTS (§ 328*)—FEDERAL COURTS—MATTER IN DISPUTE—ONE SUING FOR HIMSELF AND OTHERS.

Where one sues on behalf of himself and all others of a class similarly situated, the aggregate interest of those who join in the suit, and not those of the whole class, constitutes the matter in dispute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. § 328.*]

6. COURTS (§ 328*)—FEDERAL COURTS—JURISDICTION—ILLEGAL TAX—MATTER IN DISPUTE.

A taxpayer of the city of Utica attacked a contract between the city and a water company, the bill alleging that the amount the city was to pay the company on November 15, 1907, was \$38,903.52, which was included in the city's tax levy; that the tax rate in the city was \$9.80 per thousand, and that complainant's farm was assessed at \$2,000; that additional expenses were being incurred for water mains, etc., amounting to \$120,000, the interest on which would be added to the tax levy thereafter and become an additional burden on all the taxable property in the city, including that of complainant; that the warrant for 1907 had been signed and delivered, and included a tax of over \$20 against complainant's property; that complainant derived no benefit whatever from such contract between the city and the water company; that he was afforded no opportunity to be heard in resistance of the tax, which was illegal, and that an actual levy on his property had been made to pay the same. *Held*, that the amount of the tax levied against complainant was the matter in dispute in such action, which, being less than \$2,000, the case was not within the jurisdiction of the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. § 328.*]

7. TAXATION (§ 309*)—"ASSESSED."

The term "assessed," with reference to taxation, means the amount of the tax to be imposed on the property and collected. To assess is to rate or to fix the proportion which every person has to pay of any particular tax; the determination by the taxing body of the tax to be paid by each individual, and adjustment of the shares of a contribution by several toward a common beneficial object according to the benefit received; to set, fix, or charge a certain sum upon, by way of tax, as to assess each individual in due proportion—the tax being regarded as assessed when it is apportioned.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 309.*]

For other definitions, see Words and Phrases, vol. 1, pp. 547-549; vol. 8, p. 7583.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity.

Demurrer by the Consolidated Water Company of Utica to bill of complaint seeking, amongst other things to enjoin and restrain defendants from levying and collecting taxes on certain of his property in said city of Utica, on the ground that the laws of the state authorizing and permitting it are in violation of the Constitution of the United States, in that he is denied equal rights and the equal protection of the law, and due process of law, or that such tax is being levied and collected in violation of such constitutional rights.

Risley & Love, for complainant.

Lynch & Willis (C. E. Snyder, of counsel), for defendant Consolidated Water Co. of Utica.

RAY, District Judge. The parties to this suit are all citizens and residents of the state of New York, where the property taxed is situated, and there is no jurisdiction in this court unless a question is fairly presented arising under the Constitution or laws of the United States. The complainant brings the action for the benefit of himself and all others similarly situated, of whom there are quite a number.

The city of Utica is a municipal corporation existing under an act of the Legislature of the state of New York entitled "An act to revise the charter of the city of Utica," passed February 28, 1862 (Laws 1862, p. 28, c. 18), and the several acts supplementary thereto and amendatory thereof. The city, under its charter, has a mayor and 15 aldermen, who constitute the common council of said city. The common council is thereby authorized to regulate public wells, aqueducts, and reservoirs for the convenience of the inhabitants of the city and for protection against fire and to prevent the waste of water. The city does not own or operate any water system in said city, or any part of same, for the convenience of its inhabitants or protection against fire. The city and its inhabitants are dependent upon the Consolidated Water Company of Utica for their water supply for fire purposes and domestic use. Ordinances and resolutions of the common council may be vetoed by the mayor, but by a two-thirds vote it may be passed and become a law notwithstanding such veto. The said common council has authority under the charter to raise by tax upon the taxable property of the city certain sums of money to defray the general expenses of the city government, street lighting, parks, etc.

The Utica Waterworks Company was a domestic corporation organized to supply water to the city of Utica and the inhabitants thereof. It consolidated with the Trenton Falls Waterworks Company, and the consolidated companies became the Consolidated Water Company of Utica, and is now supplying water to said city for its use, and that of certain of its inhabitants for domestic use and fire purposes. The water so supplied is conducted through pipes laid in certain of its streets by the authority and with the consent of the common council, and these pipes are connected with the source of supply. There are more than 115 miles in length of public streets in said city, but the total number of miles of pipe laid in said streets is less than 95.

The complainant now is, and for more than 25 years last past has

been, the owner and occupant by his tenant of a farm of some 29½ acres of land located in the Thirteenth ward of said city. Upon this farm there is a 12-room dwelling house, horse barn, cow and hay barn, milkhouse, and other buildings of value used upon and in connection with said farm, and which have been used as a part of and in connection with said farm for many years last past. On said farm are three wells, two of which become dry in dry seasons, and the third is adjacent to the barn, and the water thereof is not suitable for domestic purposes. The supply of water upon said farm is wholly inadequate to protect the buildings thereon in case of fire. This farm is located on what is commonly known as the "Welshbush Road" in said city, and there is no water main or other pipe connecting with any pipe, hydrant, or water supply furnished by the city of Utica or the said Consolidated Water Company or its predecessor on said road or farm or adjacent thereto, and the nearest water main to the said farm and farm buildings is one mile substantially distant therefrom and three-fourths of a mile distant from any part of the farm. The result is that neither the city nor the said water company provide or furnish any means whatever for the protection of the buildings of the complainant situated on said farm, and such buildings are utterly without protection in case of fire.

The complainant in due form has urged and requested the city more than once to extend or cause to be extended to some point upon said farm or said Welshbush road or near said buildings a water main or pipe so as to furnish protection to complainant's said buildings on said farm against fire, but the city and its common council have neglected, failed, and refused finally so to do. At one time the common council duly adopted a resolution or ordinance to extend a water main to and upon said road and near to or by the said buildings of complainant; but the mayor vetoed the ordinance, and since that time the city and its authorities have failed to take further action, although requested so to do.

The city by its common council has extended water mains in other streets, and contracted to pay large sums for laying water pipes in other streets and sections, and levies and assesses the expense of furnishing water to various parts of the city for fire purposes upon all the taxable property of said city, including the said farm and farm property of the complainant and others in that vicinity similarly situated. These taxes have been laid, assessed, and collected for some years, and taxes for such purposes are now assessed, levied, and threatened to be collected of the complainant by levy upon and a sale of his said property. When the city refused to extend protection against fire to the buildings and property of the complainant on request of the complainant, he gave notice that he would not pay taxes for such purposes, and that the taxes assessed and levied for such purposes were illegal and in violation of his rights under the Constitution of the United States, and, upon his refusal to pay such taxes levied for such purposes, the city, by authority of its common council, levied upon and threatened to sell the said property of the complainant.

By chapter 393, p. 937, Laws of 1867, the Legislature of the state

of New York passed an act entitled "An act to authorize the Utica Water Works Company to increase its capital stock and to contract with the common council of the city of Utica for a supply of water in said city for the extinguishment of fires."

Section 1 of that act reads as follows :

"The common council of the city of Utica are hereby authorized and empowered to make a contract with the Utica Water Works Co. and to fix and agree upon the sum to be paid annually therefor, for a supply of water for the extinguishment of fires in said city; and said Utica Water Works Co. shall, when such contract is made, furnish water to the city of Utica for the purposes of extinguishing fires, and shall lay and extend its pipes and conduits in such streets as the common council shall designate, and provide suitable reservoirs to constantly supply said city with sufficient water for the extinguishment of fires. Said sum fixed as the annual sum to be paid to said Utica Water Works Co. for a supply of water for the purpose of extinguishing fires, shall be added in each year to the tax authorized to be raised by the 47th section of the city charter of said city of Utica and shall be collected therewith, and by the same power and authority."

Section 2 authorized an increase of the capital stock of said company to a sum not exceeding \$200,000, to be fixed by the directors thereof. April 7, 1870 (Laws 1870, p. 415, c. 143), this act was amended authorizing an increase of the capital stock to \$400,000, and May 17, 1887 (Laws 1887, p. 443, c. 359), the act was further amended authorizing an increase of the capital stock to \$600,000.

May 19, 1868, under and pursuant to the authority conferred by said act, a contract was entered into between the said city and the said water company, which reads as follows :

"In pursuance of chapter 393 of the Laws of 1867 it is agreed by and between the Utica Water Works Company and the city of Utica as follows, to wit:

"The said company agrees to furnish water for the said city for the extinguishment of fires; and to lay and extend its pipes and conduits in the streets designated upon a map and plan presented to the common council of said city by a committee of the directors of said company on the 20th day of April, 1868, duplicate of which is on file in the office of the city clerk and is certified by Theodore S. Sayre on behalf of the city committee as a map and plan here referred to and to provide suitable reservoirs to constantly supply said city with sufficient water for the extinguishment of fires, provided said city shall pay therefor the compensation hereinafter mentioned and also upon the condition that the said company shall be able on or before the 15th day of November next by a sale of new stock or otherwise to raise sufficient money to complete the works contemplated by this contract.

"And the city of Utica agrees that when the said company shall have furnished by the said reservoirs and by the said pipes and conduits a supply of water in manner and for the purpose aforesaid and so long as they shall continue to supply sufficient water for said purpose it will pay therefor to the said company the sum of ten thousand dollars (\$10,000.00) annually, to wit: On the 15th day of November in each and every year and will also pay and discharge one-half of all taxes aforesaid upon said company or its works or property within the limits of said city and taxes thereon in excess of the sum of one thousand dollars. The amount of the first payment to be determined by reckoning from the time a supply of water is provided in the pipes and conduits in manner aforesaid to the 15th day of November next thereafter, and if it shall be a part of a year from said time to said 15th of November then the sum to be paid on said day shall bear the same proportion to ten thousand dollars that the said part of a year shall bear to a whole

year and the taxes to be paid by the city shall be one-half of all taxes in excess of one thousand dollars aforesaid in said city against said company after the supply of water shall be furnished as aforesaid.

"It is agreed by the parties hereto that if it shall be found necessary or expedient to change the details of the said pipes and conduits, the said company by and with the consent of the common council or of a committee thereof first had and obtained, but not otherwise, shall be at liberty to make such change, provided same shall not prevent or in any material degree interfere with a supply of water as aforesaid, and if said city shall determine to have said water pipes extend on any street beyond the point designated on said map, the said company agree to extend the same to such point as may be designated, the said city agreeing to pay in addition to the sum herein specified seven per cent. upon the cost of said extension or new work.

"The said company agree that the city may obtain a supply of water from the company's pipes for the city hall and other public buildings owned or occupied for municipal purposes without the payment of water rents but subject in other respects to the usual rules of the company.

"It is understood and agreed that the city is to furnish all the hydrants which it may require for use in extinguishing fires; that the company shall put in and connect the same with the water pipes in such place as may be designated by the said city and keep the same in repair but that the city shall at all times pay the expenses of putting in, connecting and repairing said hydrants in accordance with the terms now and always heretofore existing between the company and the city for a supply of water from the company's present works, but no portion of the expense to be paid by the said city shall include the expense of the pipe connecting the hydrant with the water or main pipe.

"The said company further agrees with said city that as soon as the money hereinbefore mentioned shall be raised and paid or secured to be paid to the satisfaction of the directors of said company they will proceed with all reasonable diligence to the construction of the works provided for by this contract and with like diligence to the completion of the same.

"It is estimated that the whole work herein provided for according to the map, plan and specification herein referred to will cost more than the sum of one hundred and twenty-five thousand dollars. If, however, it shall cost less than that sum the said city in lieu of said ten thousand dollars shall pay seven per cent. upon the actual cost of said work and the taxes as hereinbefore stated.

"It being understood and agreed that the said cost of said whole work is to include the cost of making such changes, additions and repairs of the existing works of the company as shall be necessary to enable the said existing works to bear the additional pressure of water to be created by the new works and to be properly adapted thereto and so as to make the whole sufficient and as complete as may be for furnishing a supply of water as aforesaid throughout their whole extent.

"And the said waterworks company agree to erect fountains in such places in the streets as may be designated by the common council not exceeding six in number and furnish the same with water for drinking purposes at said fountains only (not including the drinking or watering of horses and cattle) but the whole expense of procuring, erecting, putting down and connecting said fountains shall be paid by the city.

"The company is to make no charge for water thus supplied. It is to be at liberty to shut off the water from said fountains when necessary to prevent freezing and also when required by general scarcity of water.

"The fountains to be under the charge and control of the superintendent of the company.

"Given under our hands and corporate seal this 19th day of May, 1868.

"J. Thos. Spriggs, Mayor of City of Utica.

"Thos. S. McIncrow, City Clerk.

"[Corporate seal of the Utica Waterworks Co.]

"W. D. Hamlin, President.

"E. A. Wetmore, Secretary."

That part of the Constitution of the United States invoked here is so much of the fourteenth amendment as reads as follows :

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It will be noted that the prohibition is directed against the state, and not against individuals, citizens, or municipalities. But the provisions refer to and include all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state violates the constitutional inhibition ; and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. *Chicago, Burlington & Q. R. Co. v. Chicago*, 166 U. S. 226, 233, 234, 17 Sup. Ct. 581, 41 L. Ed. 979 ; *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 694, 18 Sup. Ct. 223, 42 L. Ed. 626 ; *City Railway Company v. Citizens' Street Railroad Company*, 166 U. S. 557, 562, 563, 17 Sup. Ct. 653, 41 L. Ed. 1114. See, also, Brannon's "The Fourteenth Amendment," 97, 98 ; *Ex parte Virginia*, 100 U. S. 339, 347, 25 L. Ed. 676.

Further, it may be observed that the first part of the amendment is directed to the making and enforcing of laws, viz., "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," but the second and following part does not. For this reason cases arising under the first part of the amendment may not be at all applicable to those arising under the second part, which is invoked here. However, as was decided in *N. O. Waterworks v. La. Sugar Co.*, 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607 :

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.

"For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the Legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *United States v. New Orleans*, 93 U. S. 381, 392, 25 L. Ed. 225 ; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197. Accordingly, where the city council of Charleston, upon which the Legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the state. *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760. See, also, *Home Ins. Co. v. City Council of Augusta*, 93 U. S. 116, 23 L. Ed. 825."

The Legislature of the state of New York has vested the taxing power of the state in the common council of the city of Utica in so far as the levying and collection of taxes for municipal purposes, including the supply of water for domestic and fire purposes, is concerned. The state, through its agencies duly established, and having power for the

purpose granted by the state, is exercising this taxing power. It is the act of the state, and, if the common council of the city of Utica deprives, or by the exercise of this power seeks to deprive, the complainant of his property without due process of law, or denies to him the equal protection of the laws, it violates the provisions of the fourteenth amendment to the Constitution of the United States, and the complainant, in behalf of himself and others similarly situated may maintain this action in this court notwithstanding the fact that all the parties reside in this state, provided the amount in dispute is material and it exceeds, exclusive of interest and costs, the sum of \$2,000. The bill alleges that the total illegal tax levy is in excess of \$2,000, and seeks to restrain the collection of the whole tax, and also seeks to cancel the levy and assessment as an apparent lien on his property.

The Circuit Courts of the United States have such jurisdiction as Congress has conferred upon them, and no other, except that which necessarily inheres in a court, such as punishments for contempt. By Act March 3, 1875, c. 137, § 1, 18 Stat. 470, Act March 3, 1887, c. 373, § 1, 24 Stat. 552, Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), and Act March 3, 1891, c. 517, §§ 4-6, 26 Stat. 827, 828 (U. S. Comp. St. 1901, pp. 548-550), we find the following developed as the jurisdiction of this court in such an action as this:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

While the amount of over \$2,000 in dispute is requisite where the case arises under the Constitution or laws of the United States, diversity of citizenship is not. Where the case does not arise under such Constitution or laws, the Circuit Court, by a subsequent provision in the section, has jurisdiction if the parties plaintiff reside in one state and the parties defendant in another, and the amount in dispute, exclusive of interest and costs, exceeds \$2,000. In *Northern Pacific R. Co. v. Walker*, 148 U. S. 391, 13 Sup. Ct. 650, 37 L. Ed. 494, *Walter v. Northeastern R. Co.*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206, and *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, 100, 16 Sup. Ct. 506, 40 L. Ed. 630, all tax cases, it was held that the Circuit Court of the United States has no jurisdiction of an action in equity to enjoin the collection of a tax when the amount of such tax does not reach or exceed the sum of \$2,000, and the bills were dismissed. In the *Fishback Case* the complainant sought to have it decreed that the act under which the tax was assessed and levied was unconstitutional and void, that the Railroad Commissioners who levied the tax should be decreed to show the grounds of their assessment, that the act of the board in assessing the complainant's property be canceled, and that defendants be enjoined from proceeding to collect the tax. In *Northern Pacific Co. v. Walker*, *supra*, the bill also asked to have the assessment and tax levied canceled as a cloud on title. In *United States v. Sayward*, 160 U. S. 493, 498, 16 Sup. Ct. 371, 40 L. Ed. 508, the court points out the jurisdiction of the Circuit Court of the United States in

all cases of this nature. This rule is not affected by the fact that the operation of the act of March 3, 1891, c. 517, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), was to do away with any pecuniary limitations on appeals directly from the Circuit Court to the Supreme Court of the United States. The *Paquette Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320; *Holt v. Indiana, etc., Co.*, 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374. The result is that a bill filed in the Circuit Court, where there is not the requisite diversity of citizenship, must show that a question under the Constitution or laws of the United States or a treaty made is involved, and that the amount in dispute exceeds \$2,000; but on appeal from the Circuit Court direct to the Supreme Court of the United States it need not appear that the amount in dispute on such appeal exceeds \$2,000, if it does appear that the construction or application of the Constitution of the United States is involved, or that it is claimed that the Constitution or law of a state is in contravention of the Constitution of the United States. It is necessary, therefore, to take notice whether a decided case on appeal involving this question of jurisdictional amount involves objection to the sufficiency of the bill in this regard or only the amount in dispute on the appeal.

Bells Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, was on writ of error from the Supreme Court of the state of Pennsylvania to the Supreme Court of the United States, and is not in point here on the question of the jurisdiction of the Circuit Court of the United States. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, was before the Supreme Court on writ of error from the Supreme Court of the state of Texas. The other cases cited by complainant show that they were appealable to the Supreme Court regardless of amount in controversy or that the question of jurisdiction was not raised. In *United States Express Co. v. Poe, Auditor, etc.* (C. C.) 61 Fed. 475, which was a suit in equity to enjoin an assessment under a state law, the court, per Taft, C. J., held that, as the additional tax complainant would be compelled to pay by reason of the unconstitutionality of the law was less than \$2,000, the Circuit Court had no jurisdiction and dismissed the bill. In *Western Union Tel. Co. v. Poe* (C. C.) 61 Fed. 449, 454, the suit was against the board of appraisers of the state of Ohio to restrain the assessment, etc., of a tax against the company in several counties of the state on the ground of the unconstitutionality of a state law. The question of jurisdictional amount in dispute was raised, and Taft, C. J., at page 454 of 61 Fed., held that, as the action was against the board of appraisers of the state, the excess of taxes to be paid by the company in all the counties of the state could be aggregated, and that, as the aggregate of such excess or illegal taxes exceeded \$2,000, the Circuit Court had jurisdiction. The court said:

"Again, it is urged that the affidavits filed show conclusively that in no single county will the assessment against the complainant amount to \$2,000; wherefore the argument is that the jurisdiction of this court cannot be supported by adding together the amounts due in each county. If my conclusion is correct, that this action will lie against the board of appraisers, there is nothing whatever in this objection, because the amount involved in controversy in the suit is the whole amount to be certified by the board under the law, less the aggregate amount which the complainant must pay in the various

counties of Ohio under such laws as are in force if the Nicholls law is not valid. The difference admittedly exceeds \$2,000. For this reason, I am of the opinion that the bill does present a case for equitable relief in a federal court."

This doctrine would seem to be opposed to *Northern Pac. R. Co. v. Walker*, and *Walter v. Northeastern R. Co.*, supra, where it was held:

"Following *Walter v. Northeastern Railroad Company*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206, it is again held that a Circuit Court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments, in separate counties, no one of which amounts to \$2,000, and for which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined in the bill and make an aggregate of over \$2,000."

In *Western Union Tel. Co. v. Norman, Auditor (C. C.)* 77 Fed. 13, 20, it was claimed that the whole tax was illegal and void and in violation of the federal Constitution. The court held:

"The equity jurisdiction of the federal courts, in the case of a bill by a telegraph company to enjoin a State Auditor from certifying to the various county clerks the proportions of an alleged illegal tax to be collected in their several counties, is sustainable on the ground of preventing a multiplicity of suits, and because of irreparable injury, where such local taxes, taken separately, would be less than \$2,000. *Telegraph Co. v. Poe (C. C.)* 61 Fed. 469, and *Sanford v. Poe*, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641, followed."

In the opinion the court said:

"The bill, in addition to seeking to enjoin the collection of the taxes levied for the benefit of the state of Kentucky, seeks to enjoin the Auditor, Norman, from certifying to the different county clerks, 68 in number, their respective proportions of the taxes assessed by the board of valuation and assessment, and alleges that these local taxes, with the tax for the benefit of the state of Kentucky, will amount to about \$10,000. The aggregate of these local taxes is thus shown to be over \$2,000, exclusive of interest and costs. The case, we think, is not within the principle of *Fishback v. Telegraph Co.* (decided by the Supreme Court March 2, 1896) 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630, and the previous case of *Walter v. Railroad Co.*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206. In both of these cases it was sought to enjoin the collection of local taxes which had been assessed and levied by the respective counties and municipalities. Hence the local taxes had been distinctly separated, so that a separate action could have been maintained against the counties and municipalities, if the taxes had been paid under protest. Here it is sought to prevent the Auditor from completing the appraisal and levy of taxes, which, if completed without legal authority, would be a wrongful act, and one probably subjecting him to an action by the party injured thereby. However this may be, the amount of tax in controversy between the plaintiff and the defendant, for the benefit of the state of Kentucky, is over \$2,000, exclusive of interest and costs. The jurisdiction of the Circuit Court seems, therefore, to be clear from the face of the bill."

Attention is called to *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. See same case below (C. C.) 79 Fed. 679; (C. C.) 82 Fed. 839; (C. C.) 82 Fed. 850. The complainants there were citizens of the state of Massachusetts and stockholders in the Kansas City Stockyards Company. They sued in behalf of themselves and all other stockholders, seeking, amongst other things, to have an act of the Legislature of the state of Kansas declared void as in violation of the Constitution of the United States. The action was based on the proposition that the enforcement of the

law in effect destroyed the value of the stock of the company, and so reduced its income or revenues as to damage its stockholders in large sums shown to be largely in excess of \$2,000. The court below passed the question of jurisdiction by saying that it had not been seriously questioned. 79 Fed. 681. There was no holding in the case that such an action may be maintained in the Circuit Courts of the United States irrespective of the amount in dispute.

The complainant here sues in behalf of himself and all others similarly situated. It does not appear that any other has come in and joined in the suit.

In *Cowell et al. v. City Water Supply Co. et al.*, 121 Fed. 53, 57 C. C. A. 393, it was held:

"The sum or value of the matter in dispute, which conditions the jurisdiction of a federal Circuit Court, is the amount or value of that which the complainant claims to recover, or the amount or value of that which the defendants will lose if the complainant obtains the recovery he seeks. * * *

"In a suit by an alleged owner of $\frac{1}{325}$ of certain real property, constituting waterworks and their appurtenances, to cancel and avoid mortgages thereon for \$475,000, and to declare his interest in the property free from the liens of those mortgages, the sum or value of the matter in dispute is not the amount of the mortgages or the value of the entire property, but the value of the $\frac{1}{325}$ of the property which the complainant claims to own, and seeks to relieve from the liens of the incumbrances."

Where one sues in behalf of himself and all others of a class similarly situated, the aggregate interest of those who join in the suit, and not those of the whole class, constitutes the matter in dispute. *Bruce v. Manchester & K. R. Co.*, 117 U. S. 514, 516, 6 Sup. Ct. 849, 29 L. Ed. 990; *Ogden City v. Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; *Wheless v. St. Louis*, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583. See *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547; *Handley v. Stutz*, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706.

What is the matter and the sum or value of the matter in dispute here? The complainant owns a farm of some 20 acres in the city of Utica. Its value, probably, is largely in excess of \$2,000. The city of Utica, by its common council vested by the state with the taxing power, has levied thereon an illegal and an unauthorized tax, in violation of the constitutional rights of the complainant, in that it gives to his property no fire protection whatever, and unnecessarily and arbitrarily refuses to give it protection against fire or to make provision therefor, while at the same time it incurs an annual expense of many thousands of dollars to provide a water supply from outside sources to protect the property of the other citizens of said city against fire, and raises the sums to meet and pay such expense by a general assessment and tax on all the taxable property situated in said city, including that of complainant. The common council and city authorities have made a contract with outside parties to furnish this water for such purposes, having none of its own. The making of a contract for a supply of water for fire purposes is authorized by an act of the Legislature of the state of New York. This act is general in its terms, but the contract made, under and pursuant to which the expense is incurred and the tax to meet it assessed and

levied, expressly limits the supply to a certain territory and to certain designated parts of the city. If the law of New York authorizes such a contract, it is unconstitutional and void as is the contract itself. If it does not authorize such a contract, then the contract is void, and in either event the tax assessed and levied is illegal and its collection is in violation of the constitutional rights of the complainant and of the rights of all similarly situated, and its enforcement is illegal and a trespass upon the property rights of the complainant. The bill also alleges that the complainant was given no hearing, no right to a hearing, upon this question of the legality of this proceeding or tax, and that, as a levy has been made upon his property to enforce this tax and a sale thereof is threatened, he is about to be deprived of his property without due process of law, and that for the reasons stated he is also arbitrarily denied equal rights and protection under the law which are guaranteed to him under and by the Constitution of the United States. All this we will assume to be conceded by the demurrer. Still this action cannot be maintained in the Circuit Court of the United States unless the sum or amount involved and in dispute exceeds \$2,000, exclusive of interest and costs. If for that reason this court has no jurisdiction to restrain these illegal acts and cancel the tax as a cloud on title, etc., and declare the contract void, the complainant is not without remedy, as he may sue in the state court, and an appeal may be taken by either party to the Supreme Court of the United States on the constitutional question involved irrespective of the amount in dispute.

The bill of complaint states that the amount to be paid under the contract for water, November 15, 1907, was \$38,903.52, which is included in the tax levy; that a certain sum is included in the tax to pay the tax assessed against the water company by the city of Utica, as mentioned in the contract, etc.; that the tax rate in the city of Utica is about \$9.80 per \$1,000; that complainant's farm is assessed at \$2,000; that additional expenses are being incurred for water mains, etc., amounting to some \$120,000, the interest upon which sum will be added to the tax levy hereafter and become an additional burden on all the taxable property in the city of Utica, including that of complainant; that the tax warrant for 1907 has been signed and delivered, which includes a tax of over \$20 assessed and levied on the said property of the complainant, and which includes the unlawful, illegal, and unwarranted tax complained of; that the expense of maintaining the fire department exceeds \$35,000 per annum, which is supported by tax on all the taxable property of the city, and imposes an additional burden of taxation from which complainant derives no benefit; that, if not restrained, the city of Utica and its common council will continue in years to come to assess and levy and collect such illegal tax. Also that an actual levy to collect said tax of 1907 has been made on complainant's said farm, and it is advertised to be sold for the nonpayment of such tax. The complainant alleges, also, that he is able to pay such tax if it is adjudged legal.

It is evident, therefore, that the actual sum or amount in controversy between the parties in dollars and cents is at this time less than \$22; that if the city and its authorities shall continue to assess such prop-

erty at \$2,000, and gradually increase the taxation, the sum illegally assessed and demanded will increase, provided the city does not extend fire protection to the property of complainant. But it seems to be settled that in determining the jurisdictional amount in dispute the collateral effect of the judgment in other suits between the same or other parties cannot be considered. It is the direct effect of the judgment alone that can be considered. *Bruce and Another v. Manchester, etc., Railroad*, 117 U. S. 514, 6 Sup. Ct. 849, 29 L. Ed. 990; *United States ex rel. v. Wanamaker*, 147 U. S. 149, 150, 13 Sup. Ct. 279, 37 L. Ed. 118; *Wheless v. City of St. Louis (C. C.)* 96 Fed. 865. See, also, *Russell v. Stansell*, 105 U. S. 303, 26 L. Ed. 989.

In *Bruce v. Manchester*, supra, the court held:

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

What the city will do in the future is conjectural. By paying the tax under protest, and bringing suit in the state courts to recover it as illegally assessed, levied, and collected in violation of the Constitution of the United States and of the rights of complainant thereunder, the question of the legality of the tax can be determined in the courts of the state. By bringing an action in the Supreme Court of the state for an injunction restraining the collection of the tax on the grounds stated, the whole matter can be tested first in the state courts, and then on appeal to the Supreme Court of the United States by the defeated party.

In *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987, bonds had been issued by a county to the amount of some \$400,000 in payment of a subscription by the county to the capital stock of a railroad company. Some 1,200 taxpayers joined in an action in the state court to enjoin the collection of a tax about to be levied to pay the interest on such bonds, alleging that the whole issue was invalid and seeking to have it so decreed. The cause was removed into the Circuit Court of the United States, and a motion to remand, on the ground that \$500 was not in dispute (that being the amount required to give jurisdiction at that time), was denied. The Supreme Court of the United States upheld the jurisdiction of the Circuit Court. The tax for that year to be levied and collected did not reach \$500 in the case of any one complainant. However, the bonds had been issued and were outstanding. It was certain that, unless canceled, a tax would follow each year. The court, per Mr. Justice Fuller, said:

"The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability, and that contested by the adverse party, is not applicable here. For although, as to the tax for the particular year, the injunction sought might

restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

There would seem to be some inconsistency between the cases. However, as there is no certainty that the amount in controversy between the city of Utica and the complainant will ever approach \$2,000, I do not see how it can be held that any such sum is in dispute here. The city may change its attitude any year, or it may extend its water mains to the complainant's premises to-morrow and end all cause of complaint and all cause of action, except to recover a sum not to exceed \$22, or to enjoin the collection of that sum. I think the cases cited are conclusive against jurisdiction in this court. *Wheless v. St. Louis et al.*, 180 U. S. 379, 380, 381, 21 Sup. Ct. 402, 45 L. Ed. 583, affirming (C. C.) 96 Fed. 865, would seem to be decisive. There the proposition to assess the property was alleged, as here, to be in violation of the constitutional rights of the complainants; the action was by several taxpayers; the cost of the improvement was largely in excess of \$10,000; the amount of the tax that would be assessed against any one of the complainants did not exceed \$1,400 (see pages 380, 381, of 180 U. S., page 403 of 21 Sup. Ct. [45 L. Ed. 583]), and was less than \$2,000. The court, per Mr. Chief Justice Fuller, said:

"The 'matter in dispute' within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation, as, for instance, in this suit the amount of the assessment levied, or which may be levied, as against each of the complainants separately. The rules of law which might subject complainants to or relieve them from assessment would be applicable alike to all, but each would be so subjected, or relieved, in a certain sum, and not in the whole amount of the assessment. If a decision on the merits were adverse to the assessment, each of the complainants would be relieved from payment of less than \$2,000. If the assessment were sustained, neither of them would be compelled to pay so much as that.

"It is true that the assessment has not been made, but the charge is that it is threatened to be made, and the purpose of the bill is to enjoin proceedings about to be taken to that end. We agree with the Circuit Court that in these circumstances there is no force to the suggested distinction between a case where the assessment has not in fact been made and a case where it has already been made. When made, neither one of these complainants will be called upon to pay a sum equal to the amount of \$2,000, nor will any one of the lots be assessed to that amount."

It will be noted that this holding is somewhat ambiguous. Is it the amount of tax levied and to be collected under the assessment, or the amount of the assessment that determines jurisdiction? The case does not determine that question. The language is:

"When made, neither one of the complainants will be called upon to pay a sum equal to the amount of \$2,000, nor will any one of the lots be assessed to that amount."

Again, the act reads—

"where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars."

I do not think it was intended to suggest or intimate that a matter in dispute of the value of just \$2,000, and no more, gives jurisdiction.

I think the court had in mind and spoke with reference to the plea in that case, which reads as follows :

"Defendants filed a plea to the jurisdiction of the court, supported by an affidavit showing that the amount of special tax which would be assessed and levied against the property of any one of the complainants severally would not exceed \$1,400, and would not be an amount equal to \$2,000, and that hence the matter in dispute between the parties was not of the sum or value necessary to give jurisdiction to the Circuit Court of the United States, and that the bill should be dismissed for want of jurisdiction."

Assuming this to be so, in view of *Fishback v. Western Union*, 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630, where it is expressly held that the value of the matter in dispute must exceed \$2,000, and also assuming that the amount of the assessment of the property—that is, its assessed valuation, alleged here to be \$2,000—determines the value of the matter in dispute for jurisdictional purposes, still this court has no jurisdiction, as the complainant's property is not assessed at a sum in excess of \$2,000. However, I think the language "assessed to that amount" refers to the amount of the tax to be imposed on the property and collected. *Bouvier's Law Dictionary* says :

"Assess. To rate or fix the proportion which every person has to pay of any particular tax."

Also :

"Assessment. Determining the value of a man's property or occupation for the purpose of levying a tax. Determining the share of a tax to be paid by each individual. Laying a tax. Adjusting the shares of a contribution by several toward a common beneficial object according to the benefit received."

The *Century Dictionary* gives the primary meaning of "assess" as :

"To set, fix or charge a certain sum upon, by way of tax; as, to assess each individual in due proportion."

The tax is assessed when it is apportioned. Really the property is assessed when the proportion of the tax it is to pay is fixed and determined. In common expression in New York it is assessed when a valuation is placed thereon as a basis for fixing its share of the tax. It would certainly be inequitable to hold that a man whose property is placed on the assessment book at a valuation of \$2,100, and whose tax thereon for some purpose levied in contravention of the Constitution is only \$2, may maintain an action in equity in the Circuit Court of the United States to restrain its collection, while one whose property is placed on the assessment book at a valuation of \$1,950, and whose tax thereon for some purpose levied in contravention of the Constitution is \$20, or even more, may not. Congress intended nothing of the kind, and I do not think the Supreme Court has construed or intended to construe the act so as to lead to such a result. If we say that the matter in dispute is the value of the object sought to be accomplished by the bill, viz., the prevention of the sale of a farm assessed at \$2,000 (see *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322, 333, 336, 27 Sup. Ct. 629, 51 L. Ed. 821), still that value, so far as appears, is not in excess of \$2,000, and by paying all that is in dispute—about \$22—the sale of the farm is prevented. The case under consideration is not within the

principle of *Davies, Collector, v. Corbin et al.*, 112 U. S. 36, 41, 5 Sup. Ct. 4, 28 L. Ed. 627.

In *Wheless v. St. Louis*, supra, the property had not been levied upon and advertised to be sold, but I do not see that it can be held that the assessed value of the farm is the amount in dispute. Those who levy the tax only claim some \$22; they do not claim the farm. The title or ownership of the farm is not in dispute. There is no direct allegation that the amount in dispute is \$2,000, exclusive of interest and costs. It is not a case like *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84.

I am forced to the conclusion, on the allegations of the bill, that the Circuit Court of the United States is not shown to have jurisdiction. It must appear on the face of the bill by direct allegation, or by necessary implication from the facts stated, that the matter in dispute is in excess of \$2,000 in value, exclusive of interest and costs. *Grace v. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435; *Vance v. Vandercook Co.*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; *North American Co. v. Morrison*, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061.

The demurrer must be sustained on the ground the bill fails to show jurisdiction in this court, but without costs. Complainant may amend, if he shall be so advised, within 30 days.

LEWIS PUB. CO. v. WYMAN et al.

(Circuit Court, E. D. Missouri, E. D. April 17, 1907.)†

No. 5,437.

POST OFFICE (§ 15*)—ACTION OF POST OFFICE DEPARTMENT—REVIEW BY COURTS.

Under the settled rule that laches is not imputable to the government in its character as sovereign by those subject to its dominion, the fact that action on an application for admission of a periodical publication to the mails at the second-class rate of postage was delayed for several years by the officers of the Post Office Department, and that in the meantime the publication was admitted as second-class matter under a temporary permit issued by authority of section 282 of the Postal Regulations of 1893, to remain in force "until the Post Office Department shall determine whether it is admissible as second-class matter," does not entitle the publisher to a hearing before the department acts on his application, as in case of revocation of a privilege once granted, and the courts have no authority to review the action of the Postmaster General in refusing the application.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 15.*]

In Equity. Suit for injunction.

Barclay & Fauntleroy and Carter, Collins & Jones, for complainant.
Chester H. Krum and H. H. Glassie, for defendants.

TRIEBER, District Judge. The only facts which differentiate this case from No. 5,417 (152 Fed. 787) are the following:

The complainant published a magazine called "The Winner," which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Received for publication March 20, 1909.

was granted the second-class rate privilege. In 1902, the name of the magazine was changed to "The Woman's Magazine," since which time the said second-class postage privilege has been continuously used by and accorded to said magazine. On the 21st day of August, 1902, an application was made by the corporation at that time publishing the Winner Magazine and the Woman's Magazine for admission of said Woman's Magazine to the mails at second-class rates of postage. The rules of the department then in force provided (section 283, Postal Laws and Regulations of 1893; section 443, Postal Laws and Regulations of 1902):

"In case of a change of name or of the regular periods of issue of a publication already entered as second-class matter, or the removal of its office of publication to a post office other than that of original entry, the postmaster will require the publishers to apply for re-entry the same as though the publication were a new one."

The application for the Woman's Magazine was made on printed blanks furnished by the department for that purpose, and was as follows:

"St. Louis, Mo., August 21, 1902.

"Application is hereby made to have 'The Woman's Magazine,' formerly 'The Winner Magazine,' a monthly woman's magazine, published in this place, admitted to the mails at the second-class rate of postage, full particulars of it being given in the sworn answers to the subjoined interrogatories.

"Mail Order Publishing Company, Incorporated, Publisher."

Then follow the answers to the printed interrogatories.

Upon the filing of this application with the postmaster at St. Louis, he issued what is called a "temporary permit" for entry of publication at second-class rate. This temporary permit is as follows:

"Temporary Permit for Entry of Publication at Second-Class Rate.

"Post Office at St. Louis, Mo., August 21, 1902.

"Upon affidavit and other proof submitted to me and by virtue of authority conferred by section 282 of the Postal Regulations of 1903, permission is hereby given to the publishers of 'The Woman's Magazine' monthly, to mail at this office at the pound rate of postage until the Post Office Department shall determine whether it is admissible as second-class matter.

"F. W. Baumhoff, Postmaster,

"By J. P. Biedenstein."

On August 22, 1902, the postmaster of St. Louis reported to the department as follows:

"Sir: I enclose herewith a copy of 'The Woman's Magazine,' a monthly published in this city, together with an application for admission to the mails at the pound rate of postage. This publication has heretofore been entered under the name of 'The Winner Magazine' and this application is made necessary by reason of the change in name.

"I have considered it advisable to issue a temporary permit in this case pending decision of your office.

"Respectfully,

F. W. Baumhoff, Postmaster,

"By Alex. L. Sigmund, Assistant Postmaster."

Before the receipt of this letter by the department, it had been notified of the change of name and the proposed application for its admis-

sion as second-class matter, and on August 25, 1902, there was addressed the following letter to the postmaster at St. Louis:

"Sir: The Department has been informed that the name of 'The Winner Magazine' will be changed to 'The Woman's Magazine,' and an application will be made through your office for its admission as second-class matter.

"A request has been made that the deposit provided in section 441, Postal Laws and Regulations, be waived in this case. Inasmuch as 'The Winner' is entered as second-class matter, if you are satisfied that it would be perfectly proper to do so you may waive the money deposit required by section 441 of the Postal Laws and Regulations to secure payment of the third-class rate of postage upon all mailings of 'The Woman's Magazine,' pending consideration of the application for its entry as second-class matter upon the change of name from 'The Winner.'

"Respectfully yours,

H. B. Bacon,

"Acting Third Assistant Postmaster General."

On August 26, 1902, the letter of the postmaster of August 22d had reached the department, whereupon the following reply was sent:

"Postmaster, St. Louis, Missouri.

"Sir: The application for entry of 'The Woman's Magazine' as second-class matter upon change of name from 'The Winner' has been received.

"In view of the fact that 'The Winner' is no longer in existence and is superseded by the 'Home Magazine,' and further that you were given authority on the 25th instant to waive the money deposit required by section 441 of the Postal Laws and Regulations to secure payment of the third-class rate of postage upon all mailings of 'The Woman's Magazine,' pending consideration of the application for its entry as second-class matter upon change of name from 'The Winner,' you are directed to request the publisher to deliver to you the certificate of entry of 'The Winner' as second-class matter, so that it may be forwarded to the department for filing with the case of 'The Winner.'

"Very respectfully,

H. B. Bacon,

"Acting Third Assistant Postmaster General."

It is proper to state here that on April 2, 1902, before there was any change of name of the Winner Magazine, the Post Office Department had issued an order to show cause why that publication should not be denied the second-class rate of postage on the grounds set out in that notice, but no action seems to have been taken in this matter.

On October 1, 1902, the postmaster at St. Louis addressed a letter to Mr. Lewis, inclosing a copy of the letter from the Third Assistant Postmaster General requesting a return of the certificate of entry for the Winner, in which letter the postmaster refers to the fact that verbal requests for the return had been made on several occasions, and he now requests immediate attention, in order that he may send a reply to the department.

In reply to this letter, Mr. Lewis, on the same date, advised him that he was unable to find that certificate, but that he would again make careful search, and, if successful, would forward it at once. A copy of this letter was forwarded to the department by the postmaster, and on October 9th the Third Assistant Postmaster General advised the postmaster that:

"In view of the statement in your letter of the 3rd instant that the publisher of 'The Winner' is unable to find the certificate of entry of that publication as second-class matter, the department will not press its request for the surrender of that certificate."

The Woman's Magazine, in conformity with the regulations of the department, published that it was entered as second-class matter at the post office in St. Louis, giving the date when the certificate was granted to the Winner, making no mention of the temporary permit granted August 21, 1902, nor claiming any other later permit.

No final action was taken by the department on this application, and the Woman's Magazine was permitted the second-class privilege until limited by the action of the postmaster at St. Louis, as stated in No. 5,417.

On June 5, 1905, and on April 19, 1906, notices identical with those in No. 5,417 were sent to complainant. As it has been determined in the case of the Woman's Farm Journal that there was no hearing, and the facts in this case are identical, the same conclusion would naturally be reached if the second-class privilege has ever been granted for this magazine. The grounds for the claim are that the magazine was permitted to go through the mails ever since August, 1902, at second-class rates; that the temporary permit has never been revoked; that the notice on the magazine, printed in compliance with the law, showed that the privilege granted to the Winner is claimed as the authority for this magazine; that the notice sent on June 5, 1905, was that the complainant "show cause why the authorization for admission of the 'Woman's Magazine' to the second-class of mail matter, under the act of March 3, 1879, c. 180, § 10, 20 Stat. 359 (U. S. Comp. St. 1901, p. 2646), should not be revoked"; and that the letter of April 19, 1906, notifying the complainant of the day set for hearing on its appeal from the action of the postmaster in determining that the subscriptions to the Woman's Magazine did not exceed 539,901 copies, also recognized the fact that the second-class privilege had been granted; and for these reasons it is claimed that complainant possessed that privilege, and it could not be revoked without a hearing, in conformity with the act of March 3, 1901, c. 851, § 1, 31 Stat. 1107 (U. S. Comp. St. 1901, p. 2655). The action of the Postmaster General on March 4, 1907, so far as it concerns this matter, is as follows:

"In the matter of your recommendation that the department deny the pending application submitted August 22, 1902, for entry of this publication as second-class matter, you are informed that upon a hearing granted the publisher on the same dates (April 30 and May 1, 1906) and upon a careful and thorough investigation of all the evidence by the department, I find that the publication does not have a legitimate list of subscribers, that it is designed and published primarily for advertising purposes, and that it is being circulated at a nominal rate, contrary to the law and the regulation of the department. You will, therefore, refuse hereafter to accept for mailing at second-class rate of postage copies of said publication, and notify the publisher that his application for entry of 'The Woman's Magazine' as second-class matter is denied."

This was addressed to the postmaster at St. Louis.

Whatever the effect of the actions of the department officers as herein recited might be if performed by officers of private corporations, or individuals, or their agents, is immaterial, for the law is well settled that the government cannot be estopped by any unauthorized acts of its officers or their mistakes. Laches is not imputable to the government in its character as sovereign by those subject to its dominion. *United States v. Kirkpatrick*, 9 Wheat. 735, 6 L. Ed. 199;

Gibbons v. United States, 8 Wall. 269, 19 L. Ed. 453; Filor v. United States, 9 Wall. 45, 19 L. Ed. 549; Hart v. United States, 95 U. S. 316, 24 L. Ed. 479; Minturn v. United States, 106 U. S. 437, 1 Sup. Ct. 402, 27 L. Ed. 208; German Bank v. United States, 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564; United States v. Pine River, etc., Co., 89 Fed. 907, 32 C. C. A. 406; Woodruff v. Berry, 40 Ark. 251.

It is conclusively shown that no permit had ever been granted allowing the Woman's Magazine the second-class rate privilege, except the temporary permit, and that provides specifically that the permission is only granted "until the Post Office Department shall determine whether it is admissible as second-class matter." The only determination by the department is that made on March 4, 1907, refusing it.

As the law does not require the department to grant a hearing on that question, none was necessary, and as there is no provision of law for reviewing the action of the Postmaster General, the injunction prayed must be refused.

LEWIS PUB. CO. v. WYMAN.

(Circuit Court, E. D. Missouri, E. D. April 3, 1909.)

No. 5,417.

1. EQUITY (§ 212*)—PLEADING—REPLICATION.

Under equity rule 66, the interposition of a general replication is taken as denying every allegation in the answer or plea not responsive to the bill, and these allegations must be proved by the party making them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 485; Dec. Dig. § 212.*]

2. INJUNCTION (§ 163*)—GROUNDS FOR VACATING—CHANGE OF CONDITIONS.

Where a temporary injunction has been granted, but before final hearing the cause for which it was granted has been removed, it will not be continued or made perpetual.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 366; Dec. Dig. § 163.*]

3. EQUITY (§ 427*)—SCOPE OF RELIEF—CONFORMITY TO BILL.

While, under a prayer for general relief, a court of equity may grant a relief not specifically prayed for, such relief must be within the case made by the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1012; Dec. Dig. § 427.*]

4. INJUNCTION (§ 163*)—VACATING.

A bill to enjoin a postmaster from refusing to admit a magazine published by complainant to the mails at second-class rates, in consequence of the alleged illegal action of the Post Office Department in revoking the privilege previously granted to such magazine, and to determine the number of copies complainant is entitled to send at such rates, will not be entertained where, pending the suit, the department has granted a new permit, although it limits the number of copies to a smaller number than the bill alleges that complainant was entitled to send when it was filed, since such action leaves no ground for the granting of relief within the allegations of the bill or within the jurisdiction of a court of equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 366; Dec. Dig. § 163.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. EQUITY (§ 41*)—JURISDICTION—RETENTION OF JURISDICTION ACQUIRED.

The general rule that a court of equity which has once obtained jurisdiction will retain it for all purposes applies only when that part of the cause which gave the court jurisdiction is sustained, and not when it fails.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. § 41.*]

In Equity.

As, in the opinion filed on the hearing for the temporary injunction in this cause, a full statement of the material allegations in the bill is set out (152 Fed. 787), it is unnecessary to insert it here. A temporary injunction was granted at that time against the exclusion of the number of copies found by the Postmaster General to cover the bona fide circulation of the Journal, and a like number of sample copies, for the reason that the action of the Post Office Department in withdrawing the second-class mail rate privilege was without a hearing, in violation of the provisions of the act of Congress approved March 3, 1901, c. 851, 31 Stat. 1107 (U. S. Comp. St. 1901, p. 2655). The temporary injunction was granted upon condition that complainant file a bond in a sum fixed by the court to pay all damages sustained by the defendant if, upon final hearing, the temporary injunction is found to have been improvidently granted. Defendant declining to give such bond, the temporary injunction was never carried into effect. Thereafter the defendant filed an answer which, so far as it is material to a determination of this cause, denies that the Woman's Farm Journal, which, for convenience, will be referred to herein as the "Journal," had a legitimate list of subscribers, but that it was designed to be used by complainant primarily for advertising purposes and for a circulation at nominal rates; it denied that the bona fide legitimate subscriptions of the Journal were at least 315,000 copies, or that the number of copies thereof which complainant was entitled to mail at the St. Louis post office under the second-class permit or privilege is twice that number, and it charges that before the filing of the bill herein that privilege had been revoked by the Postmaster General, and therefore denies that at the time the bill was filed complainant enjoyed or possessed any privilege whatever to have the Journal carried in the mails of the United States at second-class rates. Thereafter, by leave of the court, defendant filed a supplemental plea in which he alleges that on October 5, 1907, since the filing of the answer, complainant applied to the Postmaster General for the readmission of the Journal to the United States mails at the second-class or pound rate of postage, and that thereafter the said Postmaster General ordered that said publication be admitted to the mails of the United States at the second-class or pound rate of postage, said order to take effect as of the 5th day of October, 1907, and that by virtue of said order the defendant, as postmaster of the city of St. Louis, Mo., has admitted the said publication ever since, and it is now being received and carried by the said Post Office Department of the United States at said second-class or pound rate of postage. The complainant filed a general replication to the answer and plea, and proofs were taken by the parties. The final hearing was had on the entire case.

Barclay & Fountelroy, for complainant.

Chester H. Krum, H. W. Blodgett, U. S. Atty., and T. P. Young, Asst. U. S. Atty., for defendant.

TRIEBER, District Judge (after stating the facts as above). Equity rule 66, in force since the promulgation of the equity rules by the Supreme Court in 1842, dispenses with special replications and only requires a general replication. By reason thereof the interposition of a general replication is taken as denying every allegation in the answer or plea not responsive to the bill, and these allegations must be proved by the party making them. *Humes v. Scruggs*, 94 U. S. 22, 24 L. Ed. 51.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The truth of the plea is fully established, not only by the production of the order of the Third Assistant Postmaster General to the defendant, the postmaster at St. Louis, but also by the testimony of Mr. Lewis, the president of complainant. This being the case, the question to be determined is whether the plea should be sustained, and thereby abate this action. The object of the bill, as shown by the allegations as well as the prayer for relief, is twofold: First, to enjoin the defendant, as postmaster of the city of St. Louis, from refusing transmission through the mails of the United States of the Journal at second-class pound rates theretofore accorded to it, and annulled by the Postmaster General without a hearing, in violation of the act of March 3, 1901, c. 851, 31 Stat. 1107 (U. S. Comp. St. 1901, p. 2655); and, second, to restrain him from limiting the number of publications to be thus transmitted to less than 600,000 copies, and—

“to that end the court ascertain and adjudge by its decree herein the amount of the legitimate subscription list of said Woman's Farm Journal as of March 1, 1907, and for prior months since September 1, 1905, to the end that there may be a close of the unseemly controversy raised by said defendant to limit and restrict unlawfully the full use and enjoyment by your orator of its rights to said second-class postal privilege under the postal laws of the United States, and that the said defendant, as postmaster, be perpetually enjoined from interfering with the full use and enjoyment of said second-class privilege by your orator according to the finding and decree of this court ascertaining the proper and just extent and limits thereof as herein explained.”

The principle is well established that courts will not proceed to adjudication where there is no subject-matter upon which the judgment of the court can operate. The reason for this rule is that the courts are not open for decisions on merely moot questions, but only for decisions of actual controversies between the parties. *Marye v. Parsons*, 114 U. S. 325, 330, 5 Sup. Ct. 932, 29 L. Ed. 205; *In re Baez*, 177 U. S. 378, 20 Sup. Ct. 673, 44 L. Ed. 813; *Williams v. Hagood*, 98 U. S. 72, 75, 25 L. Ed. 51; *Hunnewell v. Cass County*, 22 Wall. 464, 478, 22 L. Ed. 752; *Meyer v. Pritchard*, 131 U. S. ccix, Appx., 23 L. Ed. 961; *Singer Mfg. Co. v. Wright*, 141 U. S. 696, 700, 12 Sup. Ct. 103, 35 L. Ed. 906; *May v. May*, 167 U. S. 310, 323, 17 Sup. Ct. 824, 42 L. Ed. 179; *Bonner v. Terre Haute I. R. R. Co.*, 151 Fed. 985, 81 C. C. A. 476.

The same rule also applies to cases in which the questions involved became moot questions after final decree in the trial court, and while pending on appeal in the appellate tribunal. *San Mateo Co. v. Sou. Pacific R. R.*, 116 U. S. 138, 6 Sup. Ct. 317, 29 L. Ed. 589; *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016; *California v. San Pablo T. R. R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 16 Sup. Ct. 321, 40 L. Ed. 382; *Kimball v. Kimball*, 174 U. S. 158, 19 Sup. Ct. 639, 45 L. Ed. 932; *Jones v. Montague*, 194 U. S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913; *American Book Co. v. Kansas*, 193 U. S. 49, 24 Sup. Ct. 397, 48 L. Ed. 613; *In re Lincoln*, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984; *Fisher v. Baker*, 203 U. S. 174, 27 Sup. Ct. 135, 51 L. Ed. 142; *Fisher v. Cushman*, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292.

In *Texas & Pacific R. R. Co. v. Interstate Transportation Co.*, 155 U. S. 585, 589, 15 Sup. Ct. 228, 39 L. Ed. 271, it was held, where the

exigency existing at the time of the filing of the bill, which was made the principal foundation of the bill, has since passed away, an injunction will be refused.

And where a temporary injunction has been granted, but before final hearing the act enjoined has been legalized, or the grounds on which it was first granted no longer exist, the injunction will be dissolved. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 15 L. Ed. 435; *Baird v. Shore Line*, 6 Blatchf. 461, Fed. Cas. No. 759; *In re Jackson* (D. C.) 9 Fed. 493; *Fulton v. Greacen*, 44 N. J. Eq. 443, 15 Atl. 827.

In *Lockwood v. Wickes*, 75 Fed. 118, 123, 21 C. C. A. 257, 262, it was held, Judge Thayer delivering the opinion of the court, that an appeal in a patent case from an order granting a temporary injunction must be dismissed if, pending the appeal, the patent has expired. And it has been uniformly held that an action against an official for a mandatory injunction abates by his resignation of office. *United States v. Boutwell*, 17 Wall. 604, 609, 21 L. Ed. 721; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621; *United States v. Butterworth*, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873.

An examination of these cases will show how strictly this rule is adhered to in all cases. Applying it to the first cause for which relief is prayed, it clearly must be denied. By the order of the Post Office Department made to the postmaster at St. Louis on January 7, 1908, and notice whereof was at the time telegraphed by the Post Office Department to the complainant, the *Journal* was admitted to the second-class mail privilege as of October 5, 1907, and, in the language of the order—

“to hereafter admit to the mails at the rate of postage established by the statutes for mail matter of the second class all copies thereof which conform to the requirement of the law governing mailable matter of the second class. See Act of March 3, 1879.”

It is conceded that ever since then, and at the present time, the defendant postmaster is admitting the *Journal* to the mails at second-class rates of postage. How, then, can the court enjoin him from refusing to do what it is admitted he is not now doing, refusing to admit the *Journal* at second-class rates? It would be a useless decree so far as the rights of complainant are affected, and to merely determine a question which, in so far as the parties to this action are concerned, is a moot one, and not an actual controversy. As stated in *Spelling on Injunctions*, vol. 2, § 1052:

“Even when a temporary injunction has been granted, when the cause for which it has been granted has been removed, a court of equity will not continue or make it perpetual, and when the reasons for granting it have ceased to exist a temporary injunction may be vacated on motion.”

As to the second object for relief of the bill, it is claimed on behalf of complainant that the order of the Post Office Department now in force limits the number of copies to be admitted at that rate to 100,214, which is declared by the order to be—

“the legitimate list of subscribers prior to January 1, 1908, and an equal number of sample copies, making the total number of copies permitted to be mailed at the pound rate 200,428 monthly.”

This, it is urged, is depriving complainant of a valuable right, not because it is claimed that the bona fide circulation of the Journal at the present time is greater than that determined by the Post Office Department and permitted to be carried at the pound rate, but that at the time this bill was filed, and for several months prior thereto, the bona fide subscriptions of the Journal were much greater than the number it was permitted to mail at the one cent per pound rate, and that neither the Postmaster General nor any of his subordinates in the department have a right to limit the number of copies a publisher of a publication accorded the second-class rate privilege can send through the mails when the privilege of the second-class rate is once accorded and cannot be annulled until after a hearing given to the publisher.

It is unnecessary to cite authorities to the proposition that a suitor in equity cannot, at a final hearing, claim any greater right than is asked in the bill. Nor is there room for any doubt on the proposition that a party is bound by the allegations in his bill. *Hayward v. National Bank*, 96 U. S. 611, 24 L. Ed. 855. It is true that under the prayer for general relief the court may frequently grant a relief not specifically prayed for, but in order to do so the decree must not give relief outside of the case made by the bill, but only such as is agreeable to the allegations therein stated. This is all that is decided in *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82, and *Lockhart v. Leeds*, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263, relied on by learned counsel for the complainant. In the last-cited case the court expressly held that the averments in the bill were sufficient to justify the relief complainant insisted on. The court said:

"We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill, and that, in substance, is what is held by the above cases. The case made by the bill consists of the material facts therein stated; and where all the facts are stated, it is no reason for denying relief under a general prayer because it may differ from the theory of the law upon which the special prayer for relief is based, where both prayers are based upon the same facts, clearly set forth in the bill." 195 U. S. 437, 25 Sup. Ct. 79 (49 L. Ed. 263).

It is equally well settled that courts will not listen to an objection by a party whose rights are not affected by the particular case on trial, and who has, therefore, no interest in question. This applies even to statutes. *Supervisors v. Stanley*, 105 U. S. 305, 311, 26 L. Ed. 1044; *In re Garnett*, 141 U. S. 1, 12, 11 Sup. Ct. 840, 35 L. Ed. 631; *Clark v. Kansas City*, 176 U. S. 114, 118, 20 Sup. Ct. 284, 44 L. Ed. 392; *Patterson v. Bark Eudora*, 190 U. S. 169, 176, 23 Sup. Ct. 821, 47 L. Ed. 1002; *Missouri v. Dockery*, 191 U. S. 170, 24 Sup. Ct. 53, 48 L. Ed. 133.

Even a decree, when broader than the case as stated in the bill, will be treated as granting only the relief asked for in the bill, and nothing more. *Conway v. Taylor*, 1 Black, 603, 632, 17 L. Ed. 191; *Sailors' Union v. Hammond Lumber Co.*, 156 Fed. 450, 85 C. C. A. 16. In *New York, N. H. & H. R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 404, 26 Sup. Ct. 272, 50 L. Ed. 515, it was held that, while a carrier adjudged to have violated the act to regulate commerce in a specific particular may be restrained from further violations of

that act, it cannot be enjoined in general terms from violating the act in future in any other particular.

To determine the number of subscribers the Journal had at the time and prior to the institution of this suit, would clearly be deciding a moot question in so far as the parties to this case are now concerned. A reference to the bill shows that nowhere is the power of the Postmaster General to limit the number of copies to be sent through the mails at the second-class pound rate to actual subscribers, and an equal number of sample copies, questioned. On the contrary, the entire bill is framed on the theory that that power exists, and the object of that part of the bill is to review the findings of the department as to the number of bona fide subscribers, which it is claimed is erroneous and too small. All the evidence of complainant is directed to that issue. The bill charges:

"Your orator further avers that he has, and for many months last past has had, a legitimate list of subscribers to the Woman's Farm Journal exceeding in number 320,000, and that the attempt of said defendant to prevent or forbid the circulation by mail from the St. Louis, Mo., post office of copies of said Journal within the limit of 640,000 monthly, is in violation of the rights of your orator and the postal laws of the United States."

Assuming that the contention of complainant that the Postmaster General has no power to limit the number of copies to be sent through the mails at the second-class pound rate is correct, what kind of a decree could the court render which would in any wise give any of the relief within the allegations of the bill, and within the jurisdiction of this court sitting as a court of equity? It cannot require the defendant, as postmaster, to accept a larger number of copies than he does at the present time, for the bill has not been amended to ask for such relief, but is limited to the time the bill was filed; nor is there any proof that at the present time the limitation is unjust or prevents complainant from sending the Journal to all bona fide subscribers and an additional 100 per cent. of sample copies at that rate. For the court to ascertain and adjudge by its decree the amount of the subscribers list of the Journal "as of March 1, 1907, and for prior months since 1905," could serve no useful purpose at the present time. If it is sought to recover the moneys alleged to have been unlawfully collected by the defendant as postmaster for the alleged excess copies, a court of equity is clearly without jurisdiction, and the remedy must be at law. Even in case of fraud or mistake, a court of the United States will not sustain a bill in equity to obtain only a decree for payment of money by way of damages, when the sum due can be recovered at law in an action sounding of tort or for money had and received. *Buzard v. Houston*, 119 U. S. 347, 352, 7 Sup. Ct. 249, 30 L. Ed. 451; *Kramer v. Cohn*, 119 U. S. 355, 7 Sup. Ct. 277, 30 L. Ed. 439; *Litchfield v. Balou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. 556, 27 L. Ed. 322; *Parkersburg v. Brown*, 106 U. S. 487, 500, 1 Sup. Ct. 442, 27 L. Ed. 238.

Nor does the general rule that a court of equity, having once obtained jurisdiction, will retain it for all purposes, apply. That rule only applies when that part of the cause which gave the court of equity jurisdiction is sustained, and not when it fails. In such case the rule is

that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill which it creates, but which cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. *Russell v. Clark*, 7 Cranch, 69, 3 L. Ed. 271; *Mitchell v. Dowell*, 105 U. S. 430, 26 L. Ed. 1142; *Kramer v. Cohn*, supra; *Kessler v. Ensley Co.* (C. C.) 123 Fed. 546, 567; *Dakin v. Railway Co.* (C. C.) 5 Fed. 665; *Cumberland B. & L. Ass'n v. Sparks* (C. C.) 106 Fed. 101. To recover such illegal exactions, the common-law courts afford a complete and adequate remedy, and whenever that is the case the plaintiff must proceed at law (section 723, Rev. St. [U. S. Comp. St. 1901, p. 583]), and also for the reason that the defendant has a constitutional right to a trial by jury which he could not obtain in equity. *Hipp v. Babin*, 19 How. 271, 278, 15 L. Ed. 633; *Insurance Co. v. Bailey*, 13 Wall. 616, 621, 20 L. Ed. 501; *Grand Chute v. Winegar*, 15 Wall. 373, 375, 21 L. Ed. 174; *Lewis v. Cocks*, 23 Wall. 466, 470, 23 L. Ed. 70; *Root v. Railway Co.*, 105 U. S. 189, 212, 26 L. Ed. 975; *Killian v. Ebbinghaus*, 110 U. S. 568, 573, 4 Sup. Ct. 232, 28 L. Ed. 246; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Scott v. Neely*, 140 U. S. 106, 110, 11 Sup. Ct. 712, 35 L. Ed. 358.

The able and learned argument of counsel for complainant that the Postmaster General does not possess the power of limiting the number of sample copies to be sent at the pound rate as second-class matter, for the reason that Congress has not granted him authority to do so, cannot be determined in this cause, as there is no such issue raised by the pleadings, and there is nothing to indicate that at this time complainant's rights are in any wise injuriously affected by the regulation of the department. That "there may be a close of the unseemly controversy raised by said defendant, and by those who have conspired and confederated with him in that behalf," etc., as stated in the bill of complaint, may be commendable, but in the language of Mr. Justice Grier in *Cross v. Del Valle*, 1 Wall. 1, 16, 17 L. Ed. 515, "the court has no power to decree in thesis, as to the future rights of parties."

The bill will be dismissed, but in order that plaintiff may not be deprived of instituting any other proceedings either at law or in equity, if so advised, the dismissal will be without prejudice.

A. B. ANDREWS CO. et al. v. PUNCTURE PROOF FOOTWEAR CO.

(Circuit Court, E. D. Pennsylvania. March 26, 1909.)

No. 245.

1. COURTS (§ 292*)—TRADE-NAMES—UNFAIR COMPETITION—ACTIONS—JURISDICTION.

Where a trade-name had not been registered, as required by Act Cong. March 3, 1881, c. 138, 21 Stat. 502 (U. S. Comp. St. 1901, p. 3401), federal jurisdiction of a suit for unfair competition was not conferred by such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

act, but existed only under the rules governing ordinary suits at law or in equity.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 292.*

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. COURTS (§ 292*)—TRADE-NAMES—UNFAIR COMPETITION—FEDERAL JURISDICTION.

Where a bill for unfair competition in the use of a trade-name did not allege that the name was used or to be used on goods intended to be transported to a foreign country or in commerce with Indian tribes, the federal Circuit Court did not acquire jurisdiction under Act Cong. March 3, 1881, c. 138, § 7, 21 Stat. 503 (U. S. Comp. St. 1901, p. 3403) providing that in case of wrongful use of a trade-mark in such commerce, all courts of the United States shall have original and appellate jurisdiction, without regard to the amount in controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. § 292.*]

3. COURTS (§ 315*)—DIVERSE CITIZENSHIP—PARTNERSHIP.

Where the members of a firm owning the right to a trade-name in controversy contracted to transfer the same to a corporation on receipt of \$4,000, to be paid as a royalty on hosiery at the rate of 2 cents per dozen, the members of such firm, prior to the payment of the purchase price, had an actual interest in a suit by the purchaser for alleged unfair competition in the use of such trade-name.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 315.*]

4. COURTS (§ 315*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

A firm, one of the members of which was a citizen and resident of Pennsylvania, contracted to sell to plaintiff, a New York corporation, the right to use a trade-name, the firm, however, retaining title until payment of \$4,000 by way of a royalty, which had not been accomplished at the time the corporation filed a bill against defendant, a Pennsylvania corporation, for unfair competition. *Held* that, since the interest of the firm was real and substantial, there was no sufficient diversity of citizenship, and that the federal Circuit Court had no jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.*]

5. COURTS (§ 280*)—FEDERAL COURTS—JURISDICTION—DETERMINATION.

A federal court is not only permitted, but is bound, to examine an action and refuse relief, unless jurisdictional elements affirmatively appear.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 818; Dec. Dig. § 280.*]

In Equity. On motion for preliminary injunction.

O. Ellery Edwards, Jr., for complainants.

Sundheim & Fleisher, for respondent.

J. B. McPHERSON, District Judge. This is an action brought to redress unfair competition in the use of a trade-name—"Puncture Proof." As the name has not been registered, Act March 3, 1881, c. 138, 21 Stat. 502, 1 Supp. Rev. St. 322 (U. S. Comp. St. 1901, p. 3401), does not apply, and the jurisdiction of the Circuit Court is to be tested by the rules that govern in the ordinary suit at law or in equity. Moreover, even if the name were registered, the bill does not allege that it was used, or to be used, on goods intended to be transported to a foreign country or in commerce with the Indian tribes, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

therefore the Circuit Court does not acquire jurisdiction under section 7 of the statute. *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145, 32 L. Ed. 529; *Prince's Paint Co. v. Prince Mfg. Co.* (C. C.) 53 Fed. 493. If the bill can be maintained, there must be diversity of citizenship, and the requisite amount must appear to be involved.

So far as the amount in controversy is concerned I shall assume that the averments of the bill are sufficient; but, when the element of diverse citizenship is sought for, it seems to be plain that the needful diversity does not appear. On the contrary, the bill sets forth affirmatively that one of the complainants is a citizen and resident of Pennsylvania, while the defendant is a Pennsylvania corporation. The complainants are the A. B. Andrews Company, a New York corporation, and the Humpty Dumpty Stocking Company, a partnership created under the laws of Tennessee and averred to be composed of two persons, Frank L. Chipman, a citizen of Pennsylvania, and a resident of Easton, in the county of Northampton, and Frank Weiss, a citizen and resident of Tennessee. Apparently to avoid the consequences of this averment, the bill goes on to declare in paragraph 3 that more than a year ago, and before the present controversy arose, by a certain contract in writing—

"the A. B. Andrews Company, one of the complainants herein, assumed the entire right and interest, but not title, to all the trade-marks of the Humpty Dumpty Company and the good will of the business, the title to said marks to remain in the Humpty Dumpty Stocking Company until certain royalties provided for in the contract equaled \$4,000, at which time the titles of all trade-marks are to vest in the said A. B. Andrews Company."

It is evidently supposed that because of this contract the Humpty Dumpty Stocking Company is a merely nominal party, and that the citizenship of the partners may therefore be disregarded. *Wilson v. Oswego Township*, 151 U. S. 64, 14 Sup. Ct. 259, 38 L. Ed. 70; *Stewart v. B. & O. R. R. Co.*, 168 U. S. 449, 18 Sup. Ct. 105, 42 L. Ed. 537. I am unable to assent to this view. The contract between the A. B. Andrews Company and the Humpty Dumpty Stocking Company concerning the trade-name in question is appended to the bill, and provides, *inter alia*, as follows:

"Whereas, the Humpty Dumpty Stocking Company has been and now is engaged in the business of selling hosiery under the brand known to the trade as 'Humpty Dumpty' hosiery, which includes other names, such as * * * 'Puncture Proof.' * * * For the purposes of this contract all of the said trade-names are referred to under the one name of 'Humpty Dumpty.'

"And whereas, the said Frank A. Weiss and Frank L. Chipman are desirous of preserving the trade-marks, trade-names, and good will of their business for the A. B. Andrews Company, a corporation created by and existing under the laws of the state of New York: Now, therefore, * * * it is mutually agreed:

"First. That the parties of the first part assign the good will of the Humpty Dumpty Stocking Company to the party of the second part.

"Second. That when the sum of \$4,000 has been paid to the parties of the first part by the party of the second part, as provided for under this agreement, they will transfer all their right, title, and interest in and to the registered trade-mark 'Humpty Dumpty' and to the rights in and to the trade-names as specified above, heretofore used by them, whether registered as trade-marks or not.

"Third. All plates, copyrights, post cards, booklets, and literature used in connection with or descriptive of hosiery sold by the Humpty Dumpty Stocking Company are to become the property of the party of the second part, at the same time that the registered trade-mark is transferred to the party of the second part. A schedule of the property referred to in this paragraph is hereto appended, and the party of the second part is to be entitled to use the said property without actual expenses to them until such time as title to it actually passes, and they shall also have the exclusive use of the name and trade-mark of 'Humpty Dumpty' and other trade-names heretofore used by the parties of the first part until such time as they actually come into the possession of the party of the second part hereunder.

"Fourth. On every dozen pair of hose sold by the party of the second part under the name of 'Humpty Dumpty' they shall pay Frank A. Weiss, for the parties of the first part, the sum of 2 cents, and when in this way the sum of \$4,000 has been paid the title to the property described in paragraph third hereof and to the registered trade-mark and unregistered trade-marks mentioned in paragraph third hereof shall pass to the party of the second part."

It was conceded at the argument that the \$4,000 thus referred to has not been paid, and it seems to me therefore to be clear that both the legal title to the trade-name, "Puncture Proof," and the beneficial interest to an unspecified extent, still remain in the partners, Chipman and Weiss, and that for this reason they are real and substantial, and not merely nominal, parties to the bill. As they have not been paid in full, they have an obvious interest in the extent of the sales to be made by the A. B. Andrews Company; for upon these sales depends the amount of royalty to be paid under the contract, and therefore whatever hurts the trade of the A. B. Andrews Company does damage also to the interest of those who are still the owners to some extent of the right to the trade-name. The objection to the jurisdiction appears to be insurmountable. The interest of Chipman is real and substantial, and as he is a citizen and resident of Pennsylvania, and as, therefore, all of the complainants are not diverse in citizenship from the defendant, it follows that the Circuit Court has no jurisdiction of the present dispute. As was said by Chief Justice Marshall in *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435:

"Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in the courts of the United States."

See, also, *New Orleans v. Winter*, 1 Wheat. 92, 4 L. Ed. 44; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Case of Sewing Machine Cos.*, 18 Wall. 553, 21 L. Ed. 914; *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; *Merchants', etc., Co. v. Insurance Co.*, 151 U. S. 384, 14 Sup. Ct. 367, 38 L. Ed. 195; *Hooe v. Jamieson*, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049.

I need scarcely add that a federal court is not only permitted, but is bound, to scrutinize an action that is submitted for its decision, in order to see that the necessary elements of jurisdiction exist, and is required to refuse its aid to the plaintiff unless its right to judge the controversy affirmatively and completely appears. *Mansfield, etc., Ry. v. Swan*, 111 U. S. 382, 4 Sup. Ct. 510, 28 L. Ed. 462; *Metcalf v. Watertown*, 128 U. S. 589, 9 Sup. Ct. 173, 32 L. Ed. 543; *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; *Colorado, etc.,*

Co. v. Turck, 150 U. S. 143, 14 Sup. Ct. 35, 37 L. Ed. 1030; Great Southern, etc., Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842.

The motion for a preliminary injunction is refused.

HEIN v. WESTINGHOUSE AIR BRAKE CO.

(Circuit Court, N. D. Illinois, E. D. February 23, 1909.)

No. 28,067.

1. COURTS (§ 341*)—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE—DEGREE OF CONFORMITY.

The conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) requires the federal courts to conform generally, and as near as may be, to the practice, pleading, forms, and proceedings of the state courts; but they may, by standing rule, change subordinate provisions which they deem unsuited to their procedure, and may in their discretion reject collateral or subordinate provisions of the state practice, pleadings, or forms, which tend to obstruct the administration of justice in any particular case presenting unusual features, without making any standing rule.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 341.*]

2. COURTS (§ 347*)—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE—PLEADING.

Pleadings in a federal court in an action at law, which are not in the form of those required by the state practice, but which are substantially a compliance with it, are good.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

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

At Law. On demurrers to replications.

See, also, 164 Fed. 79.

David S. Wegg, for plaintiff.

Buell & Abbey, J. Snowden Bell, and Thomas W. Bakewell, for defendant.

SANBORN, District Judge. Declaration in covenant, filed December 21, 1905, upon a sealed contract, and breaches assigned. The contract is attached as an exhibit, and purports to have been made November 24, 1902, between plaintiff, of the first part, and George Westinghouse and the defendant company, of the second part. It recites that George Westinghouse is the owner of certain patents on friction draft and buffing apparatus, and that the defendant corporation is the sole licensee of these patents. It is further recited that Hein has made certain like inventions and applied for patents thereon, and it is desired by the second parties to acquire the exclusive right to the Hein inventions, and patents to be issued therefor. Therefore the parties agree as follows:

Agreements by Hein: Grant to Westinghouse, and through him to the company, of such exclusive rights. Should Hein acquire any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inventions relative to friction draft and buffing apparatus, he will at once disclose them to Westinghouse, and on demand execute to him the necessary agreements to bring them within the contract.

Agreements by second parties: To pay 25 cents royalty or license fee upon each friction draft and buffing apparatus they shall manufacture and sell during the term of the agreement, of whatever construction, and render to Hein quarterly accounts on the 1st of January, April, July, and October of each year, or within 30 days thereafter, statements showing the number of said articles so made and sold, with payment for the amounts shown to be due him. Westinghouse shall develop the inventions to bolster springs, in which case Hein shall convey to him the legal title to the patents obtained, with a provision for reconveyance upon the termination of this agreement, and if he does not do so Hein may utilize the inventions for bolster springs. Second parties shall defend infringement suits, and in case of infringement by others, they may join the owners of the legal title in any infringement suit, at the expense of second parties. If a patent suit is begun against second parties for infringement by the sale or use of said devices, and an injunction is granted and sustained on appeal, this contract may be declared void at the option of said Westinghouse. The contract is to continue 17 years from January 1, 1903.

The declaration alleges that defendant complied with the contract from January 1, 1903, to July 1, 1905, and in July, August, and September, 1905, sold 40,000 of the apparatus made by it, and on October 31, 1905, owed plaintiff \$10,000 thereon, which it failed and refused to pay, whereby the covenant was broken. Shortly after suit was brought the second parties brought a suit in equity in this court against Hein for the rescission and cancellation of the contract, on the ground that Hein was not the real inventor of the apparatus referred to, which was dismissed by the court because prematurely brought, and the dismissal affirmed on appeal. *Westinghouse v. Hein*, 159 Fed. 936, 87 C. C. A. 142. The history of the course of Hein's applications through the Patent Office is fully stated in the opinion of the Circuit Court of Appeals.

Upon the bringing of the equity suit this action was by agreement held in abeyance until the other was finally decided, when the defendant filed 22 pleas to the declaration. Thereupon the plaintiff, desiring to raise numerous defenses to the pleas, conceived that, in view of the intricacy of the facts and their variety and voluminous character, it would conduce to brevity and simplicity, and avoid undue and vexatious prolixity, if he might be permitted to plead the facts relied on by the plaintiff to meet the defenses set up in the pleas once for all, without being required to repeat them in each replication. After hearing the motion an order was made allowing plaintiff to reply to two or more pleas by one replication, file two or more replications to the same plea, reply several matters to one or more pleas, reply generally by the traverse *de injuria*, include therein two or more pleas, and to make a single statement of facts without the necessity of repeating it in any replication; but the defendant should not be prejudiced by such change of form, nor its rights affected, and it might demur, plead, or otherwise object in any manner, except to raise formal objections justified

by the order, to the same extent as if such order had not been made. *Hein v. Westinghouse Air Brake Co.* (C. C.) 164 Fed. 79.

From the opinion in the Court of Appeals in the equity case, and the general replication or statement of facts filed under the order, it appears that Hein applied for patents on his inventions, sold them to Westinghouse by the contract sued on, was met in the Patent Office by an interference with Shepard, which was decided in Shepard's favor, a patent issued to Shepard and bought in by Hein, and finally a patent issued to Hein. Assuming this to present the real state of facts, the defendant, in order to make any defense, must show that it did not make the contract, or that for some reason it is no longer bound by it. This it has done by pleading non est factum; that Hein did not invent or own the inventions; that he made a covenant of warranty of quiet enjoyment and broke it; that he covenanted to prosecute his applications with effect, and obtain patents, but did not do so; that he covenanted to do this within a reasonable time, but failed so to do; that he made a covenant of title to make the grant, and broke it, and covenanted that the inventions had practical utility, but they did not.

Assuming that the general replication states facts, and that it is correct in form to meet the pleas, it will be seen that the latter have no apparent merit. Westinghouse bought certain inventions, agreeing to pay a certain sum for them every three months. These payments were continued until October, 1905, but stopped on the ground that the interference proceeding had been decided against Hein. But the Court of Appeals held that Hein was not bound by that decision, but might still prosecute his applications. He did so, obtained patents, purchased Shepard's patent, and thus obtained everything he agreed with Westinghouse to sell. The defendant has thus obtained all it contracted for, all it was paying for up to October, 1905, and its pleas of want of title in Hein, warranty of quiet enjoyment and title, and want of utility, as well as the plea of non est factum, are fully met.

Plaintiff filed a replication containing the general statement of facts authorized by the order, concluding with a verification, and a number of special replications designed to meet the several pleas. Defendant has demurred specially to all the replications, on precisely the same grounds as if the order authorizing such general replication had not been made; and its attorney has without objection reargued the question, decided on the motion, as to the power of the court to make the order. He insists that the conformity act has been construed to be mandatory in compelling the federal courts to adopt in their entirety all local rules for reaching an issue in the pleadings, unless they provide otherwise by standing rule. They must adopt all such rules, whether principal or subordinate. Not only must the common-law system in its general scope be adopted in Illinois, but every one of its subordinate rules must also be followed, and the federal courts are powerless to change or relieve against a single one of them, unless they make a general standing rule relating to one or more of such subordinate provisions. In the absence of such a rule they cannot, it is argued, in any particular case, no matter how great the necessity for that case, and no matter how little the necessity for a general standing rule, re-

lieve against the burden of any technical, formal provision, which will make prolixity, confusion, and needless expense in the particular case, but which, in the great majority of cases, should not be in any way changed.

Under the statute and decisions the following rules may be stated: The conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) provides that in cases at law the practice, pleadings, and forms shall conform, as near as may be, to the practice, pleadings, and forms in like causes in the state courts. (1) The practice must conform, except as to matters covered by Congressional legislation, matters of jurisdiction, substituted service of process, charging juries, other matters relating to the personal administration of the judge, joinder of legal and equitable remedies, actions in rem, etc. (2) The federal courts may, by standing rule, change subordinate provisions which they deem unsuited to their procedure. (3) In their discretion they may reject collateral or subordinate provisions of the state practice, pleadings, or forms, which tend to obstruct the administration of justice. This they may do in a particular case, presenting unusual features, without making any standing rule. They cannot reject the local system as a whole, or in any substantial part; but they may dispense with matters of technical form, not affecting substantial rights or operating to the prejudice of a party. They cannot change the local system designed to produce an issue of law or fact (*Railroad v. Horst*, 93 U. S. 291, 23 L. Ed. 898); but they are not bound to slavishly follow subordinate technical requirements of form, when justice will be subserved by departing from them.

The order of September 25, 1908, falls within the third class. It affects no substantial right, and no one is prejudiced by it. It relates to form only. Under that order a general replication to all the special pleas, denominated a "replication," concluding with a verification, and signed by the plaintiff's attorney, has been filed, for the purpose of stating once for all the facts on which the plaintiff relies, and which, by reference, is incorporated as a whole into 17 separate special replications, setting up estoppel, ratification, splitting causes of action, *res judicata*, etc. This general statement or replication is not in technical form. It does not use the approved verbiage of the preamble or conclusion always found in a common-law replication; but it is substantially a replication of all the facts claimed by plaintiff to be material to answer the pleas. It is true that it does contain some legal conclusions, and some argument; but it is not difficult to separate these from the facts pleaded. In substance and effect it is a sufficient replication, though not so in form.

The chief objection raised by defendant's attorney is that the form of pleading allowed by the order casts upon him the onerous burden of picking out from the long statement of facts contained in the general replication the issuable facts, and then pleading a multitude of rejoinders, each of which, as he thinks, must be single, and not double. The trouble is that the case has a history, long and intricate, in its journey through the Patent Office, the chancery side, and the law side, and it was for that reason that the order was made, to prevent unneces-

sary repetition and complication. Defendant's attorney may traverse, or confess and avoid, and he may plead double, if he desires to do so. The salient facts are not difficult or complex. Hein is alleged to have covenanted to license Westinghouse in the use of certain inventions, and that the latter covenanted to pay a certain sum therefor. This allegation has been traversed by the plea of non est factum, and issue joined by the similiter. Assuming that these covenants were made, the main questions are whether Hein discovered the inventions sold and thus had title to them, whether he obtained patents for them, whether he fortified his title by acquiring the interfering invention, so that Westinghouse actually got all he bargained for, and whether Hein obtained the patents within a reasonable time. It will be easy enough to develop issues on these questions, or others deemed material, by rejoinders denying or avoiding the special replications, and such allegations of fact, not of law or argument, as support them.

Pleadings not in the form of those required by the state practice, but which are substantially a compliance with it, are good. *Lewis v. Gould*, 13 Blatchf. 216, Fed. Cas. No. 8,324. In *Erskine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745, common-law forms were used in a code state, and the Supreme Court applied common-law tests of sufficiency, paying no attention to the requirements of the local practice.

A memorandum is filed herewith, directing the entry of an order sustaining some of the demurrers and overruling the rest.

BALTIMORE & O. R. CO. v. BERKELEY SPRINGS & P. R. CO.

(Circuit Court, N. D. West Virginia. April 1, 1909.)

1. MORTGAGES (§ 27*)—EQUITABLE MORTGAGES—AGREEMENT TO MORTGAGE.

An agreement in writing to give a mortgage or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create an equitable mortgage, or a specific lien on the property intended to be mortgaged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 43, 44; Dec. Dig. § 27.*

Equitable mortgages—agreement to give a mortgage, see note to *Bridgeport Electric & Ice Co. v. Meader*, 18 C. C. A. 458.]

2. RAILROADS (§ 110*) — CONSTRUCTION CONTRACT—MORTGAGES—AGREEMENT TO EXECUTE—PERFORMANCE—LACHES.

Where an original recorded agreement for the construction of a railroad provided for an issue of bonds to cover the construction expenditure made by complainant in excess of \$30,000, the bonds to mature after 20 years from January 1, 1888, and plaintiff brought suit to compel the issuance of the bonds and the execution of the mortgage several months before such 20-year period expired, plaintiff was not chargeable with laches.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 341; Dec. Dig. § 110*]

3. ACCOUNT STATED (§ 6*)—REQUISITES—DEFINITION.

It is not necessary that an acknowledgment of the correctness of an account, in order to constitute an account stated, should be either in writing or made in express words, since an "account stated" is an account rendered by one to another showing a balance due and an acknowledgment of

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such indebtedness by the debtor either expressly or by failure to deny the account within a reasonable time.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 30-32; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 1, pp. 93-98; vol. 8, p. 7561.]

4. ACCOUNT STATED (§ 6*)—EVIDENCE.

Complainant, having completed a railroad for defendant, submitted its construction account to defendant's stockholders at a regular meeting, where it was referred to its board of directors, who returned it for a more itemized statement. This statement was subsequently furnished, after which defendant included the balance as shown thereon in several sworn reports of the cost of its road to the Interstate Commerce Commission, and at a stockholders' meeting held some years after the account was rendered, directed that a county which was a large holder of defendant's stock should be permitted to examine plaintiff's account rendered, if it desired. Nothing more was done for 10 years, nor until plaintiff's original papers, vouchers, and books were destroyed by fire, after which defendant took certain steps to discredit the account. *Held*, that the account as rendered was an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 30-32; Dec. Dig. § 6.*]

5. RAILROADS (§ 165*)—MORTGAGES—AUTHORIZATION—VOTE OF STOCKHOLDERS—STATUTES.

Code W. Va. 1899, c. 54, § 50, par. 11 (Code 1906, § 2343), requiring the assent of two-thirds of the stockholders of a railroad before a mortgage can be executed by it, applies only to mortgages given to complete, improve, or operate a road already in existence, and not to a contract to build a road originally, providing terms of payment by bond and mortgage.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 513; Dec. Dig. § 165.*]

6. RAILROADS (§ 165*)—CONSTRUCTION—MORTGAGE BONDS—STOCKHOLDERS—ESTOPPEL.

Where stockholders of a railroad company permitted a contract for the construction of the road, requiring the issuance of a bond and mortgage for construction expense to be made and performed by plaintiff, and thereafter received the benefits derived therefrom for nearly 20 years, they were estopped to assert that the mortgage provision was invalid because the assent of two-thirds of the stock required by Code W. Va. 1899, c. 54, § 50, par. 11 (Code 1906, § 2343), had not been given.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 513; Dec. Dig. § 165.*]

In Equity.

Faulkner, Walker & Woods and H. R. Preston, for plaintiff.

J. Hammond Siler and Alex. R. Hagner, for defendant.

DAYTON, District Judge. On November 4, 1887, the plaintiff and defendant companies entered into an agreement which was duly executed and recorded in the clerk's office of the county court of Morgan county, W. Va., whereby the plaintiff company agreed to construct the railroad of the defendant company from Hancock station, on the Baltimore & Ohio, to Berkeley Springs. The defendant company was to place in the hands of the plaintiff company \$30,000 on or before the 1st day of January next following for the purpose of such construction, and the plaintiff company was to furnish the additional money for such construction, which was to be completed on or before

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the 1st day of July next following. For all sums over and above the \$30,000 so furnished by the plaintiff company, the defendant company agreed to execute its bonds in the sum of \$1,000 each, bearing interest at the rate of 6 per cent. per annum, payable semiannually, and to mature 20 years after January 1, 1888. The bonds were to be secured by the defendant company by a first mortgage upon its railroad. It was further agreed that, after the completion of the construction, the plaintiff should operate, for the defendant company, the line of railroad, furnishing the requisite equipment, and making annual statements of the cost of such operation, allowing reasonable compensation for the use of equipment, and that any deficiency should constitute a debt against the defendant company. It was further agreed that a formal contract of operation, to run 10 years from completion of the railroad, should be executed by the parties after the \$30,000 had been paid over by the defendant to the plaintiff company. By a supplemental agreement under date of December 24, 1887, duly executed and recorded, the time of payment of the \$30,000 was extended so that \$10,000 thereof was to be paid on or before March 1, 1888, and the remainder within 30 days thereafter.

On March 27, 1907, the plaintiff company filed its bill herein, setting forth the contract and supplemental contract, and alleging: That in pursuance thereof it did construct the railroad from Hancock station to Berkeley Springs in all respects as required, and kept proper and accurate accounts of the money expended in the construction, and, when the same was completed, rendered a stated account to the defendant for the sums expended by it over and above the \$30,000, which sums aggregated \$56,911.85; that the defendant accepted the account as accurate, has never denied the correctness thereof, but, at various times and in various ways, has admitted that the said sum of \$56,911.85 was due by it to the plaintiff company on account of such construction work. It is then alleged that no part of said sum or its interest has ever been paid, and that the plaintiff company is entitled to have it secured by the issue of bonds and the execution of the first mortgage provided for by the agreement, and that the defendant company has received offers and contemplates a sale of its road. The prayer of the bill is that the contract may be specifically enforced, that the bonds and mortgage be required to be executed, and, until this be done, that the defendant company be enjoined and restrained from in any manner disposing of or incumbering the railroad. Upon presentation of this bill, the temporary injunction prayed for was awarded, and subsequently, on the 15th day of October, 1907, a demurrer to the bill and a motion to dissolve the injunction were both overruled.

The defense set up by the defendant company in its answer is based upon a denial: (a) That it ever agreed to pay back any sum of money in excess of the \$30,000 to the plaintiff company, but admitting that it did agree to issue its bonds and mortgage to secure such sum; (b) that the supplemental contract was ever recorded; (c) that the plaintiff ever rendered complete and accurate accounts of the cost of construction or of the expenditure of the \$30,000, that the plaintiff ever spent any such sum as \$56,911.85 demanded by it, that respondent

company ever accepted said sum as being the accurate and correct amount expended by plaintiff in construction, or ever admitted said sum to be due from it, or ever carried said sum upon its books as an indebtedness from it to the plaintiff, or ever made any reports required by law in which such indebtedness was recognized by it; (d) that complainant performed the agreement, is entitled to specific performance, or that the defendant was ever called upon to execute the bonds and mortgage; (e) that it has any offers or contemplates any sale of its railroad; and (f) charges that plaintiff company has been guilty of laches in demanding its alleged right to specific performance, by reason of which it should be held barred of any such right.

The well-known maxim that equity looks on that as done which ought to be done has long since established the principle that:

"An agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property intended to be mortgaged." *Daggett v. Rankin*, 31 Cal. 321, 326; *Fetter on Equity*, 26.

The only limitation upon this principle is defined in section 2 of chapter 74 of the Code of this state (Code 1906, § 3100) as interpreted in *Feely v. Bryan*, 55 W. Va. 586, 47 S. E. 307, that such agreement must be at the time recorded so as not to injure purchasers or creditors without notice. The original agreement, it is admitted, was recorded. It provided for an issue of bonds that should only mature after a lapse of 20 years from January 1, 1888. The equitable lien created by it did not expire therefore until 1908, several months after this suit was brought, and there can therefore no question of bar by laches as against the plaintiff arise in this case. If the defendant company is indebted to the plaintiff company for money expended in the construction of its six miles of road over and above the \$30,000 furnished by the defendant for this purpose, then the right of the plaintiff to recover for such sums so expended by it is inevitable, and such indebtedness, if any exists, being now conceded to be due under the terms of the agreement, the character of such recovery will be a decree for such sum and its interest, to be enforced by a sale of the defendant company's railroad, under the equitable lien existing by virtue of the contract to secure it.

The only question therefore is purely one of fact whether or not the demand of the plaintiff company for \$56,911.85, with its accumulated interest, is just and true, and, if not, what sum, if any, is due it on account of such construction work? Without consuming time in a needless discussion of the evidence, it is sufficient to say that these facts are clear and to a considerable extent are established by the minute records of the stockholders' and directors' meetings of the defendant itself. After completion of the construction of this railroad, the plaintiff company submitted to the president of the defendant company a statement of this indebtedness for construction, as claimed by plaintiff, which was by him, on January 4, 1890, laid before the stockholders, and by that body referred to the board of directors, which, two days after, referred it back to the plaintiff company, for a more itemized statement. On the 24th day of January,

1891, the town of Bath, a stockholder of the defendant company, through its recorder, presented to the defendant's board of directors a demand that an itemized statement of the cost of said construction be required of plaintiff company, and the directors ordered the transmissal of this demand to be made to the officers of plaintiff company. That this demand was complied with and such statement furnished is absolutely apparent from the fact that, at a subsequent meeting of the stockholders of defendant company, held on January 10, 1894, it was ordered that the secretary should "permit the county court to examine the accounts of the Baltimore & Ohio Railroad Company against the Berkeley Springs & Potomac Railroad Company, if such court desires such an examination." In this connection, it is to be borne in mind that the county of Morgan had subscribed to and held \$25,000 of the capital stock, and the town of Bath \$5,000 thereof. Two years after, in 1896, it is recited:

"The president brought to the attention of the board that the Baltimore & Ohio Railroad Company some time ago were willing to take the stock of the county of Morgan and the town of Bath and stand in their place. As the said road is going behind every year, the board therefore recommends the turning over the stock of the said county and town to the said Baltimore & Ohio Railroad Company, providing it is willing to take it, and the secretary of this board is ordered to give, present, to the county court of said county and the mayor of the said town a copy of this resolution."

In the meantime, for the year ending June 30, 1890, the president of the defendant company had returned to the Interstate Commerce Commission the report of the condition of the Berkeley Springs & Potomac Railroad Company, in which was an itemized statement of the cost of construction of said road, showing the total cost of right of way, fencing, grading, and bridge and culvert masonry, bridges and trestles, rails, ties, other superstructure, engineering expenses, and purchase of constructed road, totaling \$86,911.85, from which deducting the \$30,000 furnished by the defendant company itself, the remainder is the exact amount claimed by the plaintiff company to have been furnished by it. This report was sworn to by the president of the defendant company, and nine additional reports of a like character, sworn to by both the president and secretary of the defendant company, were, from year to year, returned to the Interstate Commerce Commission, containing precisely this same statement of the cost of construction of this road. In February, 1904, the disastrous fire in Baltimore city destroyed, to a very great extent, the books, records, vouchers, and papers of the plaintiff company, and this fact was generally known as a matter of current history. On the 5th day of July, 1905, the stockholders of the defendant company appointed its president and attorney to "ascertain from the Baltimore & Ohio Railroad Company the cost of constructing, operating, and repairing the said Berkeley Springs & Potomac Railroad Company," and directed that the latter company be requested to report to a meeting of the stockholders to be held in August following. On the 15th day of March, 1906, in a stockholders' meeting of the defendant company, an order was entered directing its attorney "to ascertain whether the statute of limitations does not run against the Baltimore & Ohio Rail-

road Company, in the matter of their claim, by their reports, of indebtedness against the Berkeley Springs & Potomac Railroad Company," and on the same day, the directors, in meeting, entered an order to the effect that:

"The account rendered by the Baltimore & Ohio Railroad Company, to this company, showing a large indebtedness of this company to the Baltimore & Ohio Railroad Company, is repudiated as being incorrect, unreasonable, and excessive."

Incidentally, it may be noted that, at a meeting held February 25, 1888, the directors had resolved that "all duties performed by the officers and directors in their capacity as such shall be free and without compensation." Notwithstanding this, the stockholders and directors, both, in September, 1901, "in consideration of services heretofore rendered the Berkeley Springs & Potomac Railroad Company, as directors and officers," ordered a number of shares of stock to be issued and distributed among themselves as such officers and directors.

The destruction by fire has necessarily made it difficult for the plaintiff to prove, item by item, the cost of this construction work nearly 20 years after its completion. This difficulty is added to by the fact that some of its employes engaged in the actual work and in keeping of its books at the time are dead, and others had severed their connection and have been lost sight of. However, ledgers to which the original entries were transferred were saved, and from them a fairly full and complete account of this work is presented. The engineer in charge of the work, who appears to have been a man of large experience, has testified that the work was economically done at the time, that it was done upon precisely the same basis as the plaintiff company did its own construction work, and plaintiff's auditor has testified that the sums charged and transferred to the ledger account, copy of which is filed, were so charged after examination and approval at the time by the superior officers whose duties involved the doing of this. Under all the circumstances, I am clearly of the opinion that this proof is sufficient. In fact, I think it fully establishes an "account stated." It is well settled that where an account is rendered by one to another showing a balance due the first, and the indebtedness thus expressed is acknowledged by the debtor, this will constitute an account stated. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; 1 Cyc. 364.

It is not necessary that the acknowledgment of an account's correctness should be either set forth in writing or be made in express words in order to constitute it an "account stated." Evidence of assent to its correctness may be inferred where no denial of it is made within a reasonable time after it has been rendered and received, as also from the subsequent conduct and acts of the parties in regard to it. *Eichel v. Sawyer* (C. C.) 44 Fed. 845. Probably the clearest enunciation of this principle is set forth in *Standard Oil Co. v. George H. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319, where it is held:

"An account rendered becomes an account stated, unless objected to within a reasonable time, and cannot afterwards be impeached except for fraud and mistake. What constitutes a reasonable time in such a case is a question of law."

See, also, *Allen-West Commission Co. v. Patillo*, 90 Fed. 628, 33 C. C. A. 194, where a failure to object to an account rendered for two years made it an account stated. Also, *Porter v. Price*, 80 Fed. 655, 26 C. C. A. 70; *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; 1 Cyc. 375, 376.

In this case, as shown by its record book, the defendant company received the plaintiff company's account in January, 1890, presented it to its stockholders in regular meeting, where it was referred to its board of directors, who returned it for "a more itemized statement." This "more itemized statement" not having been made as promptly as desired, in December of that year, a demand made therefor by the town of Bath was directed by the directors to be forwarded to plaintiff. That this was done and such "more itemized statement" was furnished is clearly apparent from two facts: First, that on the 5th day of January, 1891, the defendant company swore to and returned to the Interstate Commerce Commission the company's first report, setting forth the cost of the road's construction in detail corresponding exactly to plaintiff's account and demand, and continued for nine consecutive years thereafter to return like reports, identical in statement as to the cost of the road's construction. Second, on January 10, 1894, a stockholders' meeting, by order, directed that the county court of Morgan county, which county owned a large majority of the defendant's stock, should be permitted to examine the plaintiff company's account rendered, if it desired. It may well be presumed that this county court did examine it, that the town of Bath, the next largest stockholder, which had been impatiently demanding its rendition, examined it, that the directors examined it, and were then satisfied, for nothing more was heard from them until more than 10 years after, and until fire had destroyed plaintiff company's vouchers, papers, and books, when a new rendering of the account was demanded. It is a clear case of an account stated only to be impeached for fraud or mistake. This is not attempted. It could only be done, I take it, upon proper pleading, and I think such pleading would require a bill or cross-bill asking affirmative relief. However, I need not determine that here. The defendant has relied upon the filing of an answer simply denying that the account was rendered, acknowledged, or accepted, and disputing its correctness. No allegations of fraud or mistake are set forth therein. The evidence is clearly against it as to these matters, even if the allegations were sufficient upon which to defend. They are not so sufficient, so that both upon the pleadings and the merits this defense must fail.

It is insisted, however, that under paragraph 11 of section 50, c. 54, of the Code of West Virginia (Code 1906, § 2343), the assent of two-thirds of the stock, evidenced by their resolution, must be shown before mortgage can be given, and that such assent has never been given. This position is indefensible for, among other reasons: First, because this section relates by its terms to mortgages to be given for money borrowed by it to complete, improve, or operate its road already in existence. It does not refer to its power to contract for the building of its original road and provide terms of payment by bond and

mortgage, for its original construction. Second, because having allowed this contract to be made, and complied with, having received the benefits derivable therefrom for all these years, the assent to the agreement will be conclusively assumed. The stockholders not assenting are, after this lapse of time, estopped from setting up such defense.

Let decree be entered in favor of the plaintiff for the \$56,911.85, its accumulated interest, and the costs of this suit, and providing for sale of defendant's road by commissioner appointed for the purpose, if not paid within 90 days.

H. T. SMITH CO. v. MINETTO-MERIDEN CO.

(Circuit Court, D. Connecticut. March 16, 1909.)

No. 717.

1. DAMAGES (§ 22*)—MEASURE OF DAMAGES—BREACH OF CONTRACT—FAILURE TO PERFORM.

In an action for breach of an executory contract for the hiring of teams from plaintiff for a stated term, an excessive price alleged to have been paid by plaintiff to defendant for a teaming outfit in reliance on such contract does not constitute an element of the damages recoverable.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 22.*]

2. COURTS (§ 372*)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.

The right of a party to an executory contract, on the refusal of the other party to perform, to sue for and recover his entire damages for the breach, without waiting for the expiration of the time for performance, is a question of general law, upon which the federal courts are not bound by the rule of the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 979; Dec. Dig. § 372.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

3. DAMAGES (§ 28*)—BREACH OF CONTRACT.

It is the rule of the federal courts that, upon the absolute refusal of one party to an executory contract to perform, the other party may at once sue for and recover the damages which he has already sustained, and also such as he can show by competent evidence with reasonable certainty will result to him thereafter by reason of the breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 70; Dec. Dig. § 28.*]

At Law. On demurrer to complaint.

Fay & Clark, for plaintiff.

Gross, Hyde & Shipman, for defendant.

PLATT, District Judge. The complaint in this case sets forth a cause of action based upon the breach of an executory contract. The gist of the contract is that the plaintiff agreed to furnish two teams for the exclusive use of the defendant in hauling merchandise during every working day for a period of five years from October 16, 1906, and the defendant agreed to pay the plaintiff \$112 each month for such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

service. If the defendant used the teams for carting coal, the plaintiff was to have 50 cents per long ton in addition, after making certain rebates and allowances. It is alleged in paragraph 5 of the complaint that on or about July 1, 1908, the defendant closed up its factories in Meriden, and moved its plant and business out of the state, and "refused to further perform the said agreement on its part to be performed." After alleging its own constant willingness to perform the contract, the plaintiff claims \$3,800 damages.

Defendant wished to know a little more about the plaintiff's theory of damage, and so, in response to a motion for a more specific statement, the plaintiff filed an amendment to its complaint, stating four reasons for claiming said amount of damage, viz.:

"(1) That, as a part of the consideration of the agreement set forth in the complaint, defendant sold to plaintiff, and plaintiff purchased of defendant, the defendant's teaming outfit mentioned in paragraph 6 of said agreement, and plaintiff paid therefor the sum of \$3,957.24.

"(2) Said sum of (is?) \$1,300 in excess of the value of said teaming outfit, and plaintiff would not have purchased the same, except as a part of the consideration of said agreement described in the complaint, and in preparation to execute the same.

"(3) Plaintiff by reason whereof has been damaged in the sum of \$1,300, being the difference between said sum of \$3,957.24, paid by plaintiff for said property, and the value thereof.

"(4) Plaintiff, by reason of defendant's failure and refusal to fulfill said agreement, has been damaged by the loss of the profits on the two teams mentioned in paragraph 2 of said agreement, from July 1, 1908, to October 15, 1911, in the sum of \$2,500."

It will be seen that the first three paragraphs explain the basis upon which the plaintiff expects to rest its demand for a part of the \$3,800, viz., \$1,300. The substance of it is that it made a bad trade with the defendant, because it supposed, when it bought a teaming outfit of the defendant, that it could use said outfit in carrying out the contract which has been broken. The only reference in the contract to a teaming outfit is in paragraph 6. It is there provided that the defendant herein, who was the second party in the contract, could terminate the contract at any time upon 30 days' notice, if its directors thought it necessary or proper to do so; their judgment thereon to be conclusive and binding upon both parties. The paragraph then goes on to say that such a termination shall—

"in no way affect the indebtedness of the first party to the second party arising out of the sale this day made of the teaming outfit by the second party to the first party."

This is the argument as I gather it: That, because it has been specially provided in the contract that its termination by a method therein provided for shall have no bearing upon a certain horse trade concluded before the contract was executed, it follows that a termination of the contract by the defendant in any other way shall bring the horse trade and its details into full operation as a basis for damage. The logic is not persuasive, and the first cause of demurrer, which is directed against the relief demanded, as enlarged and explained by the first three paragraphs of the more specific statement, is therefore sustained.

The second cause of demurrer is directed against the relief demanded, as enlarged and explained by the fourth paragraph of the more specific statement. It proceeds in the first instance upon the theory that since, in Connecticut, it is the settled law that when, during the lifetime of a contract, one party refuses to perform, the other party must wait until the time for execution has expired before he can recover his entire damage, it is the duty of the federal court to take the same position. This, however, is a question of general law, and one about which the federal court is entitled to use its own independent judgment.

I understand that in the federal courts at large, and certainly in this jurisdiction, the law is well settled that in such a contract as this one an absolute refusal by one party to perform may be accepted by the other, and he may thereupon recover such damages as he can show to have resulted to him when the suit was brought on account of the breach, and such further damage as he can by competent and relevant testimony show will be likely to result to him thereafter, up to the time fixed in the contract for its completion. On the trial he must produce such evidence as will enable the jury to reach a reasonably accurate conclusion as to the prospective damage. Whether it can do so or not remains to be found out at the trial. It would be wrong to prevent the plaintiff from making the attempt by sustaining the second cause of demurrer.

The second cause of demurrer is overruled.

In re GOLDSMITH.

(District Court, E. D. New York. March 17, 1909.)

BANKRUPTCY (§ 355*)—ADMINISTRATION OF ESTATE—ADJUSTMENT OF LIENS.

The rights of a chattel mortgagee of a bankrupt determined in the proceeds of property sold by the trustee, where the proceeds of the mortgaged and un-mortgaged property, respectively, could not be definitely ascertained.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 355.*]

In Bankruptcy.

Samuel Packard, for petitioner.

Liebmann, Naumburg & Tanzer, for trustee.

CHATFIELD, District Judge. The property of the bankrupt consisted of a considerable quantity of machinery, shafting, dies, tools, and stock, which had been acquired through a considerable period. In the month of August, 1906, Goldsmith made a mortgage to John C. and James H. Dowd to secure the sum of \$4,000, with interest at 6 per cent., on or before January 1, 1907. This mortgage was properly filed, and was not paid, but was subsequently assigned to the Royal Bank of New York, which took up the mortgage upon the 17th day of January, 1907, and also, on the 18th day of January, 1907, took a further mortgage upon the same and additional chattels for the sum

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of \$3,000, payable one month after date. This mortgage was not filed until the 12th of July, 1907. The Royal Bank also advanced certain moneys to Goldsmith and took security in the form of a note and an assignment of various accounts as collateral to the note.

Goldsmith was adjudicated a bankrupt upon the 12th day of December, 1907, upon the petition of the Royal Bank of New York, and a trustee was elected in February, 1908. The property of the bankrupt was sold, and the proceeds of the sale directed to be held subject to the lien of the chattel mortgages of the Royal Bank, if they should be, and to the extent that they should be, declared liens. Upon the sale, an officer of the bank was present, and before the sale checked off the property which the bank claimed was covered by its chattel mortgage, but did not give any information as to the identity of these articles to the trustee or the auctioneer, and the trustee and the auctioneer did not do more than to keep track of the prices of the parcels as they were sold. It has thus become impossible to identify the chattels in the sale, so as to classify them under the different mortgages; it appearing from the testimony that some of the fixtures, machinery, and chattels were in the bankrupt's possession prior to the making of the first mortgage, some prior to the making of the second mortgage, and some acquired thereafter. A reference has been had to determine the validity of the mortgages and the amount of the liens, in so far as they might be held valid: The referee has reported that the second mortgage is invalid through failure to record it according to law. In this respect the referee's report will be confirmed. *In re Shiebler* (D. C.) 165 Fed. 363.

As to the first mortgage the referee has reported that it is a valid lien, and has decided that property to the amount of \$2,874.02, less \$180.20 expenses, making net \$2,693.82, should be considered as the proceeds of the property covered by that mortgage. In arriving at this amount the referee has arbitrarily (but, as he says, for the purpose of doing equity) approximated the amount of the dies, machinery, and such articles which he considered were likely to have been purchased during the periods represented by the property mortgaged in each instance. There is not much reason to question the equity of the referee's finding; but, inasmuch as the trustee was bound to sell the property and to keep a record of each article sold, it is impossible to avoid the conclusion that the trustee is unable to establish the identity of the items of the sale as to which he was to keep a separate account. On the other hand, the claimant did not or cannot identify, by lots or prices, the articles which he picked out prior to the sale as those covered by his chattel mortgage. Under these circumstances, questions as to the likelihood of the older goods bringing less prices than the newer, or that the bankrupt would have replenished the stock at about the same rate throughout the entire period, in this way making an equitable division of the assets received from the sale, are impossible as the basis of a decision. It might be properly the result of an agreement or compromise between the parties; but, as a matter of law, either the trustee has failed to perform all the obligations which rested upon him, or the claimant has not proven his right, nor identified the articles disposed of at the sale upon which he claims a lien.

The court is inclined to believe that, if the trustee had proceeded carefully, he could have preserved means of identifying the property claimed to be covered by the first chattel mortgage. But in any event the burden of proof as to the property mortgaged would be upon the mortgagee, and he has given no testimony to show by what means he identified the property which he alleges was present at the time of the sale. The testimony does show, however, and this is apparently undisputed, that the mortgagee testifies that all of the property covered by his mortgage was identified by him and in the possession of the trustee at the time of the sale. The total amount of the mortgage was \$4,000, and interest has been waived. If all of the property was present, but its identity cannot be proven, it would not be unfair to assume that sufficient was realized from it to cover the amount of the mortgage, and the balance belonging to the bankrupt's estate could thus be determined.

Upon this basis, allowing \$4,000 as the proceeds from the sale of the property covered by the first mortgage, and the referee having reported that \$810 was obtained on the sale from the property covered exclusively by the second mortgage, in addition to that described in the first, we have \$4,810 (out of \$6,234.51, total proceeds of the sale) which was realized from property pledged for loans aggregating \$7,000. The proportion of \$4,810 to \$7,000 would give \$2,748.57 to \$4,000. Thus we get \$2,748.57 as the amount realized from the chattels covered by both mortgages, which is strangely near the amount found by the referee by the method which he used.

But, assuming that the mortgagee was entitled to the whole amount of the first mortgage, the testimony also shows that the mortgagor paid at the bank, in the form of interest, amounts which are claimed to be at an usurious rate. The bank has claimed the right to keep these extra amounts under its contract, and that it has the right to a jury trial upon any attempt to collect them by the trustee. It does not seem necessary to consider the question of usury, for the overpayments were certainly made by the mortgagor to the mortgagee upon a chattel mortgage transaction, and not upon a demand loan at market rate for call money, and should be credited as payments on account of principal, inasmuch as they have been carefully kept within the account between the mortgagor and mortgagee, without reference to other debts. The result would be that, if the mortgagee was entitled to the face of the mortgage, he must credit the mortgagor with these amounts, namely, the sum of \$998, and the mortgagee then would be entitled to receive from the proceeds of the sale the difference, or \$3,002, less expenses of \$180.20, making net \$2,821.80. Upon all the circumstances this would seem to be an equitable, as well as a legal, basis for determining the rights of the mortgagee at the sale, and the referee's report will be modified to that extent.

As to the other transactions between the bank and the bankrupt, a dispute has arisen, and argument was had upon this motion; the bank claiming that it has a right to apply assets in its hands to the payments of the unsecured debts, and the trustee claiming that the security should be released first. Under the provisions of the bankruptcy law

(Act July 1, 1898, c. 541, § 68, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) it would seem that the bankrupt has the right to set off funds in his hands against the amount proved as a general claim against the estate, and also to hold the security for the purpose of reducing the amount of the creditors' claims, and these differences between the parties will apparently be adjusted upon proof of the claims, without any determination at the present time.

The Royal Bank is entitled to recover out of the fund its disbursements as they may be taxed and allowed, in lieu of taxable costs on foreclosure; but no allowance for counsel fees can be granted.

CARP v. QUEEN INS. CO. et al.

(Circuit Court, W. D. Missouri, S. W. D. February 13, 1909.)

1. COURTS (§ 321*)—JURISDICTION—FEDERAL COURTS—ACTIONS AGAINST ALIENS.

An action by a citizen of Illinois against an alien insurance company for malicious prosecution was within the original jurisdiction of the federal Circuit Court sitting in Missouri.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 847, 849; Dec. Dig. § 321.*

Diverse citizenship as a ground of federal jurisdiction, see note to Shipp v. Williams, 10 C. C. A. 249.]

2. REMOVAL OF CAUSES (§ 61*)—NATURE OF ACTION—PETITION.

The nature of a cause of action for purposes of removal from a state to a federal court is that made by plaintiff's petition.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.*]

3. REMOVAL OF CAUSES (§ 11*)—RIGHT TO REMOVE.

A cause of action, in order to be removable at all, must be such as might have been originally brought by the plaintiff in the federal Circuit Court to which a removal is desired.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.*]

4. REMOVAL OF CAUSES (§ 11*)—JOINT CONTROVERSY.

Where plaintiff brought a joint action in a state court for malicious prosecution against several corporations, some of which were aliens and all of which were nonresidents of the state where the action was brought, plaintiff could not originally have sued the corporate defendants, which were citizens of states other than Missouri, without their consent in a federal Circuit Court sitting in Missouri, and hence plaintiff's joint action against all the defendants was not removable to that court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.*]

On Motion to Remand.

Howard Gray, H. H. Bloss, and McNott & McNott, for plaintiff.
Ed. J. White and Barger & Hicks, for defendants.

POLLOCK, District Judge. Plaintiff, a citizen and resident of the state of Illinois, brought in the state court of this state his action

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to recover a judgment for damages sustained from defendants, the Queen Insurance Company and the Hanover Fire Insurance Company, corporate citizens of the state of New York, the Fireman's Fund Insurance Company, a corporate citizen of the state of California, the Hartford Fire Insurance Company, a corporate citizen of the state of Connecticut, and the National Assurance Company, a corporation of Ireland, the Commercial Union Assurance Company, Limited, a corporation of London, England, and the Hamburg-Bremen Fire Insurance Company of Hamburg, Germany, by reason of the alleged joint malicious prosecution of plaintiff by the defendants. Within due time, defendant the National Assurance Company of Ireland filed its separate petition and bond for removal of the cause of action thus pending against it into this court. A transcript has been lodged here by the removing defendant, and plaintiff has filed his motion to remand to the state court. This motion has been argued and briefed, and stands submitted for decision.

That the plaintiff, a citizen of Illinois, might, had he so desired, have brought his action against the removing alien defendant alone in this court, does not admit of controversy. In *re Hohorst*, Petitioner, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. It thus clearly appears this court in such case would have complete original jurisdiction, concurrent with that of the state court, of the subject-matter of such controversy.

But the question here presented is, can the removing defendant bring its controversy with the plaintiff to this court, to the exclusion of the jurisdiction obtained by the state court wherein defendant is proceeded against by plaintiff, not alone, but jointly with other defendants, some of which are citizens of states of this country other than that of which the plaintiff is a citizen, and other than that of this state, and some are alien defendants, to recover for a joint tort done him by defendants? As the cause of action stated by plaintiff in his petition filed in the state court makes the wrong done him a joint tort, committed by all the defendants acting conjointly, and seeks a recovery of damages for such joint wrong, it is clear there is not and cannot be a removal of the cause to this court on the ground of the existence of a separable controversy between the plaintiff and the removing defendant, as the petition for removal would seem to allege.

It has been many times decided that the cause of action for removal purposes is precisely that which the petition of plaintiff makes it, and in this case the cause of action is thus made joint and not separable. *Alabama Southern Ry. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441; *Cincinnati & Texas Pacific Ry. v. Bohon*, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448.

Again, that a cause of action may be removed into a Circuit Court of the United States at all, it must be such as might have been originally brought by the plaintiff in such Circuit Court. *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182. While plaintiff might originally have brought this action against the alien defendants, jointly, in this court, had he so desired, and could

he have procured valid personal service on such aliens in this jurisdiction, yet it is clear he could not have here brought his action against the corporate defendants, citizens of states other than this, without their consent, either singly or jointly, as they are now charged in the state court. For, under the present judiciary act, they have the undoubted right when proceeded against in a federal court of this country to require such action to be brought in the district whereof they are an inhabitant and in the state of which they are citizens. *Galveston, etc., Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768.

It is therefore clear the plaintiff, had he so desired, could not have originally brought this joint action against all the defendants in this court, and as the effect of the separate removal taken by defendant the National Assurance Company alone, if sustained, must result in bringing the entire joint controversy of plaintiff with all defendants before this court (*Chicago, Rock Island & Pacific Railway Co. v. Martin*, 178 U. S. 248, 20 Sup. Ct. 854, 44 L. Ed. 1055), when such joint controversy could not have been originally brought in this court, in my judgment, it follows, of necessity, the motion to remand must be sustained.

It is so ordered.

SORENSEN V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1909.)

No. 2,574.

1. POST OFFICE (§ 51*)—BREAKING AND ENTERING POST OFFICE—SENTENCE.

A sentence under Rev. St. § 5475 (U. S. Comp. St. 1901, p. 3694), for stealing post office property, or under section 5478 (U. S. Comp. St. 1901, p. 3696), for breaking and entering a post office, is fatally defective unless it imposes imprisonment "at hard labor" as required by each section.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 51.*]

2. POST OFFICE (§ 46*)—BREAKING AND ENTERING BUILDING USED IN PART AS POST OFFICE—ELEMENTS OF OFFENSE.

Under Rev. St. § 5478 (U. S. Comp. St. 1901, p. 3696), making it a criminal offense to "forcibly break into, or attempt to break into, any post office or any building used in whole or in part as a post office, with intent to commit therein larceny or other depredation," an intent to commit larceny or other depredation in the part of the building used as a post office is an essential ingredient of the offense; and where a post office was kept within a room used for mercantile purposes, being separated from the remainder of the room by a fence or partition, a breaking and entering of such room and the stealing of property from a safe therein, although including post office funds, will not warrant a conviction under said section unless it is shown that the safe was within the inclosure used as the post office.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 46.*]

3. BURGLARY (§ 41*)—PROSECUTION—SUFFICIENCY OF EVIDENCE—PROOF OF CORPUS DELICTO.

To warrant a conviction for burglary, the evidence must be sufficient to prove affirmatively and beyond a reasonable doubt that there was such a breaking and entry as are necessary to constitute burglary, and evidence which leaves it wholly to conjecture as to the manner in which an entry was effected into a building in which a larceny was committed is insufficient.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 97; Dec. Dig. § 41.*]

4. CRIMINAL LAW (§ 417*)—EVIDENCE—DECLARATIONS.

On the trial of a criminal case, where conspiracy is not charged, testimony is not competent against the defendant to show a statement made by some one of a party which included defendant, where the witness admits that he does not know which one made the statement or whether it was heard by or assented to by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 950; Dec. Dig. § 417.*]

5. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—WEAPONS AND TOOLS USED IN COMMISSION OF BURGLARY.

On the trial of a defendant charged with breaking and entering a building used in part as a post office, weapons and implements found on his person when arrested, 18 days after the burglary and 19 miles distant from the place, were not admissible in evidence against him, where it was not shown that such articles were used when the burglary was committed, nor that defendant was in the vicinity at or near the time of its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. CRIMINAL LAW (§ 348*)—EVIDENCE—CHARACTER OF ACCUSED.

The mental tendency of a person to commit a crime, as evidenced by weapons or tools in his possession, cannot be shown to convict him of a prior crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 796, 798; Dec. Dig. § 348.*]

7. CRIMINAL LAW (§ 424*)—EVIDENCE—DECLARATIONS OF CODEFENDANT.

Where defendant and another were arrested for a crime, letters written by such other while they were confined in jail to a third person and obtained from the possession of defendant's wife were not admissible against him, where it was not shown that he ever saw the same or knew their contents or even of their existence until afterward, or that he then knew of or concurred in what was written therein, the possession or knowledge of his wife not being imputable to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1004; Dec. Dig. § 424.*]

Admission on joint trial of evidence competent only against one or part of defendants, see note to *Sprinkle v. United States*, 73 C. C. A. 295.]

8. BURGLARY (§ 42*)—EVIDENCE—POSSESSION BY DEFENDANT OF PROPERTY STOLEN.

On the trial of a defendant charged with burglary and the larceny of property from a safe, including watches owned by a jeweler, evidence tending to show that a watch found in a dresser drawer in the house occupied by defendant's wife three weeks after the burglary, and when defendant was in jail, was one of those stolen, was not admissible against him, it not being shown that he had ever been in possession of the watch; and especially where the evidence to identify the watch as one stolen was inconclusive and disputed by defendant's wife, who claimed ownership of the watch, and to whom it was returned by the officers.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 42.*]

9. CRIMINAL LAW (§ 338*)—EVIDENCE—RELEVANCY—ADMISSION OF CIRCUMSTANTIAL EVIDENCE.

It is a recognized rule of evidence in the investigation of criminal cases dependent upon circumstantial evidence that a wide range of inquiry may be indulged, and that remotely connected incidents, no one of which singly considered would be sufficient to warrant a conviction, may be admitted, and, if the collective whole be sufficient to carry conviction of guilt to the jury beyond a reasonable doubt, their admission to that end is justified; but such rule does not imply that mere suspicion is the equivalent of proof, or that mere hearsay testimony may be resorted to, or that unrelated incompetent incidents and circumstances may become admissible because of the number of them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 753; Dec. Dig. § 338.*]

10. POST OFFICE (§ 49*)—BREAKING INTO POST OFFICE—SUFFICIENCY OF EVIDENCE.

The competent evidence on the trial of a defendant charged with breaking and entering a building used in part as a post office, and for stealing property therein, considered, and held insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 49.*]

Hook, Circuit Judge, dissenting.

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

See, also, 143 Fed. 820, 74 C. C. A. 463.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

E. D. Perry (W. A. Spurrier and E. C. Mills, on the brief), for plaintiff in error.

Marcellus L. Temple, U. S. Atty., and George B. Stewart, Asst. U. S. Atty.

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

PHILIPS, District Judge. The plaintiff in error (hereinafter designated the defendant) was indicted in connection with one Frank Hodge, in two counts, predicated of section 5478, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3696), for forcibly breaking into a building used in part as a post office of the United States, in the town of Van Meter, Dallas county, Iowa. There was another count in the indictment, predicated of section 5475 of the statute (U. S. Comp. St. 1901, p. 3694), for stealing property in said post office belonging to the Post Office Department, to wit, postal funds of the value of \$66.62 and money order funds of the value of \$76.86. On trial to a jury a verdict of guilty was returned "as charged in the indictment." Thereupon the court sentenced this defendant on the first count to imprisonment in the Iowa State Penitentiary, at Ft. Madison, for a period of four years; and on the second, for the larceny, the sentence was imprisonment for a period of two years and six months, the time of the sentence under the last-named count to commence at the termination of the sentence under the former; with the further order that the defendant be fined in the sum of \$5 and pay one-half of the costs of the prosecution. There was no sentence on the other count, for breaking into the post office, presumably for the reason that the two counts predicated of the burglary were for one and the same offense. The defendant Hodge was sentenced to imprisonment in said penitentiary for four years under the count for burglary, and one year and six months in said penitentiary on the count for larceny, with the imposition of a fine of \$5 and the payment of one-half the costs.

The penalty prescribed for a violation of said section 5478 is a fine of not more than \$1,000 and imprisonment at hard labor for not more than five years. The penalty for the violation of section 5475, when the value of the property is \$25 or more, is imprisonment at hard labor for not more than three years. It is observable that the imprisonment prescribed in both of said sections of the statute is at hard labor. There is no fine imposable under section 5475 where the value of the property exceeds \$25. Under section 5478 both imprisonment and fine are mandatory. The judgment does not show that the \$5 fine imposed was under the count for burglary. Both judgments are fatally defective for failing to impose the imprisonment at hard labor. The rule in the courts of the United States is that "a judgment in a criminal case must conform strictly to the statute, and any variation from its provisions, either in the character or extent of the judgment invoked, renders the judgment absolutely void." *Harman v. United States* (C. C.) 50 Fed. 921; *Ex parte Karstendick*, 93 U. S. 396, 23 L. Ed. 889; *In re Graham*, 138 U. S. 461, 11 Sup. Ct. 363, 34 L. Ed. 1051; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *In*

re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107. This defect would of itself compel a reversal of the judgment and remand for further proceedings in conformity to law. The course to be pursued on the remand of a case in such contingency is pointed out in *United States v. Harman* (D. C.) 68 Fed. 472, *Woodruff v. United States* (C. C.) 58 Fed. 766, and in *Re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149.

The codefendant Hodge did not join in the writ of error, which is prosecuted alone by the defendant Sorenson.

The first count of the indictment is predicated of section 5478, Rev. St. U. S., which declares that:

"Any person who shall forcibly break into, or attempt to break into any post-office, or any building used in whole or in part as a post-office, with intent to commit therein larceny or other depredation, shall be punished," etc.

It has been, without dissent, the view of the District Courts administering this statute, since the considerate and logical opinion of Judge Deady, in *United States v. Campbell* (C. C.) 16 Fed. 233, that it should be interpreted as if it read "with intent to commit larceny in the part of said building used as a post-office." See *United States v. Williams* (D. C.) 57 Fed. 201; *United States v. Yennie* (D. C.) 74 Fed. 221; *United States v. Saunders* (D. C.) 77 Fed. 170; *United States v. Shelton* (C. C.) 100 Fed. 831. In the *Shelton* Case, Judge Simonton, in discussing the instance of a breaking into a building, a single room, used for the sale of merchandise and in part as a post office, where only goods of the merchantman were taken, said:

"If we construe this section to mean that any entry, with felonious intent, into any part of a building used in part as a post office, is punishable in the federal court, then it would give the court jurisdiction of a common-law offense. This jurisdiction federal courts cannot exercise. But if we construe the section to punish an entry into that part of the building used as a post office, with intent to commit larceny therein, the jurisdiction can be sustained. The section is ambiguous. Under these circumstances, it must be construed 'ut magis valeat quam pereat.' 'If,' says Mr. Justice Story in *U. S. v. Coombs*, 12 Pet. 76, 9 L. Ed. 1006, 'the section admits of two interpretations—one which brings it within, and the other passes it beyond, the constitutional authority of Congress—it will become our duty to adopt the former construction, because a presumption ought never to be indulged that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous.' In *U. S. v. Campbell* (C. C.) 16 Fed. 233, Judge Deady sustained the demurrer to an indictment charging a defendant under this section, because the indictment did not state that the larceny was intended for that part of the building used as a post office. In *U. S. v. Williams* (D. C.) 57 Fed. 201, an indictment under this section was sustained. The word 'therein' in the indictment, used also in the section, was held to refer to the post office. It was thus distinguished from the case of *U. S. v. Campbell*. The indictment in this latter case used the words 'in said building,' and so would mean in any part of the building, whether used as a post office or not. So it was held bad on demurrer. This construction of the section seems, also, to have met the approval of Judge Brown, of New York, in *U. S. v. Yennie* (D. C.) 74 Fed. 221. It is distinctly decided in *U. S. v. Saunders* (D. C.) 77 Fed. 170. The evidence being uncontradicted that the breaking into, the entry, and the larceny were neither of them in that part of the building used as a post office, the defendant cannot be convicted under this section."

The United States district attorney in drawing the indictment here in question recognized such construction of the statute. The charge is that the defendants did—

“unlawfully, willfully, and forcibly break into a certain building then and there used in part as a post office of the United States, to wit, a building in Van Meter, in the county of Dallas, in the state of Iowa, so used as aforesaid, with the intent of them, said Andrew H. Sorenson and Frank Hodge, then and there to commit larceny therein in that part of the said building then and there so used as a post office of the United States.”

The intent in breaking into the building is the essence of the offense denounced by this section, and it must be proved as alleged. We are not here concerned with the question as to the competency of Congress, within constitutional limitations, to declare it a felony for a person to break into a building used in whole or in part as a post office. It is sufficient for the purpose of this case to say that Congress has not assumed the exercise of such power. It limited the offense of breaking into a building to the intent to commit in and on the Post Office Department a larceny or other depredation. This intent is a jurisdictional fact, because it is constitutive of the offense, and conditions the exercise of jurisdiction over it by a federal court. The statute in question was enacted by Congress in recognition of the fact that in a vast number of instances, especially in small towns and rural districts, post offices are kept in the same building and on the same floor where mercantile or other business is conducted by the occupants of part of the room. But it is the recognized practice in such instances that the post office apartment shall be fenced off or separated from the other part of the building or room. So under Postal Laws and Regulations, § 318, subsec. 3, it is observable that, in the matter of rent of a part of a building by a postmaster for post office purposes, a report is required to be made to the Postmaster General, giving a description of the room or store and the class of business carried on by the occupant, and what separation there will be between the post office and the other parts of the room. This is required before the postmaster is permitted to so locate his post office. And he is presumed to keep within his own apartment the property pertaining to the post office. For his own protection he may deposit the funds of the post office in some depository for safe-keeping. But if such deposit should be made elsewhere, the breaking into such place would not be indictable under section 5478.

Under the evidence in this case the only possible inference as to the manner of the entry into the building is that it must have been through either the front or the rear door thereof, both of which entered into the part of the building used for mercantile purposes. The post office apartment was fenced off in what was designated by the witnesses as a “cabinet.” The property taken was contained in a safe not shown to be within the post office inclosure. Part of the property was jewelry belonging to the merchantman, and part of it was funds belonging to the post office. As there was nothing to indicate to the thief that the money was the property of the United States unless the safe was in that part of the inclosure marking the post office apartment, there would be nothing except the merest con-

jecture from which the jury could infer the required intent in the breaking to steal post office funds. If having entered he found in the safe, no matter where situated, post office funds, the property of the United States, and stole them, he was guilty of larceny, punishable under another statute, on which the second count of the indictment was based.

The charge given to the jury authorized a conviction of the defendants on the first count of the indictment if the money of the Post Office Department was taken from the safe anywhere in the building. The only evidence respecting this material issue is the testimony of the witness Trindle, who was the assistant postmaster, and who also conducted the business of a jeweler in the building in question. He testified that there was a post office safe in the building, in which the post office funds were kept, and in which he also kept watches and other jewelry of his shop. The post office compartment seems to have been inclosed, as above stated, in what is termed a "cabinet." A careful reading of his testimony, which presents all that was developed respecting this matter, makes it impossible to determine with any degree of accuracy or satisfaction that the safe was within the inclosure of the post office compartment. As this was a material jurisdictional fact, it should have been made affirmatively to appear. The omission of proof entitled the defendant to the request for a directed verdict as to the counts predicated of the forcible breaking into the building.

There were other errors committed on the trial which necessitate the reversal of the judgments on both counts. The offense denounced by said section 5478 is the forcible breaking into a building used in part as a post office, as in this case. The testimony of said Trindle was that at the usual closing hour of the store, the evening before the alleged burglary and larceny, he put certain jewelry, including a certain watch, in the safe, and locked it, and that "all the doors and windows were locked." There is a total absence of any direct evidence as to how the store was entered. There was no appearance of any physical force used in effecting an entry, if the building was entered from the outside. The testimony of said witness is that he went to the post office about 4 o'clock the next morning; that a young man came to his house and said there had been a robbery uptown, and that the post office safe had been blown open; that when he got there Mr. Phillips, the postmaster, was there; "they told me to come around to the back door, and I went in; the room was full of gas and smoke, and the safe door was out on the floor; the lining of the safe was all torn out and scattered around; there were stamps lying there unmolested; but the post office funds and watches were gone." There was nothing said about the front door, or whether the back door was open when the first parties reached the building. So that the proof of the forcible breaking into the building rests solely upon the fact that the doors and windows were locked the evening before the larceny. It is suggested in argument that it is not essential to the proof of a forcible breaking that the evidence should show the application of physical, violent force, such as breaking through a window or breaking open a door, but that the offense would be committed by an

entry through the door, by unlocking it with a skeleton or false key, and the like; and as that is the only reasonable explanation of how the entry could have been effected, after the doors and windows were locked, the proof was sufficient to warrant the jury in concluding that the entry was so effected. "Mere conjectures, or suspicions, are not reasonable inferences or presumptions upon which to found convictions of crime." *Green v. State*, 68 Ala. 541. If conjectures are to be indulged, there is nothing in this record to disprove that the thief may not have been concealed in the storeroom when it was closed the preceding evening. It does not appear that any search of the building was made for such discovery when the closing took place. Entering without breaking and then breaking out does not constitute burglary. 1 Hale, P. C. (Phila. 1847) 554; *State v. McPherson*, 70 N. C. 239, 16 Am. Rep. 769; *Adkinson v. State*, 64 Tenn. 569, 30 Am. Rep. 69; *White v. State*, 51 Ga. 285; *State v. Wilson*, 1 N. J. Law, 439, 1 Am. Dec. 216. "To prove the corpus delicti, the evidence must be sufficient to show affirmatively, and beyond a reasonable doubt, that there was such a breaking and entry as are necessary to constitute burglary." 6 Cyc. (1903) 241, and citations.

If it be conceded that this evidence was sufficient to warrant a finding that the entry was effected by unlocking the door of the building, the important question remains: Was there sufficient evidence to go to the jury that the defendant so entered the building? If he had been seen about the building recently prior to the theft, and had been found inside thereof after it had been closed and locked, the jury could be indulged to infer that he had entered from without rather than that he was in when the building was so closed. There was a total absence of evidence that he was either so about the building or in the vicinity thereof, either before or after the theft. In this extremity of the government's case resort was had to the testimony of the witness Ernest Willey, who had been a penitentiary convict. The evidence, without contradiction, was that his general reputation for truth and honesty was bad. He attributed his conviction and sentence to the penitentiary for larceny to the defendant Sorenson, and admitted on the witness stand that he "had ill will against Andy Sorenson ever since I had to go to Ft. Madison"; and that he was "waiting for a chance to do Andy some damage ever since I went to the Ft. Madison penitentiary." He admitted that after this alleged burglary and larceny he was in the service of the officers in pursuing the defendant, and had received money from them for his services. It is not impertinent to observe that the employment of such a derelict by law officers, as an agent of justice, is not commendable, because of the danger ever to be apprehended that from malice, revenge, and the hope of reward such a man is likely to give false testimony against an innocent man. While his testimony is not outlawed, its probative force being for the jury, the wisdom of the law manifests itself in prescribing limits to the admissibility of the purported facts collected by such a self-serving witness. *Campbell, J.*, in *People v. Montague*, 71 Mich. 447, 451, 39 N. W. 585, 587, commenting upon the unreliability of the questionable testimony of certain witnesses, said:

"Leaving out their testimony, the case would be without any plausible foundation. It all depended on whether that testimony was true. This being so, it is important both for the people, interested in doing justice, and for the respondent, entitled to be protected against injustice, to have the trial kept clear from extraneous matter, and the rules of law governing procedure substantially guarded."

This witness (Willey) was indulged to testify that about a week or ten days before the depredation upon the post office he was with the defendant and Hodge, and a man named Gleason, at Valley Junction, Iowa, and drove the team on a fishing excursion; that in a conversation there was talk to the effect that they wanted to know if "he did not want to drive a team, Andy's team, and go to Van Meter and get a 'P. O.'"; that this was said by one of them, he did not remember exactly which one; he could not say whether it was in the presence of all of them or not, but he thought it was; that they were about 15 feet away from him; "which one made the proposition, I cannot say for sure."

Was this evidence competent to bind the defendant? As it failed to show that the defendant did the talking, for the witness said he did not know which one it was, it devolved upon the government to show to the satisfaction of the jury two additional facts: (1) That the defendant heard it; and (2) that he assented to it.

"In the case of sayings by other persons, it ought to be made affirmatively to appear that he heard the sayings, and that he assented to them either expressly, or by his way showing assent. His assent to them is the thing which makes them admissible against him, and that assent must be shown in some way, before the sayings can be admitted." *Drumright v. State*, 29 Ga. 430, 431.

So Taylor, C. J., in *Weightnovel v. State*, 46 Fla. 1, 15, 35 South. 856, 861, said:

"If the conversation was not had in the presence or hearing of the defendant, it was hearsay, and to render it admissible as having been made in defendant's hearing the burden was upon the state to show clearly that it occurred in the hearing of defendant and this fact was a preliminary one for the court, and not for the jury to decide, before admitting the conversation in evidence, and we do not think it was clearly and satisfactorily shown to have occurred in his hearing."

The mere fact that such a statement was made by some one in the party, if in the hearing of the defendant, not then assented to by him, was not admissible upon the ground that silence gave consent. "Mere silence is no ground of inference against him," unless he was called upon by the circumstances to dissent. *Vail v. Strong*, 10 Vt. 457; *Gale v. Lincoln*, 11 Vt. 152; *Fourth National Bank v. Nichols*, 43 Mo. App. 391; *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; *Commonwealth v. Brown*, 121 Mass. 69; *Commonwealth v. Densmore*, 12 Allen (Mass.) 535; *Larry v. Sherburne*, 2 Allen (Mass.) 34. The following authorities are also against the admissibility of this evidence: *Sauls v. State*, 30 Tex. App. 496-498, 17 S. W. 1066; *Yale v. Dart* (City Ct. N. Y.) 17 N. Y. Supp. 179; *Drumright v. State*, 29 Ga. 430.

In the absence of a charge and proof of conspiracy between the three parties at the time and place of the conversation, to admit

such statement without affirmatively showing it to have been made or acquiesced in by the defendant would be to announce a rule fraught with danger to innocent men. *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; *Moore v. Smith*, 14 Serg. & R. (Pa.) 393.

It is true that Willey claims that he was friendly with Sorenson up to the time of the trial of this case; but that the relation must have been strained is evident from the fact that he claims Sorenson was principally instrumental in sending him to the penitentiary, and his statement that he had it in mind ever since to "get even" with him for the injury. He testified that his principal occupation was that of fishing, which might account for his accompanying this party on a fishing excursion. Conceding, however, that the credibility of his story was for the jury, the wisdom of the law is again demonstrated in demanding that it should be made to affirmatively appear that the defendant heard and assented to the proposition, and that every reasonable intendment should be indulged in favor of the accused.

The government was also indulged, over the objection of the defendant, to show by detective officers that when they arrested the defendant and Hodge, about 18 days after the alleged burglary and at a point about 19 miles distant from said post office, they found on him a revolver, pieces of fuse, and a bottle containing liquid matter which proved to be nitroglycerin, which he afterwards stated he used for headache; and that there was found on the person of Hodge a revolver and pieces of fuse, and some skeleton keys, dynamite caps, and a flashlight, profert of which was made before the jury. As there was nothing to connect the employment of the revolvers and other articles with the burglary, and the possession of them was 18 days after the commission of the offense, we know of no principle of law rendering such facts competent evidence against the defendant on this trial, especially when the evidence disclosed that the defendant worked in coal mines, and such fuse, dynamite caps, and such lights were usable in such work. Looking to the charge of the court, it would seem that it was regarded competent as tending to show the defendant might be contemplating the commission of a crime. The court said:

"The evidence which has been allowed to come before you should have such weight as in your opinion it is entitled to under the showing that they were going to commit some other crime."

The particular language above adverted to was not excepted to, but the admission in evidence and the display of the articles and instruments to the jury were excepted to and assigned for error. We may properly look to the charge of the court for his reasons, if there given, for the admission of the questioned evidence. In the multiplication of reported cases touching the evidential effect of the possession by the accused of implements and materials adaptable to the commission of the crime in question, it will be found that some courts have admitted such facts for the consideration of the jury when such possession was more or less remote from the time and locus of the

crime; but their admissibility depended upon their being connected up with or traced to the *res gestæ*. If the articles found on the defendant had been traced to his possession prior to the burglary or theft, and there had been any evidence tending to show the presence of the defendant about the premises near to the time of the trespass, and the like, the jury might have been advised that such possession of articles and implements, if the evidence tended to show that they were probably used in executing the crime, was a circumstance for their consideration. But the mere possession 18 days after the crime and 19 miles distant from the locus, without any proof of the presence of the defendant in the locality, or the employment of such articles in the commission of the crime, was not evidence of the defendant's complicity, nor was it evidence "that they were going to commit some other crime." The ability to commit a crime does not evidence the act. The mental tendency of a party to commit a crime cannot be heard in court to convict him of another offense committed long anterior to the transaction under inquiry. If he declined to put in issue his character, the prosecution cannot attack it in such fashion. Even evidence of the commission of another offense, at such remote date, even if allied in character to the one under investigation, is inadmissible. *Rex v. Birdseye*, 4 Carr. Payne, 386; *State v. Renton*, 15 N. H. 169; *Commonwealth v. Wilson*, 56 Mass. 590; *State v. Meyers*, 82 Mo. 558, 52 Am. Rep. 389. This rule, it is true, admits of exceptional instances, as where the subsequent act is so related to its antecedent in character and locality as to aid in identifying the actor in both by the connection tending to show "that he who committed the one must have done the other." *Shaffner v. Commonwealth*, 72 Pa. 60, 65, 13 Am. Rep. 649; *State v. La Page*, 57 N. H. 245, 289, 24 Am. Rep. 69; *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283; *State v. Raymond*, 53 N. J. Law, 260, 21 Atl. 328; *State v. Vance*, 119 Iowa, 685, 94 N. W. 204; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *People v. Molineaux*, 168 N. Y. 293, 61 N. E. 286, 62 L. R. A. 193. Mr. Justice Harlan, in *Boyd v. United States*, 142 U. S. 450, 458, 12 Sup. Ct. 292, 295, 35 L. Ed. 1077, speaking to the admission in evidence of robberies committed by defendants, separate and apart from the homicide under investigation, said:

"They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. * * * Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death."

See, also, the following: *State v. Berger*, 121 Iowa, 581-586, 96 N. W. 1094; *State v. Vance*, 119 Iowa, 685, 94 N. W. 204.

The admission in evidence of certain letters is assigned for error. The witness Willey testified that while doing his detective work he got certain letters from the wife of the defendant Sorenson. They

were written while the defendant and Hodge were confined in jail at Des Moines, under arrest for this offense. They were written to one Fairgraves. The purport of the letters was to request Fairgraves to testify to an alibi for the writer. The proof was that they were written by Hodge, and not by the defendant Sorenson. There was no evidence that Hodge wrote the letters under the dictation or with the knowledge and concurrence of this defendant, or that the defendant ever saw them, or sent them out of the jail, or that he had opportunity even to have seen the letters. To implicate the defendant therewith, Willey testified that after he (Sorenson) was out on bail he asked him (Willey) if he had taken the letters to Fairgraves, and he said he had. Did the defendant at the time they were written know that Hodge was writing the letters? Or did he learn the fact after Hodge had written the letters, and did he acquiesce therein? Or did he learn from his wife, after he was out on bail, that such letters had been given to Willey to be delivered? All these are mere matters of conjecture; one inference being just as tolerable and reasonable as the other. Is a man's guilty knowledge and participation to be thus placed in the wide field of mere conjecture and speculation, when the law demands that he must be presumed to be innocent, and that this presumption cannot be displaced except by such affirmative facts as shall satisfy the minds of the jury beyond a reasonable doubt of his guilt; and when it further commands that if the act or conduct of the accused may be accounted for upon a hypothesis that consists with his innocence equally with his guilt, it shall be referred to his innocence?

The exactions of the law in this respect are illustrated by the following rulings on applied principles: In *State v. Loftus*, 128 Iowa, 529, 104 N. W. 906, the defendant, Mrs. Loftus, was prosecuted for adultery. To show illicit correspondence conducted with the defendant, the state introduced in evidence certain billets, which the evidence tended to show were in the handwriting of one Merrifield, the alleged adulterer. One of the missives was found under her bed where she and her husband usually slept, and another in an unsealed envelope under the bed in a spare room. The evidence did not show how they reached the house, or that they were otherwise in the possession of or ever had been seen by the defendant. This was supplemented by testimony tending to show that the defendant and Merrifield had been seen to exchange notes on the street. Her husband also testified that in discussing divorce proceedings between them he said to her: "I have got some notes which will be pretty hard for you to account for;" to which she replied: "They don't amount to much. There is no name signed." The court said of this:

"To what notes either referred is not disclosed. The record fails to connect those introduced in evidence with the accused, and it was error to admit them."

In *Fearing v. Kimball*, 4 Allen (Mass.) 125, 126, 81 Am. Dec. 690, it was held that an unanswered letter is inadmissible, although the statements contained are well known to the addressee. "This is on the ground that a letter written to a party by a third person to which

no reply is made does not show acquiescence in the facts stated in the letter."

So in *Commonwealth v. Edgerly*, 10 Allen (Mass.) 184, it was held that, under a charge of counterfeiting, a letter containing counterfeit money, found in the defendant's possession when arrested, is inadmissible in evidence.

In *People v. Green*, 1 Parker, Cr. R. 11, it was held the possession by a person of an unanswered letter found in his pocket at the time of his arrest was not of itself evidence of the truth of the contents, and it cannot be read in evidence against him.

People v. Colburn, 105 Cal. 648, 38 Pac. 1105, was a prosecution for robbery, alleged to have been committed by the defendant and Knox, and one Masterson, who pleaded guilty. After the arrest of Masterson the defendant and Knox disappeared. Some months later the defendant was arrested in Arizona, and a letter was found upon his person written by one Moore, in which Moore stated that he had been trying to ascertain the whereabouts of the defendant for some time and warn him of the fact that he was suspected of the robbery; that effort was being made by the officers to locate and arrest him. It contained statements of the writer assuming that the defendant was guilty of the robbery. The court said that such statements in the letter were well calculated to impress the jury with a belief of the defendant's guilt, and it was clearly hearsay:

"It will not do to say that Moore was a friend of the defendant, and hence that the evidence was admissible. * * * The question of friendship or enmity does not properly constitute a factor in the problem. The letter was a statement of a third party in nowise connected with the defendant, was not made under the sanction of an oath, and not admissible."

After, stating that a letter found upon the prisoner when arrested has been held to be no evidence of the facts stated in it, the court further said:

"There are exceptions to the rule, as, for instance, where it is shown that the defendant has acted upon the information contained in the letter, or where he has answered it, in which case so much of the letter as is explanatory of his answer is admissible, or where the party receiving the letter has by his acts or conduct invited the sending of it to him. There was no sufficient showing to render the letter admissible under any of these exceptions."

The case of *State v. Shive*, 58 Kan. 783, 51 Pac. 274, presents a most considerate opinion by Chief Justice Doster in the application of the principle of law in question. The defendant was charged with the crime of robbery. In order to connect him and another party with the scene of the robbery, pieces of an envelope, found near a haystack about three miles south of the house where the robbery occurred, were introduced in evidence. The envelope when pieced together indicated that it was addressed to the defendant Shive, on the street in which he lived, with a card directing its return to the street on which the other defendant lived. It also bore the stamp and postmark of a given town. There was also evidence tending to show that the defendant was seen on the afternoon of the robbery at the haystack. There was no direct evidence that the envelope had been in the possession of the defendant. Of the objection to the admis-

sibility of these scraps of paper the trial court said, "They are only competent as a circumstance," as tending to show that the defendant was in the vicinity of the place where the crime was committed, a short time before its commission. But Judge Doster said:

"No connection between the defendant and the paper being shown, he was unable to explain it. The state never having shown that he had it or was responsible for it, he was not called upon to explain how he parted with it, or how it came to be in the place where found. The presumption that, according to the known course of the postal service, an addressed and stamped letter reaches its destination, will not, in our judgment, suffice to show that the envelope enclosing such letter, found thereafter many miles from the place of residence of the addressee, was left by him at the place where found. * * * We are not permitted, at least against a person accused of crime, to tack one presumption upon another and from the series infer guilt against him. The very contrary is the rule."

In *Long v. State*, 81 Miss. 448, 33 South. 224, the defendant was indicted for robbery, committed by entering the house of one Lawson, at night, and taking some money therefrom. For the purpose of incriminating the defendant, the daughter of Lawson was permitted to testify that on the evening before the occurrence she told the defendant's wife that her father had received his pay that day for some work. It was held that this evidence was inadmissible, without proof that the defendant had knowledge of the possession of the money by Lawson, the court saying, "The wife's knowledge is not the husband's knowledge."

So here, the popular conception of the relation between husband and wife, as the depositaries of mutual confidences, possibly might lead the jury to conclude that the wife's possession of the letters was that of the husband as his agent. But in criminal law it is axiomatic that the wife's knowledge is not the husband's knowledge, and her possession of the article not belonging to the husband is not imputable to him. Therefore, it did not devolve upon the defendant to show or explain how the letters got into his wife's possession; but it devolved upon the government to show that he gave or sent them to her for delivery, with knowledge of their contents. This principle is recognized in *Nevada Company v. Farnsworth*, 102 Fed. 573-576, 42 C. C. A. 504, where it was sought to employ against the defendant a letter written between third parties containing statements said by the writer to have been made to him by the defendant. In that case Judge Thayer said, "It was not shown that the defendant either authorized the letter in question to be written, or that he saw the same, and was acquainted with its contents, before it was mailed;" and, therefore, it was held incompetent. Proof of such authorization "must be established by evidence that does more than raise a mere suspicion, a conjecture, or possibility, for evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict, and should not be left to the jury." *State v. Massey*, 86 N. C. 658, 41 Am. Rep. 478; *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; *Sprinkle v. United States*, 150 Fed., loc. cit. 62, 82 C. C. A. 1.

For the purpose, we presume, of connecting the defendant with both the alleged burglary and the larceny, the government introduced evidence tending to identify a watch, found in a dresser drawer of a folding bed in the house occupied by Mrs. Sorenson, as among those claimed to have been put in the safe by the jeweler, Trindle, the evening before the larceny. This was after the defendant's arrest, and when he was in jail, nearly three weeks subsequent to the theft. The officers who made the search of the house and took the watch returned it to Mrs. Sorenson the next morning. While she testified to the ownership of the watch, and there was some corroborative testimony to support her claim, the evidence on the part of the government tended to the contrary. Was this evidence admissible and sufficient to authorize the jury to infer the defendant's connection with either the burglary or the larceny? Conceding that the time within which the watch was found brought the incident within the rule of "recent possession of stolen property," it must be kept in mind that the defendant is not charged with the offense of receiving stolen goods, etc., and under the indictment is only called upon to meet the charge of burglary and larceny committed by him.

"To raise the presumption of guilt from the possession of the fruits of the instruments of crime by the prisoner, it is necessary that they should be found in his exclusive possession. A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the party responsible to a criminal charge. He can only be required to account for the possession of things which he actually and knowingly possessed; as, for example, where they are found upon his person, or in his private apartment, or in a place of which he kept the key. If they are found upon premises owned or occupied as well by others as himself, or in a place to which others have equal facility and right of access, there seems no good reason why he, rather than they, should be charged upon this evidence alone." 3 Greenleaf's Evidence (16th Ed.) § 33.

The rule is stated as follows by Underhill, Crim. Ev. § 300:

"Not only must the possession be recent, but it must be personal, exclusive, and with a distinct, implied, or expressed assertion of ownership. If these essentials are not proved, a conviction based upon the fact of possession must be set aside. A mere constructive possession is not enough. The accused will not be presumed to have stolen articles which he does not know he possesses. If other persons have equal right and facility of access with him to a room, trunk, or closet where stolen goods are discovered, possession not being exclusive or personal, is of no value as evidence."

"To warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant." Field v. State, 24 Tex. App. 422, 6 S. W. 200; State v. Castor, 93 Mo. 251, 5 S. W. 906.

The watch was not found on the person or in the actual possession of the defendant. The testimony of the witness Sims, for the prosecution was that "Hedrix found a watch there—taken out of a drawer on top of folding bed"; and Hedrix' statement was:

"It was found either on top of the folding bed or the dresser, in a little drawer on the top. It might have been both—folding beds are both."

Mrs. Sorenson testified:

"I remember them getting the watch out of a drawer in the folding bed. Hedrix took the watch away. It was my watch."

In recognition of the fact that it was taken from her possession, the officers returned it to her. There is no evidence that after the alleged larceny the defendant was in the house or room where this watch was found. The only evidence touching this is the statement of the eager witness Willey, who first testified that he saw the defendant's team in front of Hanson's saloon a little after 4 o'clock of the day the robbery occurred at Van Meter, that he next saw the team at the defendant's house the next morning in the back yard, and that the defendant was wiping down one of the horses. Giving full credit to the testimony of this witness, it only shows that there was a possibility that the defendant might have entered the room of his wife after the robbery and given her the watch. His conviction ought not to rest upon such conjecture, when there is no evidence that he was even in Van Meter the night when the larceny was committed, or without any evidence that he was absent from his home that night.

The civil unity of the marital relation has in no case been extended in a criminal proceeding to make stolen goods, found in the wife's possession and claimed by her as her individual property, the possession of the husband, especially so in the absence of the husband. In such case "he could not reasonably be required to account for or explain the possession of another." *State v. Warford*, 106 Mo. 63, 16 S. W. 888, 27 Am. St. Rep. 322.

In *State v. Owsley*, 111 Mo. 450-451, 20 S. W. 194, it was held that the fact that part of the stolen property was found in the house of defendant's wife, with whom he was not at the time living, is not sufficient to raise the presumption that he stole it, for the reason that "the possession of the wife could not under those circumstances be regarded as the exclusive possession of the husband." See, also, *People v. Hurley*, 60 Cal. 74, 44 Am. Rep. 55; *Turbeville v. State*, 42 Ind. 490; *State v. Griffin*, 71 Iowa, 372, 32 N. W. 447; *Perkins v. State*, 32 Tex. 109.

The possession of the watch by Mrs Sorenson and her assertion of ownership thereof, in the absence of the defendant while he was in jail, would tend to incriminate her rather than the husband.

No question is made of the recognized rule of evidence in the investigation of the existence of an alleged fraud or the commission of a criminal offense, dependent upon circumstantial evidence, that a wide range of inquiry may be indulged; and that remotely connected incidents, no one of which singly considered would be sufficient predicate for a conviction, may be admitted; and if the collective whole be sufficient to carry conviction to the minds of the triers of the facts beyond a reasonable doubt, they may be admitted to such end. A proper analysis of the pronouncements of courts favoring the admissibility of isolated instances of an inculpatory character, and the advisability of not excluding each dissected part merely because of its insufficiency to justify a conviction, will disclose that the parts held to be admissible come within the range of legal competency, according to established rules of evidence as applied to the special facts and circumstances of the particular case. But they do not imply that mere suspicion is the equivalent of proof, or that mere hearsay testimony may be resorted to, or that unrelated, incompetent

incidents and circumstances may become admissible because of the number of them. In law as in mathematics the multiplication of 0 by 2 does not make 1. In other words, a piece of evidence, which in and of itself is incompetent under settled rules of law, cannot be rendered admissible by attempting to link it up with some other fact or circumstance that might be competent. Otherwise, it is made possible to augment 1 by the mathematical absurdity of attempting to add to it 0.

"The facts alleged as the basis of any legal inference must be clearly proved, and indubitably connected with the factum probandum. * * * No weight, therefore, must be attached to circumstances which, however, they may excite conjecture, do not warrant belief. Occurrences may be mysterious and justify vehement suspicion, and yet the supposed connection between them may be but imaginary, and the coexistence indicative of accidental occurrence merely, and not of mutual correlation. * * * Every circumstance, therefore, which is not clearly shown to be really connected as its correlative with the hypothesis it is supposed to support, must be rejected from the judicial balance; in other words, it must be distinctly established that there exists between the factum probandum and the facts which are adduced in proof of it a real connection, either evident and necessary, or so highly probable as to admit of no other reasonable explanation." *Wills, Circumstantial Ev.* 172, 174.

It appears from the report in 143 Fed. 820, 74 C. C. A. 468, that this case was heretofore before this court on writ of error. The judgment of conviction was reversed on the ground of the improper admission in evidence of the testimony of a post office inspector respecting an alleged confession of guilt by the defendant. No other question was considered or determined by that decision. Whether or not the evidence here complained of was presented on the former trial, or any error assigned thereon, we are not advised by the record on which this writ of error was sued out—the only record here we can consider. The ruling of this court on the former writ of error only tends to show a former wrongful conviction, which certainly does not help the last one.

The desire for a conviction, and the zeal of the prosecutor to secure one, make it more the duty of the ministers of justice to see that the safeguards of the law are not broken down to compass the conviction.

There was not, in our judgment, sufficient competent evidence in this case to justify the conviction of this defendant, and the court erred in not granting the request for a directed verdict.

It results that the judgment of the District Court must be reversed, and the cause remanded with direction to grant a new trial, and for further proceeding not inconsistent with this opinion.

HOOK, Circuit Judge (dissenting). Sorenson and Hodge were twice convicted of the crimes charged in the indictment. Sorenson alone complains of the second conviction. At the first trial evidence of their confessions of guilt was received. We held that the circumstances attending the confessions rendered them inadmissible under the rule of *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, and remanded the case for retrial. It was also urged

in their behalf that error was committed in the admission of other evidence against them, but our reversal was not on that account, and no mention was made thereof in the opinion. 74 C. C. A. 468, 143 Fed. 820. When the case was again tried the trial court very naturally supposed the admission of such other evidence was proper and acted accordingly, but it is now held that its action in each instance was erroneous.

I agree that as the statute requires a sentence at hard labor, and it was not imposed, the case should be sent back for correction in that particular; but the opinion of the court goes further, and not only holds that practically all of the evidence received against Sorenson was inadmissible, but leaves it quite doubtful whether an offense under section 5478, Rev. St., was committed by any one. The last of these is the more serious in its consequences. A construction is adopted that destroys much of the effectiveness of the statute in a class of prevalent offenses which, as its language indicates, it was specially designed to cover. I refer to burglaries of post offices in small towns, villages, and rural settlements where the premises are also used for private business.

Section 5478 reads:

"Any person who shall forcibly break into or attempt to break into any post office or any building used in whole or in part as a post office with intent to commit therein larceny or other depredation, shall be punishable," etc.

This is not a case of a post office in one room of a building containing other rooms devoted to private business, and a burglarious entry and larceny in one of such other rooms. Whether the statute would apply to such a case does not arise and therefore need not be discussed. Here the undisputed evidence showed a single room in a frame building, about 22 feet wide, was used in part as a post office and in part as a jewelry store of the assistant postmaster. The main entrance was through double doors in the middle of the store front. There was also a back door and a window which gave upon the alley "right back of the stamp window." There was a fireproof "post office safe" which stood six or eight feet from the window, and a post office cabinet which formed a wall and presumably separated the officials from the public who came to transact business there. It does not affirmatively appear that the post office safe was within the cabinet, but it does appear that it was in the same room and that it contained postage stamps, \$143 of postal and money order funds, and some watches belonging to the private business. The safe was blown open in the night-time and the money and watches stolen. Upon this it is in substance said in the foregoing opinion that the federal court has jurisdiction to punish for burglary only when committed for the purpose of taking property of the United States in the post office compartment; that the intent of breaking into the post office must be to take property belonging to the Post Office Department, and that if the safe containing the money was not within the cabinet there was nothing to indicate to the thief that the money belonged to the United States, and therefore it would be mere con-

jecture to infer the requisite intent to steal post office funds; that the location of the safe within the cabinet was a jurisdictional fact which should have been made affirmatively to appear, and, as the evidence left it doubtful just where the safe was located, Sorenson's request for a directed verdict should have been granted. It will be observed that the letter of the statute broadly covers the forcible breaking into a room used in part as a post office with intent to commit a larceny or other depredation therein, and that the statute is so narrowly construed as (1) to cover only that part of the room which is physically inclosed for the exclusive use of the post office officials; (2) to mean that the intent of the burglar must be to steal or commit other depredation upon property belonging to the Post Office Department which at the time is actually within the restricted inclosure; and (3) that a fireproof safe, in the same room but outside of the restricted inclosure, used for the safe-keeping of property and funds of the Post Office Department, is not within the protection of the law.

This is so greatly at variance with my conception of the letter of the law and its manifest purpose that I am constrained to express my dissent. It is common knowledge that in very many towns, villages, and rural settlements the post office shares with a private business the occupancy of a single storeroom. It is a prevailing custom dictated by considerations of governmental economy and public convenience. The statute was intended to meet this well-known condition of affairs, and the language employed was well selected to that end. The doors, windows, and floor space of such rooms are necessary to the post office, for without them an interior inclosure devoted exclusively to post office use would be neither accessible nor inhabitable. The openings of the room and the floor outside of the cabinet are for the joint use of both the public and the private business. They are as essential to the one as to the other. True, the post office use of them is not exclusive, but the statute says, "used in whole or in part as a post office," and a joint use or a use in connection with another business is certainly a use in part. The statute does not say and does not contemplate that the partial use must be an exclusive use of a part of a room wholly isolated from the remainder by physical barriers. The patrons of the post office must necessarily pass through the doors and in and about the room to deposit and receive mail and transact other business with the public officials, and in doing so a post office use is as clearly exhibited as though the place were the lobby or corridor of a government building occupied solely as a post office. If a sack of mail is thrown into such a room through the front door or the back door, it is then in the post office. Where the post office safe is, there is a post office use, for surely the safe-keeping of the government's stamps, funds, and records is as much a part of the conduct of such an establishment as the distribution of mail matter. There is no law or regulation which required the keeping of the post office safe at Van Meter within the cabinet or in any particular part of the room.

Reference is made in the foregoing opinion to section 318, par. 3, of the postal laws and regulations, requiring a postmaster in his application

for allowance for rent of a part of a room or store to give a description thereof and state what separation there will be between the post office and the other part of the room. The regulation referred to has no application to the post office at Van Meter. It relates exclusively to post offices of the first, second, and third classes, commonly known as "presidential offices," for which rent allowances are made, and its purpose is to aid the department in determining the reasonableness of the allowance sought. But Van Meter was a fourth-class post office for which no rent allowance is made to the postmaster. Common observation tells us that in such post offices it is not at all unusual to keep the case of pigeonholes for the mail on the merchant's shelf back of the counter with the merchandise. It may be flanked by dry goods or groceries, provided, of course, the postmaster keeps his private business separate and distinct, and does not intermingle his own funds and records with those of the post office. It would, I think, be quite difficult to apply section 5478, Rev. St., as construed by my associates to the various phases of burglaries that are being constantly committed in such premises.

It is said the location of the safe within the post office cabinet in the room is a jurisdictional fact. The power of Congress over a subject of legislation committed to it is as plenary and absolute as it would be in a single government having in its organic law the limitations of the Constitution, and it includes all appropriate means for its full exercise. It is not ousted by the concurring presence of that which, if standing alone and apart from its connections, would be of purely local concern. Familiar illustrations of this principle may be found in cases involving legislation under the commerce clause of the Constitution, particularly those arising under the safety appliance acts. National and local affairs have so many points of contact and are frequently so closely interwoven that legislation by Congress properly confined to its constitutional sphere by letter and intent nevertheless affects matters which, solely regarded, are within the jurisdiction of the state; but when this occurs the law of Congress stands unimpaired. I have no doubt of the power of Congress to prohibit and punish burglarious entrances into premises occupied for post office purposes, though they may also be used for a private business; nor have I any doubt, when reading the statute, that Congress intended to exercise the power. It seems to me to be a construction altogether too narrow to say in a case like this that whether the crime charged was committed depends upon the post office safe being in some particular part of the room. It is also said that the intent of the entry must be to steal property belonging to the Post Office Department. But the statute says generally, "larceny or other depredation," without reference to the ownership of the property stolen, destroyed, or injured, and Congress rightly considered that a breaking into such premises in itself directly threatened consequences injurious to the operations of the government, whatever the burglar might steal or injure after he got inside, whether the property of the government or the property of a private individual. The statute contains no provision limiting the ulterior intent of a burglarious entry to particular property, and for a court to insert one to save its jurisdiction, if that

could be done, implies a denial of the power of Congress to protect premises used in part as a post office, regardless of the unlawful design upon its contents. Such a doctrine applied generally to the operations of the national government would disturb many views of the powers of Congress under the Constitution hitherto supposed to have been settled. Finally, it is said, in substance, that the particular intent of the burglarious entry depended upon what the burglar found and concluded to steal after he got inside, and that it would be mere conjecture that his intent was to steal post office funds if the safe containing them was not in the part of the room exclusively used for post office purposes. I think that to refute this proposition it need only be stated.

At the second trial the government was compelled to rely wholly upon circumstantial evidence, and a body of facts and circumstances was shown which convinced the jury of the guilt of the accused. The admission of these facts and circumstances is now severally assailed as well as their probative value. The contentions of counsel in these respects show a misconception of the fundamental principles of circumstantial evidence and a confusion of the duty of the trial court with the province of the jury. The admissibility of a fact in evidence is denied because of insufficiency in itself to convict, instead of being tested by its circumstantial relevancy to the question of guilt. Inferences from proven facts are dismissed as conjectures, testimony is claimed to have been improperly admitted under rules of evidence which are not applicable, and testimony relevant for one purpose claimed to be inadmissible because not relevant for another.

In determining whether a circumstance tends to show the probability of guilt or other ultimate fact in issue, the process of reasoning should be that of everyday life, not that of the schooled logician or scientist. If, when tested by common, human experience, a probable connection may be inferred between a fact proved and the fact in issue, it is sufficient. A circumstance may by itself appear quite remote from the ultimate issue, yet it should not be excluded on that ground, for its relation to other circumstances may impart to it an added significance, and the coincidence of a number may result in satisfactory proof. From their very nature they operate jointly and in a body, and to challenge them singly and severally is to ignore the very philosophy of the law of circumstantial evidence. The Supreme Court has always taken a broad and liberal view upon this subject, and has rarely reversed a case because of the admission of circumstantial evidence.

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other." *Castle v. Bullard*, 23 How. 172, 187, 16 L. Ed. 424.

"Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." *The Slavers*, 2 Wall. 383, 401, 17 L. Ed. 911.

"It is well settled that, if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the nonexistence of the disputed fact." *Insurance Co. v. Weide*, 11 Wall. 438, 440, 20 L. Ed. 197.

"As has frequently been 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." *Holmes v. Goldsmith*, 147 U. S. 150, 164, 13 Sup. Ct. 288, 292, 37 L. Ed. 118.

"There are many circumstances connected with a trial, the pertinency of which a judge, who has listened to the testimony and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter." *Mr. Justice Brown in Moore v. United States*, 150 U. S. 57, 60, 14 Sup. Ct. 26, 37 L. Ed. 996.

In *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237, a husband was convicted of murdering his wife. There was no direct proof of the crime. Witnesses testified to hearing the deceased scream at several times; to seeing her with black eyes and a bruised face; to her eyes looking red; to her crying on several occasions, and appearing alarmed and scared; and to bruises and discolorations of her body. The objection was that the witnesses did not connect the accused with the appearances or testify that he caused them. The court said:

"It is true these matters do not constitute direct evidence of ill treatment or a long-continued quarrel, but they are circumstances which, taken in connection with the testimony of what was seen and heard passing between the defendant and his wife, were fairly to be considered by the jury in determining the truth in respect thereto. Whether the relations between the defendant and his wife were friendly or the reverse was to be settled, not by direct or positive but by circumstantial evidence, and any circumstance which tended to throw light thereon might fairly be admitted in evidence before the jury."

And the ill treatment by the accused of the deceased and the feeling between them was held admissible as bearing on the motive, and tending "to rebut the presumed improbability of a husband murdering his wife."

In *Clune v. United States*, 159 U. S. 590, 592, 16 Sup. Ct. 125, 126, 40 L. Ed. 269, *Mr. Justice Brewer*, speaking of circumstantial evidence, said:

"It is familiar law that where a case rests upon that character of evidence much discretion is left to the trial court, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact."

"The destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury." *Chief Justice Fuller in Wilson v. United States*, 162 U. S. 613, 621, 16 Sup. Ct. 895, 899, 40 L. Ed. 1090.

Circumstantial evidence competent and relevant upon a charge of murder is not to be excluded because it also tends to prove the ac-

cused guilty of another murder not charged. *Moore v. United States*, 150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996.

With the foregoing principles in mind, let us look at the important facts and circumstances which led the jury to believe Sorenson was guilty. Each of them was supported by substantial evidence, most of them without dispute:

(1) During the night of September 29, 1904, the safe of the post office at Van Meter, Iowa, was blown open with some violent explosive. The door of the safe was blown off, and the lining thrown out and scattered around. Money of the post office establishment and between 20 and 30 watches belonging to the jeweler and his customers which had been placed in the safe were stolen. When the burglary was discovered between 3 and 4 o'clock of the morning of September 30th, the room was still filled with the gases of the explosion. Before the assistant postmaster and his wife left the premises the previous evening, they locked the safe and all the doors and windows of the room. There was no direct testimony showing how the burglars entered, or that they were not concealed in the room at closing time. Van Meter is a town about 19 miles from the city of Des Moines. Sorenson lived in South Des Moines.

(2) About a week before the burglary Sorenson, Hodge, one Willey, and a fourth man went on a fishing trip. During a conversation in which all participated, a proposition was made to Willey that he drive Sorenson's team, which they were then using, to Van Meter and assist them in burglarizing the post office. "They said there would be a piece of money, and that there was a jewelry store there too." Willey declined. The proposition was in the presence and hearing of Sorenson, but it was not shown who made it or that Sorenson said anything in response to it.

(3) Sorenson's team and a wagon were seen in his yard at noon of the day before the night of the burglary, again in the afternoon in front of a saloon in Des Moines, there being two seats in the wagon, one being an extra one. It was again seen the next morning in Sorenson's back yard, and he was engaged in wiping down one of the horses.

(4) October 17, 1904, 18 days after the burglary, Sorenson and Hodge were arrested in the railroad yards in South Des Moines. They had just come out of a box car. There were found on their persons a small bottle of nitroglycerin, a small bottle of oil of mustard, a flash light, fuses with dynamite caps attached, separate fuses and caps, a syringe, a piece of soap, and a bunch of skeleton keys. Each had a loaded revolver. Sorenson had the nitroglycerin. These articles constituted a complete outfit for blowing open safes. Soap was shown to be commonly used to paste over the seam made by the safe door, to render the interior air-tight, a space being left into which the nitroglycerin is dropped with the aid of a syringe. It is common knowledge that a fuse is to allow withdrawal to a place of safety, and that an exploding cap gives that sudden access of temperature which is one of the methods of exploding nitroglycerin. It was shown that oil of mustard is used to put on the soles of shoes to prevent hounds from tracing the wearers. The use to which skeleton keys, revolvers,

and flash light may be put is obvious; but, if not, it is suggested by the other members of the collection. There is no evidence in the record that Hodge was a coal miner. Moreover, the evidence was undisputed that the fuses found on them were not a third as long as should be used in a coal mine. Dynamite, of which nitroglycerin is a component part, was shown to be used in mines, but there was no evidence that liquid nitroglycerin is so used.

(5) A few hours after Sorenson's arrest, and while he was in jail, his house was searched. Other caps and fuses were found. There was also found a small gold watch in a drawer on top of a folding bed. It was taken to police headquarters, and memoranda made of the numbers of the case and works by several of the officers. The following morning it was taken back and delivered to Mrs. Sorenson. Shortly afterwards the authorities received information leading them to believe the watch was among those stolen at Van Meter, but when the officers went back to get it from Mrs. Sorenson it could not be found. Willey testified it was purposely destroyed. It is said the watch when first found was not in Sorenson's possession, but in that of his wife. That is true only in the sense that, being in jail, he was absent from home and she was in charge. The identity of the watch was convincingly proved. The original records of the jeweler who first sold it showed the numbers of case and works. The purchaser presented it to his daughter, she left it with the assistant postmaster at Van Meter for repair, and he put it in the safe when he closed the post office the night of the burglary. There was other evidence of identity. It is important to note in this connection that Mrs. Sorenson's claim of ownership was wholly inconsistent with that of the assistant postmaster's customer. There was no pretense that she found the watch or bought it of some one after the burglary.

(6) While Sorenson and Hodge were in jail, and before the first trial, Mrs. Sorenson gave to witness Willey three letters written by Hodge, two of them addressed to Willey and the other to a man named Fairgraves. She requested Willey to take them to Fairgraves. The letters contained ingenious directions in detail for the fabrication of an alibi for Hodge, and yet intended to be sufficiently vague in certain particulars to protect Fairgraves from a charge of perjury. When Sorenson was released on bail he asked Willey if he had taken the letters to Fairgraves, and upon receiving an affirmative reply he asked what Fairgraves said. An account of the incident and the letters were received in evidence against Sorenson.

It is said there was no proof of a forcible breaking, and that it is as reasonable to assume the thief was concealed in the room when it was closed in the evening. This applies to the burglary only, not to the larceny, of which Sorenson was also found guilty. It is well settled that a forcible breaking may consist of a mere displacement or putting aside of any barrier against intrusion, such as the lifting of the latch and pushing open of a closed door (*State v. Groning*, 33 Kan. 18, 5 Pac. 446), the pushing open of a closed but unfastened transom swinging horizontally on its hinges (*Dennis v. People*, 27 Mich. 151), the opening of an unlatched screen door held closed by spring hinges (*State v. Conners*, 95 Iowa, 485, 64 N. W. 295), or by the raising of

a window sash (*Frank v. State*, 39 Miss. 705; *State v. Herbert*, 63 Kan. 516, 66 Pac. 235). The description of the interior of the premises and the character and location of the furniture and fixtures given by the assistant postmaster, the care taken to fasten the doors and windows at closing time, and the extreme improbability that men equipped as the burglars were with means to blow open a steel safe to get its contents would so unnecessarily risk detection by concealing themselves in a room in a small building, all considered, would, I think, lead a reasonable mind to believe a forcible entrance was made after the departure of the lawful custodian. See *United States v. Lantry* (C. C.) 30 Fed. 232, and *State v. Warford*, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322.

The testimony of the witness Willey is criticised. It is true he had been sent to the penitentiary for stealing butter, and was afterwards paroled by the Governor and then pardoned. It is also true that witnesses testified his reputation for truth and veracity was bad. But, after all, the weight to be given to his testimony was for the jury. They saw him and the impeaching witnesses upon the stand, and observed their demeanor while testifying, and were much better qualified to determine what credence should be accorded his testimony than an appellate court. The record shows he testified temperately, and made qualifications helpful to the accused, which, if altogether evil-minded, he would probably have omitted. Moreover, none of his testimony about the conversation on the fishing trip, the whereabouts of Sorenson's team before and after the burglary, and Sorenson's connection with the attempt to make a perjured alibi was contradicted in any way.

Complaint is made of the admission of the conversation in which it was proposed to Willey that he join in the commission of the burglary. There was evidence that it was in the presence and hearing of Sorenson. The witness testified:

"Gleason, Hodge, and Andy (Sorenson), and all of us were talking in that conversation. Which one made the proposition I can't say for sure. We were not over 15 feet apart when in that part of town."

It is said that it devolved upon the government to show to the satisfaction of the jury that the defendant heard the proposition and that he assented to it. There are two distinct errors in this contention. The rule is that if a statement is made in the presence and hearing of a person it will be presumed he heard it, there being no evidence to the contrary. The rule is founded on necessity and the impossibility of proving an actual hearing save from the mouth of the hearer. Nor was it necessary in this case to show directly that Sorenson assented to the proposition at the time. There are many cases upon this subject, each turning upon its special facts and circumstances. In some it is held an assent will be presumed, in others not. Much depends upon the character of the declaration in determining whether silence gives consent. Passing the question whether Sorenson's assent could be shown by testimony of subsequent occurrences, it is sufficient here to say that the making of the proposition in his presence and hearing was relevant as conveying information of the presence of money and jewelry in the

post office at Van Meter, if for no other purpose. If it was relevant for any purpose, it is not to be rejected because irrelevant for another. In *State v. Kepper*, 65 Iowa, 745, 23 N. W. 304, it was said:

"The fact that defendant knew that there was money in the house was a proper circumstance to be considered by the jury in determining whether he is the person who broke and entered it."

Complaint is also made of the admission in evidence and exhibition to the jury of the nitroglycerin, fuses, dynamite caps, etc., found on Sorenson and Hodge when arrested. As the question is one of admissibility and not of weight, I will pass by the emphasis put upon the fact that the arrest was 18 days after the burglary and the accused were then 19 miles distant from Van Meter. The evidences of the use of a violent explosive in the appearance of the door and lining of the safe, and the gases in the room soon after the burglary, in connection with the testimony as to the way nitroglycerin and other articles found on the accused were commonly used in forcing safes, constitute some proof that implements of that character were probably employed in the present case. It is said the ability to commit a crime does not evidence the act. The correct rule, however, is that physical capacity to commit a crime (*Thiede v. Utah*, 159 U. S. 518, 16 Sup. Ct. 62, 40 L. Ed. 237), or the possession of skill, knowledge, or familiarity with the special means employed in its commission, has a probative value. If the means are peculiar, and such as men generally are not familiar with or capable of using, evidence that an accused is so equipped is obviously admissible. *People v. Brotherton*, 47 Cal. 388, 402. We all know that few men are accustomed to handling nitroglycerin or familiar with its use, and few are able to force entrance into a steel safe. The fact that each separate article had a lawful use makes of course in favor of the accused, but does not render the evidence inadmissible. It is true the trial court said in its charge to the jury that this evidence might be considered as tending to show the accused were going to commit some other crime. This was evidently inadvertent, and may well be passed by, because counsel at the trial did not direct the court's attention to it by an exception, nor did they make it the subject of an assignment of error.

In *Commonwealth v. Williams*, 2 Cush. (Mass.) 583, on a trial for burglary, a mass of burglar's tools found in the possession of the accused were received in evidence and exhibited to the jury, though it was conceded that a portion of them were not adapted to the commission of the offense. Among them were pistols. It was held not error.

State v. Dubois, 49 Mo. 573. Upon a charge of burglary and larceny it was shown that the door of the house had been broken open with burglar's tools. As part of the evidence against the accused, it was shown that eight days after the crime was committed burglar's tools were found in a trunk belonging to him, or in his possession, and the tools were produced in court and shown to the jury. It was held that the evidence was properly admitted.

In *Williams v. People*, 196 Ill. 173, 63 N. E. 681, an express office in Chicago was broken into, a trunk broken open, and certain articles stolen. Evidence was admitted that when the accused was arrested 31

days later he had on his person a jimmy and punch, a pair of pliers, and a case knife.

In *People v. Gregory*, 130 Mich. 522, 90 N. W. 414, it was held proper to receive evidence of the finding, more than eight months after a burglary, of burglars' tools on a farm belonging to the mother-in-law of the accused, but which had been occupied by him alone, also of the finding of part of the stolen property in a room in a house in the city occupied by the accused and his wife, though she claimed it to be her room.

As to the finding of the watch in Sorenson's house 18 days after the burglary: The proof was clear and convincing that the watch was one of those stolen from the safe at the time of the burglary. No explanation consistent with that fact was given in defense. It is, however, queried whether it was admissible and sufficient (wholly different things) to authorize the jury to infer defendant's connection with either the burglary or the larceny, and as Sorenson had been placed in jail a few hours before his house was searched, and his wife was then in charge, the lack of civil unity of the marital relation is employed to make the possession of the watch her possession, not his.

The possession of stolen property is always admissible on a charge of larceny, and when the property was stolen in connection with a burglary it is also admissible on a charge of the burglary. The probative value of such evidence varies with the circumstances attending the possession, and the proximity or remoteness in point of time from the commission of the crime. If the possession is recent and unexplained, it may have a prima facie effect; if not impaired by other evidence, it may be given controlling weight and alone justify conviction. This principle has been applied in a murder case, the accused being found in possession of property of the deceased two weeks after he was killed (*Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090), and on an indictment for arson, the proof being that property in the house at the time it was burned was soon afterwards found in the possession of the accused (*Rickman's Case*, 2 East, P. C. 1035). But if the possession is not recent, it is still to be received as a circumstantial fact, and its value determined by the jury in the light of all the evidence. "The lapse of a long interval opens a greater possibility of innocent explanation, and may prevent the raising of a presumption of law, but does not alter the relevancy of the fact." 1 Wigmore, Ev. § 152. And the evidence is also admissible though the possession is not personal or exclusive, as when the fruits of the crime are found in a place frequented by the accused, or with an associate or companion, accompanied by evidence of complicity. The admissibility of the fact of possession and its circumstances on the one hand, and the probative effect thereof on the other, are two different things. The range of the latter is from prima facie proof sufficient for conviction to a remote circumstantial relevancy the weight of which depends largely upon its association with other circumstances. But in every case the evidence should be admitted for the consideration of the jury when it has any tendency to show the probability of a connection between the accused and the commission of the crime. These principles are elementary, and

are so well founded in reason and good sense that one might forbear repeating them did they not appear to afford ample justification for the action of the trial court in the case at bar. Some of the cases selected at random from many will illustrate their application.

Randolph v. State, 100 Ala. 142, 14 South. 792. A man and his wife were jointly indicted and tried for burglary. Thirteen months after the commission of the offense their house was searched when the husband was in jail on another charge, and some of the stolen property was found, though a search made just previous to his arrest failed to reveal anything. It was held this was some evidence for the jury to consider on the charge against him.

In People v. Van Dam, 107 Mich. 425, 65 N. W. 277, the house of defendant, who was accused of burglarizing a store, was searched, during his temporary absence, 26 days after the crime was committed, and several articles of merchandise were found. Evidence was admitted showing this fact and the similarity of the articles in kind, shop wear, and exposure to those remaining in the store.

In Bryan v. State, 62 Ga. 179, a burglary and larceny were both committed. The possession of the property 12 days after the theft, not satisfactorily explained, was held admissible on the charge of burglary.

In Frazier v. State, 135 Ind. 38, 34 N. E. 817, the claim of the prosecution was that the accused, together with Manning and others, committed the burglary and larceny. As to the admission of certain evidence, it was said:

"We do not think the court erred in permitting the state to prove that a part of the stolen property was found on Manning at the time of his arrest, and his conduct tending to show that he was one of the thieves. Of course, such proof would not have been admissible for the purpose of proving a conspiracy to commit the crime charged, because it occurred after the crime was committed, but we think, when taken in connection with the appellant's association with Manning, both before and after the crime, that it was a circumstance proper to be considered by the jury in determining the guilt of the appellant."

In Malachi v. State, 89 Ala. 134, 8 South. 104, a coat belonging to deceased was found in possession of the accused three months after the homicide. It was left to the jury to consider in connection with the testimony of an accomplice who swore to the killing but not to the taking of the coat.

In Branson v. Commonwealth, 92 Ky. 330, 17 S. W. 1019, evidence was admitted that not long after a burglary and larceny part of the stolen goods were found in the house of the accused, part in the house of his father, and part in the possession of a brother-in-law.

Considine v. United States, 50 C. C. A. 272, 112 Fed. 342, was a case of forcibly breaking into a building in Ohio, used in part as a post office. Among the articles stolen were some money order blanks. The crime was committed in October. A witness engaged in manufacturing rubber stamps testified that about November 10th the accused purchased from him such a stamp, together with type and a pad to be used with it. The accused was arrested in Chicago December 25th, just after attempting to pass a fraudulently stamped and counterfeited money order. In a valise in his possession was the outfit he purchased from

the witness in November, and another counterfeited order was on his person. The admissibility of this evidence was challenged. Mr. Justice Day, then Circuit Judge, speaking for the Court of Appeals, said, "More cogent evidence of guilt could hardly be conceived," and the general rule was announced that the possession of goods recently stolen is entitled to more or less weight as an inculpatory circumstance depending on the facts of each case, and unless rebutted by the evidence or the explanation of the accused the jury may act upon it, not only where the charge is theft, but also where it is burglary by which the theft was accomplished.

As to Sorenson's connection with the attempt to fabricate an alibi for Hodge: The evidence was undisputed that Hodge while in jail wrote the letters containing directions to Fairgraves for the commission of perjury in establishing an alibi, that the letters in some undisclosed way came into the possession of Mrs. Sorenson, that she gave them to Willey and requested him to take them to Fairgraves, and that when Sorenson was released on bail he asked Willey if he had taken them to Fairgraves and what the latter said. There was evidence of association and companionship between Sorenson and Hodge before and after the burglary. They were together on the fishing trip when the proposition concerning the post office at Van Meter was made, and they were together when arrested, each having parts of a safe-blowing outfit in his possession. They were jointly indicted and tried. It is obvious that an alibi for Hodge, while primarily for his benefit, would also be of distinct advantage to Sorenson. If it were shown Hodge could not have been at Van Meter the night of the burglary, the case against Sorenson would have been appreciably weakened, and Sorenson's connection with the attempt to secure perjured evidence was therefore in his own interest as well as in that of his codefendant. The fabrication of evidence, the inference from which is said to be one of the simplest in human experience, is always receivable against an accused. If Sorenson's connection with a fabricated alibi for Hodge is not evidence against him, each could help the other in that way with impunity so far as concerned the proof of crimes for which they were jointly indicted. This would certainly present an anomalous condition in the law of evidence. In *State v. Hudson*, 50 Iowa, 157, testimony was admitted to show that defendant furnished money to enable his codefendant, who had admitted his guilt, to escape.

A precedent narrowly restricting the use of circumstantial evidence upon which reliance must be had in a great proportion of the cases greatly hampers and impedes the administration of justice. The modern tendency is to expand the rules of evidence, not to contract them, and to concede to the trial court a reasonable exercise of discretion in receiving proofs which will not be interfered with on appeal. Of course an accused should not be compelled to meet evidence that is hearsay, or that has no tendency to connect him with the commission of the offense charged. But society, also, has its rights.

UNITED STATES et al. v. DILLIN.

(Circuit Court of Appeals, Sixth Circuit. March 16, 1909.)

No. 1,857.

1. STATUTES (§ 241*)—CONSTRUCTION—PENAL STATUTES.

Though penal laws are to be strictly construed, they cannot be given a construction so strict as to render them ineffective and defeat the manifest purpose of their enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.*]

2. UNITED STATES (§ 44*)—DEFAULTING OFFICERS—ARREST ON DISTRESS WARRANT.

Rev. St. § 3625 et seq. (U. S. Comp. St. 1901, pp. 2418, 2419), which provide that, whenever an officer who has received public money before it is paid into the treasury of the United States fails to render his account or pay over the same as required by law, a distress warrant shall be issued by the Solicitor of the Treasury against the delinquent officer and his sureties, which shall be levied on his property, and if his goods and chattels shall not be sufficient to satisfy the warrant it may be levied on the person of such officer, who may be committed to prison, cannot be construed to apply only to persons who are officers of the government at the time the warrant is issued, so as to exclude from their operation officers who are found delinquent at the close of their terms of office.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 32; Dec. Dig. § 44.*]

3. UNITED STATES (§ 44*)—DEFAULTING OFFICERS—IMPRISONMENT ON DISTRESS WARRANT—DEFENDANT AT LARGE ON BAIL.

The fact that a person is under indictment for embezzlement of public money as an officer of the United States and has given bail does not exempt him from being imprisoned on a treasury distress warrant for the collection of such indebtedness, where he is in the custody of the marshal of the same court, which can order his production for trial on the indictment at any time, and where neither the court nor the prosecuting officers object.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 32; Dec. Dig. § 44.*]

4. CONSTITUTIONAL LAW (§ 306*)—DUE PROCESS OF LAW—DEFAULTING OFFICERS—IMPRISONMENT ON DISTRESS WARRANT.

A warrant of distress, issued by the Treasury Department against the property and person of a defaulting public officer, under Rev. St. § 3625 et seq. (U. S. Comp. St. 1901, pp. 2418, 2419), upon which he is imprisoned, does not deprive him of his liberty without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 928; Dec. Dig. § 306.*]

5. UNITED STATES (§ 44*)—IMPRISONMENT FOR DEBT—SCOPE OF FEDERAL STATUTE—IMPRISONMENT OF DEFAULTING OFFICER ON DISTRESS WARRANT.

Rev. St. § 990 (U. S. Comp. St. 1901, p. 709), which provides that no person shall be imprisoned for debt in any state on process issuing from a court of the United States, where by the laws of such state imprisonment for debt has been or shall be abolished, has no application to imprisonment under a distress warrant issued by a department under authority of a specific act of Congress against the property and body of a defaulting officer of the government.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 44.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

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

For opinion below, see 160 Fed. 751.

A. M. Tillman, U. S. Atty.

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

SANFORD, District Judge. This is an appeal by the government from a judgment of the Circuit Court discharging the appellee, Joseph W. Dillin, under a writ of habeas corpus, from imprisonment under a warrant of distress issued by the Solicitor of the Treasury. The said Dillin was for several years prior to June 30, 1907, the surveyor of customs for the port of Nashville, Tenn. At that date his term of office expired, and his successor qualified and took charge of the office. As a result of an examination of Dillin's accounts, it was ascertained in September, 1907, that he was indebted to the United States in the sum of \$6,898.32, or, after allowing him all proper credits, in the net sum of \$6,502.30.

At the October term, 1907, of the United States Circuit Court for the Middle District of Tennessee, Dillin was indicted for the embezzlement of said sum of \$6,898.32 and for failure and refusal to properly account therefor. Immediately after indictment he was arrested and gave bond for his appearance at the April term, 1908, at which term his case was continued upon his application to the October term, 1908. On March 31, 1908, the Solicitor of the Treasury issued a warrant of distress, directed to the United States marshal for the Middle district of Tennessee, reciting that Dillin had failed to pay over the said sum of \$6,502.30, and commanding him, in pursuance of section 3625 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2418), to proceed immediately and collect said sum by distress and sale of the goods and chattels of Dillin, and, if there should not be found sufficient goods and chattels to satisfy said sum, to commit the body of Dillin to prison. The marshal, having undertaken to execute this warrant and being unable to find any goods and chattels of Dillin to satisfy the same in whole or in part, committed him to prison.

Thereupon, on April 10, 1908, Dillin applied to said Circuit Court for a writ of habeas corpus, alleging that he was held in imprisonment by the marshal under the warrant of distress and was illegally restrained of his liberty (1) because he was not, either then or at the time the warrant was issued or served, "an officer of the United States government, and did not hold the position of collector of customs or any other position under the government"; and (2) because, having been indicted in said court, and having been arrested and given bond for his appearance therein, he was held by said court "in its exclusive custody and jurisdiction." Upon this petition a writ of habeas corpus was issued directed to the marshal, who made return thereto, stating that Dillin was held in prison in pursuance of the distress warrant and under section 3627 of the Revised Statutes (U. S. Comp. St. 1901, p. 2419).

Upon the hearing, the court being of the opinion that as Dillin was no longer a collector of customs, he was, therefore, not amenable to

the warrant of distress, discharged him from further imprisonment under and by virtue thereof. From the judgment discharging Dillin from custody the United States and the marshal were granted an appeal to this court.

We are of the opinion that the judgment of the Circuit Court discharging Dillin from custody was erroneous.

The provisions of law under which this treasury distress warrant was issued originated in Act May 15, 1820, c. 107, § 2, 3 Stat. 592, entitled "An act to provide for the better organization of the Treasury Department." This was amended in some matters of detail by Act May 29, 1830, c. 153, 4 Stat. 414, re-enacted in 1873 in section 3625 et seq. of the Revised Statutes, and further amended by Act Feb. 27, 1877, c. 69, 19 Stat. 249, and Act July 31, 1894, c. 174, § 4, 28 Stat. 206 (U. S. Comp. St. 1901, pp. 2418, 2419).

The provisions of the Revised Statutes, as amended, in so far as now material, are as follows:

"Sec. 3625. Whenever any collector of the revenue, receiver of public money or other officer who has received the public money before it is paid into the treasury of the United States, fails to render his account, or pay over the same in the manner or within the time required by law, it shall be the duty of the proper auditor to cause to be stated the account of such officer, exhibiting truly the amount due to the United States, and to certify the same to the Solicitor of the Treasury, who shall issue a warrant of distress against the delinquent officer and his sureties, directed to the marshal of the district in which such officer and his sureties reside. * * *

"Sec. 3626. The warrant of distress shall specify the amount with which such delinquent is chargeable and the sums, if any, which have been paid.

"Sec. 3627. The marshal authorized to execute any warrant of distress shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of goods and chattels of such delinquent officer. * * * If the goods and chattels be not sufficient to satisfy the warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law.

"Sec. 3628. If the delinquent officer absconds, or if goods and chattels belonging to him cannot be found sufficient to satisfy the warrant, the marshal or his deputy shall proceed, notwithstanding the commitment of the delinquent officer, to levy and collect the sum which remains due by such delinquent, by the distress and sale of the goods and chattels of his sureties. * * *

"Sec. 3630. For want of goods and chattels of a delinquent officer, or his sureties, sufficient to satisfy any warrant of distress issued pursuant to the foregoing provisions, the lands, tenements, and hereditaments of such officer and his sureties, or so much thereof as may be necessary for that purpose, * * * shall be sold by the marshal of such district or his deputy."

While it is true that, as stated in the opinion of the court below, no case seems to have arisen under these provisions of law since 1855, on the other hand, the re-enactment in 1873 of the provisions of the act of 1820, and their amendment so recently as 1877 and 1894, clearly show the intention of Congress that they should not be regarded as obsolete, but should remain in full force as a summary process for the collection of moneys due the government by delinquent officers.

Although, of course, if these provisions be valid, their enforcement is not to be denied by the courts on account of the drastic nature of the remedies given to the government, such considerations being for the legislative department alone, it may be noted, as bearing upon the summary and apparently severe character of such remedies, that under a

provision of the act of 1820 (sections 4 and 5), re-enacted in section 3636 of the Revised Statutes, any person aggrieved by such distress warrant may, upon preferring a bill of complaint to a District Judge and the execution of a proper bond, obtain an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires, under which provision the District Judge may inquire into the question whether the officer is indebted to the government as recited in the distress warrant (*Murray's Lessees v. Hoboken Land & Improvement Co.*, 18 How. 272, 284, 15 L. Ed. 372) and may enjoin the enforcement of the warrant, either in whole or in part, if it appears that he is not indebted in the amount claimed by the treasury officials, as equity may require (*United States v. Nourse*, 6 Pet. 470, 491, 8 L. Ed. 467; *Armstrong v. United States*, Gilp. 399, Fed. Cas. No. 548. Whether, even where the debt claimed is admittedly due, the delinquent officer can, upon proof of his inability to pay the debt, be discharged from imprisonment under the distress warrant by the President, under the provisions of Act March 3, 1817, c. 114, § 3 Stat. 399, re-enacted in section 3472 of the Revised Statutes (U. S. Comp. St. 1901, p. 2319), or whether, as was said in an early opinion of the Attorney General, this statute does not authorize discharge from imprisonment under such distress warrant, but the President may nevertheless discharge him if he confess judgment and a *capias* issue (2 Op. Atty. Gen. 285), is not entirely clear.

1. We cannot, however, agree with the court below in sustaining the contention that under the provisions of the Revised Statutes above quoted a distress warrant can be issued and executed only where the delinquent person is still an "officer" of the government at the time of such issuance and execution, and that Dillin was hence not amenable to the distress warrant; his term of office having previously expired.

Such a construction is, in our opinion, in conflict with both the spirit and the letter of the statutes. These provisions were intended to afford to the government a summary and expeditious method of collecting the debt due to it from a delinquent officer, without the delays incident to an ordinary suit and the danger of being unable at the end of such litigation to reach any property in satisfaction of the judgment, by enabling the government, through the issuance of a distress warrant on the discovery of the delinquency, to promptly levy upon the property of the delinquent and his sureties, with the added compulsion of imprisonment of the delinquent to induce the disclosure and surrender of property that might otherwise be concealed.

It appears from the first clause of section 3625, introducing and explaining the subsequent provisions, that it was intended that a distress warrant should issue "whenever" any officer who has received the public money before it is paid into the treasury fails to render his account or pay over the same as required by law. There is no word or phrase which indicates any intention to cut off the right of the government to the issuance and execution of such distress warrant by the expiration of the term of office of the delinquent; it being clear that in the subsequent provisions authorizing the issuance of "a warrant of distress against the delinquent officer and his sureties," the "distress and sale of the goods and chattels of such delinquent officer," and the

levy of the warrant "upon the person of such officer," the words "delinquent officer" and "such officer"—upon which the argument in behalf of the appellee is mainly rested—were used merely as convenient terms of description, referring back to the class of delinquent officers described in the introductory clause of section 3625, and not as words of time, describing the then condition of such delinquent and limiting the application of these provisions to a person who was an officer at the time.

Frequently, if not usually, the delinquency of an officer cannot be ascertained and stated until a final examination has been made of his accounts after his term of office has expired. Section 3622 of the Revised Statutes provides that "every officer" of the United States who receives the public money shall forward his accounts for settlement, with necessary vouchers, within 10 days after the expiration of each successive month. It follows that, as an officer whose term has expired would have until the 10th day of the succeeding month within which to forward his accounts for settlement (unless, indeed, by a process of reasoning similar to that upon which the appellee relies, it is to be held that, being no longer an "officer," this section no longer applies, and does not require him to forward his accounts for settlement at all), he would not be delinquent, under section 3625, in failing "to render his account, or pay over the same within the manner or in the time required by law," until after the expiration of the first 10 days of the succeeding month. Thus the appellee's argument would lead to the anomalous result that the very statute intended to afford the government a summary process for collecting the amount found to be due when the officer became delinquent could never in such case become operative, because he did not become delinquent under the law until after the provision for the issuance of the distress warrant had ceased to apply; that is, the very condition which would render the statute applicable on the one hand would, at the same instant, defeat its application on the other. And, of course, not merely would he himself, upon this argument, be exempt from imprisonment under the distress warrant by reason of the expiration of his term of office, but it would likewise follow, by the same process of reasoning, that his property could not be levied on in satisfaction of the distress warrant, nor could that of his sureties. In other words, the provisions of the statute would in such case be rendered meaningless and of no effect, and its purpose entirely defeated.

Statutes, however, are to be construed according to their natural and reasonable effect, and a construction leading to absurd consequences is to be discarded. *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Oates v. National Bank*, 100 U. S. 239, 244, 25 L. Ed. 580; *Holy Trinity Church v. United States*, 143 U. S. 457, 460, 12 Sup. Ct. 511, 36 L. Ed. 226. And "though penal laws are to be strictly construed, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature." *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37; *United States v. Morris*, 14 Pet. 464, 10 L. Ed. 543; *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; *Johnson v.*

Southern Pacific Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363. There is, furthermore, "a presumption against a construction which would render a statute ineffective or inefficient." *Bird v. United States*, 187 U. S. 118, 124, 23 Sup. Ct. 42, 47 L. Ed. 100.

Applying these principles of statutory construction, we think it clear that these statutes should not be so construed as to defeat their obvious purpose and render them ineffective and inapplicable in the cases to which they were manifestly intended to apply, but that their provisions should be construed, in harmony with both their letter and spirit, as remaining in full force and effect so long as the defaulting officer is delinquent and not otherwise discharged by law from the debt or imprisonment.

This construction is furthermore supported by the fact that in most, if not all, of the cases in which the enforcement of these statutes has been involved, it appears to have been tacitly recognized, both by counsel and by the courts, that the expiration of the term of the delinquent officer did not in any way affect the validity of the distress warrant. In at least five cases in which these statutes came before the courts between 1831 and 1855, it affirmatively appeared that the distress warrants had not been issued until after the term of office of the delinquent officers; in two of these cases the warrant was held valid, and enforced in whole or in part; in three, the warrant was held invalid for other reasons; but in none of them was the expiration of the delinquent's term of office referred to even incidentally as a ground of invalidity.

In the case of *Ex parte Randolph*, 2 Brock. 447, Fed. Cas. No. 11,558—in which Chief Justice Marshall, at circuit, in 1833, delivered an opinion, upon which the appellee largely bases his contention—the facts were these: Randolph, a lieutenant in the United States Navy, who had been officiating as acting pursar of the frigate *Constitution*, supplying a vacancy caused by the death of the regularly commissioned pursar on the Mediterranean station, was, on his return to the United States, upon a restatement of his account, alleged to be largely indebted to the United States, and a treasury distress warrant was issued against him as "late acting pursar of the frigate *Constitution*." Having been arrested and held in custody under this warrant, he applied for a writ of habeas corpus; his first objection to the warrant being that he was not one of the persons upon whom the act of 1820 was designed to operate. It was held by the Circuit Court that he should be discharged from custody, but in neither of the opinions delivered by the two judges was the fact that he was no longer acting pursar when the warrant was issued referred to as a reason for such holding. In the separate opinion delivered by Chief Justice Marshall, after stating "that the Legislature has not passed any act which in its construction is to be more strictly confined to the letter," and "that no debtor than one who was properly designated by the term officer was contemplated by the act," and after quoting the language of the warrant designating Randolph as "late acting pursar of the United States frigate *Constitution*," he held, without referring to the fact that Randolph had ceased to be such "acting pursar" at the time the warrant was issued, that he

did not come within the provisions of the act of 1820 because he was a mere "acting pursar" in the navy and not under bond, and the act only applied to those commissioned officers to whose hands public money is intrusted and who have given official bonds for the faithful discharge of the duties of their office. Obviously, if Chief Justice Marshall had been of the opinion that the statute did not apply because of the fact that Randolph had ceased to be acting pursar when the warrant was issued, this would also have been stated as one of the grounds of his opinion, and from his silence on this point it is clearly to be inferred that he was of the opinion that, if Randolph had been within the class of officers contemplated by the statute at the time his delinquency occurred, the fact that he had ceased to hold such position when the warrant was issued would have been entirely immaterial. His opinion is, therefore, by necessary inference, strongly in favor of the construction of the statute which we have adopted.

In the case of *United States v. Nourse*, 4 Cranch, C. C. 151, Fed. Cas. No. 15,901 (1831)—the facts of which more fully appear in the opinion in the case of *United States v. Nourse*, 6 Pet. 470, 8 L. Ed. 467—while the Circuit Court affirmed a judgment of the District Court enjoining the collection of the distress warrant that had been issued to collect a balance claimed to be due to the government by Nourse, who was described in the warrant as "late Register of the Treasury" (6 Pet. 472 [8 L. Ed. 467]), it appears that the injunction was granted solely on the ground that Nourse was not in fact indebted to the United States upon a proper settlement of his account; and while the judgment of the Circuit Court was afterwards reversed by the Supreme Court on the ground that the government had no right of appeal from the District Court to the Circuit Court, yet in none of the pleadings or opinions at any stage of the proceedings was the fact that Nourse had ceased to be Register of the Treasury when the warrant was issued referred to in any way as affecting its validity.

Similar proceedings were had in the case of *United States v. Cox*, 11 Pet. 162, 164, 9 L. Ed. 671 (1837), in which a warrant had been issued against Cox "as late receiver of the public moneys," and an injunction appears to have been granted by the District Court upon the sole ground that Cox was not indebted as claimed by the government, without referring to the fact that he was not in office at the time the warrant was issued; the appeal from the District Court to the Supreme Court being likewise dismissed for want of jurisdiction.

In the case of *Armstrong v. United States*, Gilp. 399, Fed. Cas. No. 548 (1833), after Armstrong's commission as navy agent on the port of Lima, Peru, had been revoked by the President, and after his return to the United States, on a settlement of his accounts by the accounting officers of the treasury, a certain balance was claimed to be due from him and a warrant of distress was issued under the act of 1820. He thereupon filed his bill for an injunction on the ground that he was not indebted as claimed. It was held that the amount claimed by the government was due in part, but not entirely, and the court thereupon enjoined the collection of the warrant for more than the amount thus found to be due, but dissolved the temporary writ that had been grant-

ed as to the collection of the sum found to be due, thereby permitting the warrant to be levied upon his property for the amount found to be due, although at the time of its issuance he had ceased to be in the government service.

And, finally, in the case of *Murray's Lessees v. Hoboken Land & Improvement Company*, 18 How. 272, 15 L. Ed. 372, decided by the Supreme Court in 1855, in which there was involved the validity of a sale of the land of one Swartwout made by the marshal under a treasury distress warrant, although it appeared that Swartwout had been collector of customs for eight years prior to March 29, 1838, and that the warrant to collect the balance claimed by the treasury to be due had not been issued until after an auditing of his accounts on November 10, 1838, it is stated in the opinion of the court that it was not denied that the proceedings which preceded the issuance of the warrant were in conformity with the requirements of the act of 1820, and the constitutionality of the act and the validity of the sale under the distress warrant were affirmed by the court without referring to the fact that the warrant had been issued when Swartwout was no longer in office.

The inference is therefore irresistible that in all of these cases it was recognized both by counsel and by the courts that, where the distress warrant otherwise came within the terms of the act of 1820, its validity was not affected by the fact that the delinquent was no longer in office at the time it was issued or executed; and Congress, in thereafter re-enacting in 1873 the provisions of the act in the Revised Statutes, may well be presumed to have intended that its terms should continue to be construed and applied in like manner.

2. It is also contended that as Dillin, prior to his arrest under the distress warrant, had been arrested and given bond to appear before the United States Circuit Court to answer an indictment for embezzlement, he was, at the time, in the exclusive jurisdiction of said court, and that his imprisonment under the distress warrant is hence illegal, in that it deprives said court of its jurisdiction over him and will defeat the right of said court to bring him before it for trial under the indictment. In support of this contention reliance is had upon the "principle of universal jurisprudence," stated in the opinion in the case of *Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287, "that when jurisdiction has attached to a person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

The scope of this principle is, however, defined by the recent case of *Beavers v. Haubert*, 198 U. S. 77, 87, 25 Sup. Ct. 573, 49 L. Ed. 950, in which the appellant, Beavers, who, while under indictment and bail in the United States Circuit Court for the Eastern District of New York, had been, by consent of that court, arrested in proceedings instituted by the United States attorney of that district and committed for trial to the District of Columbia to answer an indictment there, likewise insisted, in habeas corpus proceedings, that his second arrest and commitment were void as an unlawful interference with the jurisdiction of the Circuit Court in New York, and likewise relied upon the principle announced in *Taylor v. Taintor*, above quoted. This contention was,

however, overruled. The court, after quoting the principle stated in *Taylor v. Taintor*, said:

"But this is primarily the right of the court or sovereignty, and has its most striking examples in cases of extradition. * * * This case establishes that the sovereignty where jurisdiction first attaches may yield it, and that the implied custody of a defendant by his sureties cannot prevent. They may, however, claim exemption from further liability to produce him. There is nothing in *In re Johnson*, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103, which militates against this view. Indeed, that it is the right of the court of sovereignty to insist upon or waive its jurisdiction is there decided (page 126 of 167 U. S. [17 Sup. Ct. 735, 42 L. Ed. 103]). * * * The Circuit Court, as we have seen in the case at bar, consented to the removal of the appellant, and we are not called upon to decide whether the government had the right of election, without such consent, to proceed in New York or the District of Columbia."

Without determining what would be the effect of the principle stated in *Taylor v. Taintor*, if an attempt had been made to remove Dillin under the distress warrant beyond the territorial jurisdiction of the Circuit Court without its consent, we think it clear that this principle, relating to that which is "primarily the right of the court or sovereignty" rather than a personal privilege of a person arrested, can have no application in the present case, where no attempt has been made to remove Dillin beyond the territorial jurisdiction of the Circuit Court, or other right asserted under the distress warrant inconsistent with the continued exercise by the court of its jurisdiction in the criminal case, where the very officer who holds the prisoner in custody under the distress warrant is the marshal of the court in which the indictment is pending and subject to its orders in respect to the custody of the prisoner, where the government in resisting the prisoner's application for discharge is represented by the United States attorney for the district in which the indictment is pending and charged with its prosecution, and where the court may at any time assert its full and undiminished jurisdiction over the prisoner for the purpose of proceeding with the criminal case, and may at any time, by direct command to the marshal, cause the prisoner to be brought before it for trial.

3. It is also suggested in the brief in behalf of the appellee that the law authorizing the distress warrant is unconstitutional, in that under its provisions the delinquent officer is deprived of his liberty without due process of law. This suggestion, however, is completely met by the case of *Murray's Lessees v. Hoboken Land & Improvement Company*, above cited, in which lands of a delinquent collector of the customs had been sold under a treasury distress warrant and the validity of the act of 1820 was directly involved, and in which, in a learned opinion delivered in behalf of the court by Mr. Justice Curtis, it was held that both by the common law of England, and by the laws of many of the colonies before the Revolution, and of many of the states after the Declaration of Independence and before the adoption of the federal Constitution, a well-settled diversity had existed in "the law of the land" as between public defaulters on the one hand and ordinary debtors on the other; that what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, had been in nearly or quite universal use;

and that the warrant of distress issued under the act of 1820 did not deprive such defaulting officer of either his property or his liberty without due process of law or in violation of the Constitution. And in the case of *Davidson v. New Orleans*, 96 U. S. 97, 107, 24 L. Ed. 616, it was said that the distress warrant in the *Murray Case* "was sustained because it was in consonance with the usage of the English government and our state governments in collecting balances due from public accountants, and hence was 'due process of law.'"

4. It is also urged in argument that the appellee could not be lawfully imprisoned under the distress warrant, upon the ground that, imprisonment for debt having been abolished in civil actions in Tennessee, by the act of December 14, 1831, except in cases of fraud (Acts 1831, p. 56, c. 40), his imprisonment under the distress warrant is therefore forbidden by section 990 of the Revised Statutes (U. S. Comp. St. 1901, p. 709), which provides that:

"No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished."

However, section 990, by its very terms, applies only to imprisonment for debt "on process issuing from a court of the United States," and has no application to imprisonment under a distress warrant issued, under the authority of a specific act of Congress, against the property and body of a defaulting officer of the government.

The judgment is accordingly reversed, and the case remanded to the court below, with instructions to dismiss the petition for the writ of habeas corpus and remand the petitioner to imprisonment under the warrant of distress.

H. SCHERER & CO. et al. v. EVEREST. †

(Circuit Court of Appeals, Eighth Circuit. March 20, 1909.)

No. 2,802.

1. **DEPOSITIONS (§ 83*)—SUPPRESSION NOT REMEDY FOR REFUSAL TO TESTIFY.**
The suppression of depositions is not the remedy in equity and bankruptcy in the federal courts for the refusal of a witness to answer competent questions or to produce material evidence, because in case of an appeal all the evidence adduced must be presented to the appellate court. The true remedy is an enforced order of the proper court that the witness answer or produce the evidence.
[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 221; Dec. Dig. § 83.*]
2. **DEPOSITIONS (§ 101*)—PARTS OF MAY BE INTRODUCED BY OPPOSING PARTY.**
When the taker of a deposition fails or refuses after its return to put it in evidence, the opposing party may introduce all or a part of it, and the taker may then put in evidence any other part not introduced by his opponent.
[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 238; Dec. Dig. § 101.*]
3. **CORPORATIONS (§§ 450, 599*)—ULTRA VIRES—HOLDERS FOR VALUE OF EXCESSIVE INDEBTEDNESS MAY ENFORCE NOTWITHSTANDING.**
The fact that a corporation, authorized to issue commercial paper within a limit prescribed by a statute which does not declare indebtedness

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied June 5, 1909.

in excess of that limit void, created an indebtedness in excess of the limit to the knowledge of the purchasers of this commercial paper for value, does not relieve it from liability thereon.

The remedy for the violation is ouster of the corporation by the state, not the destruction of the purchasers' contracts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1793-1795, 2397, 2400, 2402; Dec. Dig. §§ 450, 599.*]

4. CORPORATIONS (§ 388*)—ESTOPPEL (§ 72*)—ULTRA VIRES—NO DEFENSE TO ACCOMMODATION PAPER HELD FOR VALUE.

A corporation authorized to issue commercial paper, which issues it without consideration to a second corporation which it authorizes to sell it and to remit the proceeds, or to substitute it for the earlier paper of the first corporation, is estopped from denying liability upon it to a purchaser without notice to whom the second corporation has indorsed it in payment of its just debt or for cash.

"When a corporation has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

Where one of two parties must suffer loss from the fault of a third, he who intentionally or culpably clothed the third party with power to cause the loss must bear it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388; * Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.*]

5. BILLS AND NOTES (§ 358*)—TAKING FOR DEBT OR AS COLLATERAL SECURITY IS TAKING FOR VALUE.

The taking of commercial paper in payment of a debt due, or past due, or as collateral security therefor, is a purchase for value in the ordinary course of business, and clothes the taker with the protection of such a purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 913-923, 961; Dec. Dig. § 358.*]

6. BILLS AND NOTES (§ 363*)—BONA FIDE HOLDER ENTITLED TO AMOUNT OF DEBT PAID FOR FRAUDULENT PAPER—SECTION 3070, IOWA CODE.

Where one takes commercial paper without notice in payment of a debt of an indorser, who had obtained it by fraud from the maker, he is entitled to recover the amount of the debt paid for it under section 3070, Code Iowa, which provides that no holder of such paper shall recover a greater sum than he paid for it.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 363.*]

JOURTS (§ 372*)—FEDERAL COURTS—FORM INDEPENDENT JUDGMENT OF COMMERCIAL AND GENERAL LAW.

It is the duty of the national courts to exercise their independent judgment in the determination of all questions of general jurisprudence, of commercial law, and of right under the Constitution and laws of the United States, although the decisions of state courts may conflict.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.*]

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

(Syllabus by the Court.)

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

I. N. Flickinger (Flickinger Bros. and Walter S. Harlan, on the brief), for appellants.

George H. Mayne (Mayne & Hazelton, Wright & Baldwin, Harl & Tinley, and G. B. Jennings, on the brief), for appellee.

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

SANBORN, Circuit Judge. This is a proceeding in bankruptcy wherein nine creditors have appealed from a decree of the District Court which disallowed certain portions of their claims against the estate of the bankrupt and affirmed rulings of the referee which suppressed the testimony of some of their witnesses. The claims of these alleged creditors are founded upon promissory notes made by the Union Transfer Company, a corporation, the bankrupt, payable to the order of the New Decatur Buggy Company, another corporation, and indorsed by the latter before maturity in the ordinary course of business to the respective claimants.

The Transfer Company was engaged in the business of buying and selling carriages, wagons, tools, and agricultural implements in the state of Iowa. The Decatur Company was manufacturing and selling carriages in the state of Ohio. In 1905, the Transfer Company agreed that prior to September 30, 1906, it would purchase of the Decatur Company 1,000 vehicles, and in September, 1906, it contracted to buy 1,500 vehicles of the Decatur Company before September 1, 1907. These contracts provided that the Transfer Company should pay for these vehicles upon their receipt by promissory notes payable to the order of the Decatur Company without interest, four months after the dates of the invoices respectively. These parties further agreed, and they performed this agreement, that the Transfer Company should order vehicles in advance of its needs, and should deliver to the Decatur Company its notes therefor payable in four months from their date; that at the maturity of these notes the Transfer Company should make and deliver like notes payable in four months to the Decatur Company, called "renewal notes," which the latter company should use to take up the original notes when possible, and, when this was impracticable, should discount and send the proceeds to the Transfer Company to enable it to pay these original notes. Under this agreement and practice the Transfer Company issued two classes of original notes, those given for vehicles received, and those given for vehicles to be delivered; and it issued three classes of renewal notes, those issued to take up original notes for vehicles received, those used to take up original notes for vehicles to be delivered, and those issued to be discounted by the Decatur Company to raise money to send to the Transfer Company to pay the original notes which could not be renewed. All the notes of these various classes were in the usual form of such commercial paper, and there was nothing about them to enable any third party to distinguish those of one class from those of any other. A very large number of these notes, which amounted in the aggregate to more than \$60,000, was issued, and many were paid; but in January, 1907, when the Transfer Company was adjudged a bank-

rupt, it owed more than \$200,000 and notes of the Transfer Company to the aggregate amount of more than \$60,000 were held by the claimants. The Decatur Company had not delivered all of the vehicles to be delivered for which some of these notes had been issued, and it had failed to pay over to the Transfer Company some of the proceeds of some of these notes which the Transfer Company had delivered to it to be discounted to raise money to enable the Transfer Company to pay its original notes. There was evidence tending to show that notes to the amount of about \$60,000 had been issued either for undelivered buggies, for renewals of notes for undelivered buggies, or for money for which the Transfer Company had received only about \$14,000 in value; but the evidence upon this subject is uncertain and unsatisfactory, and it fails to show clearly which of these numerous notes were issued for undelivered buggies, which for renewals of notes for undelivered buggies, which for cash that was not remitted, and which for cash actually returned. H. Scherer & Co. is a corporation engaged in the manufacture of carriage materials at Detroit, in the state of Michigan, and one of the claimants in this proceeding. It sold some of its carriage materials to the Decatur Company from time to time, and took in payment of its past-due account against that company, and for cash, 12 of these notes before they respectively matured, which amounted in the aggregate to \$12,917.40. Scherer & Co. filed these notes and formal proof of its claim upon them in the bankruptcy proceeding against the Transfer Company. The trustee objected to the allowance of its claim, testimony was taken, the referee suppressed that of the claimant, allowed it \$2,209.25, upon two of the notes which it held, and disallowed the remainder of its claim. The objections of the trustee were: (1) That the notes were delivered to the Decatur Company without any consideration to the Transfer Company; (2) that they were left in the hands of the Decatur Company to be negotiated for the Transfer Company, and were converted to its own use by the Decatur Company; (3) that the claimant took the notes with notice of their infirmity as collateral security for a debt of the Decatur Company; and (4) that the claim was not filed in good faith but for the Decatur Company.

It is assigned as error that the testimony of H. Scherer was suppressed by the referee and by the court for the reason that he refused to answer questions and produce exhibits on cross-examination. The facts pertinent to this specification are these: Scherer testified at Detroit, Mich., on May 1, 1907; the motion to suppress his deposition was filed with the referee in Iowa on June 29, 1907; the referee sustained that motion on September 30, 1907; on October 1, 1907, the claimant moved that the deposition be returned to the notary public for the purpose of having the questions upon cross-examination answered, and that motion was denied by the referee. Scherer testified in his deposition upon his direct examination that he was the president of the claimant; that between August 20 and November 30, 1906, he purchased the notes of the Transfer Company from the Decatur Company before their maturity for his corporation, and that his corporation paid the face value thereof less interest at 6 per cent. per annum, with a just claim it held against the Decatur Company to the amount

of about \$8,500 and with \$3,450 in cash; and that neither he nor any of the officials of the corporation, so far as he knew, had any knowledge or information of any infirmities or defects in or defenses to the notes when he purchased them. The exhibits which he refused to produce on cross-examination were a written guaranty made by the Decatur Company after the failure of the Transfer Company of the payment of the notes, certain notes made by the Decatur Company after that failure for the estimated difference between the prospective dividend from the estate of the Transfer Company and the face of the notes, and correspondence between Scherer & Co. and the Decatur Company relating to the notes in controversy and the bankruptcy of the Union Transfer Company. He did not refuse to answer any admissible question on cross-examination. He testified that the guaranty was in charge of Mr. Hoof, who was sick; that it would take considerable time, several hours, to find it; and that it would take several days to collect all the correspondence. His counsel stated at the time of taking the deposition that a copy of the guaranty and of the correspondence relating to the purchase of the notes would be attached to the deposition, and it was. In this state of the case the referee suppressed this deposition, and his order in that regard was erroneous. The guaranty and the notes of the Decatur Company were immaterial in this proceeding, because they were taken after the purchase of the notes of the Transfer Company by the claimant, and the excuse given by the witness for his failure to produce the correspondence, in the absence of any evidence of a prior notice to him so to do, was a reasonable one. A deposition may not be suppressed because the witness fails to answer irrelevant questions or to produce immaterial evidence. *Fenn v. Georgia Ry. & Electric Co.*, 122 Ga. 280, 50 S. E. 103, 104.

The deposition of Barnitz, a witness for another of the claimants, was suppressed because, after he had testified on direct examination that between July, 1906, and November 12, 1906, the claimant had purchased for value without notice 19 of these notes, he refused to produce letters written subsequent to those dates, and after the failure of the Transfer Company, between the Decatur Company and the claimant, and between the claimant and Flickinger Bros., its attorneys, concerning these notes and the bankruptcy of the Transfer Company. The letters were utterly immaterial, were not part of permissible cross-examination, and the deposition should have been received and considered. Other depositions were suppressed, but it is unnecessary to consider the rulings upon them, because the relevant matters to which they refer are sufficiently proved to sustain the claims of the appellants to which they refer without them.

The trustee took the deposition of one Elwood, one of the officers of the Decatur Company, but did not introduce it in evidence. The claimants offered in evidence a portion of this deposition, and the referee and the court below ruled it out on the ground that the claimants could not introduce arbitrarily any part of the deposition, and on the further ground that the attorneys for the trustee attempted to verify the statements in it, but the witness refused to produce and permit them to introduce books and papers which they demanded. But this was

a witness called by the trustee. He took his deposition. After it was taken and returned to the court, it was at the command of either party in the controversy. The fact that the trustee elected not to compel his witness to produce the books and papers for which he called cannot deprive the claimants of the benefit of the evidence which the witness actually gave. The testimony offered by the claimants was relevant and material to an important issue in this controversy, and it should have been received. If that testimony was contradicted or modified by other parts of the deposition, it was the right and the privilege of the trustee to put those parts in evidence. When the taker of a deposition fails or refuses after its return to put it in evidence, the opposing party may introduce all or a part of it, and the taker may then put in evidence any part not introduced by his opponent. Jones on Evidence (2d Ed.) § 685; Hale v. Gibbs, 43 Iowa, 380; Calhoun v. Hays, 8 Watts & S. 127, 42 Am. Dec. 275; Converse v. Meyer, 14 Neb. 190, 192, 15 N. W. 340; Town of Ansonia v. Cooper, 66 Conn. 184, 33 Atl. 905, 908.

The rulings of the referee and of the court upon the various motions to suppress the depositions of these witnesses have been considered, so far as they were material, on the theory, adopted by court and counsel below, that the suppression of depositions was the proper remedy for the refusal of witnesses to produce relevant evidence. But this is an error. The remedy in the national courts in equity and in bankruptcy for the failure or refusal of a witness to answer competent questions or to produce material evidence is not the suppression of the deposition or of the evidence which he does produce, and that for the reason that all evidence which is not glaringly irrelevant, whether deemed material and competent by the referee and the court below or not, must be made a part of the record, and in case of an appeal returned to the appellate court to the end that a final adjudication may be rendered in that court without another hearing below. The true remedy for the refusal of a witness to answer proper questions or to produce relevant evidence is an enforced order of the proper court that he shall do so. Dowagiac Mfg. Co. v. Lochren, 74 C. C. A. 341, 343, 344, 143 Fed. 211, 213, 214; First National Bank v. Abbott (C. C. A.) 165 Fed. 852, 855; Blease v. Garlington, 92 U. S. 1, 7, 8, 23 L. Ed. 521; In re De Gottardi (D. C.) 114 Fed. 328, 342; Dressel v. North State Lumber Company (D. C.) 119 Fed. 531; In re Romine (D. C.) 138 Fed. 837, 839.

We return to the claim of Scherer & Co. The question it presents is, Was this claim a fixed liability of the Transfer Company when the petition in bankruptcy was filed against it? Bankruptcy Law, c. 541, § 63 (Act July 1, 1898, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]). If the Transfer Company could not have escaped liability to Scherer & Co. upon this claim then neither the trustee nor other creditors of the Transfer Company can defeat it now, for these creditors derive all their rights here through it, and they have no defenses to this claim which were not available to the Transfer Company.

The 10 promissory notes of the Transfer Company which were disallowed were payable to the order of the Decatur Company, were indorsed by it, and were taken by the claimant before their maturity in

the regular course of business in payment of its claim for the purchase price of goods it had sold and delivered to the Decatur Company and of about \$1,200 in cash. The possession of commercial paper regularly indorsed is evidence of title in the holder, and that the paper is free from all equities between the antecedent parties to it, and the burden is on those who assert defenses to it to prove them. *Collins v. Gilbert*, 94 U. S. 753, 754, 756, 24 L. Ed. 170; *Brown v. Spofford*, 95 U. S. 474, 478, 24 L. Ed. 508; *Daniel on Negotiable Instruments*, § 812; *Code Supp. Iowa 1907*, §§ 3060a24, 3060a25; *Brown v. Wiley*, 20 How. 442, 15 L. Ed. 965.

What defenses has the trustee established? There is a statement in the brief of its counsel that W. A. Southard, the president of the Transfer Company, who signed the notes in its name, had no authority so to do, but no argument is presented in support of this suggestion. On the other hand, the record indubitably proves that Southard made all the notes and contracts and conducted all the business of the corporation for many months before these notes were signed, and no doubt remains that, by the acquiescence of the corporation in the course of business pursued, plenary power was granted to him to issue its commercial paper for all lawful purposes. *Merchants' Bank v. State National Bank*, 10 Wall. 604, 19 L. Ed. 1008.

Counsel contend that these notes are void because the capital stock of the Transfer Company was only \$25,000, only \$12,000 of it was issued, and the limit of its indebtedness was \$8,000 under section 1611 of the Code of Iowa, while its actual indebtedness was known to the claimant to have been vastly in excess of this limit when it took the notes. Let these facts be conceded, nevertheless the Transfer Company issued and authorized the sale or exchange of these notes by its agent, the Decatur Company. *Scherer & Co.* paid full value for them to this agent. The moment the title to them was transferred to the claimant and its payment received, these notes became executed contracts on the part of the claimant. It had performed its part of the agreements. It had paid the price for the commercial paper. The Transfer Company had the power to make promissory notes of this character. Their execution was within the scope of its corporate powers. It was but an excessive exercise of them.

The statutes of Iowa in effect declared that the limit of the indebtedness of this corporation should be \$8,000. But they did not provide that notes or contracts issued by the corporation which created an indebtedness beyond the limit thus prescribed should be void, and it is not the province of the courts to impose a penalty for the violation of a statute in which there is no moral turpitude or breach of public policy where the law fails to do so. In such a case the remedy for the violation is not the destruction of the contracts or of the property of those who have purchased them, but it is the ouster and dissolution of the corporation at the suit of the state. It is no defense for a private corporation against the enforcement of its commercial paper or other contracts, in reliance upon which a creditor has parted with value, that while their execution was within the general scope of its powers it involved an excessive exercise of one of them. *Sioux*

City Terminal R. & W. Co. v. Trust Co., 82 Fed. 124, 133, 134, 27 C. C. A. 73, 83, 84, and cases there cited; Sioux City Terminal R. & W. Co. v. Trust Co., 173 U. S. 99, 112, 19 Sup. Ct. 341, 43 L. Ed. 628; Garrett v. Burlington Plow Company, 70 Iowa, 697, 29 N. W. 395, 59 Am. Rep. 461; Warfield, Howell & Co. v. Marshall County Canning Co., 72 Iowa, 666, 672, 34 N. W. 467, 2 Am. St. Rep. 263; Beach v. Wakefield, 107 Iowa, 567, 76 N. W. 688, 694, 78 N. W. 197; Farmers' National Bank v. Sutton Mfg. Co., 52 Fed. 191, 195, 3 C. C. A. 1, 17 L. R. A. 595; Bird v. Daggett, 97 Mass. 494.

Another argument which is urged upon our consideration with persistent force is that the Decatur Company defrauded the Transfer Company of these notes and hence the claimant cannot enforce their collection. Let us see. Take the most vulnerable notes, those delivered to the Decatur Company to be substituted by it for original notes of the Transfer Company, or to be sold for the Transfer Company under the agreement that the Decatur Company should remit the proceeds to the maker of the notes. Concede that the Transfer Company never received anything for these notes, a fact which is by no means satisfactorily established, yet the testimony is undisputed that the Transfer Company signed the notes, that it delivered them to the Decatur Company, and that it authorized that company to discount them and to send the proceeds to it or to substitute them for its original notes. So far as the Decatur Company discounted the notes and received the proceeds in cash, it acted by the express authority of the Transfer Company, and, if it subsequently converted those proceeds to its own use, that fact constituted no defense to the notes, because the purchaser thereof from the authorized agent of the Transfer Company was not liable for that agent's disposition of the money which the Transfer Company had authorized it to receive on its account.

The Decatur Company, however, was not authorized to use these notes to pay its own debts, and it is said that its delivery of them to Scherer & Co. for that purpose was a fraud upon the Transfer Company which constitutes a defense to the paper. If so, the purchaser of the notes which took them in good faith in reliance upon their apparent validity and upon the Decatur Company's apparent ownership of them must suffer for this fraud, while the Transfer Company which made the notes, which knew they were without consideration, which created their false appearance of validity and the false appearance of their ownership by the Decatur Company, escapes the evil consequences of its participation in the fraud. This would be a reversal of the familiar and salutary rule that one who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. Paxson v. Brown, 61 Fed. 874, 882, 10 C. C. A. 135, 143; Union Pacific Ry. Co. v. United States, 67 Fed. 975, 979, 15 C. C. A. 123, 127; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271,

293, 22 C. C. A. 171, 192, 34 L. R. A. 518; *Given v. Times Republican Printing Co.*, 114 Fed. 92, 95, 52 C. C. A. 40, 43; *Mechem on Agency*, §§ 83, 84. The Transfer Company made these notes. It recited in the face of them that it had made them for value received. It made them payable to the order of, and it delivered them to, the Decatur Company. It intentionally clothed that company with the false appearance of an ownership it did not have, of notes which the Transfer Company had intentionally given a false appearance of having valuable considerations that never existed, and Scherer & Co., and the other claimants who bought such notes, were induced by these false representations to purchase them in payment of their accounts against the Decatur Company. If the Transfer Company had not produced these false appearances, the purchasers would not have bought the notes. If the Transfer Company is now permitted to deny that these appearances represented the truth, the purchasers will suffer the loss of the liability of the Transfer Company and of a dividend from its estate. The Transfer Company intentionally and with culpable negligence made and intrusted these deceitful representations and the power to use them to its agent, the Decatur Company, and if the latter abused that power the Transfer Company and its successor in interest, the trustee, are estopped from denying that its representations were true for the purpose of defeating the claims of the holders of these notes. When one of two parties must suffer loss from the fault of a third, he who wrongfully or with culpable negligence put it in the power of the third to cause the loss must bear it.

It is said that these notes were accommodation paper, that the issue of accommodation paper was beyond the power of the Transfer Company, and that for that reason the notes constitute no valid claim against its estate. The corporation had no power to issue accommodation paper, and this fact would have been a perfect defense to these notes in the hands of any holder who knew they were accommodation paper when he purchased them. But the corporation had power to issue negotiable paper for value. "When a corporation has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." *City of Lexington v. Butler*, 14 Wall. 282, 296, 20 L. Ed. 809. The Transfer Company intentionally gave these notes the false appearance of negotiable paper issued by it for value, and thereby induced the claimants to buy them. Where a corporation which has the power to issue negotiable paper puts forth accommodation paper beyond its power, it is estopped from denying that the latter was lawfully issued for value for the purpose of defeating the claim of a bona fide holder of such paper for value. *Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316; *In re Troy & Cohoes Shirt Co. (D. C.)* 136 Fed. 420, 425, 430, 431; *German Savings Bank v. Hanna*, 124 Iowa, 374, 100 N. W. 57; *Farmers' National Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595; *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303; *Holmes et al.*

v. Willard, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170; *Tod v. Kentucky Union Land Co.* (C. C.) 57 Fed. 47, 52; *Morawetz on Private Corporations*, § 597; *Monument National Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Mechanics' Banking Ass'n v. New York & Saugerties White Lead Co.*, 35 N. Y. 505.

Some of these notes were taken by Scherer & Co. in payment of a past due debt of the Decatur Company, and to these the objection is interposed that the claimant paid no value for them. But one who takes commercial paper before maturity, in payment of or as collateral security for a debt of the seller, due or not due, is a purchaser for value in the ordinary course of business, and protected by the same estoppels as a purchaser for cash. *Swift v. Tyson*, 16 Pet. 1, 15, 21, 10 L. Ed. 865; *Railroad Company v. National Bank*, 102 U. S. 14, 22, 28, 26 L. Ed. 61; *Robinson v. Lair*, 31 Iowa, 9, 14; *Code Supp. Iowa 1907*, §§ 3060a25, 3060a26; *Woodworth & Co. v. Carroll*, 104 Minn. 65, 112 N. W. 1054; *McMurray v. Moran*, 134 U. S. 150, 158, 10 Sup. Ct. 427, 33 L. Ed. 814; *American File Co. v. Garrett*, 110 U. S. 288, 294, 4 Sup. Ct. 90, 28 L. Ed. 149; *Hamilton v. Fowler*, 99 Fed. 18, 22, 40 C. C. A. 47; *Doe v. Northwestern Coal & Trans. Co.* (C. C.) 78 Fed. 62, 68; *Wood v. Seitzinger* (C. C.) 2 Fed. 843, 844; *In re Huddell*, Fed. Cas. No. 6,825.

There is a statute of the state of Iowa to the effect that no holder of commercial paper procured by fraud upon the maker shall recover thereon a greater sum than he paid therefor with interest and costs. *Ann. Code Iowa 1897*, § 3070; *Richards v. Monroe*, 85 Iowa, 359, 52 N. W. 339, 39 Am. St. Rep. 301. It is contended that Scherer & Co. paid nothing for these notes, but the cash which it advanced, some \$1,200, and that this should be the limit of its recovery. The answer is that the Transfer Company and the trustee of its estate are estopped by the inducing false representations of the former from claiming or proving against this claimant that this paper was procured by fraud, and, if this estoppel did not exist, the amount of the debt of the Decatur Company to the claimant, which was paid by these notes and the cash which the claimant advanced, substantially equal the face of the notes. The debt of the Decatur Company was paid for them as much as was the cash, and both may be recovered under the statute.

The objections to the claim of Scherer & Co. have now been considered under the concession that the notes which they held were originally without consideration, and our conclusion is that even if that fact were satisfactorily proved these objections cannot be sustained. The fraud in this case was not prepared, inspired, or effected by this claimant. It was the victim, not the perpetrator, of it. The Transfer Company furnished the false representations which accomplished it, and the Decatur Company, its agent, used them. Neither the Transfer Company, nor its creditors, nor the trustee can take advantage of the wrong of that company to deprive the most direct victims of it of their share in its estate. That company had no available defense to this claim when the petition in bankruptcy was filed, and the trustee and the other creditors have none now.

Decisions of state courts have been called to our attention and con-

sidered which do not in all things accord with some of the declarations of the commercial law upon which our conclusion rests. But these declarations are supported by controlling authority in this court, by the decisions of the Supreme Court which have been cited, and the duty is imposed upon the national courts to exercise their independent judgment in the determination of all questions of general jurisprudence, of commercial law, and of right under the Constitution and laws of the United States. *Railroad Company v. National Bank*, 102 U. S. 14, 30, 26 L. Ed. 61; *Railroad Company v. Lockwood*, 17 Wall. 357, 368, 21 L. Ed. 627; *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; *Carpenter v. Insurance Co.*, 16 Pet. 495, 511, 10 L. Ed. 1044; *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; *Smith v. Alabama*, 124 U. S. 465, 478, 8 Sup. Ct. 564, 31 L. Ed. 508; *Bucher v. Railroad Co.*, 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795; *Liverpool & G. W. Steam Co. v. Phenix Insurance Co.*, 129 U. S. 397, 443, 9 Sup. Ct. 469, 32 L. Ed. 788.

So far as our conclusion rests upon a construction of the statutes of Iowa, it is not inconsistent with the decisions of the Supreme Court of that state, and it is sustained by those cited above, and by the decision of the Supreme Court in *Sioux City Terminal R. & W. Co. v. Trust Company*, 173 U. S. 99, 19 Sup. Ct. 341, 43 L. Ed. 628.

The testimony regarding the disallowed claims of the eight other appellants in this case has been considered, and it brings those claims within the decision announced upon the claim of Scherer & Co. They are founded on promissory notes of the Transfer Company indorsed by the Decatur Company and purchased by the claimants before maturity in the regular course of business for debts of the Decatur Company paid thereby, or for cash, and they must be allowed.

The decree of the court below must accordingly be reversed, and this case must be remanded to the District Court with instructions to allow the claims of the appellants in controversy in this appeal upon the same basis as claims of other unsecured creditors are allowed, and it is so ordered.

TOLEDO, ST. L. & W. R. CO. v. KOUNTZ.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1909.)

No. 1,861.

1. MASTER AND SERVANT (§§ 285, 289*)—INJURIES TO SERVANT—RAILROADS—UNBLOCKED FROG—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for death to a switchman while his foot was caught in an unblocked frog, whether decedent's foot was caught before he was struck by the train, and whether he was at the switch when he gave the signal to the train to approach and caught his foot as he was leaving the switch for his station, or whether he was walking ahead of the train

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in a dangerous place and his foot was jammed into the frog after he was struck, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 285, 289.*

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

2. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—RAILROADS—“PROXIMATE CAUSE.”

A request to charge that the term “proximate cause” meant the first or efficient cause, and if the jury found that there were several causes contributing to decedent’s death, then the proximate cause was the cause coming first which set in motion the other causes producing the accident, was properly refused as susceptible of an interpretation that, if decedent was negligent in crossing defendant’s tracks in front of an approaching train, his act was necessarily the proximate cause of the accident, and as overlooking the rule that the proximate cause is the dominant cause from which the injury follows as a direct and immediate consequence; that an act prior in time is not necessarily the proximate cause of an injury, unless the injury is the natural and probable consequence of such act, to be reasonably anticipated therefrom, or if the injury could not have happened but for the intervention of a sufficient and independent cause operating between the first negligent act and the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*

For other definitions, see Words and Phrases, vol. 6, pp. 5758–5769; vol. 8, p. 7771.]

3. MASTER AND SERVANT (§ 291*)—DEATH OF SERVANT—INSTRUCTIONS.

In an action for death of a switchman whose foot was caught in an unblocked frog as he was crossing the tracks in front of a train, a request to charge that proximate cause was the first or efficient cause, and that if the jury found there were several causes contributing to decedent’s death the proximate cause was the cause coming first which set in motion the others producing the accident, was properly refused as eliminating the proposition that an unblocked frog might have been an efficient and independent cause of the accident, without which it could not have happened, though decedent was negligent in crossing the tracks ahead of the train.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

4. MASTER AND SERVANT (§ 291*)—DEATH OF SERVANT—RAILROADS—UNBLOCKED FROG—NEGLIGENCE—INSTRUCTIONS.

Where a switchman was killed after catching his foot in an unblocked frog, and the jury were permitted to find for plaintiff only on the theory that decedent’s death was caused by the negligent condition of the frog, a request to charge that if decedent, before he attempted to cross the tracks, knew that defendant’s train was approaching at rapid speed, and with such knowledge attempted to cross ahead of the train, and that this was the proximate cause of his death, plaintiff could not recover, was properly refused, as charging that plaintiff could not recover if his act in crossing the tracks ahead of the train was the proximate cause of his death, though such crossing was in the regular discharge of his duty and he had no other way to go to his station and was free from negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

5. MASTER AND SERVANT (§ 112*)—RAILROADS—SAFETY REQUIREMENTS—STATUTES—UNBLOCKED FROGS.

Rev. St. Ohio, § 3365—18, requiring every railroad operating in the state to block its frogs in yards, divisional and terminal stations, where trains are made up, is designed for the protection not only of employes who may step into them, but also of those dragged or pushed into them by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes 168 F.—53

an engine; a railroad's failure to comply therewith constituting negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 112.*

Duty of railroad companies to furnish safety appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

6. MASTER AND SERVANT (§ 112*)—DEATH OF SERVANT—RAILROADS—UNBLOCKED FROGS—STATUTES.

Rev. St. Ohio, § 3365—18, requiring railroads within the state to block all angles in frogs, switches, and crossings, is expressly limited to frogs in yards, divisional and terminal stations, where trains are made up.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 112.*]

7. MASTER AND SERVANT (§ 278*)—DEATH OF SWITCHMAN—EVIDENCE.

In an action for death of railroad switchman by being run over after catching his foot in an unblocked frog, permitted so to remain in violation of Rev. St. Ohio, § 3365—18, evidence held to justify a finding that the frog in question was located in a railroad yard where trains are made up, and was therefore within the statute.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

8. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMED FACTS.

The court did not err in assuming that the place where decedent was injured was a frog in a railroad yard, where trains were made up, which the railroad company had negligently failed to block in violation of Rev. St. Ohio, § 3365—18, where it would have been the duty of the court to set a finding to the contrary aside.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

9. TRIAL (§ 237*)—INSTRUCTIONS—"PREPONDERANCE OF PROOF"—"PERSUADED."

An instruction that by "preponderance of proof" is meant that the jury are persuaded of the soundness of the claim more satisfactorily than the contrary was not objectionable because the word "weigh" was not employed, nor as implying that the jury might be persuaded by arguments rather than proof, as the jury could properly understand the term "persuaded" only to mean that the proof must be more persuasive, more convincing.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 542, 548—551; Dec. Dig. § 237.*

For other definitions, see Words and Phrases, vol. 6, pp. 5516—5518, 5367.]

10. MASTER AND SERVANT (§ 296*)—DEATH OF SERVANT—INSTRUCTIONS.

Where, in an action for death of a railroad switchman by being run over while his foot was caught in an unblocked frog, it was uncontradicted that the frog had been in that condition for two months preceding the accident, and that decedent, who had been in the same employment for a year or more, was required to inspect the switches, where the frog was located, every time a train passed, the court did not err in omitting to charge that if decedent, in the exercise of ordinary care, could have discovered that the frog was unblocked, he must be charged with knowledge thereof, there being no request to charge that decedent was presumed to have known the condition of the frog.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

11. MASTER AND SERVANT (§ 296*)—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE—"SUBSTANTIAL CONTRIBUTION."

An instruction that, where the negligence of an employé actually contributes to the results, his negligence would not be compared, provided it was a "substantial contribution" to the accident, was not objectionable on the theory that any negligence on decedent's part was sufficient to defeat the action, since negligence, unless "substantial," could not be said to contribute directly and proximately to the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

12. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTION.

An instruction that decedent's contributory negligence, in order to defeat a recovery, must be "substantial," was not prejudicial to defendant, where the court afterwards charged that, if decedent's failure to exercise ordinary care contributed to the accident resulting in his death, plaintiff could not recover.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.*]

13. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

The court did not err in refusing to give defendant's proposed instructions relating to grounds of negligence withdrawn from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

14. APPEAL AND ERROR (§ 1004*)—SCOPE OF REVIEW—DAMAGES—EXCESSIVENESS—VERDICT.

Objections that the damages are excessive, and that the verdict is against the law and the evidence, are for the determination of the trial court on a motion for a new trial, and cannot be reviewed by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

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

Chas. A. Schmettau, for plaintiff in error.

Chas. A. Thatcher, for defendant in error.

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

KNAPPEN, District Judge. The defendant in error, plaintiff below, sued to recover damages on account of the death of his intestate, which is alleged to have been caused by his being run over by the defendant's yard train, in consequence of the catching of his foot in a frog, connected with a switch which was unblocked. Plaintiff's petition alleged negligence in the operation of the engine, in failing to have a headlight on the engine, and in running the train at an unlawful rate of speed. It also alleged a violation of section 3365—18 of the Revised Statutes of Ohio, which requires every railroad operating in that state to "adjust, fill or block, all angles in frogs, switches, and crossings on their roads in all yards, divisional and terminal stations where trains are made up." All the grounds of negligence except the violation of the statute referred to were withdrawn by the court from the consideration of the jury. There was a verdict and judgment for the plaintiff, and a denial of motion for new trial.

At the conclusion of the testimony the defendant moved for a peremptory instruction in its favor, upon the ground that plaintiff had failed to prove by a preponderance of the evidence that failure to block the frog was the proximate cause of the accident, and that the plaintiff was shown by the proofs to have been guilty of contributory negligence. Miller, the decedent, was employed by the defendant as night watchman at the crossing of Hamilton street and defendant's tracks in the city of Toledo. The tracks in this section run in a northerly and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

southerly direction. About a block south of Hamilton street the railroad crosses a swing bridge over Swan creek. A little north of Hamilton street there were three switches, one running to the west of the main track, a second extending east and north, and a third, known as the "Schenk coalyard switch," going off to the south and east. It was Miller's duty on the approach of a train from the north to see that the bridge (to the south) was closed, that the switches (to the north) were properly set for the main track, and then to give a signal to the approaching train that the track was clear; the train being required to await that signal 300 or 400 feet north of the Hamilton street crossing. After giving the signal it was Miller's duty to take his station on the west side of the tracks and on the northerly side of Hamilton street to protect traffic at the crossing. The frog in the coalyard switch had been entirely unblocked for about two months. The evidence amply supports the conclusion that Miller's death was caused by the catching of his foot in this unblocked frog connected with the coalyard switch. The propositions on which the peremptory instruction was asked, so far as their discussion is justified, rest upon the contention that the catching of Miller's foot in the frog was due to his own negligence. The theory on which the alleged negligence is predicated is that at the time he signaled the train to come on he was on the west side of the tracks; that it was his duty to go at once to the north side of Hamilton street and west of the tracks; that from the place where the signal was given there was an open space between the tracks eight feet in width leading to his station referred to; that he had thus no occasion to cross the tracks or to be at the frog in question; that the evidence indicates that he was either crossing the tracks or walking ahead of the approaching train when not required to do so in the performance of his duties; and that the probabilities favor the theory that his foot was jammed into the frog after he was struck by the train.

There is evidence tending to support this theory, viz., testimony indicating that immediately before the signal was given Miller was seen coming toward the railroad tracks down an alley between Hamilton street and the next street north, and thus toward the three switches in question; that a little later the signal to the train was given from the west side of the tracks and near the north side of Hamilton street. This testimony, however, was not undisputed. There was testimony to the effect that the signal was not required to be given from the west side of the tracks, but was properly given upon the tracks and at the switch; that the reason assigned for giving the signal upon the westerly side of the tracks, viz., that the signals were given to the engineer, did not apply in this case, from the fact that the engine which pulled the train in question was headed northerly and was thus running backwards, the engineer being thus on the east side; the fireman, whose opportunities for observation were fully as good as those possessed by the engineer, was unable to say that Miller was seen in the alley or that the signal was not given at the switch in question; and the testimony of the engineer was discredited by his testimony immediately following the accident, alleged to be inconsistent with his testimony upon the trial, and by other evidence. There was ample room under the testimony for the

conclusion that Miller's foot was caught in the frog before he was struck by the train, and that he was so overtaken by reason of his foot being caught; and the testimony, considered together, was entirely consistent with his having been at the switch when the signal to the train was given, and with the catching of his foot as he was leaving the switch for his station on the north side of Hamilton street. There was no error in refusing the request for a peremptory instruction.

Complaint is made of the court's refusal to give certain requests presented by defendant, numbered 7 and 16, both directed to Miller's alleged negligence in crossing the tracks ahead of the train. Each of these requests contained a definition of proximate cause. Request No. 7 contained the instruction that plaintiff could not recover without proving that defendant's negligence was the proximate cause of Miller's death. The court submitted to the jury, under careful instructions, the question of Miller's contributory negligence, placing sharply before the jury the conflicting claims of the parties.

The jury was told that if Miller, while engaged in the performance of his work, or, having just performed his duty, was leaving the place where he had performed it, and while exercising ordinary care for his own safety, was caught by his foot in an unblocked frog, and in consequence of being thus caught was killed, the plaintiff was entitled to recover; that, on the other hand, if Miller was not himself exercising ordinary care for his own safety, and if failure to exercise such ordinary care contributed to the accident, there could be no recovery; and, specifically, that if Miller was struck and killed while walking along the track, between the rails, no recovery could be had; and, further, upon defendant's request, that if, after giving the signal, it was Miller's duty to go to the crossing of Hamilton street, and if he could reach that crossing by walking between the tracks, where he was safe from the approaching train, but if, instead of doing so, he walked along the track on which the train was running, ahead of the train, such action was the proximate cause of death—in which case, even though Miller's foot was caught in an unblocked frog, the defendant would not be liable. A further instruction requested by defendant was given, to the effect that if, after giving the signal to the train, Miller, knowing the train was approaching, went upon the track and attempted to run along the track ahead of the train to the crossing of Hamilton street, when he might have gone to the crossing by the side of the track, and in a place where he was safe from the approaching train, and while running along the track caught his foot in an unblocked frog and was hit and run over by the approaching train, then the proximate cause of the death would have been Miller's own act, and no recovery could be had. No abstract definition of proximate cause was given, nor any instructions aimed directly at Miller's negligence in crossing the tracks (as alleged) ahead of the approaching train. Request No. 7 contained this definition of proximate cause:

"By the term 'proximate cause' is meant the first or efficient cause, and if you find from the evidence that there were several causes contributing to Miller's death, then the proximate cause is the cause coming first, which set in motion the other causes producing the accident."

This instruction was rightly refused. It was susceptible of an interpretation that, if Miller was negligent in crossing the tracks in front of the approaching train, such act was necessarily the proximate cause of the accident, being first in time. It overlooked the rule that the proximate cause is the dominant cause from which the injury follows as a direct and immediate consequence; that an act prior in time is not necessarily the proximate cause of an injury, unless such injury was the natural and probable consequence of such act; and that such injury cannot be said to be the natural and probable consequence of the act when it was not one to be reasonably anticipated from it, and when it was one which could not have happened but for the intervention of a sufficient and independent cause operating between the first negligent act and the injury. *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256; *Insurance Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395; *Scheffer v. Railroad Company*, 105 U. S. 249, 252, 26 L. Ed. 1070; *The G. R. Booth*, 171 U. S. 450, 458, 19 Sup. Ct. 9, 43 L. Ed. 234; *Cole v. German Savings & Loan Society*, 124 Fed. 113, 115, 59 C. C. A. 593, 63 L. R. A. 416; *Shugart v. Atlanta, K. & N. Ry. Co.*, 133 Fed. 505, 510, 66 C. C. A. 379. The clause referred to in the instruction asked for overlooked the proposition that an unblocked frog may have been a sufficient and independent cause for the accident, and without which it could not have happened even had Miller been negligent in crossing the tracks ahead of the train. Request No. 16 asked an instruction that if the jury should find "that Miller, before he attempted to cross the tracks, knew that defendant's train was approaching at a rapid rate of speed, and with such knowledge attempted to cross the track ahead of said train, and that this was the proximate cause of his death, as said term has been defined to you above, then you are instructed that the plaintiff is not entitled to recover." This requested instruction, it will be seen, proceeded upon the theory that if Miller's act in crossing the tracks ahead of the train was the proximate cause of his death there could be no recovery, even though such crossing was in the regular discharge of his duty, and although he had no other way to go to his station except by crossing the tracks, and notwithstanding his conduct was entirely free from negligence. The jury was permitted under the charge of the court to find for the plaintiff only upon the theory that Miller's death was caused by the catching of his foot in the unblocked frog. The failure of defendant to comply with the statutory requirement of blocking the frog was negligence as matter of law. *C. H. & D. Ry. Co. v. Van Horne*, 69 Fed. 139, 140, 16 C. C. A. 182; *Lake Erie & Western Ry. Co. v. Craig*, 73 Fed. 642, 19 C. C. A. 631; *Narramore v. C., C., & St. L. Ry. Co.*, 96 Fed. 298, 300, 37 C. C. A. 499, 48 L. R. A. 68. The statute is designed for the protection not only of employes who may step into them, but of those dragged or pushed into them by an engine. *Cooper v. Baltimore & Ohio Ry. Co.*, 159 Fed. 82, 86 C. C. A. 272, 16 L. R. A. (N. S.) 715. There is no room upon this record for an application of the doctrine of proximate cause as avoiding liability for the death of Miller resulting directly from the imprisonment of his foot in an unblocked frog, except as such proximate cause is predicated upon and involved in Miller's alleged negli-

gence. The instructions given by the court upon the subject of proximate cause were fully as favorable to defendant as it was entitled to ask. In view of the concrete instructions given, the jury could not have been aided by abstract definitions. The requested instructions were properly refused.

It is urged that the statute requiring the blocking of frogs relates only to yards "where trains are made up," and that no proof was presented that the frog in question was in such a yard. Defendant invokes the rule that a statute changing the common law modifies or abrogates it no farther than the clear import of its language necessarily requires. *Johnson v. Southern Pac. Co.*, 117 Fed. 462, 54 C. C. A. 508. The obligation imposed by the statute under consideration is limited by express terms to frogs in "yards, divisional and terminal stations where trains are made up," and it is true that no express testimony was introduced that the switch in question was in such a yard. The evidence, however, afforded by the record was clear and convincing that the place under consideration was a yard of that kind. It is conceded that the place where the injury occurred is but a little way south of the freight station. The map in evidence shows no less than nine or ten switches radiating from the main track within a distance of about three blocks next north of the bridge. The brief of the plaintiff in error states that "Miller was employed by the plaintiff in error as a watchman, switchman, and bridge tender in its yards at Toledo." The train in question was a yard train. Four yard trains on an average pass over the spot under consideration every night. The three switches referred to are spoken of in the testimony as "yard switches" and as being in the "lower yards." These yard trains were for the purpose of or in connection with the making up of trains. The only respect in which the proof can be criticised as lacking is that there is no definite statement that the trains were actually assembled in the immediate strip where the unblocked frog in question was located. It was not necessary that this should be so. The strip in question was clearly part of the yard used for the making up of trains, and so was a yard within the meaning of the statute. It was so clearly part of the yard that had the question of its status been submitted to the jury, and a finding made that it was not a yard where trains were made up, it would have been the duty of the court to set the verdict aside. There was thus no error in assuming that the place where the injury occurred was such a place as covered by the statute. *Marquardt v. Ball Engine Co.*, 122 Fed. 374, 58 C. C. A. 462; *Riley v. L. & N. Ry. Co.*, 133 Fed. 904, 66 C. C. A. 598.

No error was committed in the instruction that "by a preponderance of proof is meant that you are persuaded of the soundness of the claim that the plaintiff puts forth more satisfactorily than to the contrary." This definition is not objectionable from the mere fact that it does not employ the word "weigh"; nor does it contain an implication that the jury were at liberty to be persuaded by argument rather than by proofs. The jury could properly understand the term "persuaded" to mean only that the proof be more persuasive, more convincing.

In view of the evidence, and the other features of the charge, there was no error in failing to instruct the jury that if Miller, in the exer-

cise of ordinary care and prudence, could have discovered the fact that the frog was unblocked, he must be charged with the same knowledge as if it were proven he actually knew of that condition. The court did not submit to the jury the question of Miller's knowledge that the frog was unblocked. The testimony was direct and uncontradicted that it had been in this condition for at least two months immediately preceding the accident, and that Miller, who had been employed in this duty for a year or more, was required to inspect the switches in question every time a train passed. The court would have been justified in instructing the jury that Miller would be presumed to have known that the frog was unblocked, and, had such instruction been requested, would doubtless have done so. No such request was made. The charge seems to assume Miller's knowledge that the frog was unblocked. Such knowledge had no relation to the case, except as it bore upon the question of contributory negligence, and on this subject the jury were sufficiently instructed.

Nor was prejudicial error committed in the instruction upon the subject of contributory negligence that:

"Where the negligence of the employed person actually does contribute to the result that happened to him, we cannot stop to measure under the rule of law as it now exists, how great or how little that negligence is comparatively, provided the negligence of the employé was a substantial contribution to the accident."

The criticism upon this instruction is directed to the word "substantial," the argument being that any negligence of the decedent, no matter how slight, is sufficient to defeat the action. The test of contributory negligence is whether the want of care directly and proximately contributes to the injury. *Gilbert v. Burlington, C. N. & R. Ry. Co.*, 128 Fed. 529, 533, 63 C. C. A. 27; *Coney Island v. Dennon*, 149 Fed. 687, 693, 79 C. C. A. 375. Negligence could scarcely be said to contribute directly and proximately to the injury unless it were substantial. However, the expression criticised was used in a preliminary statement of the general principles involved. Later, the court charged that, if Miller's "failure to exercise ordinary care for his own safety contributed to the accident resulting in his death," the plaintiff could not recover. This last instruction was rather more favorable to the defendant than it was entitled to. While the word "substantial" is perhaps not a happy term, no prejudice could have resulted from its use.

There was no error in refusing to strike out the testimony of the witness Fallis. There was nothing indicating that Miller's duties had changed since the connection of the witness with the railroad. Moreover, the testimony was not only undisputed, but the same testimony was given by other witnesses conceded to be competent.

The court properly declined to give defendant's proposed instructions relative to the grounds of negligence withdrawn from the consideration of the jury.

The objections that the damages are excessive, and that the verdict is against the law and the evidence, were for the court below to decide upon motion for a new trial, and cannot be considered here.

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

GHOST v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1909.)

No. 2,579.

1. APPEAL AND ERROR (§§ 256, 518*)—RECORD—MATTERS TO BE SHOWN—MOTIONS TO STRIKE OUT PORTIONS OF A PLEADING.

A motion to strike out portions of an answer and the ruling thereon cannot be regarded as part of the record, upon a writ of error, unless made such by a bill of exceptions; nor is the ruling upon such a motion open to review where no exception thereto was taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1489, 2352; Dec. Dig. §§ 256, 518.*]

2. COURTS (§ 356*)—COURTS OF THE UNITED STATES—PROCEEDINGS PREPARATORY TO OBTAINING REVIEW OF RULINGS NOT REGULATED BY STATE STATUTES.

In the courts of the United States the proceedings preparatory to obtaining a review of their rulings, including the questions of when an exception need be taken and how motions and rulings, not in themselves part of the record, may be made such, are not regulated by state statutes, but by the statutes of the United States, and, if they be silent, by the common law and the practice prevailing in those courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

3. MINES AND MINERALS (§ 7*)—COAL LAND STATUTE—RIGHT TO COAL INCIDENTALLY REMOVED IN COURSE OF LAWFUL DEVELOPMENT WORK.

Under sections 2347-2352, Rev. St. (U. S. Comp. St. 1901, pp. 1440, 1441), a qualified individual or association who, in response to the government's invitation, enters upon public lands in search of coal deposits, and expends time, labor, and means in an honest effort to open and develop such deposits when found, intending to purchase the lands according to the statute if the coal proves to be such as to give character and value to them, is not a trespasser, but is in the exercise of a privilege conferred by law, and is entitled to such coal as is extracted and removed as an incident only to the reasonable prosecution of that work.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 7; Dec. Dig. § 7.*]

(Syllabus by the Court.)

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

Edwin Van Cise and Elmer E. Whitted (Frank L. Grant, on the brief), for plaintiff in error.

Ralph Hartzell, Asst. U. S. Atty. (Earl M. Cranston, U. S. Atty., on the brief).

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

VAN DEVANTER, Circuit Judge. In January, 1897, Allen M. Ghost purchased from prior possessory claimants a so-called coal mine upon public lands of the United States, in Colorado, the purchase including two or three hundred feet of tunnels and shafts theretofore made in an attempt to develop an outcropping vein of coal, and various improvements and appliances used in that connection. Three days later

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he tendered at the proper local United States land office a declaratory statement of his intention to purchase the land under the coal land law, accompanied by the requisite filing fee, and these were regularly accepted and properly noted upon the records of the office. He was qualified to acquire the land under the coal land law, and the land was subject to acquisition thereunder, if it was coal land. The so-called mine had then been idle quite a while and was in bad condition, the timber work being down, and the tunnels and shafts being choked with fallen material. Ghost put these in proper condition, added materially to the improvements and appliances, and extended the development work much farther into the earth, all in an industrious effort to ascertain whether the land was valuable for coal. As exposed in the original workings, the outcropping vein had a total thickness of four feet, less than half of it being good coal and the balance waste. What was thus exposed was not sufficient to make the land of practical value for coal mining, and Ghost continued the development work in the belief or hope that as the vein was followed into the earth it would improve sufficiently to make the mining of it profitable. But in this he was disappointed, for the development work done by him demonstrated that the vein did not improve, and he permitted his declaratory statement to expire by limitation, without purchasing the land. In the course of his development work, and during the life of his declaratory statement, he extracted and removed from the land 1,800 tons of lump coal and 900 tons of slack coal, which he sold at \$2 and \$1.25 per ton, its value on the cars at a nearby railway station. After his declaratory statement expired, the United States brought an action against him for the alleged conversion of the coal so extracted and sold, and upon the trial, where the matters here stated appeared in evidence, the jury, under the court's direction, returned a verdict for the government for the full value of the coal at the place of sale. The present writ of error challenges the judgment rendered upon that verdict.

Various objections were made to the complaint, one count in which is said to have been for trespass upon realty and the other for conversion of personalty. Of the rulings upon these objections it suffices to say that each count adequately stated a cause of action for conversion, and nothing more, within the rule applied in *United States v. Ute Coal & Coke Co.*, 158 Fed. 20, 85 C. C. A. 302, and that, although one of them might well have been eliminated, the record affirmatively discloses that no harm resulted from the presence of both.

Error is assigned upon the striking out of portions of the defendant's answer upon the plaintiff's written motion, but that ruling is not open to review upon the present record, because, first, the motion and the ruling thereon could be made part of the record only by a bill of exceptions (*Dietz v. Lymer*, 61 Fed. 792, 10 C. C. A. 71; *England v. Gebhardt*, 112 U. S. 502, 5 Sup. Ct. 287, 28 L. Ed. 811; *Evans v. Stettinisch*, 149 U. S. 605, 13 Sup. Ct. 931, 37 L. Ed. 866; *Metropolitan R. R. Co. v. District of Columbia*, 195 U. S. 322, 25 Sup. Ct. 28, 49 L. Ed. 219; *Wike v. Campbell*, 5 Colo. 126; *Whitney v. Teichfuss*, 11 Colo. 555, 19 Pac. 507; *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321), which was not done; and, second, if that omission could be disregarded-

ed, an exception to the ruling would still be essential (*Rodriguez v. United States*, 198 U. S. 165, 25 Sup. Ct. 617, 49 L. Ed. 994), and none is shown. Counsel for the defendant, while recognizing that these omissions ordinarily would be fatal, rely upon a Colorado statute (*Mills' Ann. Code*, § 387) which declares:

"No exceptions need be taken to opinions or decisions of courts of record sustaining or overruling demurrers or written motions affecting or based on the pleadings, or overruling motions in arrest of judgment, motions for new trials or for continuance of causes, or giving, refusing or modifying instructions; but all such opinions and decisions together with the demurrers, motions and instructions, shall be taken as a part of the record, without being made such by a bill of exceptions."

But in the courts of the United States the question of when an exception need be taken, and the further question of how motions and rulings, not in themselves part of the record, may be made such, are not determined by state statutes, but by the statutes of the United States, and, if they be silent, by the common law and the practice prevailing in those courts. As well in point, we quote from *Chateaugay Ore & Iron Co.*, Petitioner, 128 U. S. 544, 553, 555, 9 Sup. Ct. 150, 152, 153, 32 L. Ed. 508, as follows:

"We are of opinion that the practice and rules of the state court do not apply to proceedings in the Circuit Court taken for the purpose of reviewing in this court a judgment of the Circuit Court, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the 'practice, pleadings, and forms and modes of proceeding' in the Circuit Court, which are required by section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), to conform 'as near as may be' to the 'practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state' within which the Circuit Court is held, 'any rule of court to the contrary notwithstanding.'

* * * * *

"The manner or time of taking proceedings as a foundation for the removal of a cause by a writ of error from one federal court to another is a matter to be regulated exclusively by acts of Congress, or, when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States."

And as equally apposite we extract the following from the opinion in *St. Clair v. United States*, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 1010, 38 L. Ed. 936:

"What is necessary to be done in a Circuit Court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in this court, depends upon the acts of Congress and the rules of practice which this court recognizes as essential in the administration of justice."

These decisions were followed and applied by this court in the recent case of *Francisco v. Chicago & A. R. Co.*, 149 Fed. 354, 79 C. C. A. 292.

Considerable evidence was offered by the defendant which tended substantially to show that in all that was done by him he acted in good faith, with the sole purpose of ascertaining whether or not the land was valuable for coal, and with intent, if it was, to purchase it under the coal land law during the life of his declaratory statement; that he

believed what he was doing was within the law and the regulations of the Land Department; that he ceased operations and permitted his declaratory statement to expire without purchasing the land because it did not prove to be valuable for coal; that in that vicinity there were some developed coal measures which influenced him to undertake and continue his development work; that what was done by him was reasonably necessary to the proper ascertainment of the character of the land, and that the price obtained for the coal extracted and sold was less than the cost of extracting it and getting it to the place of sale. All of this evidence was excluded, save that one of the defendant's witnesses who had the development work in charge was permitted to testify as follows:

"Q. I will ask you whether or not there was any work done there during the time you were superintendent that was not done for the purpose of opening and developing this property and demonstrating, if possible to do so, that it was valuable for coal. A. My instructions were to discover, if possible, whether that could be made a paying vein of coal; not to attempt to make any profit at present, but to discover if the vein and the property was worth the government price—\$20 an acre. Q. What did you do in pursuance of those instructions? A. We spent the most of our efforts in the entry, forcing that into the hill, hoping to get a more regular vein, and during the course of that work the vein would thicken up a little and we would strike those pockets where the coal would be 32 inches thick, hard coal, and, of course, we always hoped that it would get the full thickness—four feet; and then all at once it would jump back to its minimum thickness. Q. Of what? A. 12 inches. * * * Q. Was or was not it necessary in the course of this development sometimes to take out waste in order to make the tunnel or the drift passable for men? A. It all came out. Q. Was it necessary to take it out to make room? A. Yes, sir, and it was very combustible. * * * Q. Was there any work done there during the time that you were superintendent, except in opening and developing that property? A. No, there was no work done except to develop, if possible, a coal mine—a paying vein. Q. Did you ever succeed in that? A. No, sir."

The defendant himself had testified that, at the time of his purchase of the so-called mine, it was in the condition hereinbefore described, and he sought to show its condition at that time by another witness who was familiar with it, but this evidence was also excluded.

Whether or not there was error in the exclusion of the evidence so offered is the principal question presented upon this record, and its solution must be sought in the law regulating the disposal of public coal lands and in the regulations promulgated thereunder. That law is embraced in sections 2347 to 2352, inclusive, of the Revised Statutes (U. S. Comp. St. 1901, pp. 1440, 1441), and so much of it as is here material may be summarized as follows: Every qualified person, and every association of persons severally qualified, shall have the right, upon application at the proper land office, to purchase any quantity of public "coal lands," not exceeding 160 acres to an individual or 320 acres to an association (section 2347); and every such person or association who shall "open and improve any coal mine or mines" upon the public lands and shall be in "actual possession" of the same shall have a preference right to purchase the "mines so opened and improved" (section 2348). A declaratory statement or notice of every preference right must be filed in the proper land office within 60 days after the date of "actual possession and the commencement of improvements"

(section 2349), and the right must be perfected by making due proof thereof and paying the requisite purchase price within one year from the time prescribed for filing the declaratory statement or notice (section 2350). If there be conflicting claims to the same land, priority of "possession and improvement," followed by proper filing and "continued good faith," shall determine the right to purchase (section 2351).

The regulations authoritatively issued under the law and in force at the time, so far as they are material here, are as follows (1 Land Dec. Dep. Int. 547):

"(16) Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and improved, or shall open and improve, any coal mine or mines, and which they shall have in actual possession."

"(18) The opening and improving of a coal mine, in order to confer a preference-right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

"(19) These lands are intended to be sold, where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry, shows an intention to continue the development of the mines in preference to those who would purchase for speculative purposes only. * * *

"(20) In conflicts, where improvements have been or shall hereafter be commenced, priority of possession and improvement shall govern the award when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law."

"(32) Each claimant at the time of actual purchase must make affidavit as follows: * * * I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of _____ dollars, the nature of such improvements being as follows: * * * That I am now in the actual possession of said mines * * *; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal. * * *"

And not only did the regulations then in force require an applicant to make proof at the time of actual purchase that the land was "chiefly valuable for coal," but the regulations since adopted call for proof that the lands contain "workable deposits of coal." Regulations 1907, pars. 2, 10, 14, in 35 Land Dec. Dep. Int. 667. Besides, the uniform interpretation of the statute has been that it does not admit of the purchase of public lands as "coal lands" unless they contain coal of such quality and in such quantity as reasonably to warrant the conclusion that it is capable of being profitably mined or worked. *Savage v. Boynton*, 12 Land Dec. Dep. Int. 612; *Rucker v. Knisley*, 14 Id. 113; *Scott v. Sheldon*, 15 Id. 361; *Hamilton v. Anderson*, 19 Id. 168; *Davis v. Tanner*, 20 Id. 220; *McKibben v. Gable*, 34 Id. 178, 182; *Letter of Instructions*, 34 Id. 194, 203; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 325, 328, 8 Sup. Ct. 131, 31 L. Ed. 182.

With this understanding of what lands are purchasable as "coal lands," it is not difficult to appreciate the statute in other respects. Subject to limitations not now in question, it plainly invites individuals and associations to enter upon the public lands in search of coal deposits, to take possession of lands in which they find such deposits, and to expend time, labor, and means in opening and developing them, provid-

ing only that there be an honest intent or purpose to purchase the lands according to the statute, if the coal proves to be such as to give character and value to them. And, this being so, it follows necessarily that one who, within the prescribed limitations, in good faith accepts and acts upon the statutory invitation with an intent or purpose so to purchase, must be regarded as in the exercise of a privilege conferred by law, and not as a trespasser. This much is conceded in the government's brief, for it is there frankly said:

"The right to explore for coal for the purpose of ascertaining the desirability of filing upon the land is, of course, admitted, as well as the right to pursue legitimate operations in the way of discovery and development during the period of time limited by the statute."

But it is urged that the court's rulings in excluding the evidence before described should be sustained for these reasons: (1) A mine was opened and developed upon the land in question when the defendant entered thereon, and the purpose of his subsequent operations was not to ascertain whether the land was valuable for coal, and, if so, to purchase according to the statute, but to appropriate the coal to his own benefit, without any regard to the statute. (2) Even if his operations and his purpose were within the statute, he was not entitled to the coal removed in the course of those operations, unless he purchased the land according to the statute.

The first proposition might be dismissed by saying that it assumes as true a state of facts which is the very contrary of what the evidence offered and excluded tended to show. But it properly may be added that the assumption has little substantial support in the evidence admitted. It is of no moment that the original workings were spoken of as a "mine," for the undisputed evidence relating to what was disclosed in them indicates that whether or not the land was valuable for coal was still an open question when the defendant began his operations. And, while the quantity of coal removed seems large to one inexperienced in such matters, there was some evidence that its removal was reasonably essential to the proper ascertainment of the character of the vein and there was no evidence to the contrary.

The second proposition presents a question of law which seems not to have been directly determined, and yet is not difficult of solution if regard be had to the settled rules of law applied in analogous cases. An individual or association lawfully engaged in opening and developing coal deposits upon public lands is in much the same situation, as respects the coal removed in the proper course of that work, as is a tenant for life or years, as respects timber cut in rightfully clearing the land. If there be no agreement to the contrary, the tenant becomes the owner of the timber so cut and may sell it, although he is not entitled to cut for purposes of sale (1 Washburn, Real. Prop. *109; 1 Taylor's Landlord & Tenant [8th Ed.] § 353); and by analogy, there being no provision to the contrary in the statute, we think an individual or association lawfully engaged in opening and developing coal deposits upon public lands becomes the owner of the coal removed in the proper course of that work, and may sell it, although it could not be lawfully removed for purposes of sale. In principle, this conclu-

sion is sustained by controlling decisions in cases not reasonably distinguishable from this. Thus in *United States v. Cook*, 19 Wall. 591, 593, 22 L. Ed. 210, wherein was brought in question the right of Indians to cut and sell timber from lands of the United States set apart for their use and occupancy, it was said:

"This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

"The timber while standing is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land. In theory, at least, the land is better and more valuable with the timber off than with it on. It has been improved by the removal. If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then the cutting would be wrongful, and the timber, when cut, become the absolute property of the United States."

And in *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231, wherein was brought in question the right of a homestead claimant, in advance of final entry, to cut and sell timber from the land embraced in his preliminary entry, the court, while holding that such a claimant is bound to act in good faith to the government and has no right to cut the timber for purposes of sale, fully recognizes that he is entitled to clear the land for cultivation, and becomes the owner of such timber as is necessarily cut in so doing. Application of this doctrine was further made in *Stone v. United States*, 167 U. S. 178, 192, 194, 17 Sup. Ct. 778, 783, 784, 42 L. Ed. 127, where a charge to a jury containing the following was given the fullest approval:

"That any settler going upon a tract of land with that intention (to obtain title by compliance with homestead or pre-emption law) goes by invitation of the government, and with the authority to improve the land and make it fit for use; that he is authorized to cut down the timber which he finds standing there (if it incumbers the ground), so far as is necessary to do so in order to make the land fit for cultivation; that any timber that he does so cut down in good faith and for the purpose of improving the land, he being a bona fide settler intending to acquire title in accordance with the laws, is not the property of the United States, but becomes his property after being so cut down, and that he may burn it up or he may sell it for money, and if he sells it under the conditions named the man who buys it from him gets a good title and is not required to pay the United States for it afterwards; that the converse of that proposition is true, and where a man cuts timber off the public lands, unless he is a bona fide settler intending to acquire title to the lands by obedience to the laws of the United States, he does so unlawfully, and does not make himself the owner of the timber by cutting it; and that even a settler who takes up a claim on public lands, intending to perfect his right to it, has no right, until he has perfected his

claim, to cut the timber, except so far as it is necessary and reasonable to prepare so much of the lands for cultivation as he intends to cultivate.

* * * * *

"The fact that claimants to lands under the homestead and pre-emption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful."

In view of these decisions and the obvious purpose and spirit of the coal land statute, we entertain no doubt that a qualified individual or association who, in response to the government's invitation, enters upon public lands in search of coal deposits, and expends time, labor, and means in an honest effort to open and develop such deposits when found, intending to purchase the lands according to the statute, if the coal proves to be such as to give character and value to them, becomes the owner of such coal as is extracted and removed as an incident only to the reasonable prosecution of that work.

It follows that the evidence in question ought not to have been excluded, because, if true, it would have established a complete defense to the action; and, as the burden of proof in that connection was upon the defendant (see *Northern Pacific R. R. Co. v. Lewis*, 162 U. S. 366, 375-378, 16 Sup. Ct. 831, 40 L. Ed. 1002; *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 24 Sup. Ct. 33, 48 L. Ed. 106), the exclusion was highly prejudicial to him.

In directing a verdict for the government, the court seems to have proceeded upon the theory that the evidence conclusively established that the original workings which were upon the land when the defendant began his operations constituted a fully opened and developed coal mine within the meaning of the statute, but, for reasons before stated, we think that theory has little substantial support in the evidence.

The judgment must be reversed, with a direction to set aside the verdict and to grant a new trial; and it is so ordered.

UNITED STATES EXPRESS CO. v. WAHL.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1909.)

No. 1,882.

1. TRIAL (§ 143*)—QUESTIONS FOR JURY—CONFLICT OF EVIDENCE.

The testimony of a plaintiff alone, contradictory of the testimony of witnesses for defendant on a material issue of fact, is sufficient to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.*]

2. MASTER AND SERVANT (§ 264*)—ACTION BY SERVANT FOR INJURY—ISSUES AND VARIANCE.

In an action by a servant for a personal injury, where plaintiff alleged generally that a machine which he was ordered to operate was defective

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and dangerous, which condition caused the injury, the fact that he incidentally specified particular defects does not limit him to proof of such specific defects.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 865; Dec. Dig. § 264.*]

8. DAMAGES (§ 216*) — PERSONAL INJURIES — FUTURE MENTAL SUFFERING—INSTRUCTIONS.

In an action by a servant for a personal injury resulting in the loss of an eye, an instruction which permitted the jury, in estimating plaintiff's damages, to consider "humiliation resulting from the disfigurement from the loss of the eye," was not erroneous.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 555; Dec. Dig. § 216.*]

Mental suffering as element of damages, see note to Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 563.]

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

The following is the instruction referred to in the opinion:

"Then you should assess the damages which have resulted to the plaintiff from this injury, and those damages should be such as to compensate the plaintiff for the injury he has suffered, which would include the pain and suffering which he has undergone, the humiliation resulting from the disfigurement from the loss of the eye, and effects of that disfigurement in the less ability, if you find such, to earn his living in the future, and, in fact, every element that would enter into, according to your best judgment, actual compensation for the injuries, because, if the defendant is liable, it is liable for actual compensation, and to no more than actual compensation, and no less than that sum."

Howard Lewis, for plaintiff in error.

R. H. Sutphen and Robert Newbegin, for defendant in error.

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

COCHRAN, District Judge. This action was brought to recover damages for a personal injury. The injury consisted in the loss of the sight of the plaintiff's right eye. It resulted in recovery of judgment for \$4,000. The defendant brings the case here as plaintiff in error.

It operated a repair shop in the city of Defiance, Ohio, and it was whilst employed therein as common laborer and mechanic that the plaintiff below received the injury complained of. At the time thereof he was engaged in operating what is called in the evidence a "punch press." It was a machine used for punching holes in sheet metal. It consisted of an upper part, to which was fitted a steel punch, and a lower part, upon which was located a steel die. The die was on a plate upon a table which sat upon the floor. The punch was of such size that it fit exactly into the die, and it was operated vertically. In order to do the work correctly, it was essential that the die be maintained in position under the punch. This was done by means of set screws. The punch had a head, and was passed through a socket, and thereafter the socket was screwed to the upper part of the machine, bringing the head of the punch into contact with the lower end thereof. The punch and die might get out of line through the defective condition

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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of either the upper or lower part of the machine. On the occasion in question they were out of line, and by reason thereof the punch struck the side of the die, and a sliver was broken off therefrom and entered the plaintiff's right eye, causing the injury complained of. The ground upon which recovery was sought was negligence on the part of the defendant in providing an unsafe machine and in not properly warning and instructing plaintiff as to the danger. It is claimed that the judgment of the lower court should be reversed for four reasons, and we will consider them in the order in which they are presented.

1. It is claimed that the defendant was entitled to the peremptory instruction which was asked at the conclusion of all the evidence. The basis of the contention is that it appeared from the evidence that the plaintiff had such familiarity with the machine in question that he must have known of its condition and appreciated any danger arising therefrom. This, it is maintained, is made out by the affirmative testimony of the witnesses introduced by defendant as to plaintiff's familiarity therewith, and not contradicted by the testimony of plaintiff's witnesses, which, according to defendant in error, was of a purely negative character. The case of *Baltimore & Ohio R. R. Company v. Baldwin*, 144 Fed. 53, 75 C. C. A. 211, is relied on in support of this position. But, if it be conceded that the testimony of defendant's witnesses was sufficient by itself to make out such familiarity, and that of plaintiff's witnesses, apart from himself, was of purely negative character, still defendant was not entitled to the peremptory instruction. The plaintiff himself testified, and it is not controverted, that, according to his testimony, he did not have such familiarity. The conflict in the evidence due to his testimony alone was sufficient to take the case to the jury. In the *Baldwin Case* the injured party was dead and did not testify.

2. It is claimed that the lower court allowed the plaintiff to introduce evidence of defects in the machine other than that which, according to plaintiff in error, was specifically alleged in the petition, which evidence was duly objected to, and an exception taken to its admission. The specific defect which it is claimed was alleged was that the punch was loose in its socket and when in use wobbled. The other defects allowed to be proven were that the plate on which the die was placed was cracked, the set screws which kept it in place were worn, and the foundation on which the table rested, to wit, the floor, was in bad condition. In other words, the position was that the petition relied on the fact that the upper part of the machine was defective, and evidence was improperly allowed to be introduced showing that the lower part was also defective.

The petition alleges generally that the machine, at the time of the injury was in a defective and dangerous condition, and it is not contended that by itself this language would not have been sufficient to admit of evidence of any defect in the machine that was the proximate cause of the injury. But it is claimed that the force of the general language was cut down by the allegation of the specific defect stated above to such defect alone. It is said that the rule is that where a general averment of negligence or defect is followed by specific aver-

ments, or vice versa, the plaintiff will be confined to the specific averments. These authorities are cited in support of this position, to wit: Bates, Pleading (2d Ed.) vol. 3, p. 2264; Machine Company v. Stahl (Tex. Civ. App.) 54 S. W. 40; Alban v. Electric Company, 40 Wash. 51, 82 Pac. 145. It is claimed on behalf of defendant in error that the following authorities are contra: Edgerton v. Railway Company, 39 N. Y. 230; King v. Oregon Short Line, 59 L. R. A. 277, note; Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688; Transit Company v. Walton, 105 Tenn. 415, 58 S. W. 737; Abbott's Trial Evidence (2d Ed.) p. 718.

We do not find it necessary to consider these authorities closely or decide between them, if they really conflict. It is sufficient to say that we agree with the holding in Traver v. Railway Company, 25 Wash. 225, 65 Pac. 284, as follows:

"Where general allegations of negligence are followed by enumeration and averment of specific acts, the plaintiff will not be confined to proof of such specific acts, unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts."

And we are clearly of the opinion that the plaintiff did not intend to limit himself to the defective condition of the punch in the matter of wabbling. It was not put forward as a claim then made by the pleader. The petition is in bad form, and undertook to state narratively what had taken place immediately preceding the injury and the week previous, when the plaintiff had also handled the punch. It was in this connection that it was alleged that the punch was found on each occasion to wobble, and complaint was made thereof to the superintendent. When the pleader came to state his then claim he made use of the general language referred to. It is in these words:

"The machine, at the time of its operation on January 14, 1907, by the plaintiff, was in a defective and dangerous condition, liable to cause injury to the person operating it, all of which was unknown to the plaintiff, and was well known to the defendant and the said superintendent. By reason of said defective condition of said machine a sliver from the said punch was broken off and without warning struck the plaintiff in the eye, entering the eyeball and totally destroying the sight of plaintiff's right eye. Said injury was the direct result of the defective condition of said machine and the danger of its operation, and was caused by the negligence of defendant in ordering plaintiff to operate the same in its defective condition, in not repairing it, knowing the same to be defective, in not warning plaintiff of the danger connected therewith, and not explaining and instructing plaintiff in the proper operation of said machine. As a result of said negligence plaintiff was injured as aforesaid."

This language, we think, was sufficient to authorize the introduction of the evidence complained of.

3. It is claimed that the damages allowed were excessive. That was a matter for the lower court on the motion for a new trial, and we do not think the damages were excessive.

4. The remaining error alleged was in so much of the charge on the subject of damages as permitted the jury to consider "humiliation resulting from the disfigurement from the loss of the eye." This was duly excepted to. There is a contrariety in the decisions as to whether recovery can be had for such mental suffering arising as the conse-

quence of a personal injury. A leading case holding that no recovery can be had therefor is the case of *Southern Railway Company v. Hetzler*, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288. We think the matter is settled for us by the recent decision of the Supreme Court in the case of *McDermott v. Severe*, 202 U. S. 600, 610, 26 Sup. Ct. 709, 50 L. Ed. 1162. The injury complained of in that case was the loss, by a boy under seven years of age, of one of his legs below the knee. The trial court had instructed the jury that they might find a verdict "for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg." It was held that the instruction was not erroneous. Mr. Justice Day said:

"Furthermore, an objection is taken to the charge as to mental suffering, past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect. The court said: 'The jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg.' Where such mental suffering is a direct and necessary consequence of the physical injury, we think the jury may consider it. It is not unlikely that the court might have given more ample instruction in this respect had it been requested so to do. But what was said limited the compensation to the direct consequences of the physical injury."

The judgment of the lower court is affirmed.

JONES v. BRITT et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1909.)

No. 1,887.

1. GUARANTY (§ 16*)—CONSIDERATION—FORBEARANCE.

A creditor's agreement to forbear pressing a debt for a definite time or for a reasonable time, or to grant a renewal or extension, is a detriment to the creditor, and a good consideration for a stranger's contract to pay the debt.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 17; Dec. Dig. § 16.*]

2. GUARANTY (§ 16*)—CONSIDERATION—FORBEARANCE.

A peanut company being indebted to plaintiff for nuts purchased, the price of which was not then due, and believing that it would desire an extension on some portions of the indebtedness, defendants signed an agreement, reciting that they were interested in the company, and to induce plaintiff to grant such extension, and to secure the payment of the debt, defendants promised and agreed that they would pay or cause to be paid all of the notes by which the debt was evidenced, with interest at maturity at such period of extension as might be agreed on, not exceeding 12 months. *Held* that, though the instrument was in form a proposal to the creditor for an agreement that he would grant extensions as the debtor might desire within the time limited, the signing and delivery thereof completed the mutual assent necessary to the making of a bilateral contract by which the creditor agreed to extend the peanut company's obligations within the time named on consideration that defendants would pay at the end of such extension.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 17; Dec. Dig. § 16.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. GUARANTY (§ 42*)—CONTINGENT AGREEMENT.

Prior to the maturity of certain debts of a corporation, defendants, who were interested therein, believing that it would require an extension, signed an agreement reciting that to induce plaintiff to grant such extension, not exceeding 12 months, or any part thereof, and to secure plaintiff in the payment of the sums due, defendants promised that they would pay or cause to be paid each and all the notes evidencing the debt, or any renewal thereof, at maturity, or at such period of extension as might be agreed on, not exceeding 12 months. *Held*, that the guaranty was not conditional on the corporation requesting an extension, and that, plaintiff's offer to extend as agreed having been ignored, plaintiff might treat the contract to pay at maturity as breached and sue on the guaranty.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 42.*]

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

This was an action against guarantors under an instrument in writing, in these words:

"Memorandum of agreement, between the Southern Peanut Company and T. C. Britt, W. O. Britt, Geo. C. Thompson and W. F. Bradshaw, Jr., all of Paducah, Ky., parties of the first part, and J. D. Jones, of Bakerville, Tenn., party of the second part, witnesseth:

"That, whereas, the Southern Peanut Company is indebted to the said J. D. Jones in sums as follows:

"\$1,000.00, evidenced by note, due July 4, 1907.

"\$1,000.00, evidenced by note, due July 19, 1907.

"\$669.75, evidenced by note, due June 14, 1907.

"\$669.75, evidenced by note, due July 14, 1907.

"\$1,407.05, evidenced by note, due June 15, 1907.

"\$1,407.05, evidenced by note, due July 15, 1907.

"\$1,407.06, evidenced by note, due August 4, 1907.

"\$1,339.00, evidenced by note, due June 14, 1907.

"\$3,500.00, evidenced by note, due June 3, 1907.

"\$4,221.00, evidenced by note, due July 3, 1907.

"\$——, evidenced by note, due July 18, 1907.

"Aggregating \$21,704.89, evidenced by notes as above set forth; and \$1,044.20 due on account, being purchase price of 227 bags of peanuts delivered on April 24, 1907, by the steamer 'Kentucky.'

"And, whereas, the said Southern Peanut Company is unable to pay said sums or any of them at this time and desiring an extension of time on some portion thereof for possibly as much as twelve months.

"Now, the undersigned being interested in the Southern Peanut Company and for the purpose of inducing said Jones to grant such extension of time and for the purpose of securing of said Jones the payment of said sums and all of them and the payment of such sums as an extension of time may be granted upon, the said T. C. Britt and O. W. Britt and George C. Thompson and W. F. Bradshaw, Jr., hereby promise and agree that they will pay or cause to be paid each and all of said above mentioned notes or any renewal thereof, in whole or in part, and will pay or cause to be paid said above mentioned account, and they and each of them hereby jointly and severally promise and agree to hold said Jones harmless against any and all loss, principal and interest at the rate of 8 per cent. from each and every one of said debts above mentioned and guarantee and promise the payment thereof at maturity or at such period of extension as may be agreed upon between the parties, not exceeding twelve months or any part thereof.

"In testimony whereof the parties hereto have hereunto set their hands and signed this agreement in duplicate, this 25th day of May, 1907.

"T. C. Britt.

"George C. Thompson.

"W. F. Bradshaw, Jr.

"W. O. Britt.

"J. D. Jones."

By the amended petition it was averred that the guaranty "was delivered to him by the defendants and accepted and agreed to by him on the day of its date, immediately upon its execution, and thereafter acted on and relied on by petitioner." It is also, in substance, averred that neither the debtor company nor any of the guarantors had ever requested any extension, although plaintiff stood ready at all times, within the limit of one year, to grant such extension as might be desired, and so notified the defendants on June 18, 1907, and again on August 12, 1907, in writing; but that defendants neither replied to nor acknowledged this notification, nor in any way indicated a desire for an extension or forbearance. It was then averred that all of the said secured items of indebtedness were long past due and wholly unpaid. To the original and amended petitions the defendants filed a general demurrer, "because same does not in law state any cause of action." This demurrer was sustained, and the petition dismissed.

John A. Pitts, for plaintiff in error.

J. B. Daniel, for defendants in error.

Before LURTON and SEVERENS, Circuit Judges, and TAYLER, District Judge.

LURTON, Circuit Judge (after stating the facts as above). The question arises upon the construction of the contract of guaranty. The promise of one to pay the debt of another must not only be in writing, but it must rest upon a good consideration, which may be one passing directly between the guarantee and the guarantor, or some benefit or advantage to the principal debtor or disadvantage to the creditor. Thus, an agreement to forbear pressing a debt for a definite time, or for a reasonable time, or to grant a renewal or extension, is a detriment to the creditor, and is a good consideration for a contract by a stranger to pay the debt of the debtor. *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686; *Oldershaw et al. v. King*, 2 Hurl. & Nor. 517; *Hoffmann v. Mayaud*, 93 Fed. 171, 180, 35 C. C. A. 256. The facts averred show that there has been forbearance by the creditor. The account was due when the instrument in suit was executed and the notes of the debtor began to fall due, June 3, 1907, and at intervals down to August 4, 1907. No suit was brought until three months after the last note had matured, and the proffers of extension had been absolutely ignored and plaintiff's letters unacknowledged. This forbearance, according to the averments of the petition, was due to the acceptance by the creditor of the contract of guaranty, and was performance upon his part. But if such forbearance upon his part was without any agreement by him that he would forbear, it is not in law a good consideration for the promise of the defendants to pay the debts of the debtor. "There must be a promise for a promise." *Hoffmann v. Mayaud*, cited above.

The promise of the guarantors is plain enough. It is that "they will pay or cause to be paid each and all of said above mentioned notes or any renewal thereof, in whole or in part, and will pay or cause to be paid said above mentioned account, * * *" and that such payment shall be made "at maturity or at such period of extension as may be agreed on between the parties, not exceeding twelve months or any part thereof." But it is said that the instrument sued upon is unilateral or nonmutual, in that it does not show any promise by

the creditor to forbear. That it does not in so many words include an express promise by the creditor to grant the forbearance which it is the declared purpose of the defendants to secure to the extent desired may be conceded. The form of the instrument is more in the character of a proposal to the creditor for an agreement that he will grant such extensions from time to time as the debtor might desire within the limits of the time mentioned. Still, it cannot be regarded as an unaccepted proposal. His agreement to allow such extensions as might be desired and acceptance of the proposal is necessarily implied from his signing as the second party to the contract, from the delivery of one of the signed duplicates to him, and his acceptance of such delivery. Thus, the agreement to accept the proposal and grant the forbearance which might be requested by the debtor was contemporaneous with the guaranty itself, and the creditor was not called upon to do anything until requested to perform his part of the agreement by granting such indulgences as the debtor might ask within the time limit prescribed. *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686. This signing and delivery of the instrument completed the mutual assent necessary to the making of an agreement. By such contemporaneous execution there came into force a bilateral contract, under which the guarantors secured to the debtor an option and legal right to extend its obligations within the limit of time named, upon the consideration that they would pay the debts of the debtor to the creditor, either as they matured, or "at such period of extension as may be agreed upon between the parties." But it is urged that, if there was an assent by both guarantee and guarantors to the instrument sued upon, the promises of the guarantors to stand for the debts of the debtor was not absolute but contingent. That is to say, it should be construed as if the guarantors had said to the guarantee:

"The corporation in which we are interested may not be able to meet its obligations as they mature, and may desire to renew and extend the time of payment. Now, if that shall happen, and you shall, in your discretion, permit extensions not exceeding twelve months, we will answer for the payment of the indebtedness you now hold against it."

Of course, if the liability of the guarantors is made to depend upon the actual granting of extensions as they should be requested by the debtor, the judgment of the court below in sustaining the demurrer was correct. Admittedly, if the creditor had refused to grant extensions, if requested by the debtor, he could not enforce the contract against the other party. In that sense there was a contingency. But that is not the defense. The plaintiff offered to perform. The debtor and his guarantors were requested to indicate such extensions or forbearance as they desired. They stood silent. The debts were neither paid, nor extensions nor indulgences asked. The creditor, nevertheless, waited until the last debt had been due for months and then sued, not the debtor, but the guarantors, upon their agreement to pay its debts at the date of their original or extended maturity, if extended by request.

We are unable to accept an interpretation of this agreement which makes the liability of the guarantors depend upon future forbearance at request of the debtor. That was not the real intent and meaning

of the parties as gathered from a view of the entire instrument and the surrounding circumstances. Instruments of guaranty and letters of credit have long been most useful forms of commercial obligations. Their usefulness and trustworthiness should not be lessened by narrow rules of construction. Let us look to the whole of the instrument and ascertain the real meaning of the parties.

We must begin with the significant fact that the guarantors were themselves "interested," as the contract states, "pecuniarily interested," as the petition avers, in the debtor corporation. Two, if not more, of these were active officers and managers. Only one of the debts which the parties were preparing to take care of was due, and that was a recent open account. The others were promissory notes not yet mature, which would fall due at different dates between June 3d and August 4th, following the date of the agreement. Next, it is recited that the corporation was then desirous of "an extension of time on some portion thereof for possibly as much as twelve months," and that:

"For the purpose of inducing said Jones to grant such extensions and in order to secure said extension of time, and for the purpose of securing to said Jones the payment of said sums, and all of them, and the payment of such sums as an extension of time may be granted upon, * * * they * * * hereby promise and agree that they will pay or cause to be paid," etc.

It was, apparently, not expected that extensions would be asked upon all of the items of debt. Forbearance upon all might be asked at the option of the debtor. But it is plain that the promise of the guarantors included the unextended as well as the extended paper. The plain purpose, we think, which the parties had in mind was to prepare for the exigency which confronted the corporation of bankable paper falling due in the future which at the time they saw no way to meet. The plainest business principles would induce those interested to provide for such a contingency by securing from the creditor in advance an obligation that he would renew or extend, or forbear as he should be requested, all or any part of his claims. The intent and effect of the instrument was to secure an option to the debtor to have all or any part of its paper extended for a time not exceeding one year. The guaranty of the debts of the debtor was the consideration for this option, and its validity in no way depends upon whether the debtor should avail itself of the option or not.

The consideration which passed to the guarantors may have been pecuniary, if, as averred, they were financially interested in the debtor corporation. But aside from this, the agreement to forbear, or extend or renew, was a detriment to the creditor, and this alone is a good consideration at law. *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686; *Oldershaw v. King*, 2 Hurl. & Nor. 517; *Hoffman v. Mayaud*, 93 Fed. 171, 35 C. C. A. 256; *Pulliam v. Withers*, 8 Dana (Ky.) 98, 33 Am. Dec. 479.

The promise that he would extend as requested within the limit of time mentioned was absolute and upon a good consideration, and was an obligatory promise. If he had pressed the debtor and not indulged on request, as he was obligated to do, the guarantors would have been released, and a right of action would also lie for the breach.

The promise to pay was upon the consideration of an obligatory promise for such extensions as might be requested. If no indulgence was asked, the promise to answer for the debts of the company, being absolute and not contingent upon a request, was still enforceable.

Neither was the action premature. The last of the debts fell due in August, 1907. The action was brought in November, following. The promise was to pay "at maturity or at such period of extension as may be agreed on between the parties, not exceeding twelve months or any part thereof." In June, and again in August, the plaintiff in error addressed the debtor and the guarantors, and proffered extension to any date within 12 months from date of contract. These letters went unanswered, and he had a right to treat the contract to pay at maturity as breached and start his suit.

FRANKLIN v. STOUGHTON WAGON CO.

In re FRANKLIN.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1909.)

No. 2,966 (94).

1. BANKRUPTCY (§ 306*)—DECISIONS REVIEWABLE BY APPEAL—CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.

The decision of a District Court on the petition of an adverse claimant to reclaim property taken possession of by a trustee in bankruptcy is reviewable by the Circuit Court of Appeals on appeal under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 306.*

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

2. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD BY BANKRUPT AS BAILEE—CONSTRUCTION OF CONTRACT.

A contract, under which a wagon company shipped wagons to a dealer to be sold so as to realize to such dealer the freight, expenses, and a commission above listed price to be settled for at such price when sold either in cash or in purchasers' notes guaranteed by the dealer, and which provided that until sold the wagons should remain the property of the company and subject to shipment on its order at any time on repayment of actual freight and charges paid thereon, was one of bailment and not of conditional sale, and on the bankruptcy of the dealer the company had the right to reclaim the wagons remaining unsold from his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

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

On Petition for Review.

Robert J. Boone, for appellant.

William B. Moore, for appellee.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

RINER, District Judge. This case is here on appeal from a decision of the District Court affirming the order of a special commis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sioner, which directed the return of certain personal property in the hands of a trustee in bankruptcy, and directing the referee to allow, as unsecured, the claim of the Stoughton Wagon Company for \$91.50, when properly proved, against the estate, and also upon a petition for review. By agreement of the parties, both cases are to be considered upon the same record.

On the 28th of December, 1907, the Stoughton Wagon Company and George W. Hammer & Co. entered into a written contract for the sale, on commission, of wagons manufactured by the Stoughton Wagon Company to George W. Hammer & Co. upon the terms and conditions set out in the contract. Three of the wagons were disposed of by George W. Hammer & Co., leaving 13 in controversy in this proceeding, together with the claim of \$91.50. It appears from the record that George W. Hammer was the party of the second part to this contract, although it is signed, "George W. Hammer & Co." While there is no explanation found in the record as to how the contract came to be signed George W. Hammer & Co., we presume it was signed in that form merely as a trade name; it being conceded by both parties that George W. Hammer is the only party interested as party of the second part to the contract. Subsequent to the making of the contract and the delivery of the wagons, George W. Hammer was adjudged a bankrupt, and his property, together with the property in controversy here, was taken possession of by the trustee in bankruptcy. Thereafter, on the 19th of June, 1908, the Stoughton Wagon Company filed its petition of intervention in the bankruptcy proceeding, claiming to be the owner of the wagons in controversy and requested that the same be delivered to it. The court referred the matter to a special commissioner, who, after taking the testimony, reported that the wagon company was entitled to the possession of the thirteen wagons held by the trustee and to have its claim for \$91.50 allowed by the referee as an unsecured claim. The court approved the report and recommendation of the special commissioner, and an order was entered in conformity therewith.

The contract between the Stoughton Wagon Company and George W. Hammer & Co. is as follows:

"This agreement made and entered into this 28th day of December, 1907, by and between Stoughton Wagon Company, Stoughton, Wisconsin, party of the first part, and George W. Hammer and Company, Muskogee, Oklahoma, party of the second part, witnesseth:

"That said first party for and in consideration of the stipulation and agreements herein contained have this day appointed and by these presents do hereby appoint the second party for their authorized agent at Muskogee, Oklahoma, for the sale, on commission, of the goods and articles of merchandise designated hereon, or enumerated and described on schedules or orders of said second party, to be attached hereto as hereinafter provided.

"The party of the first part agrees to furnish on the orders of the said second party so long as they have the goods in stock to fill same during the continuance of this contract the goods and articles of merchandise designated hereon or on schedules or orders hereinafter made; said schedules or orders to set forth prices of goods, the place of delivery, and when properly signed by said party of the second part and accepted by Stoughton Wagon Company, to be attached to and made a part of this contract, reference being made to same on the face thereof, subject to the following conditions, agreements and obligations: The party of the second part agrees as follows:

"(1) To receive from the transportation companies and pay all transportation charges on same, the goods and articles of merchandise sent under terms of this contract.

"(2) To furnish proper warehouse room for all goods and articles of merchandise sent under terms of this contract.

"(3) To pay all taxes, license, rents, and all other expenses incidental to the safe keeping and sale of said goods and articles of merchandise, and to waive all claims against Stoughton Wagon Company for such expense.

"(4) To keep said goods and articles of merchandise insured for their full value at expense of said second party, in the name and for the benefit of Stoughton Wagon Company, in companies provided for them, and to turn over the policies to them, the said Stoughton Wagon Company and in case of any neglect or failure to insure as herein provided, to become personally responsible for any loss or damage that may occur to said goods while in the custody of said second party.

"(5) To keep samples of said goods and articles of merchandise set up in salesrooms suitable for the purpose and to make all reasonable effort to sell them.

"(6) To sell the goods and articles of merchandise sent under this contract for enough more than the prices set opposite said goods in the orders and schedules attached to pay all freight, taxes, expenses and commissions for doing the business, it being mutually understood that the prices set opposite said goods and articles of merchandise are to be furnished, and are the prices which said second party agrees to pay Stoughton Wagon Company for same, as per terms of this contract. The full profits, commissions and expenses of said second party for doing the business to be the difference between said prices received from the sale of said goods.

"(7) To sell all goods and articles of merchandise furnished on this contract, subject to the manufacturers' regular printed warranty, and to settle all claims for breakage and defects in accordance therewith, and agrees not to part possession with any of said goods until the full and satisfactory settlement shall have been made by purchaser, and will not allow under any circumstances any of said goods to be taken away before such settlement has been made.

"(8) The second party further agrees to make out and render to the said first party on the first day of each month, and oftener if requested, a full and complete report of sales made the month previous, or since the last report made, said reports to show the amounts received in cash from such sales, and the amount sold on time; and to accompany said report with a full settlement for all goods so reported sold said settlement to be made with cash, less 5 per cent. for all cash sales and with promissory notes at four months secured by good collateral paper bearing 7 per cent. interest after maturity. And the second party further agrees that when purchaser's notes are given in settlements for sales made as herein provided, said notes will be on blanks furnished by Stoughton Wagon Company and are to be taken only from good prompt paying purchasers. And the second party further agrees to indorse all such notes given to said first party in the following manner, to wit: 'For value received, I or we hereby guarantee the payment of the within note at maturity or any time thereafter and waive demand, protest, notice of protest and nonpayment.'

"(9) To furnish Stoughton Wagon Company (in case any failure of said second party to pay at maturity any obligation or evidence of debt arising under the contract) satisfactory security to secure the payment of all obligations or evidence of debt then outstanding, arising under the contract, whether due or not.

"It is further agreed and understood that the title to and ownership of all goods and articles of merchandise shipped said second party or at present on hand under terms of this contract, and all proceeds of the sales of the same, shall remain vested in the said first party, and be the sole property of same, subject to their order until full payment shall have been made for same as herein provided.

"It is further agreed that this contract is to remain in force for one year from date, unless just cause is found for annulling same. The party of the second part agrees to give to the party of the first part note for net amounts

"A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its reversion in the seller is subject to a failure of the buyer to comply with a condition subsequent. An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale. * * * The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment."

The contract before us is not a contract in which the consignee can sell at any price or at any terms he chooses, but contains a plain provision that the goods are at all times subject to the order of the wagon company until they are sold, and we think there is no doubt about the right of the wagon company under the contract to require the goods returned. It provides:

The agent is "to sell all goods and articles of merchandise furnished on this contract subject to the manufacturers' regular printed warranty and to settle all claims for breakage and defects in accordance therewith, and agrees not to part possession with any of said goods until a full and satisfactory settlement shall have been made by purchaser, and will not allow, under any circumstances, any of said goods to be taken away before such settlement has been made."

And it is further provided in the contract:

"That the title to and ownership of all goods and articles of merchandise shipped to said second party, or at present on hand under terms of this contract, and all proceeds of sales of same shall remain vested in the said first party, and be the sole property of same, subject to their order until full payment shall have been made for same as herein provided. * * * The second party hereby agrees to forward any goods received on its contract at any time, and as said Stoughton Wagon Company, or their authorized agents may direct, charging only actual freight and drayage and a reasonable transfer charge, collecting same from transportation company as back charges."

Under these provisions we think the wagon company retained full control of the disposition to be made of the wagons, in that it could direct the goods returned to the house or shipped elsewhere as desired, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money or its equivalent for the goods delivered with no obligation to return. *Metropolitan National Bank v. Benedict Co.*, 74 Fed. 182, 20 C. C. A. 377; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214; *Hunt v. Wyman*, 100 Mass. 198; *Mower & Reaper Company v. Raynor*, 38 Wis. 119; *Union Stockyards & Transfer Co. v. Western Land & Cattle Co.*, 59 Fed. 49, 7 C. C. A. 660; *Weir Plow Co. v. Porter*, 82 Mo. 23; *In re Columbus Buggy Co.*, 143 Fed. 859, 74 C. C. A. 611; *In re Pierce*, 157 Fed. 757, 85 C. C. A. 14; *In re Galt*, 120 Fed. 64, 56 C. C. A. 470.

In the case last cited the court said:

"It was not contemplated that Galt should ever own these wagons. He was to sell them to others for the company; the notes being guaranteed by Galt. This was a *del credere* commission, and not a sale. The company could compel a return of the goods not sold. Galt had not the option to pay for them in money. Even with respect to the goods unsold within the 12 months, the option for their return or payment was with the company, and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods as in the case of a sale."

The provisions of the contract before the court in that case were in substance and indeed almost in the identical words of the contract we are considering. The contract must be read in its entirety, and its construction is not to be gathered from any separate provision of it. It is from the whole contract that the intention of the parties is to be gathered, and a careful examination of the agreement before us in the light of legal principles compels us to the conviction that it was a contract of bailment or agency only, and that the title to these wagons in the hands of George W. Hammer & Co. at the time of the adjudication in bankruptcy did not pass to the trustee. The trustee, of course, has such rights and such rights only as the bankrupt had at the time of the adjudication. As was stated by Judge Hook, in *Re Pierce*:

"That the trustee in bankruptcy has no greater right or title than the bankrupt had has been so often declared in cases like this and in cases of conditional sale that citations are unnecessary."

It follows that the order and decree of the District Court must be affirmed, and it is so ordered.

NASHVILLE RY. & LIGHT CO. et al. v. BUNN et al.

(Circuit Court of Appeals, Sixth Circuit. April 9, 1909.)

No. 1,865.

1. APPEAL AND ERROR (§ 5*)—MODE OF REVIEW—NATURE OF PROCEEDINGS.

A receiver having been appointed for a street railway company in mortgage foreclosure proceedings, defendants in error filed intervening petitions claiming damages for personal injuries, and were awarded in that proceeding judgment for damages by a special master which under state statute were entitled to preference out of the fund arising from a foreclosure sale. *Held*, that such proceedings partook of the nature of the suit in which they were conducted, and were therefore in equity and not of law, so that the judgments were reviewable on appeal only, and not by writ of error, as provided by Rev. St. §§ 691, 692 (U. S. Comp. St. 1901, p. 566).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 5.*]

2. RECEIVERS (§ 174*)—ACTIONS—JURISDICTION.

Under Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 554, as corrected by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), providing that actions against a receiver, concerning the property in his possession, may be prosecuted in any court having jurisdiction, without leave of the court appointing the receiver, and persons injured by the operation of a street railway by a receiver appointed in mortgage foreclosure proceedings in a federal court were not bound to apply for an allowance of damages in such proceedings, but could reduce their claim to judgment in a state or other court having jurisdiction.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 174.*]

ACTIONS by and against receivers of federal courts, see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.]

3. JURY (§ 14*)—RIGHT TO TRIAL BY—FORECLOSURE OF MORTGAGE.

Where, in proceedings for the foreclosure of a street railroad mortgage, persons injured by the operation of the road by a receiver intervened for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an allowance of damages, the court could have submitted the question of negligence and damages for a jury, but was not bound to do so, as the verdict would be advisory only.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 14.*]

4. EQUITY (§ 377*)—"FEIGNED ISSUE."

A "feigned issue" is an issue submitted to the jury in an equity case for the assistance and advice of the court.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 377.*]

For other definitions, see Words and Phrases, vol. 3, p. 2716.]

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

R. F. Jackson, for plaintiff in error.

Before LURTON and SEVERENS, Circuit Judges, and TAYLER, District Judge.

LURTON, Circuit Judge. This is a writ of error to reverse judgments in favor of the defendant in error and against the plaintiffs in error. These judgments were for personal injuries sustained by the defendants in error through the alleged negligent operation of the street railway company by its receiver. The receiver had been appointed under a mortgage foreclosure proceeding, and the defendants in error filed interventions claiming damages, and that their claims, under a Tennessee statute, were entitled to preference over the mortgage under foreclosure. The negligence charged was denied, as well as any right of preference out of the proceeds of the mortgaged property.

The issues thus made up were referred by the court to H. M. Doak as special master, with directions to take proof and report same, together with his finding of law and fact, to the court. The master, upon the evidence and the law, reported against the plaintiffs in error, awarding to Mary Bunn, \$8,000, and to J. W. Bunn \$1,500, and that these damages were entitled to preferences out of the fund arising under the foreclosure sale. The case is now heard upon a motion to dismiss the writ of error as not the proper proceeding for review of the judgments complained of.

The cause in which the defendants filed their intervening petition was one "in equity," as distinguished from an action at law, and the judgments or decrees in that case, whether upon matter involving common-law principles or equity jurisprudence, are judgments or decrees rendered in an equity case. That the subject-matter of the interventions was a tort does not deprive the judgment of its status as a judgment in an equity case, for the character of the principal suit gives color to every judgment and decree pronounced in that case. Having jurisdiction over the property of the railway company through the mortgage foreclosure proceeding and the appointment of a receiver, the Circuit Court drew to itself jurisdiction over all claims against the property in its custody, irrespective of any other ground of federal or equity jurisdiction, and over all suits against its receivers for demands growing out of his operation of the property. This jurisdiction of actions against receivers is in equity, exclusive of all other courts, unless leave

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

to sue in some other court is obtained, and a suit without such permission is a contempt. *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796.

With respect to the exclusiveness of this jurisdiction in suits growing out of the operation by a receiver of the property in his possession, Congress has enacted that such suits may be brought in any court, having jurisdiction otherwise, without leave of the court appointing the receiver. Act March 3, 1887, c. 373, § 3, 24 Stat. 554, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433, 436 (U. S. Comp. St. 1901, p. 582); *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. Thus the defendants in error were at liberty to bring their suit to reduce their claim to a judgment in a state court had they seen fit, or they might intervene in the foreclosure suit and obtain not only a judgment for damages, but have their status against the fund in the custody of the court determined in a single proceeding. That such an intervention was a proceeding in equity, irrespective of the character of the claim presented, is beyond question. It was within the discretion of the court to have called a jury and submitted to it the question of negligence and damages. Such a practice is well settled. But in that event the verdict of the jury would have been advisory, and might have been disregarded and judgment rendered upon the evidence without regard to the verdict. *In re Neasmith*, 147 Fed. 160, 163, 77 C. C. A. 402; 2 *Daniell's Chan. Pleading & Pr.* (5th Ed.) 1148; *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *Idaho & Oregon Land Co. v. Bradbury*, 132 U. S. 509, 516, 10 Sup. Ct. 177, 33 L. Ed. 433; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150; *Flippen v. Kimball*, 87 Fed. 258, 31 C. C. A. 282. This is precisely what was done in *Kohn v. McNulta* and *Flippen v. Kimball*, cited above, the proceedings being interventions by employes of the court's receiver injured while in his service. So the chancellor may send an issue involving a purely legal question to a court of law to be there tried by a jury. But even in such a case applications for a new trial are not made to the court of law, but must be made to the chancery court, after the proceedings are certified back. *Johnson v. Harmon*, 94 U. S. 371, 378, 24 L. Ed. 271. Where a verdict has no obligatory effect, as is the case with one in equity, there is no use for a bill of exceptions, except in so far as it may be useful upon a motion for a new trial. Indeed, the issue so submitted to a jury called in an equity case is called a "feigned issue," because of its purely advisory character. A court of equity not infrequently finds itself called upon to determine purely legal questions, sometimes arising under the matter of the original bill and sometimes arising upon an intervention. The practice in both is the same. The chancellor may call a jury or may refer the matter to a master or hear it himself. A bill of exceptions for the purpose of reviewing the trial before the jury in a superior court is an anomalous piece of useless lumber.

Manifestly, it follows that the subject-matter of a judgment or decree in a court of equity has no function in determining the method of revising such judgment. It is, after all, nothing more or less than a judgment or decree in an equity case, and can be revised only by the

procedure under which judgments and decrees of an equity court are revised.

The plaintiffs in error have resorted to a writ of error. Is it possible that a writ of error will lie to revise a judgment or decree in "cases in equity"? Aside from a rehearing allowed by the chancellor in his discretion, and the ancient practice under bills of review, there is but one method of revising the judgments and decrees of a court of equity, and that is by an appeal. An appeal is itself a rehearing by a superior court upon fact and law. 2 Daniell's Chan. Pleading & Pr. (5th Ed.) 1459. The distinction between a writ of error, which brings up the record in an action at law for a review of questions of law only, and an appeal, which involves a rehearing upon both the facts and law, is vital. These remedies have their origin and functions in the inherent difference between courts of law and courts of equity, differences which are recognized in the Constitution of the United States and the laws of Congress. The writ of error is a common-law writ, and searches the record for errors of law in the final judgment of a common-law court. If error is found, the judgment awards a venire facias de novo. *Parsons v. Bedford*, 3 Pet. 446, 448, 7 L. Ed. 732. The appeal is a procedure which comes to us from the civil law along with the fundamentals which go to make up the jurisprudence of a court of equity. Its office is to remove the entire cause, and it subjects the transcript to a scrutiny of fact and law, and is, in substance, a new trial. Notwithstanding the constitutional recognition of the difference between actions at common law and suits in equity, and the fundamental distinction between a review by appeal and by writ of error, our original judiciary act confounded the two methods of review by providing that judgments of Circuit Courts in equity and admiralty cases and in actions at law should be reviewed by the Supreme Court only upon writs of error. This common-law procedure applied to equity cases operated to deprive the Supreme Court of all power to review the facts, and limited that court to correction of errors of law upon facts found. See Act Sept. 24, 1789, §§ 19, 22-25, 1 Stat. 83-85; *Wiscart v. D'Auchy*, 3 Dall. 327, 1 L. Ed. 619; *Jones v. La Valette*, 5 Wall. 579, 18 L. Ed. 550; *Dower v. Richards*, 151 U. S. 658, 663, 14 Sup. Ct. 452, 38 L. Ed. 305. It was not until Act March 3, 1803, c. 40, 2 Stat. 244, that the remedy by appeal was substituted for the writ of error in cases in equity. *The San Pedro*, 2 Wheat. 132, 4 L. Ed. 202. Since that time these methods of review have been exclusive of each other, and a decree or judgment in a case in equity can come here only by appeal, and a judgment in an action at law must come by writ of error. Thus section 691, Rev. St. (U. S. Comp. St. 1901, p. 566), provides that "final judgments, * * * in civil actions" may be re-examined and reversed or affirmed "upon a writ of error." On the other hand, section 692, Rev. St., provides "that an appeal shall be allowed * * * from all final decrees of any Circuit Court in cases in equity."

If an intervention in a case in equity is a proceeding in equity, and the judgment thereon is a judgment in a case in equity, the judgments here complained of can be reviewed only upon an appeal, and the writ of error must be dismissed. That the practice is so settled is clear. If

there are few direct expressions upon the subject, it is because the practice has been substantially one way. The learned attorneys for the plaintiffs in error have cited and relied upon *Rouse v. Hornsby*, 67 Fed. 219, 14 C. C. A. 377. In that case a judgment upon an intervening petition in a foreclosure suit for a personal injury was taken up both by appeal and writ of error. The court dismissed the appeal, and sustained the writ of error. The judgment does not meet with our approval. Neither does it appear that the opinion upon that point met with the approval of the Supreme Court. It was taken upon error to that court, and dismissed as a final judgment under section 6 of the judiciary act of March 3, 1891, c. 551, 26 Stat. 1085 (U. S. Comp. St. 1901, p. 1296), as not subject to review by writ of error or appeal. Referring to the procedure upon which the Circuit Court of Appeals for the Eighth Circuit had taken jurisdiction, the court said:

"As the final order below was affirmed by the Circuit Court of Appeals, we are not called upon to entertain jurisdiction simply because that affirmance was entered on the writ of error rather than the appeal." *Rouse v. Hornsby*, 161 U. S. 588, 16 Sup. Ct. 588, 40 L. Ed. 817.

In *Eddy v. Letcher*, 57 Fed. 115, 6 C. C. A. 276, the same Circuit Court of Appeals heard and affirmed a similar case upon an appeal. This opinion is not referred to in *Rouse v. Hornsby*. In *Central Trust Co. v. Madden*, 70 Fed. 451, 17 C. C. A. 236, the Court of Appeals of the Fourth Circuit entertained jurisdiction upon an appeal from a judgment for personal injuries in favor of an intervener in a mortgage foreclosure suit, the opinion being by Fuller, C. J. In *Flippen v. Kimball*, 87 Fed. 258, 31 C. C. A. 282, the same court entertained an appeal from a judgment for personal injuries in favor of an intervener who had been hurt while in the service of the court's receiver. There had been a jury, who returned a verdict for the intervener. The court disregarded this verdict and dismissed the petition. The court held that the verdict was advisory only, and that it was for the trial court to determine its force and effect. The judgment was affirmed.

In *Kohn v. McNulta*, 147 U. S. 238, 240, 13 Sup. Ct. 298, 3 L. Ed. 150, there was a judgment for a personal injury in favor of an intervener in a mortgage foreclosure case. The Circuit Court submitted the issues to a jury, who found his damage to be \$10,000. The court for itself examined the evidence, set aside the verdict, and dismissed the petition. The intervener carried the case by appeal to the Supreme Court. That court said:

"So far as the mere matter of procedure is concerned, there was obviously no error. The intervention was a proceeding in a court of equity, and that court may direct a verdict by a jury upon any single fact, or upon all the matters in dispute; but such verdict is not binding upon the judgment of the court. It is advisory simply, and the court may disregard it entirely, or adopt it either partially or in toto."

The conclusion we reach is that the writ of error must be dismissed, and it is accordingly so ordered.

SHOOK et al. v. DOZIER.

(Circuit Court of Appeals, Sixth Circuit. April 12, 1909.)

No. 1,807.

APPEAL AND ERROR (§ 5*)—MODE OF REVIEW—INTERVENTION IN EQUITY PROCEEDINGS.

Where a judgment creditor of a street railway company, whose property was in the custody of a receiver, intervened to have the judgment paid out of the fund in the custody of the court in preference to the claims of the mortgagees, the intervention partook of the character of the original case, and hence a determination was reviewable by appeal and not by a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8; Dec. Dig. § 5.*]

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

Robert F. Jackson, for plaintiffs in error.

Before LURTON and SEVERENS, Circuit Judges, and TAYLER, District Judge.

LURTON, Circuit Judge. This is a writ of error to review a judgment in favor of an intervener who had recovered a judgment against a street railway company whose property had passed to a successor consolidated company and was in the custody of a receiver appointed by the court below in a mortgage foreclosure suit. The object of the intervention in the principal case was to have the judgment paid out of the fund in the custody of the court below in preference to the claims of mortgagees. The remedy was by appeal, and the writ of error must be dismissed. The case is governed by that of Nashville Railway & Light Co. v. Bunn et al. (opinion in which is handed down with this) 168 Fed. 862. It is so ordered.

JEFFERSON HOTEL CO. v. BRUMBAUGH et al.
ARENTS v. MEREDITH & COCKE et al.

(Circuit Court of Appeals, Fourth Circuit. March 12, 1909.)

Nos. 852, 888.

1. EQUITY (§ 399*)—REFERENCE TO MASTER—MASTER'S AUTHORITY.

Parties to an equity cause may, by a consent decree, constitute a special master an arbiter to settle specified matters in dispute.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 399.*]

2. EQUITY (§ 409*)—REFERENCE TO MASTER—FINDINGS—EFFECT.

In a suit to enforce a mechanic's lien, the bill prayed that defendants, except a hotel company, be compelled to appear and set up their rights, claims, and liens, and that the court settle the rights of the defendants to a fund and the property in question. In response to such prayer, the hotel company charged all its codefendants to be subcontractors under plaintiff,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

but declared itself unadvised as to the amount, nature, or extent of their claims or liens, and asked that the other defendants prove their accounts and their respective priorities before one of the masters of the court. *Held*, that such prayer did not bind the hotel company to abide the master's judgment concerning the matters in controversy between it and plaintiff, so that the court on the filing of a master's report was entitled to review the master's findings of fact and law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 921; Dec. Dig. § 409.*]

3. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS BY MASTER—CONCURRENCE BY COURT.

Where a cause is referred to a master to report his findings of fact and conclusions of law, the master's findings and conclusions concurred in by the court will be sustained on appeal unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4017; Dec. Dig. § 1022.*]

4. CONTRACTS (§ 287*)—BUILDING CONTRACTS—FINAL ARCHITECTS' CERTIFICATES—CONCLUSIVENESS—BURDEN OF PROOF.

Where a building contract constituted the architects the owner's supervising agents, but did not in terms authorize the architects to issue a conclusive final certificate, an architect's final certificate was only prima facie evidence that the work had been performed according to the contract, and placed the burden of proof on the owner to impeach the same for error, mistake, omission, or concealment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1330, 1331; Dec. Dig. § 287.*]

5. CONTRACTS (§ 287*)—SUBSTANTIAL PERFORMANCE.

On the completion of a contract for the reconstruction of part of a hotel, the architect's certificate recited that there was due the contractor \$17,841, from which the owner was entitled to deduct \$3,631.63, of which \$956.71 was for bills assumed by the owner for the contractor and \$200 was for defective plastering, leaving \$2,274.92 or less than 5 per cent. of the contract price, representing the value of uncompleted work. *Held* that, though the owner was entitled to credit for such sum, it was not sufficient to show that the contract had not been substantially complied with, so as to justify the owner in refusing to pay the contractor the balance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1330, 1331; Dec. Dig. § 287.*]

6. DAMAGES (§ 85*)—PENALTY—BUILDING CONTRACTS—DELAY.

Where the owner of a building in process of erection let a large amount of the work and the furnishing of materials to independent contractors, and their delay caused part of the general contractor's delay, the owner was chargeable with the independent contractor's delay, and the general contractor would be relieved from liability for a contract penalty for delay, as the court would not attempt to apportion the same.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 184; Dec. Dig. § 85.*]

7. PRINCIPAL AND AGENT (§ 171*)—AUTHORITY OF AGENT—ESTOPPEL TO DENY.

Where the owners of a building in process of erection permitted the architects, who were the owners' supervising agents, to contract for extras without protest, and, after the extras had been inserted, continued in possession and enjoyment thereof, the owners could not thereafter deny the general authority of the superintendents to order them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

8. CONTRACTS (§ 232*)—BUILDING CONTRACTS—EXTRAS—ORDER IN WRITING—WALVEB.

Where the owner of a building retained possession and the enjoyment, without protest of extras orally ordered of the contractor by the superintendent, and the owner was estopped to deny the general authority of the superintendents to give the order, a contract provision that all extras should be ordered in writing was waived.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 232.*]

9. ATTORNEY AND CLIENT (§ 182*)—SERVICES OF ATTORNEY—FUND PROCURED BY SERVICES.

A contractor for the reconstruction of a part of a hotel having substantially performed, but not having secured a large part of the price because of a controversy between him and the hotel company, and being a nonresident insolvent, certain attorneys instituted a suit in the contractor's name and established the contractor's claim against the solvent hotel company, which inured solely to the benefit of subcontractors and creditors of the contractor. *Held*, that the attorneys were entitled to a lien on the fund for their services prior to distribution, and this though an assignee of one of the creditors entitled to a part of the fund had other and additional security for his debt, the distribution of the fund not affecting the rights of the subcontractors and creditors to enforce their demands for any balance remaining unpaid against the contractor personally.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 400; Dec. Dig. § 182.*]

Dayton, District Judge, dissenting in part.

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

Henry R. Miller, John Pickrell, and L. L. Lewis, for appellants.

Charles V. Meredith and Preston Cocke (James L. Harman, on the brief), for appellees.

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

DAYTON, District Judge. The matter in controversy here arises under a building contract between Brumbaugh and the Jefferson Hotel Company for a part of the rebuilding of the Jefferson Hotel in Richmond, Va., which had been partially destroyed by fire. Jurisdiction in equity is acquired by the bill setting up and seeking to enforce a mechanic's lien against the property by the contractor for labor done and materials furnished under the contract. To the bill a number of subcontractors, who had filed mechanics' liens as such, are made parties defendants. The contractor claims in his bill for a balance of contract price and for extra work performed. The hotel company defends because (a) of contract being uncompleted, (b) of denial of contractor's claims for extras, and (c) of its own claim against the contractor for delays in completion of the contract within the time fixed by it. The contract was executed in duplicate in July, 1901—the exact day is matter of dispute—and provides that the contractor was to furnish all labor and material necessary for the reconstruction according to plans and specifications made by A. H. Elwood & Sons, architects, "who will also superintend the work"; that the work was to be completed on or before the 1st day of October, 1901, "excepting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

delays caused by the party of the second part"—the hotel company—and in default of completion within the time fixed therefor the contractor was to pay a penalty of \$150 for each day of delay thereafter, and, on the other hand, he was to be paid a bonus of \$150 for each day the contract might be completed prior to said October 1st. The contract price of \$48,700 was to be paid from time to time as the work progressed upon estimates made by architects, with reservations of 20 per centum until the work was completed. The conditions of the plans and specifications material to this controversy are:

"Inspection: Work and materials to be subject to inspection at all times by the superintendent. Should the contractors refuse or neglect to remove work or material declared by the superintendent to be faulty within three days after having been notified in writing by the superintendent to so remove it, then the owner shall have the right to have such faulty work or material removed, and proper work or material substituted therefor, at the contractors' expense. Should the contractors refuse or neglect at any time during the progress of the building to supply a sufficiency of materials or workmen, or cause any unreasonable delay of the work, or fail or refuse to comply with any of the articles of agreement, including these specifications, the owner shall have the right to enter upon and take possession of the premises and provide materials and workmen sufficient to finish said work, after three days' written notice, directed and mailed to the residence of or delivered personally to the contractors by the owner, or by the superintendent.

"The expense of finishing said work to be deducted from the contract price.

"Changes: The owner reserves the right to make any changes that he may decree expedient during the progress of the work, without invalidating any agreements or contracts; but previous to any change being made the price of such change shall not be considered an extra unless written orders have been given therefor, and the price thereof stipulated in such order.

"Payments: Payments will be made during the progress of the work upon the estimates of the superintendent; twenty per cent. of the value of all work done being always retained until the completion of the work and a final settlement has been made, after which a final estimate shall be made covering all balances due.

"Payments made during the progress of the work shall not be considered as an acceptance either of work or material, but the contractor shall be held to all the conditions of the contract until all the work is completed and accepted.

"Measurements: Scale measurements upon the drawings are never to be taken where figures for the same are given either in drawings or in specifications. Any discrepancy appearing between plans, details and specifications shall be referred to the architect for decision and in no case shall the work proceed in uncertainty, but the contractors shall apply to the architect who will supply all further details or explanations as may be necessary for the full understanding of the work and such further details and directions shall be received and executed as a part of this contract."

In addition to this contract, the hotel company awarded some 11 other independent contracts for elevator work, kitchen apparatus, cold storage, electric work, heating, plumbing, ventilation, machinery, tile and marble work, art and skylight glass, and for wrecking and removal of old walls.

The cause was referred to a special master, who was directed to ascertain and report (1) what amount, if any, was due to the plaintiff by the defendant under the contract; (2) what amounts, if any, were due subcontractors under mechanics' liens filed by them; (3) all liens against the hotel company's real estate; and (4) any other pertinent matter deemed necessary by himself or required by the parties to be

stated. The special master took a large amount of testimony, and returned an elaborate report, to which exceptions were taken by both plaintiff and defendant hotel company. The plaintiff, however, withdrew his objections and now abides by the report, failing to perfect a cross-appeal taken by him. The defendant hotel company insisted upon its exceptions, but they were overruled by the court below, the master's report in all respects was confirmed, and a decree entered holding the hotel company liable for a balance of \$14,209.37 of contract price and for \$13,884.13 for extra work done. From this decree the hotel company has appealed.

Meanwhile, on the same day this decree was entered, Meredith & Cocke and James L. Harman, attorneys, filed their petition in the cause, alleging, in substance, that they were employed by Brumbaugh, the contractor, to enforce his mechanic's lien against the hotel company, for the benefit of his subcontractors, to the extent of some \$28,000; that, as to such subcontractors, Brumbaugh virtually acted in the capacity of trustee; that the sums found due by the master's report were not sufficient by about 2 per cent. to pay the claims of such subcontractors; that Brumbaugh was bankrupt and nonresident of the state; that they were entitled to reasonable fees as such attorneys, had a lien therefor upon the fund, that a large majority of the subcontractors had voluntarily admitted the existence of such lien, and had offered to pay them 15 per cent. of their claim in satisfaction thereof, which they were willing to accept, although insufficient, in friendly adjustment, inasmuch as such subcontractors had their own counsel, who had to be paid; that several of said subcontractors, however, declined to consent to such payment, wherefore they ask that the court decree them 15 per cent. of the claims of such subcontractors declining to pay. Upon this petition no process issued, but, by the decree complained of entered the same day this petition was filed, its prayer was granted, and 15 per cent. of the fund was awarded and decreed to them. Among the subcontractors whose claims were so decreed was one in favor of George Arents, assignee of the Richmond Woodworking Company.

This company had not only filed its mechanic's lien, but had also given the notices required by statute to the hotel company, whereby the hotel company, by reason of having made payments to its contractor subsequent to such notice, had become personally liable for the debt, and it was entitled to be paid in full prior to all other subcontractors' claims—except one other in the same condition—out of the fund found due from the company to Brumbaugh, the contractor. This claim was assigned by the woodworking company to George Arents, who substantially owned all the stock of the hotel company. Arents had employed the same counsel to represent him in this claim as represented the hotel company and no contractual relation existed between him and the petitioning attorneys, nor did he in any way consent to the 15 per cent. allowance agreed by other subcontractors. The court, however, allowed 15 per cent. of his claim to these attorneys, to which action he has taken the appeal named second in the caption, and heard by us conjointly with the original cause.

The very able and exhaustive arguments made by counsel have been

largely devoted to discussion of the voluminous quantity of evidence produced before the master, and, independent of a few legal principles involved, the controversy turns almost wholly upon questions of fact, the evidence as to which in most instances is conflicting.

It is important at the threshold to determine the legal effect of the master's report and the decree of the court below confirming it. It is insisted by counsel for the contractor that the allegations of defendant company's answer constituted a consent on its part to refer the cause to a special master to determine, practically as an arbiter, all the matters in controversy, and that therefore it was bound by his report, and could only impeach it by apt allegations in pleading, and by satisfactory evidence, for fraud. It is therefore insisted that the court below erred in trying the cause *de novo* on any question of fact. While it cannot be denied that parties to an equity cause may, by a consent decree, constitute a special master in effect an arbiter to settle specified matters of dispute, we do not think the contention that this was so in this case can be maintained. It is not contended that the decree of reference was a consent one, but that the allegations of the bill and answer in effect made it so. Turning to the prayer of the bill, we find that it nowhere asks for a reference, but that the—

"defendants named, except the Jefferson Hotel Company, be compelled to come in and set up their rights and claims and liens, * * * and that the court may fully and completely and forever settle and adjust the rights of the said defendants to the said fund and property."

Responding to this prayer, the hotel company's answer charges all its codefendants to the bill to be subcontractors under plaintiff, to have performed labor and furnished material as such subcontractors, to have filed mechanics' liens, but declares itself unadvised as to the amounts, nature, or extent of such claims or liens,

"and defendant unites with plaintiff in asking that these other defendants who have been made parties be required to prove their accounts and their respective priorities, etc., before one of the masters of this court."

This was but a simple demand that proper proof be required of the subcontractors as to the character, amount, and priorities of their respective claims, and in no way bound the hotel company to abide by the master's judgment as to the substantial matters in controversy between it and the plaintiff contractor. We therefore conclude this reference to be a simple one directed by the court itself, and that the court below did not err in fully reviewing the master's findings of both law and fact. While this is true, there are some simple principles universally approved by appellate courts touching these reports, confirmed by the court below, which should not be overlooked when we come to review the case. These principles are very well set forth in *Crawford v. Neal*, 144 U. S. 585, at page 596, 12 Sup. Ct. 759, at page 762, 36 L. Ed. 552, where it is said:

"The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consider-

ation of the evidence, the decree should stand." Citing *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Evans v. State Bank*, 141 U. S. 107, 11 Sup. Ct. 885, 35 L. Ed. 654.

After the contractor ceased work in March, 1902, he procured from Elwood & Sons, the architects, a certificate to the effect that "he had performed and completed the contract," and that "he was entitled to the payment of seventeen thousand eight hundred and forty-one dollars, account of completion of contract." Counsel for the contractor earnestly insist that this certificate is "conclusive as to the character of the materials and workmanship and completion of the work under the contract in accordance with the plans and specifications," unless impeached for fraud or gross mistake implying bad faith. On the other hand, counsel for the hotel company as earnestly insist: First. That Elwood & Sons had no power whatever under the contract to make said certificate, and that it amounts to nothing more than an *ex parte* declaration of a third person, is not evidence, and entitled to no consideration. Second. That if, however, it should be held that they had the power under the contract to make such certificate, the same, not having been made by the contract conclusive, is not in fact conclusive and unimpeachable except for fraud, but, on the contrary, it at most is merely evidence and subject to be refuted by other evidence in the case. It must be conceded at once that the contract does not in express terms authorize these architects to issue such final certificate to the contractor to be conclusive and binding upon the hotel company. It must be admitted, however, that it constituted them not only the architects but also the superintending agents of the company, and that upon their estimates as such superintendents, made from time to time, payments, less 20 per cent. retained until completion of the work, were to be and were made by the company to the contractor. Under these circumstances, we think the legal principle governing has been enunciated by this court in *Freygang et al. v. Vera Cruz & P. R. R. Co.*, 154 Fed. 640, 83 C. C. A. 414, where it was held that, a railroad company having accepted and paid estimates made by engineers constituted by the contract its supervising agents, final estimates were properly held to be *prima facie* evidence of the work done, and that settlement of the contractor's account could be properly based on them, subject to correction, contradiction, or impeachment for error, mistake, omission, or concealment. In effect, this is the second proposition contended for by the company's counsel, except that it goes a step farther and necessarily puts the burden of proof upon the hotel company to show that such certificate was untrue, and, if so, in what particulars. This rule is substantially affirmed in *Mercantile Trust Co. v. Hensley*, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811. The equity of this rule becomes the stronger in this case when it is remembered that the specifications authorized the company after three days' notice to the contractor to remove faulty work, and after unreasonable delay to take charge of and complete the work, after like notice, at his expense; that no such action was ever taken, but, on the contrary, the company not only paid estimates, but also took immediate possession of the property. With these legal principles determined to guide us, it is not difficult to decide

the contention of the hotel company in regard to the contract work and its performance. The superintendent's certificate was to the effect that the contract was substantially performed, the hotel company took possession, the master took the testimony, weighed it, and from it found a substantial compliance, and the court below, after a full review, affirmed the fact by its decree. The burden upon the hotel company was to show wherein there was not substantial compliance. It did show by evidence satisfactory to the master that there were proper deductions from the \$17,841 certified as due by the architects of \$3,631.63, of which \$956.71 was for bills assumed by the company for the contractor and \$200 was for defective plastering, leaving \$2,274.92, or less than 5 per cent. of the contract price, to be considered as representing the value of "uncompleted" work. Certainly the company was properly held entitled to credit for this sum, but not, on account thereof, to refuse payment of the balance of \$14,209.37 on the ground that the contract was not substantially complied with, while at the same time having full possession, use, and enjoyment of the property. We, therefore, can see no such obvious error in the application of the law, or serious and important mistake in the consideration of the evidence, as would warrant us in reversing the finding of the master and the court below touching this contract work.

As to the claim of the hotel company based upon delay in the completion of the work and for which a penalty of \$150 per day was fixed by the contract, without entering into an extended discussion of the facts, we deem it sufficient to say that it must be conceded that in the rebuilding of this hotel a number of contracts, independent of the plaintiff's, were let whereby a large amount of work was to be done and material furnished by the company by and through independent contractors. It must be conceded, also, that the entire completion by plaintiff of his contract work was dependent upon these other contracts or some of them being completed first. For these conditions the hotel company must be held responsible. The enforcement of penalties are not favored in equity, and they are so enforced only after the demandant therefor has shown that he himself has strictly complied on his part with all the contract requirements prerequisite to such enforcement. It is vigorously urged that the plaintiff contractor in this case, however, was responsible for a large number of the days of delay and the defendant company for only a few of the days thereof, and that the court, under such circumstances, should attempt to "apportion" such delay between the two and hold the contractor liable in penalty for those days that it, in its judgment, deems he may be chargeable with. This is just what the courts cannot, with any degree of certainty, do, and therefore refuse to do. It needs but a moment's practical consideration of common building operations to realize that a contractor may not complete the woodwork until the plastering is done; he may not in many instances complete the cement work until the plumbing is placed; he may not do the painting until the marble work is done. To perform his work, he is entitled to work upon an orderly and systematic plan. It could not be required of him to move his scaffolding, his tools and implements, and his workmen back and forth from one quarter to

another just as the other contractors might complete in one quarter a part of the heating, in another part the plumbing, and in still another the tile and marble work, in order that he should be free from the charge of delay. Courts cannot know of these conditions as they actually existed at the time, and the evidence would be very unsatisfactory, taken months after, that would attempt to set forth all such conditions. Therefore the courts have laid down a very salutary rule to the effect that they will not attempt to apportion such delays where the causes thereof have been mutual, but will refuse under such circumstances to enforce the penalty. The law on this matter is well laid down in a series of New York cases, such as *Stewart v. Keteltas*, 36 N. Y. 388, *Heckmann v. Pinkney*, 81 N. Y. 211, and *Weeks v. Little*, 89 N. Y. 566. Perhaps the best statement of it is found in the last-named case, from which we quote:

"The rule is well settled that, where the work to be performed by the builder cannot be performed until the other work provided to be done by the owner or his employes is finished, the failure by the latter to complete their work in season to enable the builder to end his within the time limited by the contract is a sufficient excuse for his delay beyond the agreed period of completion."

Again:

"It is true he (the referee) also finds that some work was delayed which was not affected by the delay of the defendant. We do not see how that fact alters the just result. To effect that would require us to assume what is not proved, and we cannot know that there would have been delay in the independent work if the dependent work had not been hindered. The contractor could gain nothing by haste and pressure in one direction so long as entire completion was delayed by his employers. We cannot divide and apportion the fault. It is enough that damages were payable upon a failure of entire completion, and that was rendered impossible by the defendant's act, and her executor cannot recover for a failure which she made inevitable. But for that we cannot say that there would have been any delay beyond the contract time."

There was therefore no error in the decree of the court below in denying the hotel company's claim for the penalty for delays.

This brings us to a consideration of the claim of the contractor for extras. This claim was finally presented by him for \$19,677, although first presented as for \$16,777. The master allowed for these extras \$13,884.14, and the court below approved his finding. The large sum thus allowed for these extras, proportionate to the original contract price, necessarily arouses surprise and doubt as to their integrity. In this case we are not inclined to consider as carrying much weight the approval of this claim by the architects, as such approval was made, it seems to us, hastily, to say the least, and with little consideration. The temptation on the part of contractors to recoup losses on improvident contracts by claims of this kind is frequently present and strong. It is therefore the clear duty of courts to carefully scrutinize such demands and allow them only upon clear and satisfactory evidence sustaining them. In this case this claim for extras is very earnestly contested for these reasons: (1) Because the extras claimed for were not such in fact, but were covered by the contract and specifications. (2) Because the architects had no authority, under the contract or other-

wise, to order such extras, and their action in doing so was never ratified by the hotel company. (3) Because the architects ordered the alleged extras verbally and not in writing, specifying the cost and compensation therefor as provided to be done by the contract before the company could be held liable. (4) Because the prices charged and allowed were excessive. In opposition to these contentions, plaintiff's counsel insist, in effect, (1) that the work charged for was clearly extra, part of it admitted to be so by the company itself, and all clearly shown to be so by an overwhelming weight of evidence. (2) That this defendant was a corporation capable of acting only by and through its agents, and these architects were constituted by this corporation its supervising agents—superintendents—and by the terms of the contract and specifications recognized as such, whose decision as architects was to be final as to all interpretations of plans, details, and specifications, and who were to be, as superintendents, the judges of all work and material, with power to require all faulty work or material to be removed at contractor's expense, to make estimates upon which payments from time to time in the progress of the work were to be made, to approve all sub-contracts, and "remove" unsatisfactory workmen; in short, that they were in effect made the officers of the corporation, so far as the rebuilding of this hotel was concerned, with general power to act for it in the premises, and not with limited powers as contended now by counsel for it. In support of this proposition, it is contended, (a) the company even now admits its liability for some of the extra work done at Elwood & Sons' instance; (b) that Jeffress, the vice president, who, it seems to be conceded, was the resident officer highest in authority in the practical management of the affairs of the company, told the plaintiff contractor in effect that the architects would have entire control of the work and he only intended to pay the bills; and (c) therefore, if these architects did not have in fact plenary power in the premises, the contractor was led by the officer who did have it to believe that they did have it, and under such conditions the company is now estopped from denial, especially as it is in possession and having the full benefit, use, and enjoyment of the hotel property with these extras attached thereto and part thereof. (3) Such general power being shown to be thus in the architects, so far as the contractor's relations with the company is concerned, it necessarily follows (a) that he had right to order extra work done, (b) that he could waive the requirement of the contract requiring these extras to be set forth in written orders fixing cost and price, and (c) that he did generally order such extras in writing, except in a very few instances in which the requirement was clearly waived.

Without entering into extended discussion of the evidence, which is voluminous upon this question of extras, we deem it sufficient to say that the master and the court below held substantially that the contractor's contentions were right, and we are not prepared to say, after careful review of the decree, report, and the evidence, they have erred either as to the law or the facts. We are convinced, first, that the hotel company cannot now deny the general authority of its agent, Elwood & Sons, to order and contract for these extras after having allowed them

to be done upon such orders, without protest at the time when done, and being now in the possession and enjoyment of them; second, that under such circumstances it has become immaterial whether the technical requirements of the contract as to these extras being ordered in writing was strictly carried out or not, because it must be held to have been waived; third, that, after careful examination of the evidence, the items allowed as extras were in fact extras, and not "changes" under the terms of the contract; and, finally, that the compensation allowed therefor was reasonable. We think the case in this particular branch of it to be clearly ruled by the principles laid down by this court in *The Sappho*, 94 Fed. 545, 36 C. C. A. 395, and that there is no error in the decree complained of as regards the contractor's claim for extra work done and material furnished.

The only remaining question to be considered arises upon the appeal of Arents to the allowance to Meredith & Cocke and James L. Harman, attorneys, of \$1,184.19, being 15 per cent. of the debt due to Arents, assignee of the Richmond Woodworking Company, for \$7,894.60. This allowance was made upon petition heard, without notice or process served, on the day it was filed, and the allowance was made as part of the fees due to these attorneys for Brumbaugh, upon the theory that Brumbaugh was acting in practical effect as trustee for his subcontractors, and that, having "created" or secured the fund for all, they should all contribute to the expense, by way of attorney's fees, incurred by him in doing so.

This assumption, in the opinion of the writer, is unsound, for at least two reasons:

First. It is not to be forgotten that every one of these subcontractors' debts were personal ones of Brumbaugh himself. He, in fact, was not only personally but primarily liable for them, because he owed them by distinct contracts existing between him and such subcontractors. It was his clear legal and moral duty to pay these debts, wholly independent of whether the hotel company paid him or not. All of his property, real, personal, and choses in action, including this claim of his against the hotel company, were, by law, made liable for the payment of these debts. It was his moral and legal obligation to put forth every effort to collect this claim against the hotel company, and pay it over or cause it to be paid over to these creditors of his. To say that, in employing counsel and discharging this moral and legal obligation, he must be paid by his creditors his costs and expenses, would establish the new doctrine that if A. owes B. and B. owes C., in such case, if B. can collect his debt from A. by instituting suit against him, he can, when he pays his debt to C., make the latter pay out of it the costs of the collection by him of his debt against A.! A., by reason of B's insolvency, can allow such a claim if he wants to do so, but if he refuses there would seem to be no law that can compel him to thus reward his debtor for paying his debt in full, as the law demands he should do. The position of his attorneys in the litigation can be no better than his own. They agreed with him, and him alone, to do the work; they can only claim through him, and, if he is not entitled to this indemnity they are not. The case would have been entirely different if one of the sub-

contractors on behalf of all the others standing upon the same footing had instituted the suit against Brumbaugh, the insolvent, but primarily bound creditor, and the hotel company, secondarily bound for the purpose of requiring the latter to pay its contract obligation to Brumbaugh to all the subcontractors alike. In such case the ground would be common between these subcontractors. The relation of debtor and creditor would not have existed between them, but they would have in common been creditors of Brumbaugh's, interested in the creation of a fund independent of him and against another party. In such case, if the fund secured was more than sufficient to pay all Brumbaugh's creditors, leaving a balance coming to him, such balance would have been liable to the reasonable costs and attorney's fees incurred by the creditor instituting the suit and incurring such costs, and if no such balance was found, then the fund going to the subcontractors would have been liable therefor. This is the full extent to which the courts have gone in such cases as *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, *Central Railroad v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915, and *Harrison v. Perea*, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478, relied on by appellees. In the *Greenough Case*, Vose, a large bondholder, brought his suit against the Florida Railroad Company, and "created" or secured, at large expense in costs and fees, a fund of which he and his fellow bondholders derived the benefit. His fellow bondholders were required to contribute to his costs incurred in "creating" or securing the fund. In the *Pettus Case* certain creditors brought suit on behalf of themselves and all other creditors of the railroad to establish a lien upon its property. The suit was successful, and the attorneys bringing it asked and were decreed costs and fees incurred from the common fund secured for the benefit of all the creditors alike. In the *Perea Case* suit was brought by Perea, as administrator of Perea Second, deceased, against Harrison, charging him with having wrongfully appropriated the estate of decedent. He was successful in establishing a liability upon Harrison on account of the estate of his decedent so appropriated, of which Harrison was found to be entitled, as administrator of his deceased wife, to thirteen twenty-sixths, and also to three other twenty-sixths as purchaser of some of the other heirs. Perea, administrator of decedent, claimed indemnity for costs and fees paid in securing the fund, and was allowed such claim. The principle running through these cases is clear and simple, but we have yet to find any case where a debtor can bring suit to recover a fund due to himself, but inuring to the benefit of his creditors, and be allowed his costs and attorney's fees for the collection as against his creditors having debts existing prior to the incurring of such costs and fees by him.

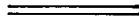
Second. Another reason arises in this case why, in the judgment of the writer, no such allowance should be made. The mechanic's lien law of Virginia provides that a subcontractor may, when he takes such subcontract from the contractor, give notice to the owner of the existence and character of such contract and the probable amount to eventually become due under such subcontract. Having done this any time within 30 days after he has filled his subcontract, he may then furnish the owner and contractor his itemized account, verified by affidavit, which

must be disputed within 10 days by such contractor, or otherwise, as this law has been construed by the Supreme Court of Virginia, the subcontractor acquires at least three securities for the amount of his account so rendered: (a) A preference of payment over all other subcontractors out of any amount due from the owner to the contractor upon the contract price; (b) a personal liability upon the part of the owner to him for his debt, provided, at the time he gave to the owner the notice of his contract, there was due or to come due from such owner to the contractor a sum sufficient to pay his claim; and (c) a lien upon the property of the owner into which, under the contract, the labor or material of such subcontractor entered, subject likewise to the above proviso. The woodworking company complied fully with these legal requirements. It gave the notice to the hotel company, recorded its lien, and filed its account with both Brumbaugh and the company, and it was undisputed. After receiving the notice in August, 1901, the hotel company recognized its liability for and paid to Brumbaugh, upon the contract price, more than \$28,000. Arents, assignee, became entitled to the three securities above set forth. Under such circumstances, even if the suit had been brought by another creditor of Brumbaugh's by, say, another subcontractor of his, to establish and secure the fund from the hotel company, it could not have inured to the benefit of the woodworking company or Arents, its assignee. It would have succeeded only in establishing the fund due from the hotel company, out of which this claim was already by law entitled to payment first in full. Such fund could only be enforced out of the hotel company's property, as against which this claim was fixed by law as a first lien. Such suit could not go further, but the rights of Arents did go further without it, for he had the hotel company also personally responsible for his debt. See Code Va. 1887, §§ 2479, 2480 (Code 1904, pp. 1241, 1242); Schriber v. Bank, 99 Va. 257, 38 S. E. 134; N. & W. R. R. Co. v. Howison, 81 Va. 125; 1 Va. Law Reg. 27, and note; 13 Va. Law J. 153; Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888.

With these views, however, the two associated judges do not agree. On the contrary, they hold that Brumbaugh being insolvent and non-resident of the state, these attorneys instituting this suit and establishing a disputed debt good against the solvent hotel company, inuring solely to the benefit of these creditors of his, would be entitled to an attorney's lien upon the fund if it were payable to Brumbaugh himself for their services, and that it can well and equitably be held to exist as against the fund itself, although going to his creditors, the subcontractors. That the fact that Arents, assignee, has other and additional security for his debt does not affect the fact that payment of it here is to be made out of this fund, which alone is involved in this case, and therefore he is entitled to no greater immunity from this attorney's lien upon the fund as a whole than are any of the other creditor subcontractors. That, in effect, they are none of them entitled to the fund as a whole until the costs of its creation are paid, and these costs include attorney fees, so secured by the attorney's well-recognized common-law lien. That, while the decree may in words be an allowance out of each subcontractor's ascertained debt of 15 per cent. in payment of these attorney's fees, it is, nevertheless, in practical effect an enforce-

ment of the attorney's lien upon the whole fund as such, and in no way affects Arents and the other subcontractors' independent rights to enforce against Brumbaugh personally their demand for the balance of their original debts against him not fully paid by reason of the allowances of these fees or for other reasons, which independent rights are not affected by this decree of distribution of this particular fund. That, finally, neither the woodworking company nor Arents, its assignee, could have derived any benefit of this fund without instituting and prosecuting a similar suit to this, involving practically the same labor and expense as this one, if Brumbaugh or some other one of the subcontractors had not done so. That had it been instituted by another subcontractor it would seem to be clear from the decisions that all would have had to contribute, and, under the peculiar circumstances of Brumbaugh's insolvency and inability to pay counsel for this necessary work, it is not perceived why equity should not look to the practical result regardless of the instrumentality by which it is obtained.

It follows that these views of the majority must prevail, and the decree of the court below in all respects is affirmed.



CITY OF GREENSBORO v. SOUTHERN PAVING & CONSTRUCTION CO.

(Circuit Court of Appeals, Fourth Circuit. March 12, 1909.)

No. 868.

1. COURTS (§ 343*)—FEDERAL COURTS—STATE STATUTES.

The North Carolina statute expressly authorizing the prosecution of a suit by a pendente lite assignee of the demand in the name of the original plaintiff, his assignor, will be followed in the federal courts sitting in that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 919; Dec. Dig. § 343.*

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. TRIAL (§ 3*)—SEPARATE TRIALS IN SAME CAUSE—MATTER OF ABATEMENT.

In a suit on a municipal paving contract, an objection that the suit was premature because the matter in difference between the city and the contractor had not been submitted to the arbitrament of the city engineer, and that the contractor had not furnished the city proper evidence that all claims for labor and material had been paid as required by the contract, was mere matter of abatement, as to which it was the city's duty to demand an independent trial prior to a submission of the case on the merits, and which the city waived by failing to do so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 6; Dec. Dig. § 3.*]

3. MUNICIPAL CORPORATIONS (§ 365*)—PAVING CONTRACTS—PERFORMANCE—ACCEPTANCE BY ENGINEER—EFFECT—IMPROPER WORK—"APPROXIMATE ESTIMATE."

A contract for street paving required the work to be done as a whole, and not in sections, according to specifications under the direction of the city's engineer. The notice to bidders and specifications alone provided for payment on semimonthly estimates as the work progressed, with a retention of 10 per cent. on each "approximate estimate." The contract

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

also provided that the contractor should be responsible for any work until its completion and final acceptance, and that the acceptance should not relieve the contractor of any obligations to do reliable work previously described. *Held*, that the word "approximate" was tautologically used to accentuate the word "estimate," which was not to be construed as a final mathematical ascertainment of what was set forth, and hence the acceptance of sections of the work by the city engineer and issuance of approximate estimates thereon to the contractor did not bar the city's right to defend, when sued for the balance due under the contract, on the ground that the work in the sections estimated did not constitute a compliance with the specifications.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 898; Dec. Dig. § 365.*

For other definitions, see *Words and Phrases*, vol. 1, p. 477; vol. 3, pp. 2492-2493.]

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

Thomas J. Shaw and E. J. Justice (Shaw & Hines and Justice & Broadhurst, on the brief), for plaintiff in error.

Garland S. Ferguson, Jr., and John N. Wilson (William P. Bynum, Jr., and Merrick & Barnard, on the brief), for defendant in error.

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

DAYTON, District Judge. The Southern Paving & Construction Company hereinafter designated the "contractor," brought its action at law in the court below against the city of Greensboro, N. C., hereinafter designated the "city," upon a street paving contract made between the Southern Contracting Company and said city, and subsequently assigned to and assumed by the said plaintiff company. By the terms of the contract the contractor was to furnish all necessary material and work required to grade and pave certain streets in the city in accordance with specifications annexed to the contract, and, further, in accordance with such plans and instructions as might, during the progress of the work, be furnished by the city's engineer. The provisions of the contract material to the controversy here were to the effect that the contractor should start the work at such point as the engineer should from time to time direct, and observe his directions as to the manner, completeness, and rate of progress of the execution of the work; that the contractor, by direction of the engineer, should remove and reconstruct at his own cost work found by the engineer not to have been done in accordance with the contract; that the city, through its engineer, should have right to make alterations in plans and grade lines before or after commencement of the work, and, if at extra cost, at a stipulated price; also to require the performance of extra work directed by the engineer in writing to be done, to be paid for upon an estimate of the engineer based upon the contract price; that the engineer's decision should be final in constructing the plans and specifications; and "to prevent all disputes and altercations" the city engineer was to—

"be referee in all cases and determine the amount, quality, acceptability and fitness of the several kinds of work * * * and to decide all questions

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 168 F.—56

which may be raised relative to the fulfillment of the contract by the contractor, that his estimates and decisions shall be final and conclusive, and that such estimates or decisions in case any question shall arise, shall be a condition precedent to the right of the contractor to receive any money under this agreement."

It was further provided:

"The contractor further agrees to be responsible for any work until its completion and final acceptance, and it is fully understood by the contractor that the acceptance of the work will not relieve him of any obligations to do reliable work as hereinbefore prescribed, and that any omission and disproof of any work by the said engineer at or before the time of the monthly or other estimate shall not be construed to be an acceptance of any defective work, and that no acceptance whether final or otherwise, will relieve the said contractor or sureties on his bond from any of its obligations under the guaranteeing the said work for three years."

It was provided, in the "Notice to Bidders and Specifications," among other things, "Approximate estimates shall be made and payment given semimonthly. Ten per cent. of each approximate estimate shall be retained by the city until the completion of the work," that "in case of any disagreement or dispute as to the true meaning of any point in the specifications, or as to the character of any part of the work, the decision of the city engineer shall be final and binding upon all the parties," and that "before the final acceptance of the work, and payment of the balance due, the contractor shall furnish to the city proper evidence that all claims for labor and material have been paid, and that no legal claims can be filed against the city for such labor and material."

The contractor's complaint charged full and complete performance of the contract on its part under the direction and with the approval of the city's engineer, and that after allowance of all payments, admitted and set forth, there was still due contractor, for contract work and extras, \$12,981.69.

The answer of the city substantially sets up four defenses to this claim: First. That the plaintiff had no right to sue, because it had assigned its claim to another, and had no real interest, therefore, in the demand. Second. The contract providing that all questions arising "as to the amount, quality, acceptability, fitness or final completion of the work" should be passed upon by the city engineer, and his decision should be final and a condition precedent to the contractor's right to receive any money thereunder, it is charged that before institution of the suit and after alleged completion of the work certain questions were raised by the city as to the character of the work done, fully set forth, which questions were not submitted to the engineer, were not passed upon by him, and that therefore the contractor's action was prematurely brought and should be dismissed. Third. That the contractor did not, prior to the institution of his action, furnish it with "proper evidence that all claims for labor and material have been paid and that no legal claims can be filed against the city for such labor and material" as provided by the contract to be a condition precedent to the payment of balance due him, and therefore his action should be dismissed as prematurely brought. Fourth. That, contrary to the requirements of the contract and the "notice to bidders and specifica-

tions," (1) the soft and boggy places in the subgrade were not filled with broken stone, or other hard material, and rolled and compacted. (2) That in preparing the concrete for the concrete base, instead of using the proportions of cement, sand, and stone as provided, said defendant in error used one part cement to five or six of sand to twelve or fifteen of stone, causing the said concrete base to be weak and of comparatively little value. (3) That said concrete base as constructed was less than four inches in thickness instead of five as provided. (4) That the brick used were not up to specifications, many of them being too soft, not having parallel sides and straight edges, and were not uniform in texture and appearance. (5) That the filler was improperly placed in the joints of said brick. (6) That the stone and sand used in said concrete were not kept free from dirt. (7) That in many places brickbats were used in lieu of bricks in laying said pavement. (8) That many of the brick used were chipped or broken. (9) That special rail brick were not laid along street car tracks. (10) That many of the brick laid along the car tracks were so placed as to stand higher than the surface of the street, making the same uneven and rough. That, in consequence, the contractor has failed to comply with its contract, but has constructed a pavement much inferior and worth much less than the contract price. That this was accomplished by the misrepresentations and fraudulent acts of the contractor fully set forth, whereby the city engineer was deceived as to the quality of such work and was misled into making approximate estimates, eight in all, of the work done, seven of which were paid by the city. At this point it may be proper to state, although it is but incidentally referred to in this pleading, that it is shown elsewhere in the record and conceded that, after these seven estimates had been paid and after the eighth had been given, but before its payment, two citizens of the city, as taxpayers, secured from a state court an injunction against the city forbidding it to pay any further sums to the contractor by reason of the defective character of the work as indicated, and no other estimates of any kind were thereafter made by the engineer and no further payments were made by the city. This injunction was afterwards dissolved upon demurrer, and such decree of dissolution was affirmed by the Supreme Court of North Carolina. See *Merrimon v. Paving Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574.

For the reasons set forth, and because of the fraud of the contractor and the gross mistake of the engineer induced by the deception of the contractor, it is charged that the city has been damaged to the extent of \$12,000. Subsequently an amended answer was permitted to be filed charging alternately such defective work to have been suffered either by reason of the gross mistake of the engineer misled by the misrepresentation and deceitful acts and conduct of the contractor, or by the direct participation by its engineer in the fraud perpetrated by the contractor. The contractor in his reply denied the charges both of bad work done and of fraud.

Upon the trial of the case below the city sought to introduce testimony to prove the allegations of its fourth ground of defense, but the learned judge presiding ruled that the "work was done, practically in sections, not any particular amount of yards or extent of work in any

particular section, but from time to time at certain points or periods the city engineer made his estimates and certified to the city for payment the purchase price, less 10 per cent., which was for work performed, the amount being reserved by the city under contract." And thereupon he held that, as to all the work included in the seven estimates certified by the engineer to the city and paid, such certificates were final and binding upon the city as to the character, quality, and amount of such work done, only impeachable for fraud or gross mistake.

As substantially all the alleged defective work was done prior to the suing out of the citizens' injunction and was covered by these seven estimates, this ruling in effect cut off all defense by the city as to the merits of the controversy, and resulted in a verdict and judgment in favor of the contractor for substantially the full amount claimed by him.

Considering now the four defenses relied upon by the city, the first, to the effect that the contractor had assigned his claim to Montague and had no substantial interest in the suit, can be quickly disposed of. It is conceded that the assignment relied upon was a *pendente lite* one. This being so, the statute of North Carolina expressly authorizes the prosecution of a suit by a *pendente lite* assignee of the demand in the name of the original plaintiff, his assignor. It is needless to say that under federal statute the rule of practice established by this state statute will prevail here. The court below did not err in overruling this defense.

The second defense, to the effect that matters in difference existing between the city and the contractor were not, prior to the institution of the suit, submitted to the arbitration of the engineer, as required by the contract, and the third defense, to the effect that the contractor did not, prior to the institution of his action, furnish the city with "proper evidence that all claims for labor and material have been paid, and that no legal claims can be filed against the city for such labor and materials," both present matters of abatement of the suit, and not matters in bar of the plaintiff's right. These matters in abatement were presented with others in bar by the same answer. Without objection on the part of the city, so far as the record discloses, these issues, both in abatement and bar, were submitted to and tried by the same jury at the same time and found against it. This court has said in *Kirven v. Virginia-Carolina Chemical Company*, 145 Fed. 288, at page 291, 76 C. C. A. 172, at page 175:

"While we, therefore, find no error in fact in the determination of this question of jurisdiction, we feel constrained to say that it is always error to submit an issue of fact as to jurisdiction, with other issues, to a jury and permit it to be determined, with such other issues, by a general verdict for or against the plaintiff. Lack of jurisdiction is a defense in abatement of the prosecution of the action, and not in bar of the right of action itself. In common-law pleading it must, at the earliest moment, be raised by plea in abatement, made in person and not by counsel, and, if to the writ, must give the defendant the better writ, and, if to the court, must indicate the court having jurisdiction. The issue upon such plea, if the matter be of law, must be determined by the court, but, if of fact, may be submitted to a jury. In either case the trial of this issue must be an independent one, for the plain and obvious reason that the judgment upon it, if effective, cannot be a bar to the plaintiff's right, but simply one of dismissal without prejudice.

"Prior to the act of 1875, the common-law rules touching the necessity of a plea in abatement to the jurisdiction prevailed in the federal courts, and it was held that the filing of a plea to the merits was a waiver of such plea to the jurisdiction. *Farmington v. Pillsbury*, 114 U. S. 138, 143, 5 Sup. Ct. 807, 29 L. Ed. 114. It has since been held that, 'in its general scope, this rule has not been altered by the act of 1875,' but that this act 'changed the rule so far as to allow the court at any time, without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered.' *Hartog v. Memory*, 116 U. S. 588, 590, 6 Sup. Ct. 521, 29 L. Ed. 725; *Williams v. Nottawa*, 104 U. S. 209, 211, 26 L. Ed. 719. Thus while in practical effect this act of 1875 has extended the right of the court to settle the question of its own jurisdiction, and, to an extent, limited the right of a jury to pass upon the question when one of fact, it has by no means, when such question is submitted to a jury, destroyed the original methods by which it should be so submitted; and especially, under no form of pleadings, has it done away with the requirement that it shall be tried as an independent issue. This is true simply because the absolute necessity for it being so tried remains. As stated in *Ashley v. Board*, 60 Fed. 55, 68, 8 C. C. A. 468: 'It is clear that such a question is an independent one, and cannot be properly confused with the issue on the merits; otherwise, it could not be determined from the verdict whether it was founded on a question of jurisdiction or of the cause of action.'"

In this case the matters set up in these defenses could only abate the action, and dismiss it without prejudice to any second action brought by the contractor, after he had complied with the requirements of the contract and submitted the matters in difference to the engineer, and had furnished the required evidence to the city that the material and labor claims had been satisfied and no legal claims could be presented against the city because of the work done. The city had a right to demand an independent trial and settlement of these matters before the cause was tried upon its merits. If it desired to rely upon these defenses, it was its plain duty to demand such independent ascertainment of them. It did not do so, but it, in effect, sought the advantage of having them, if possible, secure for it a final judgment where it would have been entitled by reason of them to only a restricted one of dismissal without prejudice, and this by allowing them to be tried with other matters in bar by the same jury. Under the plain principles above set forth, it must be held to have waived these defenses in abatement, the court below could have excluded all evidence touching them upon the trial actually had, and it will therefore not be allowed to rely here upon the failure of them in the court below as ground of error.

This brings us to the last question involved, which may be stated briefly to be, did the court below err in ruling the estimates of the engineer of work done certified to and paid by the city to be final and conclusive upon the parties, only to be, by independent action on the part of the city, impeached for fraud? We think he did. His opinion was that the work "was done in sections" under the direction of the engineer, and that, this being so, these estimates of work done were final and conclusive as to such "sections" set forth. In this view the court below erred, because (a) the contract did not provide for the work to be done in sections, but (b) did provide for it to be done as a whole, and, finally, (c) because the plaintiff's complaint was based wholly upon the contract as a whole, alleging it to be such. The "notice to bidders" and specifications" alone provided for these estimates to be made semi-

monthly for partial payment of work done. It was nowhere provided that they were to be for completed work alone. If the engineer had so directed, the whole of the concrete base could have been required to be laid before a brick was placed. This might have required more than three-fourths of the whole time required to do the work. Had he done so, the contractor would have, nevertheless, been entitled to his semi-monthly estimate upon the work done by him. These estimates are designated in the specifications as "approximate estimates." It is true the use of the word "approximate" in this connection is in a sense tautological, but it is very frequently used in these contracts, manifestly for the purpose of accentuating the fact that the other word "estimate" is not to be construed as a final mathematical ascertainment of what it sets forth. The contract expressly provides that "the contractor further agrees to be responsible for any work until its completion and final acceptance, and it is fully understood by the contractor that the acceptance of the work will not relieve him of any obligations to do reliable work as hereinbefore described."

The legal principle touching the effect of these estimates provided for, given and paid during the progress of contract work, have been correctly determined and set forth by this court in *Freygang et al. v. Vera Cruz & P. R. R. Co.*, 154 Fed. 640, 83 C. C. A. 414, where it is held that they are prima facie evidence of the work done, but subject to correction, contradiction, or impeachment for error, mistake, omission, or concealment. This principle has been affirmed by this court in the case of *Jefferson Hotel Company v. Brumbaugh* (decided at this term) 168 Fed. 867, and is in accord with the ruling in *Mercantile Trust Company v. Hensey*, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811.

It follows that the judgment of the court below must be reversed, the verdict of the jury set aside, and a new trial awarded.

Reversed.

BOHLANDER v. HEIKES.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1909.)

No. 1,848.

1. EVIDENCE (§ 348*)—DOCUMENTARY EVIDENCE—FOREIGN JUDGMENT—CERTIFICATION.

A certificate to a transcript of a judgment was entitled "Common Pleas Court, Montgomery County, Ohio," and was signed, "John C. Good, Clerk Common Pleas Court, Montgomery County, Ohio." It stated under seal of the court that the foregoing pages numbered 1 to 15, both inclusive, contained a full, true, correct, and complete transcript of the record of such court in a case designated by docket number, and then set out the various papers by name included in the transcript, "as the same appear upon the records of the court," concluding with the words, "Given under my hand and seal of said common pleas court of Montgomery county, Ohio, this 31st day of August, 1906." Attached thereto was another certificate reciting: "I, Edward F. Snediker, judge of the common pleas court of Montgomery county, Ohio, do hereby certify that the attestation of the clerk of the common pleas court, John C. Good, whose true and genuine signature and seal of said court appear thereto, is in due form"—signed by the judge, dated, and sealed. *Held*, that such transcript was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

properly certified in the manner prescribed by Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677).

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 348.*]

2. EVIDENCE (§ 28*)—JUDICIAL NOTICE—STATE LAWS.

United States courts take judicial notice of the laws of every state, including those providing for the creation, organization, and abolition of courts, the number of judges, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 36; Dec. Dig. § 28.*]

3. EVIDENCE (§ 348*)—DOCUMENTARY EVIDENCE—FOREIGN JUDGMENT—CERTIFIED TRANSCRIPT.

Where, during the pendency of an action in the superior court of Montgomery county, Ohio, that court was abolished and pending proceedings transferred to the court of common pleas of that county by Act Ohio March 19, 1885 (82 Ohio Laws, p. 84), it was no objection to a certified transcript of a judgment rendered in such action, when offered in evidence in an action on the judgment, that certain of the proceedings appeared to have been taken in the superior court and others in the court of common pleas.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 348.*]

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

This action was brought by the plaintiff in error against the defendant in error for \$2,074.54, with interest at 6 per cent. per annum from April 12, 1887, alleged to be due upon a judgment rendered by the common pleas court of Montgomery county, Ohio, on the 14th day of June, 1887. Three pleas were filed. A demurrer was sustained to the third, and issue was joined on the first and second, upon which issues the case was tried. These pleas were: (1) Nul tiel record; (2) the general issue, with leave to give in evidence any matter that would operate as a good plea in bar if specially pleaded. The plaintiff offered in evidence a transcript, written on 15 pages, together with a certificate headed "Common Pleas Court, Montgomery County, Ohio," and signed, "John C. Good, Clerk Common Pleas Court, Montgomery County, Ohio," and under the seal of the court, which stated that "the foregoing pages, numbered from 1 to 15, both inclusive, contain a full, true, correct, and complete transcript of the record of said common pleas court in the case of Peter Bohlander, plaintiff, v. William F. Heikes, defendant; said case being No. 11,095, on the docket of said court." The certificate then states the various papers by name included in the transcript, among which is named, the judgment of the court, and says, "As the same appear upon the records of said court." The certificate closes: "Given under my hand and the seal of said common pleas court of Montgomery County, Ohio, this 31st day of August, 1906." This certificate had attached thereto another, which states: "I, Edward F. Snediker, judge of the common pleas court of Montgomery county, Ohio, do hereby certify that the foregoing attestation of the clerk of the common pleas court, John C. Good, whose true and genuine signature and the seal of said court appear thereto, is in due form." This is signed by Edward F. Snediker, judge of common pleas court, and the seal of the court is also affixed; the certificate being dated September 1, 1906. Plaintiff also offered in evidence an agreement of counsel to the effect that the judgment was unpaid, but reciting that the agreement was not to cut off any other defense except payment.

The transcript offered in evidence showed that the suit in which the judgment was rendered was begun on June 13, 1885, in "the superior court of Montgomery county, Ohio," and that the summons issued from that court; that the answer of defendant was filed in that court. Then followed four orders of continuance, July, 1885, October, 1885, January, 1886, and March, 1886, each of which appears to have been made in the superior court. Then

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

follow three orders of continuance, May, 1886, October, 1886, and January, 1887, each of which was made in the common pleas court. The transcript then shows that "on the 14th day of June, A. D. 1887, there was filed in the office of the clerk of the court aforesaid (meaning the common pleas court of Montgomery county, Ohio) a reply clothed in the words and figures following, to wit: 'Superior Court of Montgomery County, Ohio. Reply. Now comes the plaintiff and for reply to the answer of the defendant herein denies each and every allegation in said answer contained. By consent verification is waived.'" Then follows: "Afterwards, to wit, on the 14th day of June, A. D. 1887, there was filed in the office of the clerk of the court aforesaid an entry clothed in the words and figures following, to wit: 'Superior Court of Montgomery County, Ohio. Entry. This cause coming on for hearing on the petition, the answer of the defendant, and the reply of plaintiff, and was submitted to the court without the intervention of a jury. On consideration whereof the court finds, on the issue joined between the plaintiff and the defendant, for said plaintiff, and that said defendant is indebted to said plaintiff, as in said petition set forth, in said sum of fifteen hundred dollars (\$1,500), with interest thereon from November 24, 1877. It is therefore considered by the court that the said plaintiff recover from the said defendant the sum of two thousand and seventy-four and $\frac{50}{100}$ dollars (\$2,074.50), with interest thereon at six per cent. from April 12, 1887, and his costs taxed at \$——, said case having been ordered on the trial docket. Approved. Dwyer, Judge.'" No statute of the state of Ohio was exhibited to the court by the plaintiff, nor was it shown to the court, other than as it appears in the above transcript, that either in law or in fact was the "common pleas court and the superior court" one and the same court, or that one was the successor of the other, or that the clerk of the "common pleas court" had authority to certify the records of the superior court. Upon this evidence the court directed a verdict for defendant. The errors relied on are the giving of the general charge or directing the verdict for defendant, to which the plaintiff duly excepted.

S. S. Pleasants, for plaintiff in error.

Lawrence Cooper, for defendant in error.

Before PARDEE, McCORMICK; and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The only suggestions we get from the briefs and transcript as to the reasons for directing a verdict for the defendant in the court below are that the Ohio laws are not proved, the transcript not sufficiently certified, and that the transcript is not clear as to whether the judgment sued on was the judgment of the superior court of Montgomery county, Ohio, or the court of common pleas of Montgomery county, Ohio; the transcript coming from the last-designated court.

The transcript seems to be certified under section 905, Rev. St. U. S. (U. S. Comp. St. 1901, p. 677), and is undoubtedly sufficient. The confusion in the transcript as to the court in which at various times proceedings were had comes from the fact that pending the suit, originally instituted in the superior court of Montgomery county, Ohio, that court was abolished and all pending proceedings were transferred to the court of common pleas of Montgomery county, Ohio, all of which appears by the fifth and sixth sections of an act of the General Assembly of the state of Ohio, passed March 19, 1885 (82 Ohio Laws, p. 84), entitled "An act to authorize the election of one additional judge in the court of common pleas in the first subdivision of the Second Judicial district of Ohio, and to repeal sections of the Revised Statutes known as 'An act to establish a superior court of Montgomery county.'" The sections of said act are as follows:

"Sec. 5. That sections 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521 and 522 of the Revised Statutes, known as 'An act to establish the superior court of Montgomery county,' passed March 29th, 1856, and an act to amend section 9 of the act entitled 'An act to establish the superior court of Montgomery county,' passed March 27, 1875 (O. L. vol. 72, p. 90), be and the same are hereby repealed; the repeal to take effect on the first day of July, A. D. 1886.

"Sec. 6. That on and after the first day of July, A. D. 1886, all the causes and business then pending in said superior court shall be transferred to, and proceeded with, in the court of common pleas in and for said county of Montgomery in the same manner as if originally commenced therein; and all judgments, decrees and orders of said superior court, notwithstanding said repeal, shall have the same force and effect in law as if the same had been rendered, ordered, adjudged, and decreed in said court of common pleas; and all remedies necessary to carry out all such orders, judgments, and decrees shall be allowed by said court of common pleas, and be enforced therein in the same manner as if they had been originally made and ordered by said court: Provided, nothing herein contained shall be construed as requiring a re-entry of the causes in said superior court in the appearance docket of said common pleas court; but the appearance docket of said superior court, and all the other records thereof kept pursuant to law, shall be used in completing and preserving the records of the causes and matters so transferred."

With this act before us all confusion in the transcript is eliminated. The United States courts take judicial notice of the laws of every state in the Union, including, of course, the laws providing for the creation, organization, and abolition of courts, number of judges, etc. See *Fourth National Bank v. Francklyn*, 120 U. S. 751, 7 Sup. Ct. 757, 30 L. Ed. 825; *Hanley v. Donoghue*, 116 U. S. 6, 6 Sup. Ct. 242, 29 L. Ed. 535; *Mills v. Green*, 159 U. S. 657, 16 Sup. Ct. 132, 40 L. Ed. 293; *Gormely v. Bunyan*, 138 U. S. 635, 11 Sup. Ct. 453, 34 L. Ed. 1086.

"The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice without plea or proof." *Lamar v. Micou*, 114 U. S. 225, 5 Sup. Ct. 857, 29 L. Ed. 94.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to award a new trial.

VON BREMEN, MacMONNIES & CO. v. UNITED STATES.
 MOUQUIN WINE & RESTAURANT CO. v. UNITED STATES.
 (Circuit Court of Appeals, Second Circuit. January 12, 1909.)

Nos. 124, 125 (4,763, 4,764).

1. CUSTOMS DUTIES (§ 44*)—CLASSIFICATION—TRUFFLES—SIMILITUDE TO MUSHROOMS—"MUSHROOMS IN TINS."

Truffles in tins are dutiable as "mushrooms in tins," by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.*]

2. CUSTOMS DUTIES (§ 30*)—"VEGETABLES"—TRUFFLES.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), the term "vegetables" is used in accord-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ance with the ordinary understanding, vegetables usually served at dinner, which does not include truffles, which are used only as a condiment in cooking.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.*
For other definitions, see Words and Phrases, vol. 8, p. 7284.]

3. STATUTES (§ 225¼*) — CONSTRUCTION — LEGISLATIVE ADOPTION OF JUDICIAL CONSTRUCTION—"VEGETABLES."

A Circuit Court held that truffles were "vegetables," though the Supreme Court had previously given that term a meaning that excluded truffles. Held that, in the subsequent re-enactment of the provision for "vegetables" in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), the term must be presumed to have been used in accordance with the Supreme Court definition.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. § 225¼.*]

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

The decision below affirmed a decision by the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York.

The opinion of the Circuit Court reads as follows:

HAZEL, District Judge. The merchandise, consisting of truffles (a fungus growth) preserved in tin packages, as assessed for duty at 40 per centum ad valorem under paragraph 241 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]), "as vegetables prepared or preserved, not specially provided for in this act." The importers urge that the same should be dutiable by similitude as mushrooms under the same paragraph at 2½ cents per pound; that truffles are not in fact vegetables, and according to eight witnesses they have never been so regarded in a trade sense.

That the growth properly belongs to the vegetable kingdom is not denied, but the argument is that as truffles have no root or stem, and grow underground without cultivation, they are not "vegetables," as that term has been defined in *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745, and *Robertson v. Salomon*, 130 U. S. 412, 9 Sup. Ct. 559, 32 L. Ed. 995. It is true that truffles are of fungus growth. They are not grown in kitchen gardens, and are almost wholly used as a condiment; but it can hardly be denied that they have some of the characteristics of a plant, and therefore come within the broad understanding of the term "vegetables." Not being elsewhere in the tariff act specially provided for, I think the classification was correct. If the question were submitted to me as an original one, I am inclined to think that I would decide that the commodity is more fairly dutiable by similitude as mushrooms in tins than as a vegetable prepared or preserved; but this court is persuaded by the decision of Judge Wheeler, rendered in 1894 in *Park v. United States* (C. C.) 61 Fed. 398, where he decided that truffles are a kind of vegetable and commercially come within the category of vegetables of all kinds prepared or preserved.

To follow the rule laid down in that case would seem to be fully justified, in view of the fact that Congress by the enactment of the present tariff act reincorporated in paragraph 241 the same phraseology contained in the earlier provision. In so doing it is presumed to have known of the decision in the *Park Case*, and to have adopted the construction given by the court to the term "vegetables of all kinds," etc. This rule of judicial construction is supported by an abundance of authorities. *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1323, 32 L. Ed. 269; *Sessions v. Romadka*, 145 U. S. 42, 12 Sup. Ct. 799, 38 L. Ed. 609; *Spencer v. Phila. Smelting & Refining Co.* (C. C.) 124 Fed. 1002. Concededly the importer is entitled to have a decision in his favor where there is uncertainty or ambiguity regarding the proper construction of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tariff acts; but in this case there is not present in the mind of the court such doubt as to warrant the application of a different rule than that above stated.

The decision of the Board of General Appraisers is affirmed.

Under a stipulation of the parties this decision includes the case of Mouquin Restaurant Company v. United States, which relates to a similar importation and contention by the importer.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for appellants. -

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

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The articles in question are truffles put up in tin packages. They were assessed as vegetables prepared or preserved, not specially provided for, under paragraph 241 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]), whereas the importers claim they should have been assessed under the same paragraph by similitude as mushrooms prepared or preserved in tins:

"Beans, pease, and mushrooms, prepared or preserved, in tins, jars, bottles, or similar packages, two and one-half cents per pound, including the weight of all tins, jars, and other immediate coverings; all vegetables, prepared or preserved, including pickles and sauces of all kinds, not specially provided for in this act, and fish paste or sauce, forty per centum ad valorem."

The judge of the Circuit Court sustained the government's classification.

The Supreme Court held in *Robertson v. Salomon*, 130 U. S. 412, 9 Sup. Ct. 559, 32 L. Ed. 995, and in *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745, that the word "vegetables" in the tariff acts must be given its ordinary rather than its botanical meaning. Therefore beans, which are seeds botanically, and tomatoes, which are fruits, were classed in accordance with the ordinary understanding as vegetables, usually served at dinner. Though truffles belong to the vegetable kingdom, they are used solely as a condiment in cooking and never separately served as a table dish, and are not included in the trade or in ordinary usage among vegetables. Therefore, not being specially provided for, they must be assessed by similitude, and we think that, so assessed, they are to be regarded as imported mushrooms, prepared or preserved in tins, they being solely used for flavoring purposes.

So the board thought and so did the judge of the Circuit Court, but he affirmed their decision solely because of the case of *Park v. United States* (C. C.) 61 Fed. 398, decided under the act of 1890 (Act Oct. 1, 1890, c. 1244, § 1, Schedule G, par. 287, 26 Stat. 586). This was in deference to the principle that, when words of an earlier statute which have been judicially considered are carried into a later statute, they must be taken to carry with them the judicial construction they have received. This consideration has given us pause; but we think that in the act of 1897 Congress must be taken to have used the word "vegetables" in accordance with the previous definition given by the Supreme Court in the cases cited supra, and if the definition of "truf-

fles" in the Park Case comes into collision with them it must yield. It expresses neither the trade nor the common understanding, and we think should be subordinated to the unambiguous meaning of the word "vegetables" as determined by the prior decisions of the Supreme Court.

Judgment reversed.

CORN PRODUCTS REFINING CO. v. KING.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909. Rehearing Denied February 19, 1909.)

No. 1,509.

1. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVENESS.

Where plaintiff, a millwright helper, 23 years old, in good health and earning \$2.50 a day, sustained an injury to his limb by defendant's negligence, which necessitated an amputation near the hip joint, an allowance of \$7,500 was not so excessive as to indicate passion or prejudice.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372, 380; Dec. Dig. § 132.*]

2. MASTER AND SERVANT (276*)—INJURIES TO SERVANT—DEFECTIVE CABLE—EVIDENCE.

Where a servant was injured by the fall of an elevator counterbalance weight, evidence *held* sufficient to sustain a verdict finding that the cable supporting the weight was defective, and that defendant knew or should have known of the defect in time to have remedied it before the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 958; Dec. Dig. § 276.*]

3. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—INSPECTION.

Where an elevator inspector found one of the cables defective at the point where it was wound around the drum, it was his duty to examine all the cables on the same drum; nor could he presume that the part of the cable exposed to the air would be less rust-eaten and defective than the part somewhat protected by the windings on the drum.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235, 238; Dec. Dig. § 124.*]

4. MASTER AND SERVANT (§ 287*)—INJURIES TO SERVANT—QUESTION FOR JURY—NEGLIGENCE OF FELLOW SERVANT.

Where plaintiff was injured by the fall of an elevator counterbalance weight, due to the breaking of the cable, and both plaintiff and his fellow workmen testified that the machinery was not started prior to the accident, whether the machinery was suddenly started by plaintiff's fellow servant, so as to jerk the weight against a beam at the top of the guides, and tear loose the guides and break the cable, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1061; Dec. Dig. § 287.*]

5. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant by the fall of an elevator counterbalance weight, alleged to have been caused by a defective cable, whether plaintiff was negligent was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1089; Dec. Dig. § 289.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. MASTER AND SERVANT (§ 219*) — INJURIES TO SERVANT — ASSUMED RISK—DEFECTIVE APPLIANCES.

While a servant assumes all the risks naturally inherent in the work he is employed to do, he does not assume the risk of its being made more hazardous by the master's negligence in a matter not obvious, and in fact unknown, to the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*

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 Southern District of Illinois.

John A. Bloomington, for plaintiff in error.

J. M. Bandy and David E. Keefe, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. In this personal injury case King recovered judgment for \$7,500. Defendant contends that the assessment of damages was excessive and that the court erred in refusing to direct a verdict of not guilty.

Plaintiff was a millwright helper or apprentice, 23 years old, in good health, earning \$2.50 a day. His left leg was crushed so badly that it had to be amputated near the hip joint. We do not regard an allowance of \$7,500 as evidence that the jury were influenced by passion or prejudice.

From a cross-bar on defendant's freight elevator a hoisting cable extended to the top of the shaft, passed over pulleys, and ran down beside the shaft to a drum fastened to the basement ceiling. As the hoisting cable wound upon the drum, the elevator was raised; as it unwound, the elevator was lowered. Another cable was also attached to the drum, whence it ran to the top of the shaft, passed over a pulley, and supported a heavy iron weight that was movable in wooden guides at the side of the shaft. As the hoisting cable wound upon the drum, the weight cable unwound, and vice versa. The function of the weight was to exert a strain opposite to that of the hoisting cable and thereby prevent lost motion. On the day of the accident the elevator was resting on the bottom of the pit below the floor and the hoisting cable hung loose from the drum. Plaintiff, whose duty it was to assist in such carpenter and millwright work about the plant as his superiors directed him to engage in, was told by the superintendent and also by his foreman to go with another workman and replace the cables on the drum. While plaintiff was seated astride of the cross-bar at the top of the elevator, reaching over toward the drum, the counterweight cable broke and the weight fell from the guides, producing the injuries complained of.

Defendant's first insistence is that there was no evidence to sustain the averments that the cable was in a defective condition and that defendant knew or ought to have known of the defects in time to have remedied them before the time of the accident. The broken cable was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not exhibited in evidence, and the descriptions given by witnesses are variant. But the jury had the right to accept the testimony of plaintiff that immediately after the accident the cable at the point in question "was all busted and unraveled, looked like 50 or 60 small wires, all sticking out, looked all rusty and black." From this the inference of a rust-eaten condition of long standing might fairly be drawn. But the length of time is established by the testimony of the man whose duty it was to inspect the cables. Two weeks before the accident occurred, he climbed up on the drum of this elevator and found that the cable was rusty and that some of the wires were broken and sticking out. At once he made a written requisition upon the proper general officer for 300 feet of cable for this and another elevator. This witness said:

"I am not able now to state to the jury whether it was the cable on the counterweight I felt or the cable that lifted the elevator."

But if he found the one cable to be defective it was his duty to have examined the other that was on the same drum and subject to the same rust-producing atmospheric conditions of acid fumes and moisture; and defendant is chargeable as of that date with knowledge of what such examination would have disclosed. Attention is called to the fact that the cable at the point where it broke, a short distance from the weight, was never wound upon the drum, and so was not within the range of the inspector's discoveries. But the inspector had no right to presume that the part continually exposed to the air would be any less rust-eaten than the part somewhat protected by the windings on the drum.

It is next urged, in effect, that the negligence of a fellow servant, and not the defective condition of the cable, was the proximate cause of the weight's fall. Stress is laid on testimony for defendant that the man working with plaintiff started the machinery, that the weight was thereby jerked up against a beam at the top of the guides, and that the continued pull of the revolving drum tore loose the guides and broke the cable. Inasmuch as plaintiff and his fellow workman testified that the machinery was not started, the truth of defendant's theory cannot be taken as established beyond rightful rejection by the jury. And if the jury concluded, as they might, that the cable broke because it was so defective that it could no longer hold together under the mere strain of the weight, then well might they further infer that the sudden release of 1,000 pounds or more of iron bars would be likely to push out the four-inch wooden pieces that were screwed to the wooden framework.

Plaintiff neither knew nor had occasion to know of the defective condition of the cable before he went to the scene of the accident. While he was astride the cross-bar of the elevator he found, on reaching for the drum under the edge of the floor, that the hoisting cable was rusty and jagged; but as we read the evidence this was only the instant before the counterweight fell. We find no error in the submission of the question of contributory negligence to the jury. And though plaintiff assumed all the risks that naturally inhered in the work he was employed to do, he did not assume the risk of its being

made still more hazardous by defendant's negligence in a matter not obvious and in fact unknown to him. *American Window Glass Co. v. Noe*, 158 Fed. 777, 86 C. C. A. 133.

The judgment is affirmed.

HOUSTON & T. C. R. CO. V. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1909.)

No. 1,839.

1. CRIMINAL LAW (§ 1059*)—APPEAL AND ERROR—EXCEPTIONS—SCOPE.

An assignment that the court erred in peremptorily directing a verdict against defendant could not be reviewed, in the absence of an exception to the whole charge.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1059.*]

2. CRIMINAL LAW (§ 1059*)—EXCEPTIONS—SCOPE.

An assignment charging error in the whole charge cannot be reviewed on an exception to a single instruction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1059.*]

3. CARRIERS (§ 38*)—TRANSPORTATION OF LIVE STOCK—FOOD AND REST.

Where, notwithstanding the jury found in defendant's favor on the recitals and conditions in a requested charge, they could also conclude under the evidence that defendant "knowingly" and "willfully" failed to comply with the food and rest law, an instruction charging that if such conditions were found the jury should find for defendant was properly refused.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 38.*]

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

M. A. Spoons, Geo. Thompson, and J. H. Barwise, Jr., for plaintiff in error.

Wm. H. Atwell, for the United States.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. There is no bill of exceptions in the transcript showing that the trial judge peremptorily directed a verdict against the defendant. This disposes of the first assignment of error.

The bill of exceptions found in the transcript does show that the trial judge, in a somewhat lengthy charge, argumentatively advised the jury to find a verdict against the defendant; but no exception was taken to this charge as a whole, and only as follows:

"To which portion of the court's charge, instructing the jury that the memorandum was no defense, the defendant then and there in open court excepted, and still excepts, for the reason that the memorandum on the waybill, and the fact shown thereby, raised for the determination of the jury an issue as to whether or not a prudent and diligent man, and one who desired to enforce the law, would not have acted on the statement contained in the notation on the waybill."

And we are thus precluded from considering the second assignment of error, which charges error in the whole charge.

The third assignment of error is based upon the refusal of the court, duly excepted to, to direct the jury to find a verdict in favor

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the defendant. This assignment is not well taken. Under the evidence recited in the bill of exceptions, considered most favorably for the defendant, the case was one for the jury.

The fourth and last assignment of error was the refusal of the court to charge the jury as follows:

"If you find and believe from the testimony that there was a memorandum notation or other information on the waybill showing that the hogs had been unloaded, fed, watered, and rested, as required by the law, at Jacksonville, Tex., and that they had thereafter been reloaded at 1 a. m., December 19, 1907, and if the defendant company knew this when they received the shipment at Ft. Worth, and if you believe that an ordinarily prudent person, and one who was diligently and honestly striving to obey the law and faithfully seeking to carry it out, would have relied on this information so shown, and believed it, and if you further believe that defendant's employes at Ft. Worth did so rely on and believe this information, and because thereof did not unload the hogs, or have it done, and because of this had such hogs in possession after the expiration of the limit without unloading them, then you are instructed to find for defendant."

Taking all the recitals and conditions in this request to charge to be correct, upon which we express no opinion, still the evidence in the case offered by the government, and as to other circumstances and information, and as to other employes of the defendant, may have required the submission of the case to the jury to determine whether the defendant "knowingly" and "willfully" failed to comply with the law.

From a consideration of the whole record, a majority of the judges are of opinion that the record shows no reversible error.

Affirmed.

OLEKSY v. MIDLAND LINSEED CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909.)

No. 1,512.

MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMED RISK—OPEN ELEVATOR SHAFT.

Defendant maintained an elevator in its mill, but employed no operator, the elevator being operated by any employé who had occasion to use it. Two sides of the shaft were brick walls, the third side was protected by a wooden railing, and the remaining side had an iron rail at one end of which an opening was left to afford access to the elevator, protected only by an iron bar. Plaintiff had been employed in the mill at different times for a year and three months, during which there had been no change in the operation of the elevator. On the occasion of his injury plaintiff took the elevator to the fourth floor to change a movable spout. While doing this, another employé removed the elevator to another floor without replacing the bar, and plaintiff, without knowledge thereof, stepped through the unguarded opening and fell. *Held*, that the situation was open and obvious, and that plaintiff assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*

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

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

David Belasco, for plaintiff in error.
Robert Slater, for defendant in error.

Before GROSSCUP, BAKER, and KOHL, SAAT, Circuit Judges.

BAKER, Circuit Judge. Error is predicated of a directed verdict of not guilty in a personal injury case.

In defendant's four-story mill there was a freight elevator. No operator was employed, but every one from superintendent to roustabout ran it for himself whenever his work took him from one floor to another. On the fourth floor were bins to which a movable spout could be connected. This spout was some seven feet above the floor, and when any employé moved it from one connection to another he used a stick to lift and guide it with. As the spout in certain positions hung over or near the edge of the elevator shaft, the work was manifestly dangerous if the shaft was open and unguarded. Two sides of the shaft were brick walls, and the third side was protected by a wooden railing. On the remaining side there was an iron railing, at one end of which an opening was left to afford access to the elevator. An iron bar served as a gate in this opening.

According to the testimony most favorable to plaintiff, he was directed by his foreman while on the first floor to go to the fourth floor and change the spout connection. He took himself up in the elevator. After putting the iron bar across the opening and seeing that the elevator was in place, he began to move the spout. While walking around the elevator shaft, with his eyes directed upward, he came to the opening in the iron railing. The elevator was gone, the bar was out of place, he stepped through the unguarded opening, and fell.

When plaintiff was moving the spout, his foreman was also on the fourth floor, having come there on another matter. The foreman and plaintiff at this time said nothing to each other. As plaintiff's eyes were fixed upon the spout, he could not see what the foreman was doing. But the foreman admitted that he saw that the elevator had descended and that the bar was not in place, and refrained from telling plaintiff because he had no thought but that plaintiff was fully apprised of the situation.

Plaintiff had worked in this mill for a year, then was away for about a year, and at the time of the accident had been back at work for three months. He had run the elevator repeatedly, and had been on the fourth floor very often. But that was the first or second time he had moved the spout. Throughout his employment there had been no change in the physical relationship and the methods of operation of the elevator and of the spout. And there was no claim that any of the appliances was out of repair.

If it be conceded that on this state of facts defendant was negligent in adopting such a construction and location of spout and elevator guards, and such methods of operating them, nevertheless it is clear that the peremptory instruction was right. All the conditions were obvious, and were as well known to plaintiff as defendant. When he began his second term of employment, he knew the situation and methods under which he would have to work. And so, the risk of the

movement of the elevator by some employé, the risk of the failure of himself or another to secure properly the bar across the opening, and the risk of the failure of foreman or fellow servants to understand his peril and shield him from it, were all risks that he had assumed.

The judgment is affirmed.

DE LONG HOOK & EYE CO. v. FRANCIS HOOK & EYE & FASTENER CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 146.

TRADE-MARKS AND TRADE-NAMES (§ 99*)—SUIT FOR UNFAIR COMPETITION—CONCLUSIVENESS OF INTERLOCUTORY DECREE.

Where by an interlocutory decree on the merits it was adjudged that a defendant was chargeable with unfair competition in simulating the dress of complainant's goods, and a reference was directed to take an accounting of profits recoverable, all questions as to defendant's liability are concluded, and cannot be reopened before the master.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 99.*

Unfair competition, see notes to *Scheuer v. Muller et al.*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

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

This cause comes here upon appeal from a decree of the Circuit Court (159 Fed. 292), which decree confirmed the master's report herein and awarded complainant \$5,019, with interest and costs; said principal sum representing the profits wrongfully acquired by defendant in the sale of cards of hooks and eyes fraudulently simulating complainant's cards.

Edmund Wetmore and J. William Ellis, for appellant.

Charles E. Rushmore, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Defendant, a New York corporation, succeeded a West Virginia corporation, which had for some time been pirating complainant's cards. It actually began to do business the 1st of May, 1902, and the figures found by the master as representing the profits made by defendant upon its sales subsequent to that date are those furnished by the defendant. In order to understand the precise point presented by defendant upon this appeal, it will be necessary briefly to review the history of the litigation.

The suit was begun May 3, 1902, against defendant's predecessors in the state court. Complaint was then amended by substituting defendant, which thereupon removed the cause into the United States Circuit Court. The cause came on for hearing on pleadings and proofs before the Circuit Court, which held that defendant had "manufactured and sold cards of hooks and eyes which are in simulation and evident resemblance of those of complainant set forth in the bill of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complaint and put in evidence as Complainant's Exhibits De Long Cards Nos. 4, 5, and 6, in violation of the rights and to the injury of said complainant, and that such simulation and resemblance was intentional, for the purpose of deceiving the public and an unlawful and fraudulent competition in business." The Circuit Court directed the issuance of an injunction, and adjudged that defendant "account for and pay to the complainant all the profits realized by it on the sale of hooks and eyes carded by it and sold by it in imitation of the aforesaid carding of the hooks and eyes manufactured and sold by the complainant." It referred the cause to a master to take the account. Appeal was taken to this court, which modified the decree by eliminating carding such as was shown in Exhibit No. 6, and affirmed it as to carding such as shown in Nos. 4 and 5. Upon the return of the mandate the former decree of the Circuit Court was modified by striking out all reference to "No. 6"; the language above quoted as to accounting for profits being repeated in the modified decree. The master took testimony, accepted defendant's statement as to the amount of profits, and reported the same as \$5,019, with interest. Defendant excepted to the report, the court overruled the exceptions and confirmed the report, and defendant has appealed.

The point mainly relied upon is that the master refused to receive testimony to show that complainant had not continued to card and sell its hooks and eyes as shown in Exhibits 4 and 5, down to the period covered by defendant's infringement; it being contended that, if such goods were withdrawn from the market, defendant could not be liable for profits derived from simulating. It is not necessary to pass upon the merits of this contention. We do not intend to intimate that it has any merit. The master properly excluded the testimony, because the question was conclusively disposed of by the decree. The point, if sound, bears, not upon the amount of profits, but upon complainant's right to any decree at all for profits. That question was a part of the main case, and should have been litigated upon the trial. The decree for profits, which has been affirmed by this court, finally disposed of it.

The same remarks apply to the proposition that the laches of complainant's predecessors is sufficient to preclude any right to an account for past profits. A defendant cannot hold back such a point as that when trying the case on the merits, and then, after he has been defeated, and the decree affirmed on appeal, present it for the first time before the master.

The decree is affirmed, with costs.

DE LONG HOOK & EYE CO. v. FRANCIS HOOK & EYE & FASTENER CO.
(Circuit Court of Appeals, Second Circuit. February 17, 1909.)

No. 50.

PATENTS (§ 328*)—INVENTION—HOOK AND EYE PACKAGE.

The Richardson patent, No. 676,824, for a hook and eye package, is void for lack of invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

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

For opinion below, see 150 Fed. 597.

Cyrus N. Anderson and Joseph C. Fraley, for appellant.
Macomber & Ellis (Edmund Wetmore, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit to restrain the alleged infringement of letters patent No. 676,824, issued on June 18, 1901, to Thomas De Q. Richardson for an improvement in "hook and eye packages," and now owned by the complainant.

There are two well-known types of eyes used in a hook and eye fastener. One—known as the "loop eye"—is the U-shaped form in which the eye extends from its point of attachment to the garment toward the hook in substantially the plane of the flaps of the garment to be fastened. The other—known as the "invisible eye"—consists of a bar which extends in a straight line upon the fabric, but is offset therefrom in order to receive the hook.

It is explained in the patent that as sometimes a user will require one form and eye and sometimes the other, and that as the particular form required will not ordinarily be known in advance, the patentee proposed to furnish with each package of hooks and loop eyes a number of invisible eyes, so that the purchaser might have a choice. The nature of the invention as stated in the patent is as follows:

"In its broader aspect, my invention comprehends the application to the face of a card, upon which are mounted and secured hooks and loop eyes, of a series of what are termed 'invisible eyes.'"

Claim 1 of the patent, which is now in suit, is as follows:

"A commercial package of hooks and eyes comprising a carrier card and a row of hooks and loop eyes, two rows of thread stitching which secures said hooks and eyes to the card, and a series of invisible eyes secured to the card by one of said rows of thread stitching, substantially as set forth."

The defenses are (1) want of invention in view of the prior art, and (2) noninfringement.

The claim in question has these elements: (1) A carrier card. (2) A row of hooks and loop eyes. (3) Two rows of thread stitching, which secure the hooks and eyes to the card. (4) A series of invisible eyes, secured to the card by one of the rows of stitching. All of these elements were old at the time of the application for the patent. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

combination, by attaching the hooks and loop eyes to the card by rows of stitching, was also old. Merely mounting the invisible eyes upon a card bearing the hooks and loop eyes obviously required no invention. If there was any novelty at all in the patent, it consisted in securing the invisible eyes to the card by the same thread with which the hooks and loop eyes were attached.

But, as stated by the complainant's own expert, the prior art showed: (a) Commercial packages, consisting of cards with hooks and one kind of eyes secured thereon by stitching. (b) Constructions wherein a single line of stitching was employed to secure two articles or materials to a third material. (c) Commercial packages, consisting of sample cards having two or more samples or articles other than hooks and eyes secured thereto by threads. While, therefore, the precise commercial package of the claim is not shown in the prior art, the state of the art was such that it required no invention to attach to the old hook and eye card another set of eyes by the old means of securing two articles by one thread; and, without any testimony of prior uses, it seems to us obvious that only ordinary mechanical skill and judgment were required to attach two kinds of eyes to a card by the same stitching when it was thought desirable to sell them together, and to use as little space as possible upon the card.

It is urged that the package of the patent went into general use. Undoubtedly it did supply a want, but that alone does not show invention.

The claim in question is held to be invalid, and, consequently, the decree of the Circuit Court is affirmed, with costs.

CHICAGO, M. & ST. P. RY. CO. v. ANDERSON.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1909.)

No. 2,770.

1. APPEAL AND ERROR (§ 731*)—ASSIGNMENTS OF ERROR—SCOPE.

An assignment that the verdict "is not justified by the evidence and is contrary to law" is too general and indefinite to raise a question for the consideration of the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017, 3021; Dec. Dig. § 731.*]

2. APPEAL AND ERROR (§ 997*)—REVIEW—VERDICT.

Where the evidence is conflicting, and there is substantial proof in support of the verdict, the denial of defendant's motion for a directed verdict will not be reversed, though the preponderance of the evidence favors defendant's contention.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024; Dec. Dig. § 997.*]

3. EVIDENCE (§ 20*)—JUDICIAL NOTICE—RAILROAD MANAGEMENT—AUTHORITY OF CONDUCTOR.

Courts will take judicial notice of the general features of railroad operation, that the conductor of a train has control and management there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of, and that the protection of the railroad company's rights against trespassers is within the general scope of his authority.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.*]

4. RAILROADS (§ 277*)—TRESPASSERS—EJECTION.

A railroad company is liable for compensatory damages for a misuse of a conductor's authority in the ejection of a trespasser from a freight train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 887-890; Dec. Dig. § 277.*]

Duty to trespasser on train, see note to Southern Ry. Co. v. Shaw, 31 C. C. A. 76.]

5. TRIAL (§ 244*)—REQUEST TO CHARGE—PROMINENCE TO PARTICULAR MATTERS.

Requests to charge especially directing the jury's attention to statements, claimed to have been made by plaintiff after the accident, not in harmony with his testimony at the trial, and that, if the jury found the statements were understandingly made and were true, their verdict should be for defendant, were properly refused as singling out and giving undue prominence to particular matters of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

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

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

W. D. Abbott (L. L. Brown and S. H. Somsen, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. The plaintiff, Roy Anderson, recovered a judgment against the railway company for personal injuries sustained by being compelled by one of its trainmen to get off of a freight train while it was in rapid motion. Anderson was a trespasser, and claimed he was forced to get off by threats of personal violence at a time when it was very dangerous to do so. He first said a brakeman threatened him, but afterwards identified the conductor as the man. The company presents six assignments of error.

The first assignment, that the verdict of the jury "is not justified by the evidence and is contrary to law," is too general and indefinite to raise a question for the consideration of this court. *Wilson v. Everett*, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286; *Oswego Township v. Travelers' Insurance Co.*, 70 Fed. 225, 17 C. C. A. 77.

The second is that the trial court erred in denying the request of the railway company for a directed verdict. It will serve no useful purpose to set forth the testimony. It was conflicting, and, while the preponderance may have favored the defendant, it cannot be denied there was substantial proof supporting the verdict.

The third and sixth assignments relate to instructions given the jury; the contention being that, as there was no proof upon the subject, it was error for the court to assume the conductor had authority to eject a trespasser from a moving train. It is said that "the relation between the master and servant in such cases is reduced to one

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of agency, to establish the scope of which proof must be offered," and that "no presumption can possibly arise as to the authority of a conductor upon a freight train to deal with persons seeking transportation thereon." The law is, however, that courts take judicial notice of the general features of railroad operation, that the conductor has the control and management of the train to which he is assigned, and that the protection of the rights of the company against trespassers is within the general scope of his authority. A misuse of such authority subjects the company to liability for compensatory damages.

In the fourth and fifth assignments complaint is made of the refusal to give two instructions that were requested. In each of them it was sought to direct the attention of the jury specially to statements which witnesses testified Anderson made after the accident and which were not in harmony with his testimony at the trial, and to have the jury instructed that, if they found the statements were understandingly made and were true, their verdict should be for the defendant. The trial court was right. The vice in such instructions is that they single out and give undue prominence to particular matters of evidence. *Western Coal & Mining Co. v. Berberich*, 94 Fed. 329, 36 C. C. A. 364.

The judgment is affirmed.

LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE V. HAYES.

(Circuit Court of Appeals, Second Circuit. March 16, 1909.)

No. 205.

1. SHIPPING (§ 86*)—INJURIES TO LONGSHOREMAN—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a longshoreman by being struck by certain rods alleged to have been negligently lowered into the hold, whether defendant's foreman of longshoremen and its assistant foreman were negligent in hastily lowering the rods into the hold without back-lashing held for the jury.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 86.*]

2. PLEADING (§ 376*)—ISSUES AND PROOF—ADMITTED FACTS.

Where defendant's answer and its bill of exceptions admitted service of plaintiff's notice of intention to sue under the New York employer's liability act (Laws 1902, p. 1748, c. 600), proof of such intention was not required.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.*]

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

On writ of error to review a judgment entered upon the verdict of a jury in favor of Michael Hayes, the plaintiff below, for \$2,500. The action was commenced in the Supreme Court of the state and notice was served pursuant to the provisions of the employer's liability act of New York (Laws 1902, p. 1748, c. 600). The defendant removed the action to this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John M. & Joseph P. Nolan, for plaintiff in error.
Thomas C. McDonald, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The plaintiff below had been a longshoreman in the employ of the defendant for nine years prior to November 13, 1906. On that day he was, with others, engaged in receiving and stowing cargo in the lower hold of the steamship La Touraine and was injured by being struck by the contents of a case which was being lowered into the hold. This case was about 16 feet in length and from a foot to a foot and a half square and contained brass rods "as thick as a man's finger." When the case had been lowered part way the end broke, or became loose, and the rods fell out and struck the plaintiff, who was in a stooping position, upon the back and left hip causing serious injury. The accident happened because back-lashes were not used.

That the omission to use them was negligence is not seriously disputed but the defendant contends that the fault was that of a fellow servant. The plaintiff insists, on the contrary, that the fault was directly attributable to a person, or persons, whose sole or principal duty was that of superintendence. Louis Johnson was defendant's foreman of longshoremen, hiring and discharging many of the men, and Connors was assistant foreman. There was testimony that but for the orders of these men, or one of them, the case would have been properly back-lashed before being lowered into the hold and that the anxiety of the foreman to get the cargo in quickly induced him to order this case sent down without being properly safeguarded. The court submitted to the jury the question whether this particular case required back-lashing, and, if so, whether the failure to back-lash was due to the negligence of Johnson or Connors. If they found that it was not, they were instructed that the defendant was entitled to a verdict.

The question of negligence was clearly for the jury and the instructions of the court were as favorable to the defendant as the facts warranted. It was argued that no proof was made of service of notice of injury required by the state liability act (Laws 1902, p. 1748, c. 600). The complaint alleges the service, the answer admits it, and the third paragraph of the bill of exceptions is as follows:

"Defendant's counsel admits that the defendant was served with a notice of intention to sue under the employer's liability act."

How there could be any stronger proof than this we are at a loss to discover. The denial by the Circuit Court of the motion to set aside the verdict and for a new trial presents no question which this court can review.

The judgment is affirmed with costs.

GARRETT v. POPE MOTOR CAR CO.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1909.)

No. 1,893.

1. APPEAL AND ERROR (§ 728*)—ASSIGNMENTS OF ERROR—SUFFICIENCY—RULINGS ON EVIDENCE.

An assignment that the court erred in ruling out evidence offered on behalf of plaintiff over plaintiff's exceptions is fatally defective for failure to quote the full substance of the evidence ruled out, as required by Circuit Court of Appeals rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) and will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3012; Dec. Dig. § 728.*]

2. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—RULINGS ON INSTRUCTIONS.

Assignments that the court erred in its charge to the jury and in refusing to charge as requested are fatally defective for failure to state in what particular the court erred in its charge and what particular request the court erred in refusing, under Circuit Court of Appeals rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), providing that, if error is alleged to the court's charge, the assignments shall set out the part referred to totidem verbis, whether it be in instructions given or refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3015; Dec. Dig. § 730.*]

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

Before LURTON and SEVERENS, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. In the view we take of this case it is only necessary to say that it was heard before the court and jury, resulting in a verdict for the defendant. A motion for a new trial was entered and disallowed. Errors were assigned, and appeal taken.

The errors assigned by appellant are as follows:

"(1) The court erred in ruling out evidence offered on behalf of plaintiff over the exceptions of plaintiff. (2) The court erred in the charge to the jury. (3) The court erred in refusing to charge the jury as requested. (4) The court erred in overruling plaintiff's motion for a new trial. (5) The judgment is contrary to the weight of the evidence. (6) The judgment is contrary to law. (7) The verdict should have been for the plaintiff, instead of for the defendant."

A casual examination of the assignment of errors discloses the fact that it wholly fails to meet the requirements of the rules of this court. Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) provides as follows:

"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 errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed 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."

In substance, this rule requires that the appellant shall file an assignment of errors, stating separately and particularly each error asserted and intended to be urged. If the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. If 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 instructions given or instructions refused. Errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned.

The first error assigned does not quote the full substance of the evidence ruled out, nor, indeed, does it quote any part thereof, but in the most general fashion states that the court erred in ruling out evidence offered on behalf of the plaintiff. The second and third assigned errors as to the charges are as general as the first. In what particular did the court below err in the charge to the jury? What particular request did the court below refuse to give in charge to the jury? In short, under the rule of the court above quoted, there is no error assigned of which this court can take notice, unless it could do so under the last clause. *Coney Island Company v. Dennan*, 149 Fed. 687, 79 C. C. A. 375.

Since there is no error in the record so plain as to warrant the court on its own motion to take notice of it, the judgment below must be affirmed.

MEYER v. NATIONAL BISCUIT CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909.)

No. 1,496.

COURTS (§ 352*)—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE—DISMISSAL AND NONSUIT.

Under the conformity act (Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684]), it was error for the federal Circuit Court, sitting in Illinois, in an action tried to a jury, to refuse plaintiff's motion for leave to take a nonsuit, after the judge had announced his decision sustaining a motion for a directed verdict.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 352.*

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

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edward Maher and Robert F. Kolb, for plaintiff in error.
John D. Beack, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. At the conclusion of the evidence in this action for damages on account of personal injuries the defendant company moved for a directed verdict. After argument by counsel for the respective parties the judge announced his decision sustaining the motion. Thereupon plaintiff moved for leave to take a nonsuit. This motion was overruled, and plaintiff duly excepted. The judge then gave a peremptory instruction in obedience to which the jury rendered a verdict for defendant.

While it may be true that there is sufficient elasticity in the conformity act (section 914, Rev. St. U. S. [U. S. Comp. St. 1901, p. 684]; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699) to permit the United States courts to decide that the state practice giving plaintiffs in actions at law, where jury trial has not been waived, the right to take nonsuits at any time before the jury retire should not be applied to the disposition of a case on demurrer to the evidence, or on the present-day substitute, the motion for a directed verdict (*Parks v. Southern R. Co.*, 143 Fed. 276, 74 C. C. A. 414), nevertheless we believe that the long-established custom of the United States courts sitting in Illinois of following the Illinois practice respecting nonsuits should be adhered to, at least until by duly promulgated rules the bar have been advised of the change.

On the facts of this case plaintiff would have been entitled to a nonsuit in the trial courts of Illinois. *Brown v. Lawler*, 130 Ill. App. 540; *Berry v. Savage*, 2 Scam. 261; *Howe v. Harroun*, 17 Ill. 294; *Adams v. Shepard*, 24 Ill. 464; *Gordon v. Goodell*, 34 Ill. 429.

In *Wolcott v. Studebaker*, 34 Fed. 8, Judge Dyer, sitting in the Circuit Court for the Northern District of Illinois, and following precedents established by Judge Drummond and Judge Blodgett, permitted the plaintiff to discontinue after a motion for a directed verdict had been sustained. In the Southern District Judge Humphrey ruled that plaintiff's motion for leave to take a nonsuit came too late, if it was not made until after the peremptory instruction had been given and the jury discharged from further service in the case. *Drummond v. Louisville & N. R. Co.*, 109 Fed. 531. The practice is the same in the United States courts in Indiana. *Gassman v. Jarvis*, 94 Fed. 603.

In *Chicago, M. & St. P. R. Co. v. Metalstaff*, 101 Fed. 769, 41 C. C. A. 669, the Circuit Court of Appeals for the Eighth Circuit approved the practice of the United States courts sitting in Missouri of permitting nonsuits in conformity to the practice in the Missouri courts.

The judgment is reversed, and the cause remanded, with the direction to grant plaintiff's motion for a nonsuit.

THE MESSENGER.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1909.)

No. 1,444.

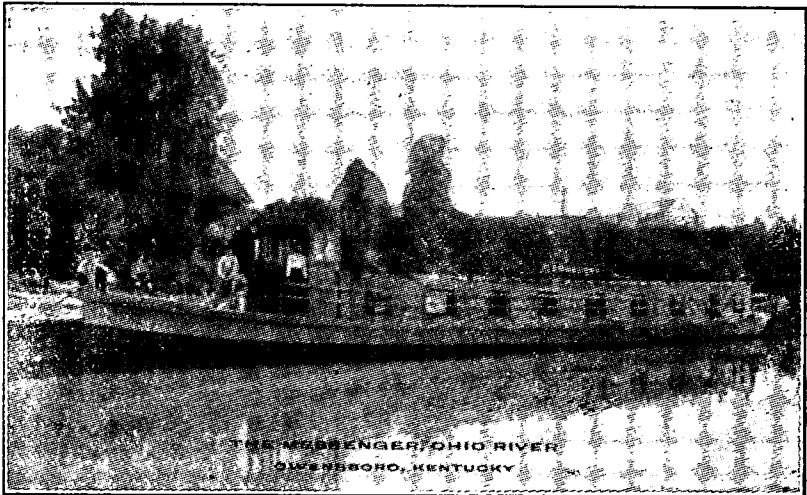
SHIPPING (§ 10*)—REGULATION OF GASOLINE VESSELS—COMPUTATION OF TONNAGE.

The superstructure of an inclosed cabin on a gasoline boat, which cabin extends from the bottom of the boat above the deck having windows in the superstructure, but which adds nothing to the carrying capacity of the boat in either passengers or cargo, is not a "closed-in space * * * available for cargo or stores or for the berthing or accommodation of passengers or crew," which under Rev. St. § 4153 (U. S. Comp. St. 1901, p. 2812) is to be added to the space below deck in computing the vessel's tonnage, and where without it the boat is not over 15 tons burden, she is not subject to inspection, etc., under the provisions of Rev. St. § 4426 (U. S. Comp. St. 1901, p. 3029).

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 24; Dec. Dig. § 10.*]

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

That the facts hereinafter stated might be the more readily understood, the following picture of the boat involved in this case was put into the record:



R. W. Slack, for appellant.

M. H. Thatcher, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the court below was a libel of information, under section 4426, tit. 52, c. 1, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3029), by the District Attorney for the District

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of Indiana, against a gasoline boat known as the Messenger, her boats, tackle, apparel and furniture, and against all persons intervening therein, to have assessed against said boat certain statutory penalties for violation of the United States statutes requiring boats over fifteen tons burden to be inspected, and to carry inspection papers. The Messenger was alleged in the libel to be engaged in navigating a waterway of the United States, the Ohio River, between the states of Indiana and Kentucky, carrying freight and passengers for hire.

The chief defense is that the boat was not one of over fifteen tons burden. But on the question thus raised there is no dispute of fact; for both the witnesses for the government and the witnesses for the defense put the measurement of the boat below the level of the tonnage deck (that is to say exclusive of the cubic quantities of the so-called superstructure above that level) at fifteen tons; and in the calculation of the witnesses both for the government and for the defense, if the so-called superstructure above the tonnage deck is to be included, the boat is above fifteen tons burden. The whole case, therefore, turns upon the question whether, in the calculation under the statute, anything is to be added to the tonnage below the level of the tonnage deck on account of the cubic quantity of the so-called superstructure above the tonnage deck level.

The law provides (section 4153, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2812]) that if there be "a break, a poop or any other permanent closed in space on the upper deck available for cargoes or stores, or for the berthing or accommodation of passengers or crew, the tonnage of that space shall be ascertained and added to the gross tonnage: providing that nothing shall be added to the gross tonnage for any sheltered space above the upper deck which is under cover, and open to the weather"; and it is argued that the superstructure above the deck comes within this provision of the statute.

"Breaks" and "poops" have been defined as follows:

"Break: The sudden rise of a deck when not flush; when the aft and sometimes the forepart of a vessel's deck is kept up to give more height below and at the drifts." (Sailor's Word-Book. Admiral W. H. Smyth.)

"Poop: The aftermost and highest part of a large ship's hull; also a deck raised over the afterpart of a spar deck, sometimes called the round-house. A frigate has no poop, but is said to be pooped when a wave strikes the stern and washes on board." (Sailor's Word-Book. Admiral W. H. Smyth.)

"Break: In a ship the part where a deck terminates and the descent to the next deck begins." (Century.)

"Break of the Poop: The forward end of the poop-deck." (Century.)

"Poop: Stern or aftermost part of a ship. A deck above the ordinary deck in the aftermost part of a ship." (Century.)

The cabin enclosed by the superstructure is let down through the tonnage deck to the bottom of the boat, so that the bottom of the boat becomes the floor for the cabin. The sides of the superstructure above the tonnage deck are the sides of the cabin exposed to the weather, and the roof of the superstructure is the roof of the cabin. The cabin is built of planking timbers, in which are set windows like a street or railway car, and has a roof of tar canvas, and water proof sides. Nothing is added by the cabin, either below the deck level or in the

enclosed space above the deck level, to the carrying area of the boat. So far as burden is concerned, the boat offers the same area, no more and no less, than if the space was open, or was covered merely by a canopy; and if the covering were that merely of a canopy, there is no claim that the break in the deck and the superstructure over it, would be a "break" or "poop" within the meaning of the law.

These facts, it seems to us, resolve the question presented in favor of the appellant. Unquestionably, the reason for adding in the calculation of tonnage, the enclosed spaces described as breaks or poops, is when, and because, such spaces add substantially to the carrying power of the boat; for in the absence of such added carrying power there would be no reason for added tonnage. And inasmuch as the superstructure presented to us adds nothing to the carrying area, it is neither within the reason for adding the area of "poops" and "breaks" or the express definition thereof. True, as the government contends, these provisions are for the safety of passengers. But there is no reason why Congress should have intended to have taken any greater precautions in the case of passengers who looked out through windows upon the weather, than of passengers who have no protection from the weather, except that of a covering or canopy, the sole difference, so far as safety is concerned, being in the presence or absence of the windows.

Following, in this holding, the ruling of the Circuit Court of Appeals for the Sixth Circuit, in *U. S. v. The Ben R.*, 134 Fed. 784, 67 C. C. A. 290, the decree of the District Court is reversed, with instructions to dismiss the libel.

In re MUNGER VEHICLE TIRE CO.

(Circuit Court of Appeals, Second Circuit. November 16, 1908.)

No. 39.

BANKRUPTCY (§ 250*)—INSOLVENT CORPORATION—CALL ON STOCKHOLDERS OF UNPAID STOCK.

The bankruptcy court has jurisdiction to make a call on the stockholders of a bankrupt corporation; but the hearing before the referee to take evidence on such question should be expressly limited to the question: Should there be a call on the shareholders of unpaid stock, and, if so, to what amount?

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 350; Dec. Dig. § 250.*]

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

On appeal from an order of the District Court, dated the 14th day of January, 1908, whereby the petition of the trustee in bankruptcy, asking for an order that an assessment be levied upon the Rubber Goods Manufacturing Company, an alleged stockholder of the bankrupt corporation, was referred to the referee, as special master, to "take evidence bearing on the question whether an assessment should be levied upon said Rubber Goods Manufacturing Company, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whether the relief prayed for in said petition, verified April 18, 1907, by said trustee, should be granted."

Ernest Hopkinson (Henry F. Wolff, of counsel), for petitioner.
G. H. Montaque, for respondents.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We are of the opinion that the District Court had jurisdiction to make a call upon the stockholders of the Munger Vehicle Tire Company, if the facts warranted the court in taking such action. We think, however, that the hearing before the referee should be expressly limited to the determination of this issue alone. It being conceded at the argument that the prayer of the petition is too broad, it follows that the reference to determine whether the relief prayed for in the petition should be granted is also too broad, and opens a field of inquiry which may possibly be prejudicial to the interests of the rubber company. The issue before the referee should be confined solely to the question: Should there be a call upon the shareholders of unpaid stock, and, if so, to what amount? With the controversy thus narrowed, we fail to see how the rubber company will be prevented from making any defense it may have to an action brought against it as a stockholder, whether it appears before the special master or fails to do so.

The order should be amended in conformity with this opinion, and, as so amended, should be affirmed. No costs of this appeal to either party.

NAYLOR et al. v. ALSOP PROCESS CO.†

(Circuit Court of Appeals, Eighth Circuit. April 3, 1909.)

No. 2,808.

1. PATENTS (§ 21*)—INVENTION—PROCESS.

The mere selection of one substance from among a number as the active agent in a chemical process may involve patentable invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. § 21.*]

2. PATENTS (§ 66*)—ANTICIPATION—PRIOR PATENTS.

When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. They cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 66.*]

3. PATENTS (§ 55*)—ANTICIPATION—PRIOR PATENTS.

An expert cannot take a process patent, which has never been applied industrially, and work the process in his laboratory, and discover therefrom something which is not disclosed on the face of the patent, and then transfer that experience back to the time of the patent, and make it a part of the prior art, for the purpose of defeating a subsequent patent for a meritorious invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 74; Dec. Dig. § 55.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† Rehearing denied June 14, 1909.

4. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — PROCESS OF BLEACHING FLOUR.

The Andrews patent, No. 693,207, for a process for aging and bleaching flour, which consists in passing the same in a state of fine division through an atmosphere containing a small regulated quantity of gaseous nitrogen peroxide, was not anticipated in the prior art, and discloses both novelty and invention, and in the absence of evidence that the process results in an adulteration of the flour, or is used for the purpose of fraud, must be conceded utility, it being conceded that it whitens the flour without the necessity of aging as previously required; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

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

George P. Barton, Dewitt C. Tanner, and George E. Folk, for appellants.

Livingston Gifford, George W. Rea, and Bruce S. Elliott, for appellee.

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

AMIDON, District Judge. This is a suit in equity, brought by the Alsop Process Company, to restrain the infringement of letters patent No. 693,207, granted to John and Sidney Andrews, February 11, 1902, on an application filed September 21, 1901, for a process of bleaching and conditioning flour. The complainant prevailed below. It had long been known that flour immediately after grinding, especially if produced from newly grown wheat, was unfit for domestic use. Storing the flour for about three months was necessary in order to whiten its color and otherwise improve its condition. The patentees claim to accomplish these results immediately by their process. In their specification they state that:

"The invention consists essentially in subjecting the flour to the action of a suitable gaseous oxidizing agent, whereby nascent oxygen, or its equivalent, is produced, or comes in contact with the flour. A very small quantity of the oxidizing agent suffices, so little, indeed, that the actual composition of the flour, as shown by analysis, is hardly perceptibly altered. The plan we prefer is to pass the flour through various conveyors whereby it is brought in contact with the gaseous oxidizing agent, and the drawings we herewith append show the apparatus which from long experience we have found to act best with air carrying a small quantity of gaseous peroxide of nitrogen (N₂O₄). We do not, however, limit ourselves to the use of nitrogen peroxide, as we have found that chlorine, bromine, and other gaseous compounds capable of liberating oxygen will act with more or less efficiency."

They then expressly disclaim ozone and sulphuric and sulphurous acid, for reasons stated. Claim 1 of the patent, as originally presented, read as follows:

"The improvement in the process of aging and bleaching flour, which consists in thoroughly and uniformly exposing the same to a medium capable of giving nascent oxygen to the flour, substantially as described."

Claim 3 was framed so as to substitute for "nascent oxygen" "a dilute, gaseous, or vaporized oxidizing agent." The application was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rejected, and the inventors were required to bring their claims "down to the actual invention." In obedience to that requirement the claims were framed as they now appear in the patent. Claim 1 reads as follows:

"The improvement in the process of aging and bleaching flour, which consists in passing the same in a state of fine division through an atmosphere containing a small regulated quantity of gaseous nitrogen peroxide."

Claim 2 is substantially the same, while claims 3 and 4 simply embrace well-known methods of producing nitrogen peroxide by a combination of nitric acid and ferrous sulphate, or other recognized metallic compounds. The patent, therefore, both by its language and by what occurred while it was pending before the patent office, is confined to nitrogen peroxide as its chemical agent, and any other chemical agent, if any such exist, so well known to accomplish the same result as to make it an equivalent of nitrogen peroxide within the rules of patent law. It will be noticed that the specifications are much broader than the claims, and in such a case it is now elementary that the claims measure the scope of the patent.

There are two well-known methods of producing nitrogen peroxide. The one is chemical, by combining nitric acid with a metallic compound, like sulphate of iron. The other is electrical, and is accomplished by subjecting atmospheric air to a flaming electric arc. The Andrews patent was first granted in England, where the inventors reside, and pointed out, as already stated, the chemical method of producing nitrogen peroxide. In 1904, a patent was issued to James N. Alsop, in the United States, for a process which accomplished in flour the same results as the Andrews process. The agent claimed by Alsop was the gases generated by subjecting air to a flaming electric arc. In his patent he does not attempt to name such gases, and it probably was not known to him at the time that nitrogen peroxide was his active agent. The Andrews process went into immediate and extensive use in the flour mills of Great Britain. No attempt was made to introduce it in this country. Here, immediately after the taking out of the Alsop patent, that process was extensively applied industrially. The Alsops also took out a patent for their process in Great Britain, and by 1906 the two processes came in conflict before the industrial world. In that year the Alsops instituted a suit in the English courts for the revocation of the Andrews patent, claiming, among other things, that it was void for want of novelty, invention, and utility. This litigation has resulted in decisions by the Court of Appeals and the House of Lords sustaining the Andrews patent, and adjudging the Alsop process to be an infringement of it. In this suit it was fully established that nitrogen peroxide is the active agent of both Alsop and Andrews. Patents for both these processes were also taken out in France, and in litigation between the parties there the Andrews patent has been sustained, and the Alsop process enjoined as an infringement.

After their defeat in the English courts, the Alsops, in order to protect the licensees of their process in the United States, purchased

of Andrews, for a consideration of \$300,000, the exclusive right to use that process in this country, and this suit is brought by them for the protection of the rights thus secured.

Turning now to the defendants, they are engaged in the manufacture and sale of a machine which embodies the Andrews process. They produce their nitrogen peroxide chemically. It is fully established, and in fact conceded, that the machine made and sold by them embodies the Andrews process. Under well-known principles, therefore, the defendants are guilty of contributory infringement. It is quite likely that they were led to engage in their business from the fact that the only process here employed was the Alsop process using the electric method, and it may be that when the defendants began manufacturing their machine they were not aware that a process which produced nitrogen peroxide chemically was an infringement of any patented process, as the Andrews patent had not then been industrially applied in this country.

The defendants are liable, if the Andrews patent is valid. They challenge its validity upon three grounds: (1) For want of utility. (2) Because it lacks patentable invention. (3) For want of novelty.

The foreign suits above referred to were all brought to final decision while the present suit was pending. In both the French and English trial courts the Andrews patent was held invalid—in the former for want of utility, and in the latter for want of invention. These decisions gave to the defendants great encouragement in the defense of the present suit. It may be doubted whether their defense would have been made if the final result in the appellate courts of France and England had been known to the defendants at the time this suit was instituted, for all the questions that are here involved were there litigated and decided. See *In the Matter of Andrews Patent*, 23 *Patents, Designs & Trade-Mark Cas.* 441; same case on appeal, 24 *Patents, Designs & Trade-Mark Cas.* 349; same case in House of Lords, — *Patents, Designs & Trade-Mark Cas.* —. See, also, *Flour Oxidizing Co., Limited, v. Carr & Co., Limited*, 25 *Patents, Designs & Trade-Mark Cas.* 428, involving the same patents. Copies of the French decisions have been furnished to us, but the volumes of the French reports containing the decisions, are not given.

Very little evidence was adduced at the trial in support of the defense relating to the utility of the invention. But, since the argument of the cause, the decision rendered by the Secretary of Agriculture on December 9, 1908, wherein it was held that complainant's process of bleaching flour is a violation of Food and Drugs Act June 30, 1906, c. 3915, 34 *Stat.* 768 (*U. S. Comp. St. Supp.* 1907, p. 928), has been brought to the notice of the court by counsel. Conceding, without deciding, that such a decision might properly have been introduced in the trial court as evidence, it cannot be brought to this court for that purpose, nor can it be availed of here as a decision of controlling authority. It may be that complainant's bleaching is simply the whiteness of the whited sepulchre—a mere cover for adulteration and fraud. It is urged in argument that whiteness has long been regarded among purchasers of flour as an index of the wheat from which the

flour is made, and of the strength of the flour for bread making and other domestic uses, and that artificial bleaching not only adulterates the flour, so as to make it less wholesome, but also enables the millers and merchants to palm off on the consumer flour made from inferior grades of wheat and possessing inferior strength for flour of better origin and quality, because by the bleaching process they are able to give to flour of all kinds the same outward appearance. The difficulty with this defense in the present case is that it has not been litigated. For a proper determination of these grave issues the court must be instructed by evidence upon two important questions: First, as to adulteration, the court must be informed by scientific experts as to what elements are introduced into the flour by this process, and their effect upon it as an article of food; second, as to fraud, the court must be informed by proper evidence touching the influence of color as an index of the quality and source of flour, and whether or not bleached flour is in fact used as a means of defrauding the consumer. We have no evidence to guide us upon either of these subjects. The defendants have the burden of proof, and their defense must fail. These matters must be left for decision in a case where they are properly litigated. In the absence of the objectionable features just referred to, the process plainly involves patentable utility. It saves the expense of storing flour, and prepares it for immediate use in the domestic arts. Whiteness has long been a desirable quality in flour, and has been the controlling motive in the milling business. The whole system of bolting simply removes the darker portions of the wheat. Furthermore, as a matter of taste, whiteness in flour constitutes utility, within the patent law, as much as whiteness in sugar or yellowness in butter.

On the defense of lack of invention, the only patent cited here, and the only one that exists, is a French and English patent granted to Emile Frichot, in the former country May 9, 1898, and in the latter country July 18, 1899. This patent plainly shows that the inventor was seeking the same industrial result as the Andrews patent accomplishes. Ozone, however, was the agent which he employed. He says:

"The treatment consists in subjecting the flour to the action of nascent oxygen or ozone in the various forms of ozonated oxygen or ozonated air, either in the open air, or preferably in a closed chamber, or again in a vacuum. For this purpose the flour, after undergoing the usual operations of grinding and bolting, is introduced in thin layers, or preferably stirred in a closed chamber, where it is in contact with an atmosphere of nascent oxygen, or of ozonated oxygen or ozonated air, which acts immediately on its particles, sterilizes them, bleaches their gray, farinaceous parts, and prevents the essential oils from undergoing any change. After this oxygenating or ozonizing, the flour is left undisturbed; care only being taken to shovel or stir it from time to time. It is then dried in the open air, or subjected to heat or cold, for the purpose of removing every trace of oxygen or ozone."

Several mechanisms are pointed out for working the process. In all of them the ozone is produced by subjecting air to a silent electrical discharge. In one of these the inventor points out that the flour "descends in presence of the nascent oxygen or ozone."

And again:

"During this descent from the top to the bottom of the chamber, the material is subjected to continuous action and exposed to the ascending current of nascent oxygen."

He again states that in order to obtain a more active ozonated fluid, and to avoid any loss of ozone, he prefers to bring the air, after it has been electrically treated, into immediate contact with the flour. The process is for treating both wheat and flour. We have separated the portions relating to flour. The claim of the patent specifies a process of treating flour, consisting in exposing it "to the action of nascent oxygen or ozone, or by ozonized air or ozonized oxygen in the open air, or preferably in a closed chamber, by distributing it in thin layers in presence of a stream of ozonated fluid or a current of pure, dry, cold air or oxygen, becoming ozonized by contact with metal filings or fine wires placed in glass tubes connected with a high tension electric current as described." Frichot uses the language of alchemy rather than chemistry. Defendant's expert, when questioned as to what was meant by the phrase "nascent oxygen or ozone," stated that in his judgment Frichot meant simply nascent oxygen liberated from ozone. The same is true as to his other phrases, "ozonated air or ozonated oxygen." No significance can be attached to these terms, except nascent oxygen derived from ozone, in combination with air. A careful study of Frichot's patent convinces us, as it did the foreign courts, that ozone is the agent by which he sought to accomplish the results of his process. We reach this conclusion upon two grounds: First, ozone is specifically claimed throughout the patent; second, the mechanism which he indicates for treating air electrically will at least chiefly produce ozone. There may be other by-products, but they were not desired by Frichot. This is substantially conceded by counsel for defendant. But they claim to have proven by experts as the result of laboratory experiments that ozone will not in fact bleach flour, and that the apparatus specified in Frichot's patent produces a small quantity of nitrogen peroxide as a by-product, and that this, though unknown to Frichot, was the agent which produced the results claimed by him. There are several answers to this contention: First. It is not established that ozone will not bleach flour. The evidence adduced by complainants tends strongly to show that ozone alone is capable of producing that result. But to produce this effect the flour must be subjected to the ozone for a considerable time, ranging from a few minutes to several hours. The result is that the flour is tainted and ruined. Second. Ozone is confessedly the principal product of treating air electrically in the method pointed out by Frichot. Flour, if exposed to a gaseous compound of air, ozone and nitrogen peroxide, is bleached by the nitrogen peroxide, but is also tainted by the ozone. Such tainting is undoubtedly one of the results of the Frichot process. He points it out repeatedly in his patent, and provides methods for treating the flour to remove the taint. Complainant's process avoids all tainting of the flour. It is, therefore, patentable over the Frichot process, even if it be conceded that the agent in that process is nitrogen peroxide.

In view of the prior art at the time of the Andrews invention, is their patent void for want of novelty? The prior art that has been brought to our notice is mainly literary. Defendants have ransacked patent offices in America and Europe, and brought together a formidable collection of patents. Many of them are paper patents, and others relate to remote arts. Piecing together excerpts and elements from this wide search, they have built up a formidable speculative argument to show how simple and easy was the step taken by Andrews. This is a form of argumentation familiar in patent litigation. Though it seldom succeeds, it is often the only recourse of the infringer. The patent law, however, has its proper place in the realm of actual industrial life, and not in the limboes of parchment casuistry. The merit of a patent is to be determined, not by its standing in dialectics, but by its actual effects in the art to which it belongs. Judged by that test, the Andrews invention was revolutionary. Within five years after its discovery it had been generally applied in the milling business, both in this country and abroad. It accomplished a new and desired industrial result simply, cheaply, and efficiently. In the presence of such an experience, speculative arguments based on the prior art can seldom prevail. It is first urged in support of this defense that Frichot, if his patent did not directly anticipate the Andrews patent, brought the art of bleaching and aging flour so near to success that the step taken by the Andrews involved no invention. Is this true? The immediate agent of both processes is pointed out in the patents to be nascent oxygen. This is not an independent element, or a new kind of oxygen. It is simply oxygen at the moment when it is passing from one compound into another. Free oxygen is exceedingly unstable. In the presence of other substances it immediately enters into composition. We can conceive of the atom as passing from one compound into another. That passage, however, is infinitesimal in space and instantaneous in time. It can be accomplished only by bringing the compound from which the oxygen is liberated into immediate association with the compound into which it is to enter. The result is that, while the nascent oxygen is producing the bleaching effects desired, other elements in the compound from which it is liberated produce other effects in the compound into which it enters. That was the fatal defect of ozone in the Frichot process. While the nascent oxygen did the bleaching, other elements produced other effects which tainted the flour. Dr. Liebman, a consulting chemist in the English case, well remarks that nascent oxygen "has a meaning only when we know from what it is produced." That is especially true when the substance to be treated is so complex as flour (which embodies some 20 different elements), and is likewise so easily subject to taint as flour. So the teaching of Frichot that nascent oxygen liberated from ozone would bleach flour served as a warning rather than a guide to Andrews, for Frichot's experience also taught that his process would taint the flour.

Nitrogen peroxide is a dark brown gas, deepening in color as the temperature is increased. It has a peculiarly repulsive odor, and is poisonous when inhaled. While it sometimes bleaches, it more frequently imparts color. This is especially true as to proteids, which

are an important constituent of flour. It will turn corn meal and other corn products and rice products yellow. Tobacco is made darker by it. All the experts, those for the defendant as well as those for the plaintiff, agree that it was impossible, at the time the patent in suit was taken out, to foretell the effect of nitrogen peroxide upon a complex substance like flour. Reasoning by analogy, most of them say that the natural inference would have been that it would taint the flour and color it yellow. Dr. Keiser, one of the experts for complainant, names several bleaching agents, among them nitrogen peroxide, which he said he would have supposed, reasoning by analogy, would bleach flour; but he also states that it would be impossible to tell what other effects they might produce. The whole argument of counsel for defendants, in support of their defense that the patent is void for want of novelty, is based upon reasoning by analogy. The foundation of this reasoning is that at the time of the Andrews invention it was well known that numerous substances could be bleached by several well-known chemical compounds; some being bleached by one, and some by another. That was the general art, and it is contended that the Andrews invention was simply the selection of the best of several well-known agents for the accomplishment of the desired result. This reasoning is fallacious. It was not known that any of the recognized bleaching agents could be successfully used in bleaching flour. The accomplishment of that result involved three features: First, an agent that would bleach flour; second, an agent that would accomplish this result without injuring the flour; third, an agent that could be applied to the flour in the usual milling processes. No bleaching agent was known that would accomplish these results. Frichot's was the only attempt that had thus far been made, and he had succeeded only as to the first feature. Science and experience alike warned against the use of nitrogen peroxide. Ozone is the most innocuous of all the bleaching compounds, and it had been found to taint the flour. Nitrogen peroxide, while it sometimes bleached, more often imparted color, and was at the same time one of the most offensive and deadly of gases. It is not true, therefore, as counsel for defendant contends, that the discovery of the nitrogen peroxide process was simply a selection of one of several well-known agents. All that was well known was that there were several agents that would bleach. It was not known that any of the agents could be used commercially to bleach flour. The mere knowledge that there are known chemical agents that accomplish such a general function as bleaching does not advance us a step with such a complex substance as flour and one so susceptible of taint. If it had been known that flour could be bleached commercially by one or more of the ordinary chemical bleaching agents, then the selection of nitrogen peroxide might or might not be the mere selection of a known agent, such as would lack patentable novelty. That would depend upon the advantages that nitrogen peroxide disclosed in the art over other known agents. If those advantages were distinct and conspicuous, a process embodying them might be entitled to the benefit of the patent laws, although it had been discovered that other agents would accomplish the same result in a less successful manner. But the complainant in

the present case occupies a much more favorable position. Here it had not been discovered that flour could be commercially bleached by any chemical agent. The complainant was the first to discover a successful process for accomplishing that result. His act was not selection of known agents in the art of bleaching flour, but was the discovery of the only agent that has yet been found to accomplish that result successfully in the milling industry.

It should also be borne in mind in considering this subject that reasoning by analogy in a complex field like chemistry is very much more restricted than in a simple field like mechanics. This distinction has been frequently recognized by the courts.

"Of course, a discovery to be patentable must have the attributes of invention; but the mental operation is somewhat different in one who invents a machine and one who discovers a process. * * * The mere selection of a material, and this, too, by a process of exclusion, has been deemed sufficient to sustain patentability, and the patent law abounds in instances in which patents have been upheld where the inventor stumbled upon the discovery in total oblivion of the reason why effect followed cause." *Badische v. Kalle* (C. C.) 94 Fed. 163.

We shall not lengthen this opinion by quoting extracts from decisions to illustrate this principle. It was explained and enforced in the following cases: *Celluloid Mfg. Co. v. Zylonyte Co.* (C. C.) 35 Fed. 301; *Union Tubing Co. v. Patterson Co.* (C. C.) 23 Fed. 79, 82; *King v. Anderson* (C. C.) 90 Fed. 500, 504; *Electric Smelting Co. v. Carborundum Co.*, 102 Fed. 618, 631, 42 C. C. A. 537; *Hemolin Co. v. Harway Co.*, 138 Fed. 54, 56, 70 C. C. A. 480; *U. S. Mitis Co. v. Midvale Co.* (C. C.) 135 Fed. 103, 107; *Tannage Co. v. Donallan* (C. C.) 93 Fed. 811, 816; *Thomas Co. v. Electric Co.* (C. C.) 111 Fed. 923, 930.

The same principle is admirably illustrated by Lord Justice Vaughan Williams, in his opinion involving the Andrews patent. In discussing the limitation of the doctrine of equivalents in patents based upon a chemical process, he says:

"It was urged on behalf of the petitioners that Frichot's patent was an anticipation of Andrews' invention, because all oxidizing agents which liberate nascent oxygen are chemical equivalents, and if you once have a man say, 'I propose to bleach flour by nascent oxygen which is liberated from ozone,' that is an anticipation of the subsequent patent, which says, 'I propose to bleach flour by an oxidizing agent of another character which only operates, and can only operate, by the liberation of nascent oxygen or its equivalent.' The answer to this is put in this way: *That you cannot apply the doctrine of mechanical equivalents to a chemical patent*, because you cannot predicate that all oxidizing agents will act in the same way, and cannot, therefore, predicate that in conditioning flour an oxide of nitrogen, or an oxidizing agent of the chlorine or bromine type, will act in the same way as ozone or any other oxidizing agent mentioned in Frichot's patent." 24 Patent, Design & Trade-Mark Cases, 365.

The learned judge qualifies the language which we have italicized later in the opinion when speaking of the doctrine of equivalents in chemical cases, and states the correct rule with remarkable precision as follows:

"The doctrine does apply in cases where, having regard to the subject-matter, it can be truly asserted that one of two or more chemical substances is

well known as producing the same effect on the same subject-matter." 24 Patent, Design & Trade-Mark Cases, 366.

When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. Such patents cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art. That, however, is precisely what the defendants attempt to do in this case in respect to the Frichot patent. That patent disclosed ozone as the source of the nascent oxygen used for bleaching flour. Defendants say that, while such is the real character of the verbal disclosure on the face of the patent, the process actually produced nitrogen peroxide, which was in fact its bleaching agent. There are two objections to that kind of reasoning in this case: First. Frichot himself designates ozone as the primary basis of his process. The mechanism which he points out for producing his gas will produce ozone: There is nothing on the face of his patent to teach the world that nitrogen peroxide was an efficient agency for the bleaching and aging of flour. Second. Frichot's patent is a paper patent. He never applied in the industrial world the art which his patent disclosed. It may be that, if he had transferred his paper patent to the milling industry, it would then have disclosed nitrogen peroxide as its active agent. This, however, he did not do, and the expert chemists employed by the defendants in this case to work the Frichot apparatus in their laboratory cannot, by their discovery from that experience, make what they learn a part of the prior art. *Western Electric Co. v. Home Tel. Co.* (C. C.) 85 Fed. 649, 656; *Badische Anilin Co. v. Kalle & Co.*, 104 Fed. 802, 808, 44 C. C. A. 201; same case (C. C.) 94 Fed. 163, 168. Prior patents are a part of the prior art only by what they disclose upon their face. If they are carried into effect in the industrial world, what is learned from that experience also becomes a part of the prior art. An expert, however, cannot take a process patent, which has never been applied industrially, and work the process in his laboratory, and discover therefrom something which is not disclosed on the face of the patent, and then transfer that experience back to the time of the patent, and make it a part of the prior art for the purpose of defeating a meritorious invention. That would be *ex post facto* law of the most pernicious character. Such a practice would be especially misleading in a case like the present. The elements here involved are so numerous that a slight modification in the process would be likely to produce conspicuous changes in the product. The evidence leaves no doubt that an electrical current may be so applied to air as to produce either ozone or nitrogen peroxide. The silent current produces ozone. A current of sufficient strength to produce the flaming arc results in nitrogen peroxide. As you pass from the lower current to the higher, nitrogen peroxide appears as a product, and the quantity of ozone decreases; and this change progresses until, when the flaming arc is reached, a heat is developed which completely consumes the ozone and leaves nothing but nitrogen peroxide. It is easy to see how such a process might be worked in the laboratory so as to modify the result which Frichot himself attained. Again, the working of such a process, which might be found sufficient to bleach a small quantity of

flour in a laboratory test, might be wholly ineffective if the process were applied in the milling business. What kind of electric current will best produce nitrogen peroxide for the practical bleaching of flour is now well known. We are not dependent upon the laboratory work of experts for evidence on that subject. Wherever the electric current has been used for that purpose in the industrial world, it has been such a current as will produce a flaming arc, creating such a heat as will entirely destroy ozone. That is the only use of the electric current that has been found industrially adequate. The trifling experiments of the laboratory shown by defendant's experts in this case, are not entitled to weight as against the teaching of this practical experience.

The prior art which has been exhibited to us was presented to the English and French courts, and was held unavailable. We shall discuss only those matters that are claimed to be new in the present suit. It is first contended by defendants that it was not disclosed in the foreign litigation that ozone would not bleach flour, and that nitrogen peroxide, as a by-product of the Frichot process, was its real bleaching agent. It is said that the Alsops, who were assailing the Andrews patent in that litigation, did not dare to bring this fact to light, because their own process was electrical, the same as Frichot's, and such a disclosure would have been even more fatal to their patent than that of Andrews. An examination of the report of the foreign litigation does not disclose whether these alleged facts were developed there. It does appear that such distinguished chemists as Sir William Crookes, on the one side, and Sir James Dewar, on the other, testified before the English courts; and it hardly seems probable that the facts here urged, if they were facts, would not have been developed upon that hearing. Be that as it may, a careful reading of the evidence in this case fails to convince us either that ozone will not bleach flour, or that the process of the Frichot patent, when applied according to Frichot's directions, will develop nitrogen peroxide as a by-product. We reach the conclusion, therefore, that Frichot's patent, as a part of the prior art, must stand in this case simply for what Frichot himself declared, and not be enlarged by what defendant's experts claim to have discovered by a laboratory working of that process.

Defendants also urge upon our notice as a part of the prior art two American patents issued to Davis in February, 1901, Nos. 724,753 and 724,754. They relate to a process for the preservation of perishable food products, and accomplish their results by subjecting the food products for a considerable period to the gas engendered by treating air "electrostatically." The patents point out three conspicuous features: The electric current is low; the electrodes are carefully insulated; and direction is given that the temperature of the air be kept low. All of these features indicate that the result of the electrical treatment of the air here taught would be to produce chiefly ozone. The patentee states that ozone is the chief product, but that the ozone is changed in its character before the process is complete, and that the preserving agent is really "the lower oxygen-nitrogen compounds." These patents are not cited so much for the process they disclose as for the chemical dissertation which they contain. It is very doubtful, however, whether

the patentee's chemical theory is sound, in view of the apparatus which he describes. In any event the patent belongs in a remote art, relating to the preservation of food from decay. It has nothing to do either with bleaching or with aging.

The only other matter of any importance that is brought to our notice, which was not before the English courts, is an article in Spon's Encyclopedia of Industrial Arts, published in London in 1881. In the publication the article is entitled "Oils and Fatty Substances—Refining, Clarifying, and Bleaching." The important parts of the article are as follows:

"Many plans of decolorizing oils are in vogue. A process much recommended is to pass nitrous acid gas through the oil."

Numerous other processes are pointed out in the article, which then proceeds as follows:

"Most processes for the bleaching of oils depend upon the oxidation of the coloring matter by some suitable reagent, chiefly involving nascent oxygen in some form. * * * Experiment alone can determine the particular process best suited to any given oil, having regard to the purpose for which it is to be used."

It is probable that the term "nitrous acid gas," used in this article, refers to nitrogen peroxide, as that is the name which the gas bore in the old nomenclature. The article contains no direction as to the process by which the oil is to be treated or the condition in which the gas is to be applied. The character of the oils is not indicated, whether they are oils used for foods, drugs, or paints. If for paints and similar purposes, the imparting to them of an odor or flavor could not be material. Nothing is shown as to the period of time for which the oil is to be subjected to the gas. The chemical knowledge that nitrogen peroxide would bleach oil would not teach that it would bleach flour, and least of all would it teach that it would not taint flour. The bleaching of oil belongs to a remote art, and an encyclopedia disclosure that nitrogen peroxide would accomplish that result does not deprive the Andrews process for bleaching flour of patentable invention.

In connection with this article, as well as the other prior art, the case of *Spill v. Celluloid Mfg. Co.* (C. C.) 21 Fed. 631, is urged as much in point, and a general statement is quoted from the decision to the effect that:

"The application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated."

We are unable to find any analogy between that case and the present. There prior patents had taught that vegetable fiber could be bleached by certain chemical agents. The patent in suit applied those agents to vegetable fiber after it had been crushed. As the court says:

"The only difference was that the product was bleached vegetable fiber in the shape of converted gun cotton, instead of bleached vegetable fiber not so converted."

Under such circumstances it is quite plain that the former patent anticipated the later.

We have carefully examined the voluminous record in this case, and the almost equally voluminous briefs. It would prolong this opinion to unreasonable lengths to discuss each of the separate subordinate matters argued by counsel. They have all been considered, and in our judgment present no justification for a decree in favor of the defendant. The decree in favor of the complainant must therefore be affirmed.

SUPERIOR DRILL CO. et al. v. LA CROSSE PLOW CO.

(Circuit Court of Appeals, Seventh Circuit. January 19, 1909.)

No. 1,494.

PATENTS (§ 328*)—INFRINGEMENT—GRAIN DRILLS.

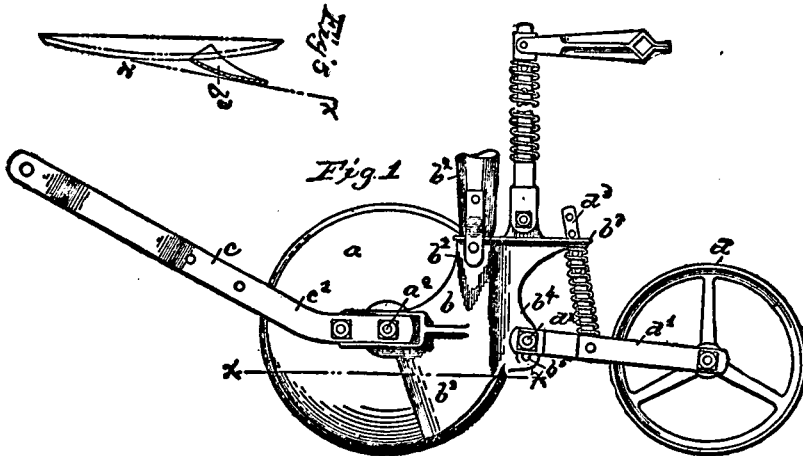
The Packham patent, No. 557,868, for an improvement in grain drills, construed, and held not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

For opinion below, see 160 Fed. 504.

The decree appealed from dismisses the bill for want of equity. The bill is to restrain infringement of Letters Patent No. 557,868, issued April 7th, 1896, to Frank R. Packham, for an improvement in Furrow Openers for Seeding Machines. Figures 1 and 5 of the drawings are as follows:



The difficulty in furrow opening that the patent was intended to overcome, and the means used to overcome it, are set forth in the patent as follows:

"I have discovered in practice that the seeds which are distributed through said conduit are frequently diverted from the furrow after they leave the lower end of the conduit by means of the stubble which would be bent down by the passage of the disk or the supporting-frame therefor, and when released would fly back and strike the dropping grain, and thus distribute it over a larger territory than was intended. To overcome this and to further provide a shield to prevent the land side of the furrow from caving in until the grain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

has been deposited therein, I have provided the frame b with an extension b³, which extends downwardly in front of and below the end of the conduit b', following substantially the line of the furrow-opening disk. This shield or extension b³ lies wholly within a line drawn parallel with the drag-bar and passing tangent to the front or furrow-opening edge of the disk, so that under ordinary circumstances it stands wholly within the furrow, as indicated by the line x x in Fig. 5."

The claims sued upon are as follows:

"1. A furrow opener consisting essentially of a frame or support having a conduit therein, a disk journaled on a suitable trunnion on said frame or support which is located in front of the conduit, said frame or support being provided with an extended portion which projects below the lower end of the conduit and in front of the same, said extension being formed at the front to conform to the shape of the side of the disk adjacent to which it is adapted to lie, substantially as specified.

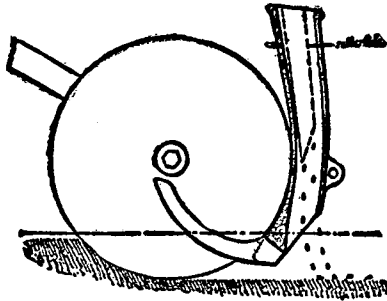
"2. The combination with the frame having a conduit therein, and a furrow opening disk journaled at an angle on the frame, of a guide or shield extending below the end of the conduit and in front of the same, said shield being located within the angle of the furrow opening disk so as to stand wholly within the furrow, substantially as specified.

"3. The combination with the supporting frame having a conduit therein, and a disk journaled on said frame at an angle to the line of draft, as described, of a downwardly projecting shield in front of and below the conduit, said shield being curved at the front so as to lie adjacent to the disk, and being placed wholly within the path of said disk, so as to extend within the furrow formed thereby, substantially as specified."

Other patents cited are as follows:

- No. 659,881, Oct. 16, 1900, W. A. Van Brunt.
- No. 6,996, Jan. 8, 1850, W. Bullock.
- No. 12,895, May 22, 1855, L. W. Colver.
- No. 18,698, Nov. 24, 1857, J. Lee.
- No. 21,349, Aug. 31, 1858, McCormick & Baker.
- No. 37,753, Feb. 24, 1863, G. D. Haworth.
- No. 44,725, Oct. 18, 1864, G. D. Haworth.
- No. 44,810, Oct. 25, 1864, R. McCorkell.
- No. 59,638, Nov. 13, 1866, C. Patton.
- No. 100,032, Feb. 22, 1870, G. D. Haworth.
- No. 161,445, March 30, 1875, I. B. Sandusky.
- No. 191,054, May 22, 1877, J. L. Hill.
- No. 197,551, Nov. 27, 1877, G. D. Haworth.
- No. 222,042, Nov. 25, 1879, G. D. Haworth.
- No. 235,029, Nov. 30, 1880, J. D. Shrigley.
- No. 272,228, Feb. 13, 1883, Frakes & Reiners.
- No. 277,982, May 22, 1883, A. Bradford.
- No. 312,791, Feb. 24, 1885, W. D. Arnett.
- No. 321,273, June 30, 1885, H. C. Beebe.
- No. 325,512, Sept. 1, 1885, W. P. Elam.
- No. 331,753, Dec. 8, 1885, W. D. Arnett.
- No. 337,543, March 9, 1886, M. Wonsler.
- No. 340,190, April 20, 1886, H. C. Beebe.
- No. 345,403, July 13, 1886, W. D. Arnett.
- No. 347,863, Aug. 24, 1886, H. C. Beebe.
- No. 347,982, Aug. 24, 1886, W. D. Arnett.
- No. 354,163, Dec. 14, 1886, D. E. McSherry.
- No. 358,246, Feb. 22, 1887, W. D. Arnett.
- No. 358,248, Feb. 22, 1887, W. D. Arnett.
- No. 359,832, March 22, 1887, W. D. Arnett.
- No. 386,484, July 24, 1888, A. C. McClelland.
- No. 443,643, Dec. 30, 1890, Fuller & Lee.
- No. 446,230, Feb. 10, 1891, W. F. Hoyt.
- No. 448,349, March 17, 1891, J. M. King.
- No. 448,943, March 24, 1891, C. H. & H. L. Dooley.
- No. 460,366, Sept. 29, 1891, R. B. Snell.

No. 465,220, Dec. 15, 1891, Steinke & Propst.
 No. 476,056, May 31, 1892, A. Matson.
 No. 486,035, Nov. 8, 1892, Fuller & Lee.
 No. 488,846, Dec. 27, 1892, Snell & Smith.
 No. 489,353, Jan. 3, 1893, W. Webster.
 No. 495,120, April 11, 1893, G. W. Packer.
 No. 496,782, May 2, 1893, M. S. Henry.
 No. 497,864, May 23, 1893, Christman & Munn.
 No. 500,725, July 4, 1893, J. A. M. Tyler.
 No. 502,832, Aug. 8, 1893, W. G. Sayr.
 No. 527,621, Oct. 16, 1894, F. R. Packham.
 No. 530,962, Dec. 18, 1894, F. R. Packham.
 No. 534,305, Feb. 19, 1895, G. W. Tucker.
 No. 535,544, March 12, 1895, W. A. Lee.
 No. 540,758, June 11, 1895, C. H. Pelton.
 No. 573,416, Dec. 15, 1896, J. M. King.
 No. 578,941, March 16, 1897, F. R. Packham.
 No. 586,107, July 13, 1897, F. R. Packham.
 No. 591,354, Oct. 5, 1897, S. H. Jones.
 No. 601,477, March 29, 1898, F. R. Packham.
 No. 659,880, Oct. 16, 1900, W. A. Van Brunt.
 No. 659,881, Oct. 16, 1900, W. A. Van Brunt.
 No. 711,626, Oct. 21, 1902, Heath & Baseman.
 No. 717,155, Dec. 30, 1902, E. Baseman.
 No. 718,513, Jan. 13, 1903, F. R. Packham.
 No. 830,644, Sept. 11, 1906, F. E. Davis.
 No. 830,645, Sept. 11, 1906, F. E. Davis.
 Canadian Patent, Sept. 9, 1890, Thomas J. McBride.
 Canadian Patent No. 45,090, Aug. 10, 1893, W. A. Sims.
 The appellee's device (the alleged infringing device) is shown in the following drawing:



Further facts are stated in the opinion.

Paul A. Staley and Border Bowman, for appellants.
 Fred Gerlach and George Fisher, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). Patent No. 557,868 was intended to be an improvement, specifically, on patent No. 527,621 issued October 16th, 1894, to the same patentee—a furrow opener operating with a single disk running at an angle to the line of the draft, the purpose of which arrangement was to dig open the furrow, throwing out the dirt by the revolution of the disk, instead of wedging the furrow apart by impaction, as was done by furrow

openers in common use employing the shoe, double disk, and mould-board devices.

The earlier patent (No. 527,621) was in every respect the later patent, illustrated in figure 1 above, except that it omitted shield B. 3, leaving the grain to be dropped through the open air from the conduit, ending at the axis of the disk, into the furrow.

The conduit of the earlier patent, or one side thereof, was formed at an angle in the nature of a chute, having an angularity approximating the angularity of the side of the disk; the function being to so direct the grain into the furrow opened by the disk, and in the rear of the center thereof, that the seeds to be dropped would be scattered along the furrow, instead of being dropped in piles—the function, indeed, that differentiated the earlier Packham patent from the prior art; for furrow opening by means of disks, set at an angle to the line of the draft, was in the prior art.

But it was found in practice that without a deflecting shield, such as the later patent (the one sued upon), added to the earlier patent, the seeds would for one reason and another, scatter too widely, and the whole purpose of the patent sued upon was that it should co-operate with the disk of the earlier patent in deflecting the seed so as to prevent the scattering of the seed. This purpose is well stated by Judge Wanty in *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 53 C. C. A. 36, as follows:

“The co-operation accomplished by this protecting device (the shield) which is located below and in front of the conduit and wholly within the furrow and is shaped in front so as to conform to the side of the disk, had never before been accomplished. By this construction the disk opens, and the shield prevents the obstructing of the furrow until the grain is deposited, and it tends to deflect the grain against the revolving disk and scatter it in the furrow. The spout ends where the shield or guard begins; but with the revolving disk and shield the grain finds its way to the bottom of the furrow scattered in the center more thoroughly than it could be if it was conducted there by the spout. Instead of falling against the disk and shield. Although the spout, disk and shield in different form are found in the prior art, there was no such combination as is effected by this patent.”

This indeed states the gist of the patent, and also marks the limit of the patent—just the departure from the previous art that enabled the Court of Appeals for the Sixth Circuit to sustain the validity of the patent. *Dowagiac Mfg. Co. v. Superior Drill Co.*, supra.

The appellee's device (the alleged infringing device), shown in the drawing in the statement of facts, closely follows, in some respects, the Packham earlier patent; but as that patent is not sued upon, no question of infringement of that patent is raised. It omits, however, the arrangement whereby the grain is delivered against the side of the disk, as in the earlier Packham patent, as also the co-operating advantage of the shield added by the later Packham patent, by delivering the grain to the furrow through a conduit. And in so departing from the Packham devices, it departs from those features of those devices upon which their validity is sustained. There is nothing, therefore, that the Circuit Court could have done, in view of these limitations, other than to have dismissed the bill, as it did.

The decree of the Circuit Court is affirmed.

VAN BRUNT v. LA CROSSE PLOW CO.

(Circuit Court of Appeals, Seventh Circuit. January 19, 1909.)

No. 1,495.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GRAIN DRILLS.

The Van Brunt patent, No. 659,881, for an improvement in grain drills, in so far as it covers a blade attached to the toe of the boot to act as a scraper of the disk, was not anticipated and discloses invention; also held infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

For opinion below, see 160 Fed. 504.

The decree appealed from was one dismissing the bill for want of equity. The bill is to restrain infringement of Letters Patent No. 659,881, issued October 16, 1900, to Willard A. Van Brunt, for improvement in grain drills. Figure 8 of the drawings—the only one that need be reproduced—is as follows:

Appellee's device (the alleged infringing device) so far as it relates to figure 8 above, is shown in the following drawing:

The claims sued upon are as follows:

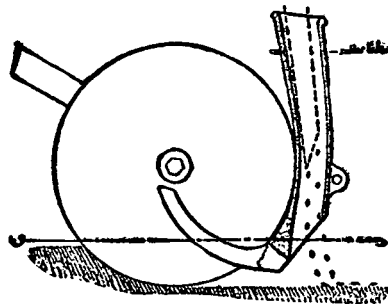
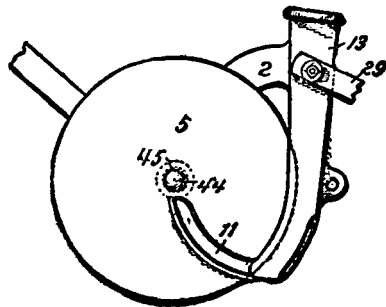
"1. The combination with a boot, of an arm projecting forwardly and downwardly from the upper portion of said boot and offset laterally therefrom, and a disk mounted at the end of said arm, so as to be disposed between the arm and the boot.

"2. The combination with a boot, of an arm projecting forwardly and downwardly from the upper portion of said boot and offset laterally therefrom, and a disk mounted at the end of said arm, so as to be disposed between the arm and the boot and a scraper attached to said arm and engaging the concave face of the disk.

"3. The combination with a concavo-convex disk and a boot disposed adjacent to the convex face of the disk, of an arm projecting forwardly and downwardly from the upper portion of the boot and offset therefrom, so as to be disposed adjacent to the concave face of the disk, a bearing for the disk at the end of said arm, and a scraper for the convex face of the disk secured to the toe of the boot.

"4. The combination with a boot, an arm projecting therefrom, a concavo-convex disk and a bearing for said disk at the end of the arm, of a scraper carried by said arm and engaging the concave face of the disk, and a scraper secured to the boot and engaging the convex face of the disk.

"5. The combination with a boot, and a disk disposed to one side and having its bearing forwardly of the boot, of a scraper secured to the toe of the



*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

boot and projecting forwardly and upwardly therefrom and in engagement with the convex face of the disk."

Other patents cited are as follows:

- No. 557,868, April 7, 1896, F. R. Packham.
 - No. 12,895, May 22, 1855, L. W. Colver.
 - No. 37,753, Feb. 24, 1863, G. D. Haworth.
 - No. 44,810, Oct. 25, 1864, R. McCorkell.
 - No. 61,903, Feb. 5, 1867, Wheeler & Tuttle.
 - No. 137,026, March 18, 1873, S. G. Randall.
 - No. 161,445, March 30, 1875, I. B. Sandusky.
 - No. 197,551, Nov. 27, 1877, G. D. Haworth.
 - No. 212,669, Feb. 25, 1879, E. Emmert.
 - No. 222,042, Nov. 25, 1879, G. D. Haworth.
 - No. 235,029, Nov. 30, 1880, J. D. Shrigley.
 - No. 237,001, Jan. 25, 1881, Elam & Boggs.
 - No. 237,278, Feb. 1, 1881, C. J. Hofund.
 - No. 272,228, Feb. 13, 1883, Frakes & Reiners.
 - No. 354,163, Dec. 14, 1886, D. E. McSherry.
 - No. 358,248, Feb. 22, 1887, W. D. Arnett.
 - No. 386,484, July 24, 1888, A. C. McClelland.
 - No. 406,147, July 2, 1889, Rogers & Kennedy.
 - No. 443,643, Dec. 30, 1890, Fuller & Lee.
 - No. 448,943, March 24, 1891, C. H. & H. L. Dooley.
 - No. 465,220, Dec. 15, 1891, Steinke & Propst.
 - No. 486,035, Nov. 8, 1892, Fuller & Lee.
 - No. 489,353, Jan. 3, 1893, W. Webster.
 - No. 495,120, April 11, 1893, G. W. Packer.
 - No. 500,725, July 4, 1893, J. A. M. Tyler.
 - No. 535,544, March 12, 1895, W. A. Lee.
 - No. 540,758, June 11, 1895, G. W. Pelton.
 - No. 573,416, Dec. 15, 1896, J. M. King.
 - No. 591,354, Oct. 5, 1897, S. H. Jones.
 - No. 601,477, March 29, 1898, F. R. Packham.
 - No. 602,827, April 26, 1898, E. Christman et al.
 - No. 603,863, May 10, 1898, W. Stephenson.
 - No. 605,348, June 7, 1898, W. W. Schultz.
 - No. 607,914, July 26, 1898, E. Christman.
 - No. 612,602, Oct. 18, 1898, H. B. Cease.
 - No. 659,880, Oct. 16, 1900, W. A. Van Brunt.
 - No. 659,881, Oct. 16, 1900, W. A. Van Brunt.
 - No. 769,202, Sept. 6, 1904, W. A. Van Brunt.
 - No. 830,644, Sept. 11, 1906, F. E. Davis.
 - No. 830,645, Sept. 11, 1906, F. E. Davis.
 - Canadian Patent, Sept. 9, 1890, T. J. McBride.
- The further facts are stated in the opinion.

Paul A. Staley and Border Bowman, for appellant.

Fred Gerlach and George P. Fisher, Jr., for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). Both the patent sued upon, and the alleged infringing device, are drills of the type having a single disk running at an angle to the line of draft, the purpose of which is to dig open the furrow, and by the revolution of the disk to throw out the dirt—the shield and the disk holding the furrow open until the seed is deposited—instead of wedging it apart by impaction through the means of a shoe, double disk, or mould board. We have just decided (*Superior Drill Co. v. La Crosse Plow Co.* 168 Fed. 923) that drills of this general type were old in the art, the particular co-operating function of the disk, and the shield in

delivering the seed to the furrow, being the inventive idea in the Packham patent.

Apart from the employment of a blade acting distinctively as a scraper of the disk, and attached to the toe of the boot, we agree with the Circuit Court that the Van Brunt patent constitutes a "so highly specialized combination" that the La Crosse device cannot be held to be an infringement. The reasons for this view are satisfactorily set forth in the opinion of the Circuit Court. 160 Fed. 504.

But we cannot agree with the Circuit Court that the idea of attaching a blade acting as a scraper to the toe of the boot, was anticipated in any prior patent. The patents cited in the opinion as proof of this statement, are the Colver patent, No. 12,895, and the Christman patent, No. 602,827; and at the argument it was urged upon us that though the Webster patent (No. 489,353) on its face did not distinctively show such a scraper, such a scraper was actually employed by Webster in subsequent exhibitions of his device.

A careful examination of the proof fails to convince us with that clearness and certainty that the law requires in cases where prior use alone is alleged, that Webster ever employed his "cutter" as a scraper, and our understanding of his patent, as well as that of Colver and Christman, and other patents cited on that point is, that the part in the Webster patent called the "cutter" and in the Colver patent the "peculiarly shaped sword or divider" are in fact "cutters" or "dividers" as distinguished from "scrapers," that is to say, their function is to cut or divide the earth in co-operation with the disk, and in no substantial way operate as a scraper of the disk—a purpose and function that in no way anticipates the Van Brunt scraper simply because, by adjustment, it may be made to act as a scraper. And the so-called "scraper" in the Christman patent is so widely different from the Van Brunt scraper, both in the point of its adjustment, and the manner in which it operates, that it cannot be held to be an anticipation.

Now it is just this blade in the Van Brunt patent, acting as a "scraper," and made capable of such action by the manner of its attachment to the toe of the boot, that gives to the Van Brunt device a method of overcoming difficulties encountered in the sticky soil of the northwest that has made the Van Brunt device a new and valuable contribution to grain seeders—the value of the contribution being shown by the way in which appellee has exactly copied it in its device.

To the extent, therefore, that appellee is using the Van Brunt scraper, its device is an infringement of the combination claimed in the Van Brunt patent, and so the decree below is reversed with instructions to enter a decree in accordance with this opinion.

A. B. DICK CO. v. MILWAUKEE OFFICE SPECIALTY CO. et al.

(Circuit Court, E. D. Wisconsin. October 5, 1908.)

PATENTS (§ 259*)—CONTRIBUTORY INFRINGEMENT—INDUCING VIOLATION OF LICENSE RESTRICTIONS.

It is within the right of the manufacturer of patented printing machines called the "mimeograph" to sell the same under license contracts providing that they shall be used only with ink made by the seller, and third persons who with knowledge of such restriction sell a different ink to owners of the machines intending that it shall be used with such machines, and which is so used, are chargeable with contributory infringement which entitles the owner of the patent to an injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 401; Dec. Dig. § 259.*

Contributory infringement of patents, see notes to Edison Electric Light Co. v. Peninsular Light, Power & Heat Co., 43 C. C. A. 485; Æolian Co. v. Harry H. Juelg Co., 86 C. C. A. 206.]

In Equity. On motion for preliminary injunction.

S. O. Edmonds and J. V. Quarles, Jr., for complainant.
Paul & Paul, for defendants.

SEAMAN, Circuit Judge. The fact of sale to licensees of the complainant of ink made by the Chamberlain Ink Company for use with the complainant's stencil printing machines, known as "Rotary Mimeograph," with knowledge of the inhibition of such use contained in the license under the patents averred in the bill, intending the Chamberlain ink to be so used, and fact of use thereof by the licensees accordingly, are well established by the affidavits on behalf of the complainant; and no substantial dispute appears in the answering affidavits, as I believe. So the only issue is, whether the defendants Andreas Bothe and Robert E. Watson, doing business under the name of the Milwaukee Specialty Company, thus appear guilty of infringement, under the rule of constructive infringement which must govern the determination.

The authorities upon the question are fairly stated and reviewed in the brief submitted on behalf of the defendants, and neither citations nor review is needful for the purposes of this decision. The cases referred to in this circuit have settled the controlling doctrine of unlimited right in the patentee to thus restrict the use of his device, and thereunder no escape appears from its application to the state of facts presented on this motion as constructive infringement. Whatever my impressions may have been in reference to the rule so extended and upheld, the duty of this court is plain to observe and enforce it, standing unreversed by the Circuit Court of Appeals and modified by decision of the Supreme Court. Remarks which are cited from recent opinions of the Supreme Court merely amount to reservation of the question to be determined when it may arise, and do not authorize departure from the rule referred to. The opinion of Judge Ray, in the cognate case of A. B. Dick Co. v. Henry (C. C.) 149 Fed. 424, satisfactorily states the grounds for injunctive relief to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be applied under the present motion, within the above-mentioned doctrine.

An injunction pendente lite will be granted accordingly, to restrain the defendants Bothe and Watson from sale of the ink in question, directly or indirectly, to licensees of the complainant, intending its use with the complainant's device described in the bill.

The Chamberlain Ink Company, named defendant in the bill, is not served with process, and cannot be included in the injunctive order, nor can the question of its privity be passed upon herein.

Let an order be prepared and submitted as above indicated.

CUTLER v. MARYLAND HOTEL CO.

(Circuit Court, E. D. Missouri, E. D. March 22, 1909.)

No. 5,653.

PATENTS (§ 283*)—SUIT IN EQUITY FOR INFRINGEMENT—DEFENSES.

In a suit in equity for infringement of a patent for a mail chute, where the bill alleges that defendant has made or caused to be made and used a mail chute which infringes the patent, a plea denying that defendant has made or used, or is making or using, any mail chute whatsoever, and alleging that a mail chute installed in a hotel owned by it is used in the collection of mail matter, and under the statutes and regulations of the Post Office Department is the property of the United States and under the exclusive care and custody of the Post Office Department, states a defense against the right of complainant to any relief in equity, his right of action, if any, being at law for damages.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 283.*]

In Equity. On argument of plea.

A. C. Fowler and Church & Rich, for complainant.

Bakewell & Cornwall and John W. Noble, for defendant.

DYER, District Judge. This is an action for an alleged infringement by the defendant of certain letters patent of the United States granted to the complainant.

The bill alleges, in substance: That the plaintiff is a citizen of the United States, and resides in the state of New York, and that the defendant is a corporation under the laws of the state of Missouri, and is a resident of the Eastern division of the Eastern judicial district of Missouri; that complainant was the true, original, and first inventor for certain new and useful improvements in mail chutes, which are fully described in the specification of the letters patent; that being the first inventor of said improvements he made application to the proper department of the United States for letters patent therefor, and that on the 26th day of April, 1904, letters patent for said invention were granted to the complainant under the seal of the Patent Office of the United States, which said letters patent are numbered 758,128; that said letters patent granted and secured to him, his heirs and assigns, for the term of 17 years from the date thereof, the full and exclusive right to make, use, and vend said invention throughout the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

United States and the territories thereof; that since the grant of said letters patent the complainant has exclusively possessed said letters patent, and all rights under the same, and of the inventions thereby secured and intended to be secured, and has put the same into practice.

The complainant then says, upon information and belief, that the defendant, since the date of said letters patent, and before the commencement of this action, and during and within the 17 years mentioned in said letters patent, unlawfully, wrongfully, and injuriously, and with the intent to derive profit from using said improvements, and so deprive your orator of the benefit of the monopolies granted by said letters patent, and without the license of your orator and against his will, has made or caused to be made and used mail chutes which contain and employ, and contained and employed, the inventions covered by said letters patent hereinbefore set forth, and particularly the subject-matter of claims 1, 2, 3, 4, 9, 17, 18, 19, 20, 21, 27, and 54 of said letters patent, in infringement of the exclusive rights secured to him by the letters patent aforesaid, but as to the number of said mail chutes made by said defendant complainant is not informed.

Complainant further says in his bill that he has reason to fear, and fears, that defendant, unless restrained by writ of injunction, will continue to use said mail chutes and encourage others to do so, thereby infringing the complainant's rights, which will cause irreparable injury to him.

A prayer for injunction and accounting follows.

On the 4th day of December, 1908, the defendant company filed the following plea to the bill:

"That this defendant has never made or used, and is not now engaged in making or using, any mail chute whatsoever; that in defendant's building, situated at the northwest corner of Ninth and Pine streets, in the city of St. Louis, state of Missouri (a building which is freely open to the public during business hours), is installed for public use a certain mail chute, used for the collection of mail matter, which mail chute, under the statutes of the United States in such cases made and provided, and under the postal rules and regulations governing mail chutes and receiving boxes, is under the exclusive care and custody of the Post Office Department of the United States; that said mail chute complained of in this action (which mail chute defendant does not admit embodies any invention, the subject-matter of any claim or claims of the letters patent in suit) is, under the statutes of the United States, and under the postal regulations governing mail chutes and receiving boxes enacted in pursuance of the statutes of the United States, the property of the United States, and is under the exclusive care and custody of the Post Office Department of the United States, representing in this behalf the government of the United States.

"This defendant, Maryland Hotel Company, pleads the above facts in bar to the whole of said bill, and demands the judgment of this honorable court why it ought to be compelled to make any answer to the said bill of complaint, and prays that it may be hence dismissed with its reasonable costs in this behalf most wrongfully sustained."

On the 1st of February, 1909, the complainant by his solicitors filed a motion to set said plea down for argument. That motion is as follows:

"Now comes Joseph Warren Cutler, by A. C. Fowler, his attorney, and moves the court to set down this action for argument upon the plea filed herein by the

said defendant, the Maryland Hotel Company, on the ground that the plea does not furnish a sufficient defense to the bill of complaint filed herein."

This motion is filed in pursuance of rule 38 (Rules of Practice in Equity).

The plea was set down for argument at the instance and on motion of the complainant. The effect of this action on the part of the complainant, and the reason for such plea, is stated in the case of Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. Ed. 684. The court there says:

"If he sets down the plea for argument, he thereby admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea joining issue upon the facts averred in it, and so puts the defendant to the trouble and expense of proving his plea, he thereby, according to the English chancery practice, admits that, if the particular facts stated in the plea are true, they are sufficient in law to bar his recovery; and if they are proved to be true the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill."

The bill charges that the defendant—

"has made and used mail chutes which contain and employ the inventions covered by the letters patent, * * * in infringement of the exclusive rights secured to him by the letters patent, etc., * * * and fears, and has reason to fear, that unless the defendant is restrained, etc., it will continue to use said mail chutes. * * *"

The plea is substantially this: The defendant has not made nor used, and is not making or using, any mail chute whatsoever. That the mail chute installed in defendant's hotel is used for the collection of mail matter, and is, in pursuance of law and the rules of the Post Office Department of the United States, under the exclusive care and custody of the Post Office Department, and under the law is the property of the United States.

The complainant challenges the sufficiency of the plea, mainly on the ground that it raises the defense of noninfringement, and for that reason cannot be raised by plea, but must be raised by answer. On the other hand, the defendant claims that the plea does not raise the question of infringement in the technical sense, but merely the question of nonliability.

These contentions present very sharply the questions to be now decided. If the defendant has not made or used, and is not making or using, any mail chute whatsoever, then the prayer in the bill for injunction should not be granted, for the simple reason that the defendant has in no wise infringed (either by making or using) the rights secured to the complainant by the letters patent. The bill, however, charges that the defendant caused to be made mail chutes that infringed his patent. This is not denied by defendant in its plea. If, however, the defendant caused to be made and installed the mail chute in the Maryland Hotel, then that act was in violation of complainant's rights (as now appears), for which the defendant should account. The defendant claims in its plea that the chute in the Maryland Hotel is now, under the laws of the United States and valid post office regulations, in the absolute care and custody of the United States, and is

the property of the United States, and that it has no control over the chute in the Maryland Hotel. In support of that contention, the defendant cites the following act of Congress (Act January 23, 1893, 27 Stat. 421, c. 41 [U. S. Comp. St. 1901, p. 2638]) and following regulation of the Post Office Department, to wit:

"That no boxes for the collection of mail matter by carriers shall be placed inside any building except a public building, or a building which is freely open to the public during business hours, or a railroad station (and that the Postmaster General is hereby authorized in his discretion, to declare by official order that the chutes connected with mail boxes, that are attached to any chute or device that may be approved by him, are a part of said receiving boxes, and under the exclusive care and custody of the Post Office Department.) Approved January 23, 1893."

"Mailing chutes and receiving boxes shall be considered the property of the United States, whenever and so long as collections of mail matter are made therefrom, and shall be and remain under the exclusive custody and control of the postmaster until such collections are discontinued by his directions."

The court has reached the conclusion from the facts set forth in the plea that it cannot grant the relief prayed for in the bill. If the complainant has any right of action against the defendant at all, it is an action at law and not in equity.

The plea interposed by the defendant is sustained.

In re ST. LOUIS & KANSAS OIL & GAS CO.

(District Court, D. Kansas, Third Division. June 25, 1908.)

1. JUDGMENT (§ 736*)—RES JUDICATA—MATTERS DETERMINED.

Where a fund in controversy was produced by the operation of certain oil wells, after the commencement of an action in the state court to forfeit a lease of the wells, and the right to such fund was neither presented to nor determined by the state court on the trial of such action, a judgment in favor of the lessors therein was not a conclusive determination that they were entitled to the fund.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1264; Dec. Dig. § 736.*]

2. JUDGMENT (§ 538*)—TIME OF TAKING EFFECT.

A determination canceling an oil lease related back to the commencement of the action, and was a final determination of the rights of all the parties in interest with reference to the property as of that date.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 985; Dec. Dig. § 538.*]

3. BANKRUPTCY (§ 139*)—TRUSTEE—OCCUPATION OF PROPERTY.

Where, pending a suit to cancel an oil lease, the lessee's trustee in bankruptcy was directed to enter and continue the operation of the wells, it being thereafter determined that the lessors were entitled to cancellation, the trustee's possession pendente lite was that of a trespasser under a claim of title.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 139.*]

4. BANKRUPTCY (§ 140*)—DAMAGES—OIL TAKEN FROM LAND.

Where the trustee of a bankrupt lessee of oil land entered in good faith under a claim of title, pending suit by the lessors to cancel the lease in which they were subsequently successful, and operated the wells until the termination of the suit, paying to the lessors the royalty stipulated for in the lease, there being no other evidence as to the reasonable value of the oil in place in the ground, such royalty would be taken to be the reason-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

able value thereof, and hence, no damage being done to the land aside from the extraction of the oil during the trustee's operation of the wells, the lessors were not entitled to the fund produced by the oil, but such fund, after payment of the royalties, belonged to the trustee for distribution.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In Bankruptcy. Application for funds in the hands of the trustee.

Lapham & Brewster and Geo. A. Amos, for trustee.

Keene & Gates, J. B. F. Cates, and Keplinger & Trickett, for G. W. Squires and others.

POLLOCK, District Judge. The facts arising on this application, briefly stated, are as follows:

During the early part of March, 1904, and for several months thereafter, there were several cases pending in the state court against the St. Louis & Kansas Oil & Gas Company, lessees, and G. W. Squires et al., lessors, of certain oil and gas lands. That during September, 1904, the lessors of these lands filed their answer and cross-petition in one of these actions, praying for a cancellation of the lease between themselves and the St. Louis & Kansas Oil & Gas Company, for an injunction against operating under the lease, and for the appointment of a receiver, and for damages. This cross-petition was resisted by the lessee. It appears that under the order of the state court one of the officers of the lessee company was placed in charge of the plant upon the leased land, and was to operate it and hold the funds subject to the further order of the court.

On the 26th day of May, 1905, the St. Louis & Kansas Oil & Gas Company, pursuant to a petition in bankruptcy filed against it in this court, was adjudged a bankrupt. On the 27th day of July, J. H. Armel was duly elected and qualified as trustee of said bankrupt, and he thereafter on the 9th day of October, 1905, intervened on behalf of the bankrupt corporation, in the suit brought in the state court by G. W. Squires et al., upon their cross-petition for a forfeiture of the lease. It appears that from about the time the proceeding in bankruptcy was instituted, and until a short time after the trustee intervened in the suit in the state court, no one was operating the leased premises. During the latter part of October, pursuant to a recommendation in his report, the trustee was ordered by the referee in bankruptcy to take charge of the oil wells and operate them for the production of oil, and that he at once began their operation, and continued to operate the plant at a profit until the suit for a cancellation of the lease was prosecuted to a final judgment in the state court, at which time he promptly surrendered the possession of the leased premises to the owner. The trustee operated the plant for a period of nearly two years. The owners of the plant during all this time accepted the product which had been transferred into the pipe line without protest or objection. It appears from the evidence and from the pleadings that the operation by the trustee was beneficial to the lessors, and to all parties, and preserved the premises from deterioration, and that the lessors were glad to have the plant operated during the pendency of the litigation in the state court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The referee denied the application of the owners of the land and awarded the fund in controversy, now in possession of this court, arising from the operation of the wells by the trustee, to the trustee for distribution to the creditors of the bankrupt estate. This was done by the trustee on the theory of *res adjudicata*, by the decisions of the state court, and on the further theory that applicants, the owners of the real estate, are estopped by reason of their acceptance of the royalties stipulated in the lease, without protest, from the trustee, during his possession and operation of the wells. I find nothing substantial in the argument of *res adjudicata* for the reason the fund in controversy was produced after the commencement of the action in the state court, and the right to such fund was neither presented nor determined by that court on the trial of the issue there joined.

As to the argument made based on estoppel, I do not find it stands to reason because the owners of the land were entitled to the royalties paid by the trustee, regardless of any decision which might thereafter be made by the state court, and as possession of their land was taken by the trustee acting under orders from this court, in preservation of the rights of the bankrupt claimed under the lease then in litigation, and for the protection of all parties in interest in such property, they were powerless to dispute with the trustee.

The application must therefore be considered and determined on its merits from the proofs adduced, and, so considered, it must be conceded the decree of the state court canceling and annulling the lease relates back to the commencement of that action is a determination of the rights of the parties at that time, and is a final and conclusive determination of the rights of all parties in interest as of that date. Therefore it must now be held the owners of the land, applicants herein, were entitled to the possession of the premises freed from any claim under the lease from that date. Hence the trustee must be now regarded as having entered upon the premises, and produced the oil from which the proceeds in controversy flowed, as a trespasser under claim of title or right thereto. This is the claim asserted and most favorable to applicants. So considered, what are the rights of the parties in this fund?

As the proofs show, the trustee was in possession, claiming as the successor of the bankrupt corporation under the lease. The trustee at all times acted in good faith, and was guilty of no intentional wrong. No actual damage was done to the property of the applicants. In fact, it was benefited by the operation. No testimony has been taken for the purpose of showing the value of the oil in the ground. It is conceded applicants were paid an amount equivalent to the royalty usually paid to lessors by lessees of oil territory in that section of the country, and that the royalty was one-sixth of the oil produced, transferred to the pipe line.

In the absence of other proofs, and, as has been seen, none are found in this record, the royalty stipulated for in the lease must be taken as the reasonable value of the oil in place in the ground. The owners of the land expended no money and did no act toward its production; therefore they parted with nothing more than the reasonable value of the mineral oil in place in their property. Judge Sanborn, de-

livering the opinion of the Circuit Court of Appeals for this Circuit in *Durant Min. Co. v. Percy Consol. Min. Co.*, 93 Fed. 166, 35 C. C. A. 252, said:

"One who unintentionally, and in the honest belief that he is lawfully exercising a right which he has, enters upon the property of another and removes his ore, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, timber, or other thing in its original place, and for no more."

In *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617, it is said:

"Where there is a wrongful purpose or a wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies, and so long as we bear this in mind we shall have but little difficulty in managing the form of action so as to secure fair results. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits."

In the case at bar no damage was done to the land aside from the extraction of the oil which formed a part thereof. In fact, the real estate of applicants was benefited by the operation of the wells. The only question therefore presented here for review is: Who is entitled to the fund produced by the oil drawn from its place in the land in question?

The applicants have been paid the fair, reasonable value, under all the proofs in this case, of the oil in place. The remainder of the proceeds therefore belong to the trustee who produced them under the order of this court.

The decision of the referee must be sustained.

It is so ordered.

GUARANTY TRUST CO. V. METROPOLITAN ST. RY. CO.

(Circuit Court, S. D. New York. March 18, 1909.)

1. STREET RAILROADS (§ 55*)—FORECLOSURE OF MORTGAGES—PROVISIONS OF DECREE.

In a decree of foreclosure and sale, covering all of the property of a large and complicated street railroad system being operated by receivers, a provision for a minute inventory, covering fuel, supplies, repair material, etc., is not necessary nor practicable.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 134; Dec. Dig. § 55.*]

2. STREET RAILROADS (§ 55*)—FORECLOSURE OF MORTGAGES—MANNER OF SALE.

On the foreclosure of a mortgage covering the entire property of an extensive street railway system, including leased lines, the public interests are to be taken into account, and the court should preserve the road as a going concern so far as it can be done, and to that end will direct its sale as a unitary system, and not authorize its sale in parcels to suit particular bidders.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 134; Dec. Dig. § 55.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. On settlement of decree of foreclosure and sale.
For prior opinion, see 166 Fed. 569.

Davies, Stone & Auerbach, for Guaranty Trust Co.

Brownson Winthrop, for Morton Trust Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. The elaborate provisions proposed as to inventory of the personal property are rejected, not because of the great labor involved in complying with them, but because they seem impracticable and unnecessary. In the operation of a large and complicated system like this, the items of personal property required for operation, repair, and construction are constantly fluctuating. At whatever time an inventory might be made, it would be found a few weeks later to inaccurately represent then existing conditions. Such an inventory is not necessary. The cars will be listed, described, and identified by numbers, and so will the larger units of machinery. The annual inventory and the books of the receivers will be open to bidders, who will also be given access to all power houses, shops, cars, and storage barns. Certainly no one will bid for this railroad property without the advice of skilled and experienced engineers, whose inspection of the property and what may be found on it, coupled with the list of cars, etc., provided for in the decree, will give all the information needed for the exercise of an intelligent judgment.

The suggestion that the bidder should have some security against receivers disposing of material and supplies intermediate sale and delivery is not persuasive. The only disposition they can properly make of them is to put them into the road or its operation. If, for example, the supply of coal runs down during the period and is not replenished, the purchaser will not get as much coal as he saw when he made the survey; but, per contra, there will not be an unpaid coal bill to that extent for him to assume the obligation of paying. If 500 tons of rails are taken from supplies and laid on the yokes, he will get them just the same as if they remained in storage.

As to the reservation of right to impose lien for unadjusted claims, etc. (see article 7 et al.): This method is adopted mainly in order to enable bondholders to make use of their bonds in bidding. It seems curious that they should be practically the sole objectors to these clauses, which do not undertake to settle priorities now, in advance of the testimony, but merely reserve those questions to be settled hereafter, while a fund to provide for payment is thus secured. There is nothing in these clauses to terrify a prospective bidder on any theory of uncertain future liabilities. The claim of the Third avenue road is now being adjusted. The claims of other roads referred to in the same paragraph are apparently so trifling that no one seems interested in prosecuting them. The obligations of the receivers will be disclosed by the statements provided for in article 10. The damage claims arising during operation by receivers could not be adjusted accurately anyhow, and, as in all such cases, must be figured on by estimates from past experience. Practically all claims of contract creditors of

every kind and sort have been liquidated before the master; and the same is true of the tort claims. An intelligent and careful inquirer need have no difficulty in determining the utmost limit of the amount to secure which the right to impose liens is reserved, and can easily adjust the amount of his bid accordingly.

The Central Park, North & East River Railroad Company objects to having its lease included among the properties sold, since it has taken back its road upon nonpayment of the rent. That road, and also the Twenty-Eighth & Twenty-Ninth street and the Fulton Ferry roads, are not included, for reasons stated in the opinion filed.

Under the right reserved to the purchaser to refuse to adopt any particular lease or traffic agreement, it is possible that one or more of the leased lines may be thrown off; but the court is unwilling at this stage of the proceedings to permit a complete disintegration of the system. For that reason the proposed clauses providing that, on the request of any one interested, the property be offered in separate parcels, are not approved. To do so would put it in the power of the owners of roads which are now money makers for the system to take them out of it. No doubt the various parcels of real estate add materially to the security of the mortgage; but that mortgage is not the hypothecation merely of a number of pieces of real estate. It is a railroad mortgage, covering the entire property combined into a unitary system, operated as a going concern rendering public service. Every bondholder, when he bought his bonds, knew that they were secured by a railroad mortgage, and that foreclosure and sale would presumably conform to the practice usual with property of that character. In the case of such property the public interests are to be taken into account, and, so far as the court may be able to preserve the road as a going concern, it should do so. That can best be accomplished by offering it in its entirety, with power houses on some parcels, car barns or shops on other parcels, but all welded into a unitary system, ready to be taken hold of and operated by the purchaser without any visible change in service from that rendered by the receivers.

The Supreme Court, when reviewing the original appointment of receivers for this property, called attention to the importance of preserving "a great property operated as one system through the various streets of a populous city." In *re* *Reisenberg*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403. This court must assume that there will be a purchaser willing to pay a fair price for the entire property at a sale which would cut off both mortgages and the stock, and should act in conformity to that assumption.

The date of sale is fixed as late as June 1st in order that any one who wishes to review any of the provisions of the decree may have ample opportunity to present the same to the Circuit Court of Appeals. The record is printed, and there is nothing to cause delay in the presentation or hearing of such appeal, which will be given a preference in that court.

MILLER v. MOISE et al. (three cases).

(Circuit Court, E. D. Pennsylvania. March 29, 1909.)

Nos. 241, 247, 249.

1. DISCOVERY (§ 3*)—BILL—RIGHT TO RELIEF.

Bills for discovery will not be sustained, where the information desired can be obtained by the taking of depositions, by cross-examination of plaintiff at or before trial, by the examination of public records, or by notice to produce documents.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

2. RECORDS (§ 14*)—PUBLIC RECORDS—RIGHT TO EXAMINATION.

The contents of a public record office are always at the service of a person desiring to examine the same, on due application to the official in charge.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 13-17; Dec. Dig. § 14.*]

3. DEPOSITIONS (§ 8*)—RIGHT TO TAKE.

Depositions of witnesses who cannot be compelled to respond to a subpoena may be taken at any time, by the entry of an appropriate rule in the Circuit Court.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 8; Dec. Dig. § 8.*]

Bills for Discovery.

Sidney E. Smith, for complainant.

Sharp, Alleman & Moise, for defendants.

J. B. McPHERSON, District Judge. Without noticing several other objections to these bills of discovery, it is enough to say concerning each of them that I see nothing in the facts averred to call for the exercise of a chancery power which has become practically obsolete, or at all events is only to be exercised in unusual cases. All the information that the complainant declares to be essential to his defense in the three actions at law that have been brought against him in the Circuit Court can be obtained either by taking the depositions of certain persons named in these bills as respondents, or by the cross-examination of the plaintiff in the three actions at law—and such cross-examination may be had either at the trial or by deposition before the trial—or by inquiry in the public record office of the appropriate county in South Carolina, or by the usual notice to plaintiff's counsel to produce certain papers. If the plaintiff in the actions at law—who is beyond the reach of a subpoena—should not appear at the trial, the court can decline to proceed with the case until he offers himself for cross-examination; and a similar remedy can be applied if papers are not produced after proper notice. The contents of a public record office are always at the complainant's service upon due application to the official in charge, and the depositions of witnesses who cannot be compelled to respond to a subpoena may be taken at any time by the entry of an appropriate rule in the Circuit Court.

Without making any formal order now upon these bills, the fore-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

going brief expression of my views concerning the complainant's right to maintain them will probably be sufficient. I may add that upon his own showing he seems to be well informed about the matters in dispute, and to be exposed to no more than the usual hazard from the disclosure of his adversary's case.

MORTON TRUST CO. v. METROPOLITAN ST. RY. CO. et al.

(Circuit Court, S. D. New York. March 22, 1909.)

CORPORATIONS (§ 482*)—SUIT FOR FORECLOSURE OF MORTGAGE—INTERVENTION.

In a suit to foreclose a corporate mortgage, which covers past-due bonds of another corporation held by the mortgage trustee as a part of the security, such corporation will not be permitted to intervene for the purpose of litigating the question of its liability on such bonds, since a purchaser will acquire no better title than the mortgagee, and that question can be litigated in any suit for their enforcement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1881; Dec. Dig. § 482.*]

In Equity. On petition of Twenty-Third Street Railway Company for leave to intervene.

Parker, Hatch & Sheehan, for petitioner.

J. Parker Kirlin, for Metropolitan St. Ry.

Brownson Winthrop, for Morton Trust Co.

Masten & Nichols, for receivers of Metropolitan St. Ry.

LACOMBE, Circuit Judge. The relief prayed for is directed to protecting petitioner against liability on \$200,000 of its extended 6 per cent. mortgage bonds and \$150,000 of its debenture bonds. These bonds are held by the trustee as part of the security under the mortgage now being foreclosed in this suit, and in orderly course would be covered by the decree and offered for sale. But all of these bonds are past due, and upon sale the purchaser would obtain no better title than the mortgagee now has. Intervention, therefore, seems unnecessary. It would give no greater protection to the petitioner. All defenses it may have against claims for payment of these bonds are available against whomsoever may acquire them, and it is unnecessary to try any such questions in this suit.

The petition is denied.

THE TILLIE BAKER.

(District Court, E. D. Pennsylvania. March 22, 1909.)

No. 6.

FALSE IMPRISONMENT (§ 7*)—MASTER OF VESSEL—LIABILITY.

The master of a vessel, who procured the arrest of a seaman without a warrant, for which no legal justification is shown, is liable in damages for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 47; Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Libel for damages. On final hearing.
See, also, 168 Fed. 942.

Lionel Teller Schlesinger, for libelant.
Edward F. Pugh, for respondent.

J. B. McPHERSON, District Judge. The libelant's arrest, which was acquiesced in (and probably procured) by the respondent, was made without a warrant, and, as no legal justification has been shown for an arrest without process, the charge of false imprisonment must therefore be sustained. But this offense, I think, is only chargeable against the respondent during the period between September 5th and September 23d. He had nothing to do with what took place on and after the last-named date. The libelant is entitled to some damages; but his admitted misconduct and his insubordinate behavior were so exasperating, to say the least, that the amount to be awarded should be very moderate.

A decree may be entered in his favor for \$25, with costs.

THE TILLIE BAKER.

(District Court, E. D. Pennsylvania. March 22, 1909.)

No. 7.

SEAMEN (§ 19*)—DISCHARGE—WAGES.

Where the cook of a ship was lawfully discharged, in settling his wages the master could not deduct a sum paid by him to obtain advice for his guidance in connection with such discharge.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 19.*]

In Admiralty. Libel for wages. On final hearing.
See, also, 168 Fed. 941.

Lionel Teller Schlesinger, for libelant.
Edward F. Pugh, for respondent.

J. B. McPHERSON, District Judge. At the time of his discharge from the position of cook, the libelant was concededly entitled to \$5 more than he received, and I think that the deduction of this sum to reimburse the master for counsel fees that were paid by him in order to obtain advice for his own guidance was improperly made. I agree that the discharge was justified, and that the libelant's right to wages ceased when he was taken off the ship; but for the sum of \$5, with costs, he is entitled to a decree.

F. W. COOK BREWING CO. v. GARBER et al.

(Circuit Court, M. D. Alabama, N. D. January 13, 1909.)

1. COURTS (§ 371*)—FEDERAL COURTS—JURISDICTION—STATUTES—CONSTRUCTION—VALIDITY.

Where a federal court has jurisdiction of the parties and subject-matter, it has no power to refuse to exercise such jurisdiction merely because

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff seeks to litigate a right depending solely on the validity of a state statute as tested by the state Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 972; Dec. Dig. § 371.*]

2. COURTS (§ 489*)—FEDERAL COURTS—NATURE OF JURISDICTION.

The Circuit Courts of the United States in the exercise of their concurrent jurisdiction are for practical purposes courts of the states in which they sit; their functions under such circumstances being to enforce the rights of parties according to the laws of the states and the United States, and the courts of the state and the federal courts thereby constituting a single judicial system.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324, 1343; Dec. Dig. § 489.*]

3. INTOXICATING LIQUORS (§ 6*)—RIGHT TO SELL—LEGISLATIVE PROHIBITION.

So long as a state recognizes the right to make and sell intoxicating liquors, the occupation is under protection of the law, but is then at most a mere license which may be revoked at the arbitrary will of the Legislature, which if done, there is no right or property in the business in which the owner is protected by the Constitution and laws of the state or of the United States.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.*]

4. INJUNCTION (§ 9*)—STATE LAW—ALLEGED INVALIDITY—RIGHT TO SUE.

Where, in a suit by a nonresident manufacturer and seller of beer to enjoin the enforcement of the Alabama prohibitory law on the ground that the same had been illegally passed, it did not appear that complainant was authorized to do business in the state otherwise than in interstate transactions, even though the prohibitory law be set aside, and complainant's former customers, of whose intimidation complaint was made, had not qualified themselves to sell complainant's product, complainant was not entitled to sue to restrain the enforcement of such prohibitory law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 8; Dec. Dig. § 9.*]

5. INJUNCTION (§ 132*)—PRELIMINARY INJUNCTION—PURPOSE.

The general office of a preliminary injunction is to maintain a status quo existing at the time of filing the bill, where the ultimate right is involved in doubt with the probabilities in its favor, and there is danger of irreparable injury if the preliminary injunction is withheld.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

6. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—STATUTES—PUBLIC INTEREST.

Where, in a suit to enjoin the enforcement of a prohibitory law, it appeared that the public had a vital interest therein, the court would be justified in refusing a preliminary injunction, though, if the matter concerned only the parties to the suit, the writ would be granted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 307; Dec. Dig. § 137.*]

7. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—ENFORCEMENT OF STATE STATUTE—CONTINUANCE FOR HEARING IN STATE COURT.

Where, in a suit in a federal court to enjoin the enforcement of a state prohibitory law on the theory that the law had been illegally passed, it appeared, on motion for a preliminary injunction, that the Supreme Court of the state would soon pass on the question, the federal court should await the state court's determination, especially where the injury to the public arising from the sustaining of plaintiff's contention would greatly exceed the benefits to be derived by complainant therefrom, since the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cision of the Supreme Court of the state on such question, when rendered, would be conclusive on the federal courts.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 307; Dec. Dig. § 137.*]

In Equity.

Complainant, a corporation organized under the laws of Indiana, engaged in the manufacture and sale of beer, files its bill against Alexander M. Garber, Attorney General, Philip H. Stern, solicitor of Montgomery county, and Horace Hood, sheriff of Montgomery county, and others, citizens of Alabama, seeking, in substance, to prevent the defendants respectively from taking any steps to enforce the "general prohibition law," which prohibits the sale of intoxicating liquors and beer in this state, except as to transactions in interstate commerce, etc. The bill alleges that, by reason of the excellence of its beer and large sales thereof for a number of years to customers in Alabama, complainant had built up a good will in its business in this state which is worth at least the sum of \$100,000, and that for many years before the passage of the prohibition act it maintained various and important agencies in the state for the sale of its product, and that most of its business was done by sale, not directly to consumers, but to wholesalers and retailers in Alabama, by whom it was disposed of to the public, and that so much so was this the case that complainant's business in disposing of its product in Alabama was and has been practically dependent upon the continuation in business of such wholesalers and retailers. The bill sets forth threats by the various defendants to prosecute complainant and its agents for violation of the statute if they sell beer or attempt to carry on a purely domestic business in this state. It alleges that its business, which is lawful, the prohibition law being alleged to be invalid, is being destroyed, etc., and is of the value of more than \$2,000. The whole equity of the bill, in its last analysis, is rested upon the allegation that the statute known as the "general prohibition law" was not enacted in conformity to certain mandatory provisions of the Constitution of Alabama regarding the passage of laws, and the prohibition enactment is therefore without force of law, and that its enforcement by state officers, under such circumstances, would be a denial of due process to complainant, and inflict irreparable injury to its property rights and business in Alabama, and involve it in a multiplicity of suits and the defense of a multitude of indictments, if it has no other remedy than meeting the indictments and suits as they arise in the courts of law. In the view the court took of the case, it is not necessary to set out the particulars wherein it is alleged the Constitution was infringed in the passage of the statute. The bill prays a preliminary injunction against the officers named, and that on final hearing the injunction may be made perpetual, etc. The complainant moved for a restraining order and a preliminary injunction, of which notice was given the adverse parties, and upon the hearing the court denied both motions.

Troy, Watts & Letcher, for complainant.

Alex. M. Garber, Atty. Gen., Thos. W. Martin, Asst. Atty. Gen., Philip H. Stern, and Armstead Brown, for defendants.

JONES, District Judge (after stating the facts as above). The proposition upon which the complainant really rests the equity of its bill is that the act approved November 27, 1907, "to prohibit the manufacture, sale, barter, exchange, giving away to induce trade, and furnishing at public places or otherwise disposing of alcoholic, spirituous, vinous or malt liquors or other liquors or beverages by whatsoever name called, which, if drunk to excess will produce intoxication, except the sale of alcohol in certain cases upon certain conditions, and except the sale of wine for sacramental purposes," is not a valid law

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of this state, because there was such transgression in its enactment against mandatory requirements of the Constitution as to amending and passing bills that the act in question never had the force of law. The right and power of the state to pass such a law, the Constitution being conformed to in its enactment, is not and cannot be denied.

Respondents strenuously insist that the act is constitutional. Conceding for the sake of argument that the enactment is invalid, they insist that the complainant is in no position to challenge its constitutionality, since there are other laws and certain sections of the state Constitution which require the complainant to perform certain conditions precedent before it is entitled to protection as to any business done in this state, other than interstate commerce transactions, and that the bill does not show that complainant had complied with those laws. They also insist that this court cannot entertain this bill, because it shows no invasion of any rights secured under the Constitution or laws of the United States, and hinges its sole title to relief upon the allegations that the prohibition statute, which if valid puts an end to complainant's case, was not passed in conformity to the Constitution of the state of Alabama, which presents a question, the decision of which it is insisted lies so peculiarly within the province of the state court that the federal court ought not to entertain the bill, but should remit the complainant to the state forum, where alone the question can be finally determined. They further insist that the court has a discretion, in view of the nature of the property right asserted and the public concern in its exercise, to consider the harm which may result to the public from granting the preliminary injunction, as well as that which may result to complainant from refusing it, and on high grounds of public policy should withhold a preliminary injunction until the question of complainant's right to do other than interstate commerce in this state is tested by mandamus in the state courts, to compel the issue of a license to it or to the wholesalers and retailers of its beer in this state, which respondents insist, under the circumstances of this case, is an adequate and the only remedy.

Complainant, on the other hand, as strenuously insists, for reasons ably detailed, that the prohibition statute is invalid, and the complainant having built up a reputation and good will for its business and products, in which it has expended large sums of money, and being prepared to make large sales to wholesalers and retailers, who, but for the threats to prosecute them under the invalid enactment, would buy largely of complainant's product as they did in the past, the good will of the business is being destroyed, and it is prevented from making large profits which it otherwise would make, and that defendants are unable personally to respond for the amount of damages inflicted, whereby complainant is daily compelled to suffer irreparable injury, for the redress of which it has no adequate remedy at law. It also insists that the court not only has jurisdiction, but it is under duty now to determine the questions raised, and that since nothing but a pure question of law is involved, which cannot be varied on the final hearing, this court is bound to act now on its own judgment as to the constitutionality of the prohibition law, and, if it be of opinion

that it is invalid, must *ex debito justitiæ* grant the relief here prayed, upon the same principles which governed the court's action in the railroad rate cases here, and the action of the Supreme Court of the United States in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932.

Under the Constitution and laws of the United States, the Circuit Courts of the United States have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law and in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, in which there is a controversy between citizens of different states. A citizen of Indiana may therefore, other conditions permitting, litigate with citizens of Alabama in a federal court here any question which he might litigate if he were the plaintiff in a state court. The Constitution and laws giving a citizen of another state the right to resort to the federal court here to settle a dispute with a citizen of this state, the court has no power to cast such a suitor out of its portals merely because he seeks to litigate in the federal court a right dependent solely upon the construction or validity of the statutes of this state.

It must not be forgotten that the Circuit Courts of the United States in the exercise of such concurrent jurisdiction are, for all practical purposes, courts of the states in which they sit, and their function, under such circumstances, is to enforce the rights of the parties according to the laws of the state, just as the courts of the state in exercising jurisdiction concurrent with the Circuit Courts of the United States, in certain cases under the Constitution, laws, and treaties of the United States, must enforce the rights of the parties under the laws of the United States. In this way the state and federal courts reciprocally support the authority of the state and federal governments, and for these purposes these courts constitute one judicial system. *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257.

The exercise of jurisdiction by the state and federal courts, in this class of cases, has always been governed by considerations of comity and the desire upon the part of each to avoid trenching upon the province of the other. When, however, it is essential to the ends of justice, and the necessities of the particular case require it, a federal court may, and frequently must, pass upon the constitutionality of a state statute in advance of the courts of the state, although the sole issue be whether the Legislature of the state in the passage of the statute has conformed to the mode required by the state Constitution for the passage of laws. The spirit in which the federal courts should deal with such matters has been amplified in many decisions of the federal courts. The writ of habeas corpus is one of the most sacred writs in our jurisprudence. Federal courts and judges have authority, and are under duty, to grant writs of habeas corpus whenever persons are deprived of liberty in violation of the Constitution and laws of the United States; yet so great is the solicitude of the courts of the United States not to interfere in advance in matters of this kind, where the execution of the laws of a state is concerned, that the Supreme Court has repeatedly declared that the federal courts should refuse to issue the writ in such cases, and put the parties to their

remedy by writ of error from the Supreme Court of the United States to the highest court of the state, except in extreme cases, where the operations of the government might be impeded, or persons are imprisoned by state authority for obedience to the laws or orders of the courts of the United States and the like.

The general duty of the federal courts in such cases is laid down by the Supreme Court of the United States in *Felton v. Bank of the United States*, 101 U. S. 143, 25 L. Ed. 901, where it is stated:

"It is an appropriate duty which this court is called upon to perform very often to protect rights founded upon the Constitution, laws, and treaties of the United States, when those rights are invaded by state authority; but it is a very different thing for this court to declare that an act of the state Legislature passed in the usual forms necessary to its validity is void, because that Legislature has violated the Constitution of the state. It has long been recognized by this court that the highest court of the state is the one to which such questions properly belong, and though the courts of the United States in exercising concurrent jurisdiction must decide for themselves, though the question has not been previously considered by the state court, it would be indelicate to make such decisions in advance of the state courts unless the case imperatively demanded it."

In *Michigan Central Railway Co. v. Powers*, 201 U. S. 291, 26 Sup. Ct. 461, 50 L. Ed. 744, it is said:

"Undoubtedly the federal court has the jurisdiction, and when the question is properly presented, it may often become its duty to pass upon an alleged conflict between a statute and the state Constitution, even before the question has been considered by the state tribunals. At the same time the court will be reluctant to do so. * * * And this reluctance becomes more imperative where the statute has been before the highest court of the state, and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented and determined."

Circuit Judge Taft, in *Western Union Telegraph Co. v. Poe* (C. C.) 61 Fed. 468, expressed his embarrassment at having to decide such a question in the advance of a decision by the highest court of a state. On that account Judge Taft for several months held a case under advisement, which involved only the validity of a state statute according to its Constitution and laws, and finally rendered judgment in the case after long waiting, evidently because he despaired of any early decision by the highest court of the state, and was pressed by counsel not longer to delay a judgment the withholding of which might jeopardize an admitted property right. Having held the particular law in question unconstitutional, and the highest court of the state having afterwards sustained its validity, before the federal court had lost control of the case, Judge Taft promptly reversed his former ruling to make it harmonious with that of the highest court of the state. See, also, observations by Newman, District Judge, in *Christian Moerlein Brewing Co. v. Hill et al.* (not yet officially reported) 166 Fed. 140. The rule to be extracted from the decisions as to injunctions which interfere with the execution of state laws passed for the protection of the morals and peace of the state, especially where the issue is not as to the power of the state to pass the law, but only whether it has been passed in conformity to the state Constitution, is that the federal court should refrain from passing upon the statute in advance of a decision by the highest court of the state, except in very extreme

cases, where the nature of the right sought to be vindicated before the federal court imperatively demands its intervention in advance.

This case and the rate cases involve in some respects common principles, but the rule in the rate cases does not give the law which controls the issue of a preliminary injunction in a case like this. The difference between the two cases is in some important elements very great and vital. The rate cases concerned interruption of occupations which were not harmful or noxious in any way. On the contrary, the carrying on of the business of the carrier was laudable and promotive of the public weal, and the performance of it exacted by the laws of the state. The Legislature had no power, as in this instance, at its own mere pleasure, to prohibit the carrying on of the occupation. Its whole power was confined to properly regulating the rates. It had no power whatever to prescribe rates which would be confiscatory or oppressive. Whether or not the rate prescribed by statute had that effect depended upon the truth of controverted facts which could not be fairly ascertained prior to the final hearing. Although the rate laws were leveled at the carrying on of a lawful business, every single transaction in it, of which there were several thousand daily, was made the subject of a heavy penalty, and the carrier was thus placed in a position where it must submit to an irreparable loss or else disobey the laws, and, if mistaken in the justice of its complaint against the rates, forfeit its entire property, and, even if successful in the courts, encounter burdens almost as great as would result from obedience to the law, and meanwhile be prevented practically from discharging public duties, inflicting untold harm upon the public as well as the carriers themselves. A prima facie showing having been made of irreparable injury to an admitted property right, the court, upon exacting security for those who might be injured by a preliminary injunction, enjoined the enforcement of the rate statutes until the right could be adjudged on the final hearing after full proof. Nearly every property right sought to be protected in those cases found its final sanction in the Constitution and laws of the United States, questions upon which a decision of the state courts would in no way bind the federal courts, and which controlled the judgment as to the entire case, irrespective of matters wherein some of the laws were attacked solely because of their violation of the Constitution of the state.

In the case in hand, no property right whatever is involved, if the prohibition statute be valid. So long as the state law recognizes the right to make and vend intoxicating liquors, that occupation is under the protection of the law, but even then it is at most mere license to carry on an occupation, which may be revoked at the arbitrary will of the Legislature at any time. If the Legislature chooses to outlaw the occupation, there is no right of property in the business in which the owner is protected by the Constitution and laws either of the state or of the United States. Courts, in dealing with such cases and exercising their preventive jurisdiction in equity in regard to interference with such occupations, have on high grounds of public policy been much more reluctant to interfere, than where its preventive pow-

er is invoked to block interference with an occupation which the Legislature in no event may destroy and can only regulate, especially when the exercise of the property right does not endanger the lives, health, morals, or peace of the community. *North American Cold Storage Co. v. City of Chicago et al.* (decided by the Supreme Court of the United States, December 7, 1908) 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. —, and cases there cited.

The complainant has its principal place of business in Evansville, Ind., and has there built up its business of brewing and manufacturing beer and other malt liquors. From there its product has been sent out to different states of the Union and to many foreign countries. The excellence of its product is not denied, nor that it has built up a good will in its business which is of great value. Prior to January 1, 1908, it had agencies in Alabama for the sale of its product and solicited orders and carried on its business within this state. At that time it formally withdrew its agencies, doubtless because of the passage of the general prohibition law, which took effect on the first of this month, and thereafter, until the filing of the bill, shipped and sold its product here to retailers and wholesalers only in interstate transactions. These retailers and wholesalers had theretofore made large purchases from which complainant derived much profit. Its exact complaint now is that having built up at great expense a good will in its business, and having formerly done much domestic business in Alabama, through wholesalers and retailers, the good will of its business is jeopardized by the threats of individuals, who are officers of the state, to execute the provisions of an invalid prohibition law by criminal prosecutions, in consequence of which threats retailers and wholesalers, who in the past had bought, and who, but for such threats, would buy in the future, have been deterred from purchasing its product, whereby it has been subjected to irremediable loss in diminished profits, as the individuals named are not men of sufficient property to respond for all damage inflicted by the threats of the execution of the prohibition law, if it be invalid as complainant insists.

Complainant is not engaged in the making of beer in this state. The only injury of which it complains is that wholesalers and retailers here in consequence of the threats of prosecution, under what is claimed to be the invalid law, will not longer purchase its beer and malt liquors for resale in Alabama. The bill, it seems to the court, is not susceptible of the construction that complainant has complied with the Constitution and laws of this state so as to authorize it, the prohibition law being out of the way, to engage in business of any kind in this state, or that any threats have been made against it to prevent it from engaging in business here. True, it alleges the tender of \$10 to the Secretary of State for the purpose of permitting it to do business here, but it is not alleged that it has by proper instrument designated a known place of business in this state and an authorized agent or agents residing thereat, nor that it has filed with the Secretary of State a copy of its charter. If it be conceded that complainant stands, after the tender to the Secretary of State, as though it had a license to exercise its corporate functions in this state, that only authorizes it to make con-

tracts within this state within the purview of its charter. It would not license it to engage in the business of a wholesaler or retailer of beer in this state without complying with the license law in that respect and paying the price of the license. Complainant therefore stands as having no right, even if the prohibition law be set aside, itself to carry on its business or sell its product in this state, otherwise than in interstate transactions. The wholesalers and retailers whose intimidation is complained of have not qualified themselves in any way to sell complainant's product. It is difficult therefore to see how complainant can hinge an equity in its bill upon the destruction of the good will of its business by their failure for the reasons alleged to purchase its goods.

It is true that the invisible, intangible expectation of future profits from customers attracted by the excellence of the product and the management of the business, which is denominated its good will, is a valuable property right which exists wherever markets may be lawfully found, without any reference to the original place of manufacture, and is protected in any forum where that good will is attacked by unlawful means, preventing customers from buying. The foundation, however, of the right of a court of equity to protect the good will of a business, depends upon whether the owner has the right to sell his product in the locality where his would-be customers are prevented from buying his product. If neither complainant nor the resident wholesalers or retailers, of whose intimidation complaint is made, have any right to sell beer here, and therefore will not buy the article for resale in the locality where the intimidation is practiced, and people in such locality are thereby prevented from becoming purchasers, the intimidation of such would-be purchasers is not in law an attack upon the good will of the business of complainant and furnishes no basis for a bill to protect it. The complainant not having taken out a license and complied with the law, has no authority to sell its beer in domestic or wholly state transactions, even with the prohibition law out of the way. Having no right to sell its beer here, otherwise than in interstate transactions, to wholesalers and retailers, and the latter not having taken out a license, complainant has no good will in that respect which the law can protect, since the good will which the law protects must grow out of or be bottomed upon the right to sell in the locality where the sale of the product is hindered.

We repeat if complainant itself has no right to sell its beer here, and the wholesalers and retailers, whom it is alleged are deterred from becoming purchasers of its beer, have no license or authority themselves to resell it, threats to proceed against the wholesalers and retailers, who are not qualified to do such business, even if the prohibition law be void, give no cause of action in favor of the complainant, because in the last analysis the only effect of such threats is to prevent either the complainant or the wholesalers and retailers from doing that which the law forbids them to do. Moreover, an injunction issued at the instance of a manufacturer to prevent the execution of an alleged invalid law against third persons, who, but for the fear of the law which prevents them from reselling in a given locality, would become

purchasers of the manufacturer's products, though they had not contracted to do so, would carry the doctrine of the power of a court of equity to interfere for the protection of the good will of a business to startling lengths, especially when, as here, the law complained of is not directed specially against complainant's wares, but operates upon every one who sells the forbidden goods in the state. There is no such privity in right between the manufacturer and such third persons, under such circumstances, as authorizes the manufacturer to complain, and the injury is too remote and indirect to give a legal cause of action to the manufacturer, even though the prohibition law be invalid.

If, however, the court is mistaken in the foregoing analysis of complainant's bill, and the general allegation therein—that "at all times herein mentioned, in carrying on its business as aforesaid, complainant has observed such local rules and regulations, and complied with such statutes of the state of Alabama, and of the United States as were applicable"—should be taken to mean that the complainant has complied with the constitution and laws of this state by filing the proper papers with the Secretary of State and taking out the proper licenses for its agents, then it becomes necessary to consider the duty of the court, assuming the invalidity of the prohibition law. If complainant and its agents are authorized to sell its product in this state, and have complied with the state laws in that respect, and the prohibition statute be unconstitutional, then the threats of the defendants to execute it with the result stated in the bill would present the case of individuals under color of a void law inflicting irreparable injury upon a property right, and the person thus injured would ordinarily be entitled to a remedy in the court of equity, instead of being put to an action at law to vindicate the right.

The office, in general, of a preliminary injunction, is to maintain a status quo existing at the time of the filing of the bill, where the ultimate right is involved in doubt with the probabilities in its favor, and there is danger of irreparable injury if the preliminary injunction be withheld, and its office sometimes is by means of its operation in the future, upon the exercise of an existing right, to restore the status quo to what it was before it has been illegally changed to the prejudice of the complainant, who has endeavored to maintain it, and has been illegally prevented from doing so, without fault or acquiescence on his part, prior to the filing of the bill. On issuing a preliminary injunction, the court, except in very rare instances, must always consider the balance of resultant injury to the parties, and in many cases to the public, and where the right asserted is one in the exercise of which the public has a vital interest, as in the execution of laws of this kind, the court may refuse a preliminary injunction, when, if the matter concerned only the parties to the suit, it would grant it. The situation at the time the preliminary writ is asked must frequently control the denial or granting of it, even though the right sought to be protected be clear, and though on final decree the court might be compelled to adjudge the right in favor of the complainant. *Winslow v. B. & O. R. R. Co.*, 188 U. S. 646, 23 Sup. Ct. 443, 47 L. Ed. 635.

Whatever may be the convictions of the court as to the validity or in-

validity of the prohibition statute, and as to the judgment which the court should pronounce thereon, if the case were ripe for final decree, it is clear in the conviction that it ought not on motion for a restraining order to render any judgment based upon the theory that the prohibition statute is invalid. The validity of the statute is a question of which the highest court of the state is the sole arbiter, and its decision is binding on all the world. The Supreme Court of the state will soon pass upon the question. The statute is now being measurably observed. If this court, on the theory that the prohibition statute is unconstitutional, should issue a preliminary injunction, and the Supreme Court of the state should afterwards uphold the validity of the law, this court would have immediately to retrace its steps and dismiss the bill. Under such circumstances, the issue of a preliminary injunction would not be a kindness even to those whose business has been destroyed by the operation of the statute. If they should re-enter the business under the protection of a preliminary injunction, and the highest court of the state should hold the law to be valid, parties who engaged in the business in the interval under the protection of a restraining order would be subject to indictments and punishment, and be prosecuted in the state courts, the moment that protection was withdrawn. Such a rapid change and reversal of conditions, especially in communities whose local authorities, from the time of their foundation down to the present day, have been permitted to control such matters according to the judgment and wishes of the people most immediately concerned, and have therefore permitted the carrying on of the occupation, would only bring about further business and social unrest and disturbance of public tranquility. These are consequences which no court can overlook in deciding upon the granting of a preliminary injunction, and they far outweigh any injury which an individual may suffer from being deprived of the right to enter the business, if it be found to exist, in the short interval necessary to get a decision of the Supreme Court of the state, especially when, as here, the complainant by injunction seeks to embark anew in a domestic business, which it had abandoned prior to the filing of its bill. The situation presents a case, at this time at least, where the rights of the individual must yield to considerations of public welfare. It is far better, at this stage of the litigation, for all concerned, to wait upon the judgment of the highest court of the state.

Counsel for respondents may draw an order refusing complainant's motion for a preliminary injunction, with leave to renew it at some later date, as it may be advised in view of the event of the litigation concerning this matter in the state courts. *Winslow v. B. & O. R. R. Co.*, 188 U. S. 646, 23 Sup. Ct. 443, 47 L. Ed. 635.

OHMAN v. CITY OF NEW YORK.

(Circuit Court, S. D. New York. March 8, 1909.)

1. COPYRIGHTS (§ 69*)—REMEDY FOR INFRINGEMENT—MAPS—ACTIONS AT LAW—PLEADING.

The remedies provided by Rev. St. §§ 4965, 4970 (U. S. Comp. St. 1901, pp. 3414, 3416), for infringement of copyright of a map, etc., by injunction, and by the recovery of a penalty of \$1 from the infringer "for every copy of the same found in his possession," are exclusive, and an action for damages for infringement cannot be maintained other than one under such penalty provision, in which it must be alleged that copies were found in defendant's possession.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 69.*]

2. ACTION (§ 44*)—JOINDER OF CAUSES—NEW YORK CODE.

Causes of action to recover penalties for infringement of copyright and for damages for a tort not connected with copyright cannot be joined in the same complaint under Code Civ. Proc. N. Y. § 484, which governs the practice in the federal courts within that state.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 44.*]

3. COURTS (§ 329*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—PLEADING.

A complaint alleging that plaintiff was a designer and publisher of maps, and had acquired a reputation as such; that he designed and published a certain map, of which defendant city published and circulated in an official publication a mutilated copy, having thereon plaintiff's name, to his "loss or damage in the sum of \$6,000," but which does not allege any special damage to plaintiff's business or reputation—does not state a cause of action for the recovery of more than nominal damages, and the action does not involve a sufficient amount or value to give a federal court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. § 329.*]

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.]

At Law. Demurrer to complaint in action to recover penalties for infringement of complainant's copyright of a map of the borough of Manhattan, and others, and to recover damages for mutilating and selling maps made and designed by plaintiff.

Avery & Schlesinger (Frank C. Avery and James Hamilton, of counsel), for plaintiff.

Francis Key Pendleton (Charles C. Gill, of counsel), for defendant.

RAY, District Judge. The complaint purports to set out seven separate causes of action, five for the violation or infringement of copyrights for a map of the borough of Manhattan and a part of the Bronx, N. Y., and a map of the Bronx, part of the city of New York, N. Y., and a map of the borough of Manhattan, N. Y., and a map of the borough of Queens; and plaintiff seeks to recover the statutory penalties claimed to have been incurred by defendant because of the said violations or infringements. The sixth and seventh causes of action are to recover damages for mutilating and selling maps made and designed by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff as his work, same having his name thereon. Each cause of action alleges that the plaintiff is a subject of the Empire of Great Britain and Ireland, temporarily domiciled and residing in the city and county of New York, in the Southern district of the state of New York, and that the defendant is a municipal corporation organized under the laws of the state of New York and domiciled in said city and county.

In addition, the first cause of action alleges that in the year 1898, there was duly copyrighted, pursuant to the laws of the United States, a map of the borough of Manhattan and a part of the borough of the Bronx, being a part of the said present city of New York, and that "prior to the year 1904 all the rights and interests in the said copyright had devolved upon and were held by the plaintiff"; also that the said original map, as copyrighted, had been recopyrighted, or the copyright thereof renewed, by the plaintiff, and that the same, as issued and published by him, was marked, in accordance with the laws of the United States in such case made and provided, "Copyright 1904 by A. R. Ohman."

The complaint then alleges that on or about May 25, 1906, the defendant city, pursuant to the laws of the state of New York, was the publisher and responsible editor of the City Record, a publication relating to the affairs of said city of New York, and that, by its servants, agents and employes, without the authority or license of the plaintiff, the said defendant did in such publication utter, publish, and circulate a copy or reproduction of the said copyrighted map of the plaintiff by inserting such copy or reproduction in the issue of the City Record of that date, May 25, 1906, and thereafter, without the authority or license of the plaintiff, did publish and distribute the said copy, with the name of the plaintiff, in the form and manner as set forth in the said copy of the City Record of that date. A copy of the said publication of that date containing said map is annexed to the complaint. The complaint also alleges that an edition of 12,000 copies of said Record of that date, without the authority or license of the plaintiff, was printed, published, and circulated by the defendant; that defendant in so doing willfully violated and infringed the rights of the plaintiff "in and to said map, and his copyright thereof, and the reproduction thereof, as secured to him by the laws of the United States." The complaint then says that this was done "to the plaintiff's loss and damage, and in and whereby the defendant incurred, under the laws of the United States, penalties, in all amounting to the sum of six thousand dollars."

The second cause of action is a duplication of the first, except that it relates to a map of the borough of the Bronx, a part of the city of New York.

Aside from the first allegation above stated to be found in such cause of action, the third cause of action reads as follows:

"Sixth. That in the year 1905 the plaintiff duly copyrighted, pursuant to the laws of the United States, a map of the borough of the Bronx, being part of the said present city of New York, and that the said city, in violation of the plaintiff's rights, and without his license or authority, caused to be reproduced and published, and issued and distributed, through, in and by the department of finance of the said city, copies and reproductions of the plaintiff's said copyrighted map, to his loss and damage, and for statutory penalties as provided by law, in the sum of five thousand (5,000) dollars."

The fourth cause of action is a duplication of the third, except it relates to a map of the borough of Manhattan.

The fifth cause of action is the same, except it relates to a map of the borough of Queens.

The sixth and seventh causes of action, so far as appears from the complaint, have nothing to do with a copyrighted map or publication of any kind or description, except that plaintiff had marked it "Copyright 1904 by A. R. Ohman."

These seem to be causes of action for a sort of libel or slander upon either the plaintiff, as a designer and publisher of maps, or on the map, mentioned therein, itself. There is no allegation or statement in these causes of action that the maps referred to therein and alleged to have been changed and mutilated by the defendant were ever copyrighted. These causes of action set forth that the plaintiff for 15 years has been engaged in the business of designing, preparing, and publishing maps, which is his business; that he has acquired a reputation as a competent, careful, and accurate designer and publisher of maps; and that, says the sixth cause of action, "during the year 1904 this plaintiff did design, add to, and improve a map already owned by him, and produced and published the same, it being a map of the borough of Manhattan and part of the Bronx, * * * and that said map was not given or dedicated to the public, but was marked by him, in accordance with the laws in such cases made and provided, 'Copyright 1904 by A. R. Ohman,' " and that such map had been sold, etc., and was well known as the design and production of the plaintiff. The complaint then alleges that the defendant then took and marked up and altered and mutilated a copy of such map, and then caused such marked-up, altered, and mutilated copy to be reproduced and published, containing thereon the name, "A. R. Ohman," as a supplement in the said City Record of May 25, 1906, and then caused 12,000 copies of such Record containing such marked-up, altered, and mutilated map to be circulated in the city of New York and elsewhere, "thereby causing a mutilated and altered copy of his map to be so circulated as if the same had been produced by him, to his loss and damage in the sum of six thousand (6,000) dollars." The seventh cause of action is the same, except it refers to a map of the borough of the Bronx. The complaint alleges a presentation of his claim for penalties and damages, and a refusal to adjust, settle, or pay same.

The defendant demurs on the ground that the alleged causes of action from 1 to 6, inclusive, do not state facts sufficient to constitute a cause of action; that the sixth and seventh do not state facts sufficient to constitute a cause of action; and that this court has no jurisdiction thereof. Also, that the complaint is multifarious, in that different causes of action relating to different subject-matters have been improperly joined; that the causes of action relating to copyrights relate to different copyrights, and claim to recover statutory penalties for a violation of plaintiff's rights thereunder, and that 6 and 7 relate to claims for damages upon principles relating to the good will of trades, etc.

The first and second causes of action say that "in the year 1898 there was duly copyrighted, pursuant to the laws of the United States, a

map," etc., and that "prior to the year 1904 all the rights and interests in the said copyright had devolved upon and were held by the plaintiff; that the said original map as copyrighted had been recopyrighted, or the copyright thereof renewed, by the plaintiff," and that same was marked, etc., as required by law. Three, four, and five say "that in the year," giving it "the plaintiff duly copyrighted, pursuant to the laws of the United States, a map." Nothing is said as to these maps being marked copyright, etc. The defendant says these are mere statements of conclusions and not of facts, and that the complaint must set forth what was actually done in procuring the copyright; also, that no penalty can be recovered, as the complaint alleges that all were "distributed," and there is no allegation that a single copy was found in defendant's possession.

Title 60, c. 3, of the Revised Statutes of the United States, was amended (Act March 3, 1891, c. 565, 26 Stat. 1106 [U. S. Comp. St. 1901, p. 3405]), and the sections of the statute so amended that section 4956 read:

"No person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition * * * for which he desires a copyright. Nor unless he shall also * * * deliver at the office of the Librarian of Congress * * * or deposit in the mail within the United States addressed to the Librarian of Congress * * * two copies of such copyright book, map," etc.

By section 4952, it was provided that:

"The author, inventor, designer, or proprietor of any book, map, chart, * * * and the executors, administrators, or assigns of any such person shall, upon complying with the provision of this chapter, have the sole liberty of printing, reprinting, copying, executing, finishing and vending the same." etc

This last section, 4952, was amended March 3, 1905 (Act March 3, 1905, c. 1432, 33 Stat. 1000 [U. S. Comp. St. Supp. 1907, p. 1021]), but in no way that affects this action.

Section 4965, as amended March 2, 1895 (Act March 2, 1895, c. 194, 28 Stat. 965 [U. S. Comp. St. 1901, p. 3414]), provides that:

"If any person, after the recording of the title of any map, chart, * * * as provided by this act, shall within the term limited [14 years], contrary to the provisions of this act, and without the consent of the proprietor of the copyright, first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or impart, either in whole or in part, or by varying the main design with intent to evade the law, * * * he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imparted or exposed for sale * * * one half thereof to the proprietor and the other half to the use of the United States."

By section 4970, bills in equity may be filed, and the Circuit Courts of the United States are given power to grant injunctions to prevent the violation of rights secured by the laws relating to copyrights, and Judiciary Act, c. 7, § 629 (U. S. Comp. St. 1901, p. 504), confers

jurisdiction upon said courts "of all suits at law or in equity arising under the patent or copyright laws of the United States."

The said Act March 3, 1891, c. 565, 26 Stat. 1106 (U. S. Comp. St. 1901, p. 1110), also provides (section 13):

"That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens;

"Or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement.

"The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time as the purposes of this act may require."

There is no allegation in the complaint that these conditions exist.

By Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and corrected by Act Aug 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), it is provided:

"The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars * * * in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

Considering the first five causes of action by themselves, I am of the opinion that the demurrer to each is well taken. Each shows on its face that the plaintiff is a subject of the Kingdom of England and Ireland, Great Britain (I regard the use of the word "Empire" as immaterial), and fails to state the existence of facts which entitle him to the benefits of our copyright laws. It is true, however, that we have the necessary copyright relations with Great Britain. Act July 1, 1891, 27 Stat. 981, 982. I think our courts must take judicial notice of this fact. But it has been held (*Ford v. Blaney A. Co.* [C. C.] 148 Fed. 642) that:

"In an action for infringement of a copyright, it is not sufficient to allege generally in the bill or complaint that all conditions and requisites required by the laws of the United States to obtain a copyright have been complied with, but the specific acts done and necessary to constitute such compliance with the law must be affirmatively alleged, and the complaint must also show that the person in whose name the copyright was obtained was the person who owned the right and was entitled to it."

See, also, *Trow City Directory Co. v. Curtin* (C. C.) 36 Fed. 829; *Chicago Music Co. v. Butler Co.* (C. C.) 19 Fed. 758.

This complaint has no such allegations. Again, there is no allegation in either cause of action referred to that a single copy of the map was in or "found" in the "possession" of the defendant. It is not sufficient to allege that the defendant has caused such copies or sheets

to be printed, and has caused them to be circulated, or that it has had them in its possession. This is a penal statute, and must be strictly construed, not against, but in favor of, the defendant. The penalty of \$1 is incurred "for every sheet of the same found in his possession"; that is, the possession of the person wrongfully engraving, printing, etc., the map; not otherwise. *Bolles v. Outing Co.*, 175 U. S. 265, 268, 20 Sup. Ct. 94, 44 L. Ed. 156; *Child v. New York Times Co.* (C. C.) 110 Fed. 527. The statute is clear on its face, and is not susceptible of any other construction unless we do violence to the English language. This view is also fully sustained in *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 367, 28 Sup. Ct. 726, 728, 52 L. Ed. 1096, where it is held:

"The right of an author in the United States to multiply copies of his works after publication is the creation of a new right by federal statute under constitutional authority and not a continuation of a common-law right. *Wheaton v. Peters*, 8 Pet. 590, 8 L. Ed. 1055.

"While a general liability or right created by statute without a remedy may be enforced by an appropriate common-law action, when a special remedy is coupled therewith, that remedy is exclusive. *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376.

"Although remedies given by a statute to protect property in copyright may be inadequate for the purpose intended, the courts cannot enlarge the remedy. Congress alone has power so to do by amending the statute.

"Congress having, by sections 4965-4970, Rev. St., provided a remedy for those whose copyrights in maps are infringed, a civil action at common law for money damages cannot be maintained against the infringers."

Said the court:

"To the owner of a copyright on a map is given, under section 4965, forfeiture of plates and sheets, and one-half the penalty of \$1 for every sheet found in the defendant's possession; under section 4970, the right to proceed by injunction. It thus appears that Congress has prescribed the remedies it intends to give; this being true, 'however inadequate,' as Lord Kenyon said in *Beckford v. Hood*, *supra* [7 Term R. 620], 'no others can be resorted to.'"

This last case cited and quoted from settles the proposition that the first five causes of action cannot be sustained as causes of action to recover damages. Congress has given the right to copyrights, and provided the remedies for the violation of that right, and these remedies are exclusive.

This brings us to the consideration of the sixth and seventh alleged causes of action. I do not think either states facts sufficient to constitute a cause of action. Again, they are improperly joined with the causes of action to recover penalties. The absence of an allegation that the maps referred to in the sixth and seventh causes of action, and alleged to have been mutilated and printed and circulated in their mutilated form, were copyrighted, prevents the application of the doctrine of *Globe Newspaper Co. v. Walker*, *supra*. But no special damage is alleged to have resulted from the doing of the acts complained of. There is no allegation that the plaintiff was injured in his name or reputation as a man or as a designer, etc., of maps, or that he has lost any sale or sales or any business of any kind, or that he has lost employment or engagements in consequence of such acts. No facts or circumstances are alleged which would justify punitive damages. If we are to say that the complaint justifies the inference that de-

pendant took and converted a copy of the map, which copy was owned by the plaintiff, there is no allegation as to its value, and, as we may properly look to the map attached to the complaint and made a part of it, we are justified in saying that the copy itself had but little value. In the absence of allegations of special damage, damage to plaintiff's business or business reputation, I think the court must say that the damages laid, \$6,000, are colorable, and inserted for the purpose of giving this court jurisdiction. It is evident that proof of special damages, or of damage to plaintiff's good name and reputation as a designer, etc., of maps, or to his business, could not be given under the allegations of this complaint. As a consequence, on the allegations of the complaint he can only recover nominal damages, if any. The result is that while there is a controversy between a citizen of the state of New York—the city of New York—and the subject of a foreign nation, state, or government, the amount in controversy does not exceed the sum of \$2,000, exclusive of interest and costs, and this fact appears upon the face of the record, notwithstanding the plaintiff says he sustained damages in the sum of \$6,000 and demands judgment accordingly. *Barry v. Edmunds*, 116 U. S. 550, 559, 560, 561, 6 Sup. Ct. 501, 29 L. Ed. 729; *Bowman et al. v. Chicago & N. W. R. Co.*, 115 U. S. 611, 613, 6 Sup. Ct. 192, 29 L. Ed. 502; *Hilton v. Dickinson*, 108 U. S. 165, 174, 175, 2 Sup. Ct. 424, 27 L. Ed. 688; *Lee et al. v. Watson*, 1 Wall. 337, 339, 17 L. Ed. 557; *Vance v. Vandercook Co.*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; *North American T. & T. Co. v. Morrison*, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061.

These cases settle the proposition that, in actions for damages as well as on money demands, we are to look to the record itself, or, on demurrer, to the complaint as a whole, and not merely to the allegation as to damages and the prayer for relief, in determining whether or not the amount in controversy exceeds the sum of \$2,000. In *Hilton v. Dickinson*, *supra*, the court, at pages 174, 175, of 108 U. S., at page 430 of 2 Sup. Ct. (27 L. Ed. 688), said:

"It is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail. * * * In this connection it is to be remarked that the amount as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining whether this court can take jurisdiction."

The same is declared in *Lee v. Watson*, 1 Wall. 339, 17 L. Ed. 557. In *Bowman et al. v. Chicago & N. W. R. Co.*, 115 U. S., at page 613, 6 Sup. Ct., at page 193, 29 L. Ed. 502, the court said:

"Here the suit is to recover damages for not transporting from Chicago to Marshalltown 1,000 kegs of beer. There are no allegations of special damage or malicious conduct. In the original declaration the claim was for only \$1,200, and it was not until the case was actually decided, or about to be decided on its merits, that application was made for leave to increase the amount of the demand. Then it was manifestly done, not in the expectation of recovering more than was originally claimed, but to give color to the jurisdiction of this court."

In *Barry v. Edmunds*, 116 U. S., at pages 560-562, 6 Sup. Ct., at page 506, 29 L. Ed. 729, the court said:

"It is true, indeed, that in some cases it might appear as matter of law, from the nature of the case as stated in the pleadings, that there could not legally be a judgment recovered for the amount necessary to the jurisdiction, notwithstanding the damages were laid in the declaration at a larger sum. In the early case of *Wilson v. Daniel*, 3 Dall. 401, 407, 1 L. Ed. 653, decided in this court in 1798, under the judiciary act of 1789, then in force, it was declared by Chief Justice Ellsworth that: 'The nature of the case must certainly guide the judgment of the court; and, whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for £100, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction. The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded.'

"The amount of damages laid in the declaration, however, in cases where the law gives no rule, is not conclusive upon the question of jurisdiction; but if upon the case stated there could legally be a recovery for the amount necessary to the jurisdiction and that amount is claimed, it would be necessary, in order to defeat the jurisdiction, since the passage of the act of March 3, 1875, for the court to find, as matter of fact, upon evidence legally sufficient, 'that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case' within the jurisdiction of the court. Then it would appear to the satisfaction of the court that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.'

"In the present case the Circuit Court has not found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case within the jurisdiction of the court. Its action is not based on evidence of an attempted fraud upon the jurisdiction of the court, but upon the assumption, as matter of law, that upon the face of the declaration no recovery could be legally had of an amount sufficient to make the matter in dispute equal to that required to maintain its jurisdiction. * * *

"The cause of action stated in the declaration is a willful and malicious trespass, in seizing and taking personal property with circumstances of aggravation, and averments of special damage. The trespass is alleged to have been committed by the defendant, *colore officii*, under the pretended authority of void process, in open defiance of known law, accompanied by conduct intended to bring the plaintiff into public contempt and odium, and amounting to oppression in office. * * * 'It is a well-established principle of the common law,' said Mr. Justice Grier in *Day v. Woodworth*, 13 How. 362, 371, 14 L. Ed. 181, 'that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. * * * In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called "smart money."'"

In *North American, etc., Co. v. Morrison*, 178 U. S., at pages 266, 267, 20 Sup. Ct., at page 871, 44 L. Ed. 1061, the court said:

"While it has sometimes been said that it is the amount claimed by the plaintiff in his declaration that brings his case within the jurisdiction of the Circuit Court, that was in suits for unliquidated damages in which the amount which the plaintiff was entitled to recover was a question for the jury; an inspection of the declaration did not disclose, and could not disclose, but that the plaintiff was entitled to recover the amount claimed, and hence, even if the jury found a verdict in a sum less than the jurisdictional amount, the jurisdiction of the court would not be defeated. *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; *Scott v. Donald*, 165 U. S. 58, 89, 17 Sup. Ct. 265, 41 L. Ed. 632.

"But where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction on the Circuit Court, but the court on motion or demurrer, or of its own motion, may dismiss the suit. And such, we think, was the present case."

And in *Vance v. W. A. Vandercook Co.*, *supra*, the court held:

"In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that, if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach, even though the damages be laid in the declaration at a larger sum."

Here we have a case for damages in marking and using in an official publication a copy of plaintiff's map, with no allegation of damage to business or business reputation, no allegation of special damages, and no allegation of malice or of willful misconduct, and, as stated, I think that, assuming a cause of action is stated, the only damages recoverable, under the allegations, would be merely nominal damages. A person may not confer jurisdiction on the Circuit Court of the United States by alleging a simple trespass, and placing his damages at more than \$2,000, when it is perfectly apparent, on the face of the complaint, he is entitled to nominal damages only.

And I do not think a plaintiff may unite in the same complaint causes of action to recover penalties for the infringement of copyrights and causes of action for a trespass or alleged wrongs such as this. "The sufficiency and scope of pleadings and the form and effect of verdicts, in actions at law, are matters in which the Circuit Courts of the United States are governed by the practice of the courts of the state in which they are held. . Rev. St. § 914 (U. S. Comp. St. 1901, p. 684); *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835." This was the decision in *Glenn v. Sumner*, 132 U. S. 152, 10 Sup. Ct. 41, 33 L. Ed. 301; 2 *Foster's Fed. Practice*, 874; *O'Connell v. Reed*, 56 Fed. 534, 535, 5 C. C. A. 586; *Roberts v. Lewis*, 144 U. S. 656, 657, 12 Sup. Ct. 781, 36 L. Ed. 579; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 39, 40, 11 Sup. Ct. 478, 35 L. Ed. 55. Under section 484, Code Civ. Proc. N. Y., these causes of action cannot be joined. *Sullivan v. N. Y., N. H. & H. R. Co.* (C. C.) 11 Fed. 848; *Motley v. Pratt*, 13 Misc. Rep. 758, 35 N. Y. Supp. 184; *People v. Wells*, 52 App. Div. 583, 65 N. Y. Supp. 319; *De Wolfe v. Abraham*, 151 N. Y. 186, 45 N. E. 455.

In *Sullivan v. New York, N. H. & H. R. Co.*, *supra*, it was held that a cause of action to recover a penalty incurred for taking excessive fares and a cause of action to recover damages for personal injuries

for unlawful ejection from defendant's cars on a subsequent trip could not be joined in the same complaint. In *Motley v. Pratt*, 13 Misc. Rep. 758, 35 N. Y. Supp. 184, it was held that a cause of action to enforce the statutory liability of a director for the debts of a corporation for failure to file the annual report could not be joined in the same complaint with a cause of action to enforce the statutory liability for consenting to the creation of unsecured indebtedness in excess of the amount of the paid-up capital stock, both causes of action being penal in their nature and arising under different statutes. The demurrer was sustained on the ground there was an improper joinder of causes of action. In *De Wolfe v. Abraham et al.*, supra, it was held that:

"Causes of action for slander and false imprisonment cannot be united in the same complaint, even if they originated simultaneously."

The court said:

"We think to so hold [that they could be] is to ignore a distinction that exists in all jurisdictions where the common law is administered."

The court then holds that the New York Code of Civil Procedure will not permit such a joinder. It is clear to my mind, neither at common law nor under the New York Code can a plaintiff unite in the same complaint a cause of action to recover a penalty given by a federal statute for the violation of a copyright with one for an injury to property rights or business, or business reputation.

It follows that the demurrer must be sustained, with costs.

The plaintiff may elect upon which of the two classes of action he will proceed, if he elects to proceed at all, and, on payment of the costs to be taxed by the clerk within 20 days after taxation, may file and serve an amended complaint as to the penalties or as to the other alleged grounds of action, but not as to both. As to the causes of action not proceeded upon, the defendant is entitled to a final judgment dismissing the complaint with costs.



TWEEDIE TRADING CO. v. WESTERN ASSUR. CO. OF TORONTO.

SAME v. HIGGINS et al.

(District Court, S. D. New York. March 27, 1909.)

INSURANCE (§§ 159, 415, 489*)—MARINE INSURANCE—SHIPMENT OF CATTLE—INSURANCE SUBJECT OF BILL OF LADING—DEVIATION OF ROUTE—"UNSEAWORTHY."

Insurance on freight on cattle shipped from New Orleans to Cape Town, South Africa. Loss en route by mortality said to have been due to improper food furnished by the shippers. It appeared that the food supplied was ample in quantity, and of a quality the animals were accustomed to on the ranges from which they were taken. It was approved by competent experts in New Orleans. *Held* that as the insurance was against mortality generally, the underwriters were liable notwithstanding the unusual number of deaths, due, perhaps, to a deficiency in kinds of fodder supplied. Vessel not unseaworthy for such reason. Bill of lading freight the subject of insurance and *held* recoverable. A deviation en

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

route to Barbados held justified by a mutiny among the cattle men and the expenses thereof recoverable from the underwriters.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1111, 1255; Dec. Dig. §§ 159, 415, 489.*

For other definitions, see Words and Phrases, vol. 8, p. 7210.]

(Syllabus by the Judge.)

Ralph J. M. Bullowa, for libellant.

Wing, Putnam & Burlingham, for respondents.

ADAMS, District Judge. These actions were brought by the Tweedie Trading Company to recover from the Western Assurance Company and A. Foster Higgins et al. certain insurance, said to be due by reason of the loss of freight caused by the death of a number of cattle shipped on the steamship Nordkyn, of which the libellant was the chartered owner, for transportation from New Orleans to Cape Town, South Africa.

The amended libel alleges that on the 8th day of July, 1904, the libellant sub-chartered the said steamer to James Graham of New Orleans for a period of one trip from New Orleans to Cape Town, to transport a cargo of live stock and general merchandise and that the steamer should discharge there as customary; that the total amount of freight payable by the said Graham was to be a lump sum of £4,250 and one-half thereof, or £2,125, was prepaid by the said Graham at New Orleans; that it was further agreed in said sub-charter that the balance of the bill of lading freight should be insured at the charterer's expense, for the ship's benefit, against all risks, including mortality; that after the making of the said sub-charter, and before the 5th of August, 1904, the Western Assurance Company, in consideration of a certain sum to be paid to it by said Graham, underwrote its two policies of insurance in the said balance of freight money to become due under the sub-charter, one policy for the sum of £708.11.6 and delivered it to Graham, whereby it insured Graham and his assigns to the extent of the said sum, for the benefit of the libellant, against all risks which might happen to the cattle upon the voyage, including mortality, and another policy for the sum of £455.3.2 which was delivered to Dale & Company, whereby they and their assigns were insured to that extent for the benefit of the libellant against all risks that might happen to the cattle, including mortality; that Graham shipped a cargo on the steamer of about 5,000 head of cattle; that on the 5th of August, 1904, the vessel sailed from New Orleans for Cape Town and arrived at the latter place on or about September 21, 1904; that during the voyage 768 out of the 4,735 head of cattle died from causes incident to the voyage, and from natural causes, which risk was one of the perils insured against, and the consignees of the cargo, on account of said deaths, deducted from the amount of freight money which was payable under the bills of lading, the sum of £697.8.6 and the said sum, being parcel of the balance of said freight money insured by the said policies, remains and is wholly unpaid to the libellant; that before the arrival of the vessel at Cape Town the said Graham and Dale & Co. assigned to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

libellant the policies for a valuable consideration pursuant to an agreement contained in the said sub-charter; that the respondent was duly notified of the loss of the freight money, and due proof made thereof, and that the libellant during January, 1905, demanded payment of the balance upon the policies, which it refused to pay, whereby it became indebted to the libellant in the sum of \$1,861.92 with interest. For a second cause of action, after referring to some of the foregoing allegations, it was stated that on or about August 19, 1904, 10 of the men shipped by the owners of the cargo for the care of the cattle, without good cause or justification, refused to do the work required of them and mutinied and the steamer could not with safety proceed without obtaining other men in place thereof, and part of the water supply became stagnant and thereupon in order to protect and safeguard the cargo, the master of the Nordkyn deviated and proceeded to Barbados as a port of refuge, where other men were secured and fresh water, pursuant to the direction of the respondent and its agents, was supplied; that by reason of the said deviation and under the provisions of the policies, the libellant is entitled to recover from the respondent the cost of said deviation, amounting to \$2,915.19.

The respondent duly answered the libel and admitted, inter alia, that on August 5th, 1904, at New Orleans, and at August 13th, 1904; at Montreal, it issued certificates whereby it insured the persons named in the certificates on the balance of the freight money to become due under the sub-charters mentioned in the libel; that there were shipped on the Nordkyn in New Orleans in August, 1904, 4,050 sheep, 93 horses, 412 mules and 280 donkeys or thereabouts; that on or about August 5th, 1904, the steamer sailed from New Orleans; that after making a deviation to Barbados, she arrived in Cape Town on or about September 21st, 1904; that during the deviation, or after her arrival in Cape Town, 768 of said animals, to wit, 332 sheep, 81 horses, 183 mules and 172 donkeys died. The respondent then denied any knowledge or belief as to whether bills of lading were issued for the animals and as to whether the consignees under the bills of lading deducted £697.8.8 or any other sum from the freight money payable thereunder. The respondent then makes some further formal admissions and denials and, further answering, alleges that the Nordkyn was unseaworthy in the following respects, among others, viz: improper food, unsuitable and improper hay, insufficiency of bran, oats and grain, insufficiency of proper attendants, want of proper veterinary surgeon, insufficient ventilation.

The libel against A. Foster Higgins et al. alleged that they were the attorneys for the several subscribers at United States Lloyds and trustee to conduct an insurance business upon the Lloyds plan for the subscribers; that upon a proper consideration they underwrote their policy of insurance on the said balance of freight money and became indebted to the libellant thereunder in the sum of £700. The remaining allegations are substantially the same as in the Western Assurance Company action and the answer of the respondents in this case corresponds with the answer there. And further answering the respondents here allege that the freight insured by them was a balance of a libel sum under the said sub-charter and there was no loss of freight

under the policy, and further answering they allege that the deviation of the Nordkyn was unjustifiable and inexcusable.

The contracts of insurance are practically admitted in the pleadings, and in addition thereto the policies and certificates of insurance were offered in evidence by the libellant and received, showing the contracts as claimed by the libellant. The assignments to the libellant were duly proved, also the issuance of bills of lading and certain deductions made from the freight moneys by reason of the loss of some of the cattle.

The principal contention on the facts is with respect to the seaworthiness of the Nordkyn as a live stock carrying vessel. It is urged by the underwriters that the mortality was due to the character of the fodder. And it is further urged that if the fodder furnished was unexceptionable in itself, the proofs established that hay alone was not a sufficient or proper food for the live stock shipped on this steamer; that it is essential to supplement the hay with bran and oats.

It appears that the Nordkyn was amply provided with hay but had only 12 sacks, 2,040 pounds, of bran and only 25 sacks, 4,490 pounds, of oats. The quality of the hay is in dispute but the preponderance of the testimony shows it was a proper kind for these animals, which were taken from the ranges, and used to similar hay. Timothy hay, which is sometimes supplied for animals in transit, was in some respects a better, as it was a more expensive, article, but it could hardly be expected that the latter would be supplied, inasmuch as the former was the kind the animals were accustomed to.

The quantity of bran and grain furnished was possibly inadequate. There is a great conflict of testimony as to the kind of a laxative to be used and whether it should be a food or a medicine. In the latter case, there was doubtless sufficient. Graham testified that he bought Texas hay because it was the natural food of the animals, which were from Texas. He said that in his negotiations with the parties in London, who ultimately proved to be the agents of the parties with whom he placed the insurance, they inquired whether the food that would be furnished during the voyage would be the same that the animals had been used to. He further said that the hay was inspected at New Orleans by Joseph R. Givins, a licensed inspector and public weigher, and Dr. L. M. Holmes, of the Ontario Veterinary College, who issued a certificate that he had examined the hay placed on the steamer and found it to be of "good sound quality and suitable in every way for the purposes described." He further certified that:

"A small quantity of oats and bran of good quality had been placed on board, and the necessary medical and surgical supplies, for use in special cases of sickness amongst the animals."

Both Mr. Givins and Dr. Holmes were examined by deposition. The former testified that he had had about 16 years' experience in inspecting hay and the hay shipped was "a fair to good quality of Texas prairie hay, suitable for feeding Texas animals." He said on cross-examination that his knowledge was based on what people told him; that he had seen the Texas hay used for feeding cattle on ships before. Dr. Holmes testified as to his 8 years' experience as a veter-

inarian in New Orleans and said the hay referred to in his certificate was a good quality of prairie hay; that a great deal of it was used in New Orleans and he had had charge of a number of horses and stables that used it; that it was a "mighty good filler and a good nutritious food"; that if he were going to submit an animal to a strain which it was unused to for a considerable period of time, he would consider it best to give it a food to which it had been accustomed; that the vessel otherwise was properly furnished with medicines and surgical apparatus; that he examined the animals twice in New Orleans and they were all in good condition when they left; that they were ranch animals, excepting 4 cattle from up the country; that it was at his suggestion "that they did not send any bran and oats to amount to anything." He said when a mule or horse becomes constipated, he made some change in his food, gave him "a little bran and water mixed up and salt put in it"; that when an animal becomes constipated, the proper remedy would be to "change his food and give him bran mashes, if you can get him to eat it"; that the vessel did not have a veterinarian aboard but had a man named Gardner, who was "a good horseman. He was a man who was in the business and knew quite a bit about horses."

There was an unusual number of deaths among the cattle on the steamer. They commenced to die almost immediately after shipment, and the mortality continued day by day up to and for several days after her arrival at Cape Town. There were shipped 280 donkeys, 4,050 sheep, 412 mules and 93 horses. There were delivered a considerable number less, the loss by death having been 172 donkeys, 332 sheep, 183 mules and 81 horses. The voyage was rather a long one, several days in excess of the average, and the respondents' witnesses, among whom were some credible experts, while commenting on the risk incurred by the length of time the cattle were on board, 45 days, 5 of which were spent in Barbados, were not inclined to attribute the deaths to this cause but rather to insufficient nourishment in the food supplied, which was almost solely the hay hereinbefore described. The chief veterinarian for the Government at Cape Town, for example, said that the deaths and condition of the animals were due to defective nourishment in the hay supplied, which did not contain all the constituents necessary to form a complete food. He said there was an abundance of the hay, which had been well prepared and looked perfectly sound and if it contained the necessary constituents, they did not exist in a form capable of being properly digested and assimilated by the organs of the animals.

The respondents in their brief claim that a perfect defence exists by reason of the deficiency of the proper kind of food and cite in support of that contention the case of *Sleigh v. Tyser*, L. R. 2 Q. B. Div. 333, 5 Com. Cases, 271, where Mr. Justice Bigham held that insufficient ventilation and an insufficient supply of cattle men constituted a breach of the implied condition of seaworthiness. That was an action to recover the plaintiff's proportion of the amount payable in respect of a loss of cattle shipped at Brisbane on a steamer for carriage to Lourenço Marques in Delagoa Bay. The contract of insurance there

was somewhat similar to those involved here, and was expressed to cover:

"All risks of shipping, unloading craft, &c., until safely landed; all risks including mortality and jettison arising from any cause whatever; animals walking ashore or, when slung from the vessel, walking after being taken out of the slings and landed, to be deemed arrived, and no claim to attach to this policy on such animals. Each animal to be deemed a separate insurance. Fittings and condition of cattle to be approved by Lloyd's agent's surveyor." 2 Q. B. 333.

I think, however, that this question is not governed by that decision. There was no warranty of seaworthiness here with respect to food as there was there with respect to fittings and men. Deficiency in either fittings or men would constitute unseaworthiness of the vessel, but I do not think that the failure to furnish exactly the proper kind of food for cattle cargo can be held to do so or to exclude a recovery. The provisions for insurance in these contracts were:

"Be it known that H. B. Sedgwick & Co. * * * cause * * * to be insured, lost or not lost, at and from New Orleans to Cape Town * * * ; and it shall be lawful for the said ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever or wheresoever without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

On Ocean Freight on 4,050 Head of Sheep @ 4/8¼ each.....	=	£949. 4.4.
100 " " Mules @ £2.14/- each.....	=	270. 0.0
91 " " Mares @ £1.17.6 each.....	=	170.12.6
312 " " Mules @ £1.17.6 each.....	=	585. 0.0
280 " " Donkeys @ 10/9 each.....	=	150.10.0

Including risk of mortality, jettison and washing overboard. Animals walking ashore or when slung from the vessel walking after being taken out of the slings to be deemed a safe arrival and no claim except General Average to attach thereto."

The obvious distinction between the underwriters' obligations here and in *Sleigh v. Tyser* is that in the latter there was an unseaworthiness in the ordinary sense, that is the vessel was deficient in equipment, and in the case at bar, if there was any deficiency it was in the kind of food provided for the animals. The shippers of the animals seem to have taken every reasonable precaution, under the best obtainable advice, to make proper provision for their welfare. It is possible that the arrangements made were not such as would be adopted after the experience that was obtained from this voyage but if that is so, it does not seem that the underwriters should be relieved from their liability to be responsible according to their agreement. One of the risks they took was that of mortality, and this risk caused a very heavy and unusual loss but in the absence of unseaworthiness, which would prevent the policies from attaching, I do not see why they should not respond. It is argued by the respondents that the vessel was unseaworthy because proper fodder was not furnished and the said authority is cited to support the proposition but I do not think it can properly be deemed to go to that extent. Every proper effort was made here to render the ship in a suitable condition with respect to fodder and if the unusual loss was due to the hay, or rather lack of additions to the hay for the purpose of rendering it more digestible

and nutritious, that was knowledge obtained after the event and should not affect the obligations of the underwriters, who took the risk at premiums with which they were satisfied at the time. I do not know what the value of insurance would be if it could be set aside in a case of this kind. I therefore hold that the obligations of the insured with respect to furnishing food for the animals were complied with and the defence in this respect should fail.

The respondents claim that the libellant suffered no loss under the policies.

It appears that the libellant was the time-charterer of the Nordkyn and on July 8th, 1904, sub-chartered her to James Graham "for a period of one trip from New Orleans to Cape Town, S. A. with a cargo of live stock and general merchandise etc." The charter further provided:

"4. Also that the total amount of freight payable by the parties of the second part is to be a lump sum of £4,250 Br. Stg. in full of all primage, port charges, dues, pilotages, etc. at both ports of loading and discharging. One half of this total amount of freight say £2,125 Br. Stg. to be prepaid by the parties of the second part at New Orleans, on signing Bills of Lading by the Master. The remaining one half, say, £2,125 Br. Stg. to be paid on delivery of the live stock etc. at Cape Town, S. A. Bills of Lading to give ship lien on live stock etc. for the balance of freight due, this balance to be insured at charterers expense for ships benefit against all risks including mortality. Insurance certificate to be turned over to The Tweedie Trading Co. as soon as received by Jas. Graham and Jas. Graham to notify the Tweedie Trading Co. before sailing of where insurance effected and conditions. * * *

7. Also that, the captain shall sign Bills of Lading as and when presented without reference or prejudice to this charter party, any difference in freight to be settled at port of loading before sailing, if in charterers favor, by Captain's draft payable five days after arrival at Cape Town, if in steamers favor, in cash at New Orleans less the insurance. * * *

9. Also that, charterers to supply live stock fittings, furnish cattlemen, feed and fodder for the live stock at their own expense and to load and discharge the ship free of charge.

10. Also that, the ship is to pay for victualing the cattlemen, furnishing them with ordinary cattlemen's food and returning them to a United States Port via port or ports."

It was alleged in the first libel that the Western Assurance Company:

"* * * underwrote its policy of insurance on the said balance of freight money to become due under the said sub-charter,—that is to say,—the sum of Two thousand one hundred and twenty-five pounds British sterling, and delivered the said policy of insurance to the said Graham, wherein and whereby it insured the said Graham and his assigns, to the extent of said balance, for the benefit of libellant, against all risks that might happen to the said cattle upon the said voyage, including mortality. * * *"

The libel also alleged:

"It was further agreed in said sub-charter that the balance of the charter hire should be insured at the charterer's expense. * * *"

The first amended libel alleged:

"Said charter provided that the libellant should have a lien on freights and subfreights for the payment of charter hire."

The libellant filed a second amended libel in which it alleged that the respondents:

“ * * * underwrote its two certain policies of insurance on the said balance of the freight money to become due under the said sub-charter. * * * ”

On the trial, the libellant moved to amend its second amended libel by inserting the words “bill of lading” before the word “freight.” This was subsequently allowed. Consequently the subject of insurance was the bill of lading freight.

The respondents claim that the libellant has no interest in such freight and therefore none in the subject insured; and further that the freight had actually been earned and it follows that the underwriters can not be held liable.

It appears that section 4 of the charter provided as quoted above.

The balance of freight due was the subject of insurance. It might have been one-half of £4,250 or might have been more. It was in fact £2,125.6.10, with a detailed valuation on each animal. Apart, however, from such nice computations, there was an evident intention here that the libellant should be insured against any loss of freight which it might suffer and it seems obvious that a loss was suffered by it. This claim of the respondents should therefore be rejected.

The further contention is made by the respondents that there is no legal or other justification for the allowance of alleged expenses in Barbados.

There was no real trouble about the water for although one tank had become stagnant, there was an abundance in the remaining tanks and if there had been any deficiency it could have been supplied by means of the condenser on board. There was no reason therefore for going to Barbados on account of water, although some was put aboard there. There was difficulty, however, about the cattle men. Some 10 of them became dissatisfied, alleging insufficiency of the proper kind of food. The demand was not justified as there was ample food, which they were obliged to admit. They then asked for fresh bread. This it was impossible to furnish them. They were getting the same kind of bread as the other men but they remained dissatisfied and refused to work. It was concluded that the cattle were in danger, and it was necessary to seek the nearest port, which was Barbados, to obtain new men.

The provisions of the contracts upon this point were:

“ * * * And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said Live Stock, or any part thereof, without prejudice to this insurance; to the charges whereof, the said Assurers will contribute according to the rate and quality of the sum herein insured. * * * ”

It was held in *The Pomeranian*, Prob. Div. 1895, 349, that a marine policy of insurance on live cattle, including mortality from any cause whatsoever, renders the insurer liable, under the suing and laboring clause, for the extra cost of fodder supplied to the cattle whilst the vessel in which they were shipped was detained in a port of refuge for necessary repairs due to perils of the sea, for there was a danger of total loss unless the expense was incurred. The facts there are somewhat different from those in the case under consideration, but there does not appear to be any difference in the governing principle.

Here there was also danger of loss if the deviation was not made, and it seems proper that the underwriters should bear the expense. See, also, *Popham v. The St. Petersburg Ins. Co.*, 10 Com. Cas., 276.

The underwriters were duly kept advised of the Barbados incident by the libellant and approved of its action, subject of course to the subsequent determination of their legal liability. What was done was for the underwriters' benefit and they should respond for the disbursements.

There will be a decree for the libellant for the freight on the lost animals, also to cover the Barbados expenses, for the ascertainment of which a reference will be necessary.

WM. WOLFF & CO. v. UNITED STATES.

(Circuit Court, N. D. California. March 22, 1909.)

No. 13,836.

CUSTOMS DUTIES (§ 85*)—PROCEDURE—APPEAL FROM GENERAL APPRAISERS—ADDITIONAL EVIDENCE.

An importer is not precluded from introducing new evidence in the Circuit Court, on appeal from the Board of General Appraisers, under Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 (U. S. Comp. St. 1901, p. 1933), if he introduced some evidence before the board.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 205; Dec. Dig. § 85.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Choynski & Humphreys (William P. Humphreys, of counsel), for importers.

Robert T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty.

VAN FLEET, District Judge. This is an appeal from a decision of the Board of General Appraisers sustaining the action of the collector of customs at the port of San Francisco in assessing and collecting the duty on a certain consignment of German kummel, known as "Gilka Kummel," imported by the petitioner. The question involved before the collector was whether the commodity was dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, 30 Stat. 173 (U. S. Comp. St. 1901, p. 1653), which fixes the tax of \$2.25 per proof gallon, or came within the trade convention with Germany then in force, made in pursuance of section 3 of the tariff act, which fixes the duty on importations of like character from that country at \$1.75 per proof gallon. Proc. of Pres. 31 Stat. 1978.

The importer claimed that the commodity was a product of the soil of Germany, and had been imported by it direct from that country, having been bought on its account from the manufacturer at Berlin. But the certified invoice accompanying the shipment, instead of having been made out in Berlin, was issued and consulated at Antwerp, and disclosed nothing as to the place of purchase or country of pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

duction of the goods covered. The collector had consequently no discretion but to treat the merchandise as an importation from Belgium, which he did, and imposed duty at the higher rate. The importer, however, was granted the privilege of entering the goods upon a pro forma invoice on giving a bond to produce later a corrected invoice, properly made out and consulated at Berlin, and the duty was then paid under protest. The protest having been duly certified by the collector to the Board of General Appraisers, that tribunal, upon a hearing subsequently had before it, affirmed the ruling of the collector. Thereupon this application was made to review the decision of the board; and the parties having, as authorized by the statute, taken such additional evidence in this court as they desired, the matter has now been submitted.

There is but one question presented here, and that is a question of law. The evidence taken in this court upon which the controversy is submitted need not be stated, since it is conceded by the government that, if available to petitioner, it is sufficient to sustain its contention as to the source and character of the importation. In that respect it is stated in the brief of the United States attorney:

"No dispute is made in this case as to the character of the imported article. It comes within the provisions of section 3 of the act of 1897 hereinbefore referred to, and it comes within the purview of the President's proclamation. And it is conceded that the contention of the petitioner here is correct, providing proper procedure has been followed by the importer to show that the kummel imported was liable to a duty of only \$1.75 per gallon, instead of the regular duty of \$2.25 per gallon."

The defect in procedure implied in this language and urged by the government as its sole objection is that the additional evidence taken here cannot be resorted to by petitioner to countervail the ruling of the Board of General Appraisers, for the reason, as claimed, that no evidence on certain essential features of the controversy was presented to that board. Counsel says:

"In this case it was incumbent upon the petitioner to produce evidence before the Board of General Appraisers to establish an importation direct from Germany, and to establish the fact that the kummel was a product of Germany, and that it had not become mingled with the commerce of Belgium prior to its shipment."

And it is contended that no such evidence was there presented, and that in such an instance the protesting importer cannot be permitted for the first time to present such evidence here, that the case must be regarded as if the party had defaulted before the board and given it no opportunity to pass upon the merits of the controversy, and thus one of the essential features of the procedure provided by the statute has been ignored. The authority relied upon to sustain this position is the case of *United States v. China & Japan Trading Co.*, 71 Fed. 864, 18 C. C. A. 335, decided by the Circuit Court of Appeals for the Second Circuit. In that case Judge Wallace, commenting upon the record before them, used this language:

"Notwithstanding these articles were improperly classified by the collector, the Board of Appraisers was entirely justified in affirming his decision. It appears from the record that the board affirmed the collector because the importer failed to appear pursuant to its notification to show cause why the ac-

tion of the collector should not be affirmed. The whole scheme of the customs administrative act would be defeated if the importer, who complains of the action of the collector, can obtain a review of that action by the Circuit Court without first resorting to the Board of General Appraisers and obtaining its decision upon the facts and the law of the case. The point, however, does not seem to have been presented for the consideration of the Circuit Court, has not been argued in this court, and is not suggested in the assignments of error. Consequently we are not called upon to consider it."

As indicated, this language was used by the learned judge merely en passant, and in response to no question presented or involved in the case, and it must therefore be regarded as a pure dictum. It does, however, in my judgment express a correct and just principle of law, and one applicable to the construction of the statute in question, and should therefore in a proper case be applied. But it has no application to the facts of the present case. The record here discloses that the hearing before the board was not permitted to go by default. The protesting importer was not only represented on the hearing, but there was evidence presented which in my judgment was sufficient to have warranted, although perhaps not demanding, a finding by the board sustaining the protest. The board had before it, not only the original invoice certified at Antwerp, but a corrected invoice properly consulated at Berlin, which latter referred to the commodity as "German kummel," and which, when considered in connection with the statement therein of the place where purchased, was sufficient to raise a presumption that it was of German production; and taken in connection with the sworn statement, wholly uncontroverted, made to the board by Mr. Hoyt, representing the importer, was sufficient to rebut any inference that the merchandise had ever become commingled with the commerce of Belgium. Mr. Hoyt stated in referring to the invoice originally taken out at Antwerp:

"As the goods were of German production and should be entitled to the benefit of the German reciprocity treaty, we discarded said invoice on the ground that it was not correct, and gave a bond for the production of a corrected consular invoice, showing the goods were the product of Germany and had started on their journey to the United States from Germany."

This record, therefore, precludes the claim that the case virtually, or at all, went by default at the hearing before the board. Nor did the latter regard the case as within that category. Their conclusion, as expressed in their opinion, after referring to the evidence before them and discussing its effect, was that:

"There is not before us sufficient facts to warrant us in making a finding in favor of the importers. The protest is therefore overruled."

In my judgment the facts of the case bring it squarely within the principles laid down in *Mendelson v. United States*, 154 Fed. 33, 83 C. C. A. 145, a case also decided by the Circuit Court of Appeals for the Second Circuit. In that case Judge Lacombe, stating the facts of the case, says:

"The government contended, in support of the decision of the Circuit Court, that no legal evidence was taken before the board, and that therefore no 'further' evidence should be permitted in the Circuit Court; and it was argued in the brief, with regard to the provision quoted from said section 15 (Act June 10, 1890, c. 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933]): 'The whole ob-

ject of this act was to obtain, in the first instance, from the Board of Appraisers, their decision upon questions of classification; and, where no legal testimony is offered before said board when the case is called for argument, the appellant cannot in his appeal ask that further testimony may be taken. * * * Since the China & Japan Trading Company decision, it has been generally recognized that, where the importers neglected to appear before the board on due notice, they would be denied the privilege of introducing further evidence in the Circuit Court. The question arises: Are they in any better position, if they do appear and introduce an ex parte affidavit, which would not be received or considered by any court as legal evidence? In the importers' brief it was urged that the board had admitted the affidavit as evidence, and that this admission made it competent under the further provision of said section that 'all the evidence taken by and before said appraisers shall be competent evidence before said Circuit Court'; and it was pointed out that this court, in *U. S. v. Downing*, 146 Fed. 56, 60, 76 C. C. A. 376, had considered and given weight to an ex parte affidavit made by the exporter of the goods. Note *U. S. v. Hempstead* (C. C.) 153 Fed. 483."

In answering the contention of the government it is said in the opinion:

"Testimony was taken in the Circuit Court; but the judge, upon motion of counsel for the government, expunged it, citing *U. S. v. China & Japan Co.*, 71 Fed. 864, 18 C. C. A. 335. In the case cited the importer offered no evidence in support of his protest, and 'failed to appear pursuant to the board's notification to show cause why the action of the collector should not be affirmed.' In the case at bar, however, the importer did appear and offered evidence, which the board found not satisfactory. It consisted merely of an affidavit made by a person in China. The rule laid down in the *China & Japan Case* does not apply where the importer appears and offers some evidence to support his protest. We are of the opinion, therefore, that the evidence taken in the Circuit Court was properly in the record and should be considered."

In accord with the conclusion there expressed, I am satisfied that the petitioner must be given the benefit of the evidence offered; and, in view of the conceded effect of that evidence, the ruling of the Board of General Appraisers must be reversed, and the protest sustained.

It is so ordered.

In re DUNSEATH & SON CO. et al.

(District Court, W. D. Pennsylvania. March 22, 1909.)

No. 5.

1. BANKRUPTCY (§ 115*)—RECEIVERS—EXTRATERRITORIAL AUTHORITY.

A receiver in bankruptcy appointed by the District Court of one district cannot maintain an action in the District Court of another district to recover assets in the hands of strangers, nor can a court of the latter district stay the officers of the state court and order them to surrender assets of the bankrupt within the district to the receiver appointed in the foreign district, that the assets may be preserved until a trustee is elected.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 115.*]

2. BANKRUPTCY (§ 114*)—FEDERAL COURTS—ANCILLARY JURISDICTION—RECEIVERS.

Under Bankr. Act July 1, 1893, c. 541, § 1, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), giving federal courts bankruptcy jurisdiction to be exercised within their territorial limits, to administer estates in all their details, and providing that nothing contained in the enumerated powers in section 2 should deprive a court of bankruptcy of any power it would

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

possess if the specific powers had not been therein enumerated, a federal District Court in a district other than that in which bankruptcy proceedings are pending has jurisdiction to appoint an ancillary receiver to take possession of property in such district belonging to the bankrupt pending adjudication, in order to preserve the same.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

John W. Dunkle and Carrell & Henkle, for petitioners.
J. M. Shields and A. B. Angney, for creditors.

YOUNG, District Judge. This case is here upon the petition of the American Manufacturing Company, a corporation of the state of West Virginia, which recites that it is a creditor and a person interested in the estate of the above bankrupts; that Robert Dunseath, individually and the firm of Dunseath & Son Company, on February 9, 1909, filed a petition in the clerk's office of the District Court for the Southern district of New York, praying for the adjudication in bankruptcy of Robert Dunseath, individually and the partnership firm of Dunseath & Son Company; that the bankrupts have been engaged in business in the city of New York, in the Southern district of New York; that on February 9, 1909, the United States District Court for the Southern district of New York appointed James O. Tryon receiver, who has duly qualified and given bond as required by the court; that the partnership of Dunseath & Son Company consists of Robert Dunseath, Alfred E. Dunseath, an infant, and George Harvey; that service of the subpoena has not been had on Harvey, and that time will be required to serve him by publication; that pending the appointment of a referee the adjudication and election of a trustee several months will probably elapse; that property consisting of machinery and supplies used in the construction of bridges is located near the town of Donora, in this district; that the assets within this district can now be sold at higher prices than later because of a demand for such material in the construction of a new bridge at Donora; that the expense of caring for the assets pending the election of a trustee could be saved by the appointment of a receiver and the sale of the assets; and that an ancillary receiver should be appointed. The petition filed by James O. Tryon, the receiver appointed by the District Court for the Southern district of New York, was filed with the above-recited petition of the American Manufacturing Company, which recites the same matters, and, in addition thereto, that the assets of the bankrupts located in this district are in the custody of the sheriffs of Washington and Westmoreland counties, both in this district, by virtue of sundry writs of foreign attachments obtained within four months of the commencement of the bankruptcy proceedings, and that said sheriffs refused to deliver the property seized thereunder to the petitioner as receiver, and prays for an order directing these officers to turn over the assets in their custody to the receiver. Service of notice of these applications was accepted by counsel for the attaching creditors.

Two questions are thus presented for our consideration: First. Can

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the District Court of this district stay the officers of the state court, and order them to surrender the assets of the bankrupts in this district to the receiver appointed in the Southern district of New York, so that they may be preserved until the trustee is elected? Second. Has a District Court of the United States jurisdiction to appoint an ancillary receiver pending the adjudication of the bankrupts in another district in aid of the proceedings in bankruptcy?

The first question must be answered in the negative. The weight of authority is that the receiver appointed by the District Court of one district cannot maintain an action in the District Court of another district to recover the assets in the hands of strangers. The extra-territorial power of a receiver was carefully considered in the case of *Clark v. Booth*, 17 How. 327, 15 L. Ed. 164, and it was there decided that the receiver possessed no such power. This case was referred to in the case of *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, where Mr. Justice Peckham, in commenting on the case of *Clark v. Booth*, said:

"We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case."

In our own circuit Judge McPherson, sitting in the Eastern district of Pennsylvania, in the case of *In re National Mercantile Agency (D. C.)* 12 Am. Bankr. Rep. 189, 128 Fed. 639, decided that a receiver in bankruptcy under an order to collect and take possession of all the assets of an alleged bankrupt is not authorized to bring suits in a district other than the one in which he was appointed, and shows that this position is sustained by the highest authority. We must therefore conclude that the receiver in the case at bar cannot maintain a suit in this district. Under the prevailing authorities he certainly cannot by a summary proceeding such as is brought in this case either restrain the state officers or recover the assets of the bankrupts from the hands of strangers. This disposes of the first question.

The second question, viz., Has the District Court of this district jurisdiction to appoint an ancillary receiver in aid of the District Court of the United States for the Southern district of New York, which has taken jurisdiction of the bankrupts' estate? is one of very much more difficulty. We are confronted with these facts. A receiver has been appointed to take possession of and preserve the assets of the alleged bankrupts until a trustee can be appointed. Almost all the assets of the bankrupt are within this district. An adjudication cannot be had and a trustee cannot be elected for a long time because of the impossibility of serving one member of the bankrupt firm. The assets consist of machinery and bridge supplies for which there is now a ready market at good prices because of the building of a bridge at the place where the assets are located. These assets will not only be less salable in the future, but the expense of preserving them by the state officers in custody of them by writs of attachment will be large. If not interfered with, the state officers, pending the appointment of a trustee, who can bring a plenary action to recover them, may proceed upon their writs and the title to the assets pass to third parties, and the amount realized on a forced sale be but a moiety of their

real value. Under these facts, if there is any authority in this court to appoint an ancillary receiver, it should be done. This question has never been decided, so far as we have been able to find, by any federal appellate court, and the decisions of the federal District Courts are diverse.

We believe the correct principle to be stated in the case of *Lathrop, Assignee, v. Drake*, 91 U. S. 516, 23 L. Ed. 414, where Mr. Justice Bradley, in deciding a case arising under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), says:

"But the exclusion of other District Courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principle court cannot exercise jurisdiction, and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the design and scope of the act. The state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the states in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the First circuit in the case of *Sherman v. Bingham*, 7 N. B. R. 490; and we concur in the opinion there expressed, that the several District Courts have jurisdiction of suits brought by assignees appointed by other District Courts in cases of bankruptcy."

That learned judge, without further elaborating this doctrine, cites the opinion of Mr. Justice Clifford in the case of *Sherman v. Bingham*, Fed. Cas. No. 12,762, where is found a most learned, exhaustive, and persuasive discussion of the power of the federal courts to uniformly and effectively administer the national bankruptcy act. The reasons for this decision are equally applicable to the present bankruptcy act. The bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) throughout gives to the federal courts jurisdiction to be exercised "within their territorial limits" to administer the estates of bankrupts in all their details. Section 2 enumerates their powers, and closes with the provision that:

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

We have in this section, then, not only powers enumerated and authority to take jurisdiction conferred; but, lest any matter necessary to the complete administering of the estate should have been overlooked in this section, we have the provision reaffirming to those courts all the powers they would possess as a court of bankruptcy commensurate with the purposes of a system of administering insolvent estates. These federal courts have apart from and undisturbed by this act their jurisdiction as ordinary courts of suits at law and in equity as defined by statute and decision. This jurisdiction of the

District Court has been well defined in *Lathrop, Assignee, v. Drake*, supra, where the learned justice says:

"Of this there are two distinct classes: First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition and ending in the distribution of assets amongst the creditors and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him."

Our present bankruptcy act, being a system of law enacted for the purpose of establishing a uniform system for the adjustment of insolvent estates throughout the Union, is not only to be construed in the light of other bankruptcy acts heretofore enacted in this country, but is to be construed with such liberality as will make the system effective in the collection, preservation, and distribution of estates. If, therefore, we may interpret this act with the purposes in view which we believe courts have held to be its purposes, we find that unless the creditors or the bankrupt or some other interested party may go into a court of like jurisdiction beyond the territorial limits of the court having the administration of the estate, for the purpose, pending adjudication (for we have seen no one can bring a plenary suit until a trustee is elected and no summary proceedings can be commenced for the collection of the assets of the bankrupt), of collecting or preserving the assets for distribution to the creditors in the district having jurisdiction of the estate, we shall find the assets scattered into innocent hands by bona fide sales upon judicial process at great sacrifice, stolen, depreciated in value by reason of neglect, or destroyed, so that, when finally one has arisen with power to take possession of them, their value will have departed, and little will be left for those interested in the estate. And all this, although the statute says that the title to the assets passes out of the bankrupt to the trustee from the commencement of the proceedings wherever they may be situated.

Does not a bankrupt act so interpreted as to result in such failure destroy the beneficent system by which the honest debtor may turn over to his creditors all that he has with the expectation that it will be so conserved and preserved that his just creditors will have the benefit of it? Is the act regulating this system to be so interpreted that, while it only allows the court of the domicile to take into its grasp assets within its territorial boundary, and forbids it to enter by its accredited officer another co-ordinate court, it will also stay the arm of every other court beyond its territorial boundary from aiding or assisting it in doing that for which the law was enacted? Rightly interpreted, we believe the true doctrine is that this is an effective national system of administering insolvent estates, giving to the court of the domicile full power to administer the estate, and giving to other courts of like jurisdiction beyond the boundary of the primary court full authority to aid by its decrees and processes that primary court, so that all the assets of the bankrupt may be at last brought into the primary court for distribution. We believe the authority of the District Courts of sister jurisdictions is auxiliary and ancillary for

the purpose of making the act effective. Many cases might be cited showing the ancillary powers in sister courts outside of those pertaining to bankruptcy.

We believe the authority rests in this court to aid the District Court for the Southern district of New York in its administration of the bankrupts' estate by appointing an ancillary receiver who shall take the assets and preserve them until there shall be an adjudication and appointment of a trustee. Let an order be drawn accordingly.

In re SYMANOWSSKI.

(Circuit Court, N. D. Illinois, El. D. March 29, 1909.)

1. ALIENS (§ 69*)—NATURALIZATION—RECORD.

A naturalization record need not show jurisdiction, or that all the legal requisites have been complied with, nor contain the alien's previous declaration of intention to become a citizen, in order to import validity.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 69.*]

2. ALIENS (§ 70*)—NATURALIZATION—PROCEEDINGS OF COURT.

Courts, in exercising jurisdiction to admit aliens to citizenship, act judicially, and their proceedings must be liberally construed; every intendment being in their favor.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 70.*]

3. ALIENS (§ 68*)—CITIZENSHIP—DECLARATION OF INTENTION—MINORS.

Under Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329), providing that aliens may be admitted to citizenship where a declaration of intention shall have been filed at least two years before admission, such declaration may be made by a minor just before coming of age, and is ratified on his subsequent application for citizenship after arriving at majority.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.*]

4. ALIENS (§ 68*)—CITIZENSHIP—DECLARATION OF INTENTION—STATUTES.

Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329), providing that aliens may be admitted to citizenship where a declaration of intention shall have been filed at least two years before admission, does not require a renunciation of allegiance to the foreign sovereign, or the actual declaration of allegiance to the United States, at the time of the applicant's declaration of intention to become a citizen.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.*]

Mr. Crutchfield, for the Attorney General.

SANBORN, District Judge. The petition was made October 26, 1908, and properly verified on the same day by two competent witnesses. It appears from the petition that the applicant was born in Russia March 10, 1885; that he immigrated May 15, 1901, and has resided in the United States since May 23, 1901, and in Illinois since May 25, 1901. The petition and verification were fully supported by the testimony on the hearing. The only question is whether the declaration of intention to become a citizen, made March 8, 1906, was not made one day too soon. The applicant, having been born March 10, 1885, became of full age March 9, 1906, so that his declaration, made March 8, 1906, was made one day before he reached his ma-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jority. Was a minor, pursuant to the law in force March 8, 1906, competent to make a declaration of intention to become a citizen of the United States?

Naturalization is now governed by the provisions of Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 95); and by section 4 of that act a minor may declare his intention to become a citizen after reaching the age of 18 years. Regulations for the execution of the act of June 29, 1906, made by the Secretary of Commerce and Labor, took effect, pursuant to section 28 of the act, September 27, 1906. The act itself took effect on that day. The case, therefore, is governed by the law in force prior to the act of 1906, which is embodied in sections 2165 and 2167, Rev. St. (U. S. Comp. St. 1901, pp. 1329, 1332). These sections are as follows:

"Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner and not otherwise: First. He shall declare on oath, before a Circuit or District Court of the United States, or a district or Supreme Court of the territories, or a court of record of any of the states having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. * * *"

"Sec. 2167. Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be made a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona fide intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization."

It will be noticed that there is nothing in the language of section 2165 to indicate whether the declarant was required to be 21 years of age at the time of making declaration. But it is argued in opposition to the right of the petitioner to naturalization that, if minors were intended to be governed by section 2165, the enactment of section 2167 was entirely unnecessary, and that the latter section shows a purpose on the part of Congress to grant to minor aliens a privilege they would not have under section 2165. On the other hand, it is urged that section 2167 shows that Congress recognized the capacity of a minor to form an intention to become a citizen, and if he could form such an intention he certainly could declare it. This is the view taken by the Circuit Court of Appeals of the Second Circuit in *United States v. George*, 164 Fed. 45, the latest reported case on the subject.

In the case of *In re Polsson* (C. C.) 159 Fed. 283, an application for citizenship was granted where the declaration was made at the age of nineteen; it being held that section 2167 did not imply that an alien could in no instance make a declaration of intention during minority.

In *re Spitzer* (C. C.) 160 Fed. 137, takes the opposite view, upon the ground that no alien has a natural right to sojourn, reside, or become a citizen in the United States, and the giving or withholding of either of these rights is an attribute of sovereignty. An alien may be admitted to citizenship only by compliance with the conditions prescribed by Congress in the exercise of such sovereign power. Section 2167 was an implied declaration that no step looking to the acquisition of citizenship can be taken by a person before reaching majority, on the theory that the abdication by an individual of allegiance to one sovereign and the undertaking of allegiance to another are acts of such grave solemnity that they should be performed only by persons of mature judgment. While this consideration did not control the action of Congress in passing the act of 1906, yet the intention of previous legislation is clear, and *Spitzer's* declaration was therefore without effect.

Another case is that of *Jonas Gross* in the Eastern district of New York (160 Fed. 739), where it was held by Judge Chatfield that section 2167 recognizes the capacity of an infant to form an intention, and that a declaration made by an infant may be ratified by him by applying for naturalization after becoming of full age.

It will be seen that in all of the cases, except that of *Spitzer*, which was a case in this district, the validity of a minor's declaration is upheld. Such declarations are also recognized as valid by all the state courts sitting in Chicago. The different results reached by the courts in the cases cited seem to result from different points of view. If a liberal construction is applied, as in the *Gross*, *George* and *Polsson* Cases, the minor's declaration is upheld, at least to the extent that he may ratify it, and thus make it retroactively good. If a strict construction, on the other hand, is applied, as in the *Spitzer* Case, it is held void.

There is no doubt great force in the argument that the abdication of allegiance to one sovereign and the undertaking of allegiance to another are acts of grave import and solemnity. But the force of this consideration is somewhat weakened by the language of section 2167, allowing applicants to declare on oath that for two years preceding it was their bona fide intention to become citizens; and such two years might be, under that section, from 19 to 21. This is pointed out by Judge Lacombe in the *George* Case. It may also be said that, conceding the grave nature of the act, yet it is one which, being beneficial to the applicant, may be ratified by him after reaching his majority. This is held by Judge Chatfield in the *Gross* Case. And it may be added that our naturalization laws have always been construed, both by the State Department and the courts, with the utmost liberality. While a declaration of intention to become a citizen by an adult alien does not make him a citizen (*Wallenburg v. Missouri Pac. Ry.* [C. C.] 159 Fed. 217), yet the making of such a declaration does work an important change of status by an adult alien who has gained a domicile in this country. This question was very fully considered by the State Department in the case of *Michael Koszta*. The interesting correspondence in relation to this case is found in *Wharton's International Law* Dig. vol. 2, page 358 et seq.

"It is a familiar rule that, on the construction of grants of franchises, that construction is adopted which is most favorable to the persons for whose benefit the franchise is to be granted." Letter of Mr. Bayard, Secretary of State, 2 Whart. Int. Law Dig. p. 342, § 173.

In the same letter he assumes that a minor is incapable of making a declaration of citizenship. The liberal rule of judicial interpretation above referred to is said to be in harmony with our system of government, and to have been uniformly respected and followed by the executive branch of the government. Letter of Mr. Fish, Secretary of State, 2 Whart. Int. Law Dig. p. 345.

A naturalization record need not show jurisdiction, or that all the legal requisites have been complied with, in order to import validity. A record need not show the requisite previous declaration of intention to become a citizen. The judgment of admission is conclusive. *Stark v. Chesapeake Ins. Co.*, 7 Cranch, 420, 3 L. Ed. 391. Naturalization proceedings are liberally construed, every intendment being in their favor. *Priest v. Cummings*, 16 Wend. (N. Y.) 625. Courts admitting to citizenship act judicially. *In re Bodek* (C. C.) 63 Fed. 814.

The liberal rule applicable to naturalized citizens is illustrated in *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532. The mining laws of the United States apply only to citizens. But where a citizen located a mining claim, and conveyed a third interest therein to an alien, Manuel, this was held by the state court to constitute an abandonment of the claim. In a contest involving the right to a patent, the court held that Manuel was an alien. He applied for naturalization and was at once admitted to citizenship. This was held by the Supreme Court, on a writ of error to the state court, to retroactively remove Manuel's disability, citing *Gouverneur v. Robertson*, 11 Wheat. 332, 6 L. Ed. 488, and *Osterman v. Baldwin*, 6 Wall. 116, 18 L. Ed. 730, to the effect that naturalization has a retroactive effect in cases of land entries.

There is nothing in section 2165 which requires a renunciation of allegiance to the foreign sovereign, or the actual declaration of allegiance to this government. All that is necessary is a declaration on oath that it is the present intention of the declarant to become a citizen, and his present intention to renounce allegiance to his foreign sovereign at some future time. In other words, the minor making the declaration simply states his present intent to do something which he cannot then accomplish. The declaration in no way changes his status, nor the status of a declarant of full age, unless domiciled here. If the minor may form the intent, why may he not declare it? Concede that he is not yet competent to abdicate his allegiance to one sovereign and undertake allegiance to another; what prevents him from both intending to do these things and giving expression to such intent?

It seems quite clear to me, on the whole, that the applicant in this case should be admitted to citizenship. His declaration was made only a few hours before he reached his majority. By applying for citizenship based upon such declaration, he ratified such declaration, and I think such ratification should be given effect.

MILLER v. ILLINOIS CENT. R. CO.

(Circuit Court, N. D. Georgia. April 10, 1909.)

1. REMOVAL OF CAUSES (§ 25*)—ACTION ARISING UNDER FEDERAL STATUTE.

In order to justify a removal of a cause from a state court to the Circuit Court of the United States on the ground that the suit is one arising under the Constitution, laws, or treaties of the United States as authorized by Act Cong. March 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), it must appear in plaintiff's statement of his own claim that the suit is one so arising, it being insufficient that such facts appear in the answer or petition to remove.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 25.*]

2. REMOVAL OF CAUSES (§ 23*)—GROUNDS—FEDERAL CONSTITUTION, LAWS, OR TREATIES.

A cause cannot be removed to a federal court, on the ground that it is one arising under the Constitution, laws, or treaties of the United States, merely because it may become necessary in the progress of the litigation to construe the Constitution or laws of the United States, but the cause must be one the decision of which depends on such construction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 54; Dec. Dig. § 23.*]

3. REMOVAL OF CAUSES (§ 23*)—GROUNDS—CAUSE ARISING UNDER FEDERAL CONSTITUTION AND LAWS.

Where an action for injuries to a servant of a railroad company was brought under the employer's liability act (Act Cong. April 22, 1908 [Act April 22, 1908, 35 Stat. 65, c. 149]), but it did not appear from plaintiff's declaration that the construction of the act was involved, but that the decision would depend on the law as applied to the facts, the cause was not removable as arising under the laws of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 54; Dec. Dig. § 23.*]

4. COURTS (§ 394*)—FEDERAL COURTS—UNITED STATES SUPREME COURT—JURISDICTION.

Where, in the course of a trial in a state court, it develops that the decision of a case depends on the construction of an act of Congress, and the decision is against some right or privilege set up and claimed by the defendant thereunder, the case may be reviewed by the Supreme Court of the United States on a writ of error to the highest state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1053; Dec. Dig. § 394.*]

Jurisdiction of cases involving federal question, 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.]

Burton Smith, for plaintiff.

Tye, Peeples & Jordan, for defendant.

NEWMAN, District Judge. In the suit brought in the state court, which was removed into the Circuit Court by the defendant corporation, the petition or declaration is as follows:

“Georgia, Fulton County.

“To the City Court of Atlanta:

“The petition of Albert Miller shows the following facts:

“(1) The defendant is the Illinois Central Railroad Company, a railroad corporation with officers, agents, and a place of business in said county.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(2) Defendant is a foreign corporation, and is not a resident or citizen of the state of Georgia.

"(3) Plaintiff is a citizen and resident of Tennessee.

"(4) Defendant has damaged petitioner in the sum of \$10,000 by reason of the following facts: [Here follows a copy in full of the act of Congress of April 22, 1908, known as the 'Employer's Liability Act' (Act April 22, 1908, 35 Stat. 65, c. 149)].

"(6) On or about August 1, 1908, petitioner was in the employ of the defendant.

"(7) On said date, while in the employ of the defendant, he was injured at Dyersburg, Tenn.

"(8) The work in which petitioner was engaged was running a freight train, which train was running from one state into another and was engaged in interstate commerce.

"(9) Petitioner was employed by the defendant, a common carrier, in such commerce.

"(10) In the discharge of his duty petitioner was setting or throwing the switch at Dyersburg.

"(11) The lock on the switch was hard to handle, and it took some time to do this.

"(12) As soon as petitioner fixed the switch he turned toward the engine on which he was working, which had been a short distance from him; as petitioner turned, he found the engine right on him. The engine was backing, and the cab was nearly passed. Petitioner grabbed at the cab, was thrown under the engine, and his leg cut off. As petitioner saw he was falling, he halloed. The engineer paid no attention to him, and went on some 50 feet beyond him.

"(13) Defendant was negligent in that its engine advanced toward and upon petitioner before any signal was given by petitioner, and before any signal had been given that the engine was about to advance upon him.

"(14) Defendant was negligent in failing to stop its engine after petitioner had fallen.

"(15) Petitioner, as said engine approached him, found the engine right at him. It was his duty to go with said engine, and there was an emergency upon him.

"(16) Petitioner thought then, and thinks now, that he was more apt to be injured by not seeking to get upon said engine than seeking to get upon said engine.

"(17) Petitioner used all ordinary care at the time and place he could have used under the circumstances.

"(18) Petitioner's leg was cut off just below the knee.

"(19) Petitioner was about 27 years of age, and was earning from sixty to seventy dollars per month.

"(20) Petitioner's capacity to work and earn money has been destroyed.

"(21) Petitioner has suffered and will always suffer great mental and physical pain and anguish as a result of said injury.

"(22) The grabiron or handholds on the side of the engine were insecure, unsafe, and not properly constructed.

"(23) Petitioner brings this suit under the federal statute herein set forth, and relies solely upon the same for his recovery.

"Wherefore petitioner prays that process issue to the defendant requiring it to be and appear at the next term of this court to answer his complaint."

The process attached to the declaration shows that the case was returnable to the city court of Atlanta on the 1st day of March, 1909. On that day the defendant appeared and filed its petition for removal to the Circuit Court of the United States for this district, properly verified, and accompanied by the bond necessary under the removal act. The petition for removal is as follows:

"Your petitioner, Illinois Central Railroad Company, appearing only for the purpose of this application, respectfully shows to this honorable court:

"(1) That it is defendant in this suit, which is of a civil nature, and that

the matter and amount in dispute in this case exceeds the value or sum of two thousand dollars, exclusive of interest and costs.

"(2) That the cause of action on which this suit is founded arises under the laws of the United States, under an act of Congress approved April 22, 1908, the title of said act being 'An act relating to the liability of common carriers by railroad to their employes, in certain cases.'

"(3) That this suit shows that petitioner is a common carrier engaged in interstate commerce, and that plaintiff was an employe of defendant, and above-entitled action is brought for the purpose of recovering from your petitioner the sum of ten thousand dollars damages on account of personal injuries received by plaintiff, while an employe of petitioner engaged in interstate commerce, on one of its cars.

"(4) Said complaint further shows that the determination of the liability of your petitioner to pay the damages complained of in the complaint, to wit, ten thousand dollars, depends upon the construction of the act of Congress of the United States above referred to, which act of Congress is set out in plaintiff's petition and made part of his complaint; that the defendant, your petitioner, will and does claim that, under and in pursuance of the provisions of said act of Congress, it is not liable to plaintiff in any sum whatever.

"(5) Your petitioner represents that the only question involved in this action arises out of and depends upon the construction to be given to the aforesaid act of Congress of the United States, and the decision of this case and of the issues arising herein between the plaintiff and the defendant depends upon the construction of the aforesaid laws of the United States as contained in the employer's liability act of Congress; and this suit arises wholly out of a controversy between the parties in regard to the operation and effect of the laws aforesaid upon the facts involved.

"(6) Your petitioner herewith presents a good and sufficient bond, as provided by the statute in such cases, that it will, on or before the first day of the ensuing session of the United States Circuit Court for the Northern District of Georgia, file therein a transcript of the record in this action, and for the payment of all costs which may be awarded by the said court, if the said Circuit Court shall hold that this suit was wrongfully removed thereto.

"Your petitioner, therefore, prays that this court proceed no further herein, except to make order of removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court, as provided by law, and, as in duty bound, your petitioner will ever pray."

It will be perceived that the ground for removal is that the cause of action on which the suit is founded arises under the laws of the United States; that is, under the employer's liability act of Congress approved April 22, 1908. The plaintiff has seasonably filed a motion to remand this case to the state court from which it was removed. This is the motion:

"Now comes the plaintiff in the above-stated case and shows to the court that there is no dispute or controversy as to the effect or construction of the Constitution or laws of the United States involved in said case, and that this was the only ground upon which said case was removed.

"Plaintiff, therefore, moves the court to remand said cause to the state court."

Even if the petition for removal shows satisfactorily that the determination of this case depends upon the construction of the employer's liability act of Congress, and I do not think it does, that would be insufficient to justify the removal of the case on the ground that it is a case arising under the Constitution or laws of the United States. Since the decision by the Supreme Court in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, it is thoroughly settled that under the act of March 3, 1887, 24 Stat. 552,

c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866 (U. S. Comp. St. 1901, p. 508), to justify a removal from the state court to the Circuit Court of the United States on the ground that the suit is one arising under the Constitution, laws, or treaties of the United States, it must so appear in the plaintiff's statement of his own claim. Under the act of 1875 (18 Stat. 470, c. 137 [U. S. Comp. St. 1901, p. 508]) it was held that if the fact that the case arose under the Constitution, or laws, or treaties of the United States appeared in the answer of the defendant, or the petition for removal, it was sufficient. *Railway Company v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Provident Savings Society v. Ford*, 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. Ed. 261; *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; *Tennessee v. Whitworth*, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830; *Southern Pacific Railroad Company v. California*, 118 U. S. 109, 6 Sup. Ct. 993, 30 L. Ed. 103; *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314.

But even under the act of 1875 as to cases originally brought into the Circuit Court on the ground that the suit was one arising under the Constitution, laws, or treaties of the United States, it was necessary that it should appear to be such a case by the plaintiff's own statement of his claim. In the opinion by Mr. Justice Gray in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, he said, speaking of the acts of 1887 and 1888:

"In section 1, as thereby amended, the words giving original cognizance to the Circuit Courts of the United States in this class of cases are the same as in the act of 1875 (except that the jurisdictional amount is fixed at \$2,000), and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the Constitution or laws of the United States. But the corresponding clause in section 2 allows removals from a state court to be made only by defendants, and of suits 'of which the Circuit Court of the United States are given original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States, on removal by the defendant under this section, to such suits as might have been brought in that court by the plaintiff under the first section. 24 Stat. 553; 25 Stat. 434. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States."

This case of *Tennessee v. Union & Planters' Bank* has been followed in many cases by the Supreme Court. In *Arkansas v. Kansas & Texas Coal Company*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144, in the opinion by the Chief Justice on page 188 of 183 U. S., on page 48 of 22 Sup. Ct. (46 L. Ed. 144), it is said:

"The general policy of the act of March 3, 1887, as corrected by the act of August 13, 1888 (24 Stat. 552, c. 373; 25 Stat. 433, c. 866), as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the Circuit Courts. Those cases, and those only, were made removable under section 2 in respect of which original jurisdiction was given to the Circuit Courts by section 1. Hence it has been settled that a case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and, if it does not so appear, the want of it cannot be supplied by any

statement of the petition for removal or in the subsequent pleadings. And, moreover, that jurisdiction is not conferred by allegations that defendant intends to assert a defense based on the Constitution or a law or treaty of the United States, or under statutes of the United States, or of a state, in conflict with the Constitution"—citing *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Chappell v. Watherworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738, 42 L. Ed. 76; *Sawyer v. Kockersperger*, 170 U. S. 303, 18 Sup. Ct. 946, 42 L. Ed. 1046; *Florida Central & Peninsula Railroad v. Bell*, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 436."

Considering the claims the plaintiff has made by his own statement of the same, is it a case for removal from the state court to the Circuit Court of the United States under the acts of Congress of 1837 and 1838, as one arising under the Constitution, laws, or treaties of the United States?

Under the act of 1875 it was held by the Supreme Court in *Gold Washing & Water Company v. Keyes*, 96 U. S. 199, 24 L. Ed. 656:

"A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. That this was the intention of Congress is apparent from section 5 of the act of 1875, which requires the Circuit Court to dismiss the cause, or remand it to the state court if it shall appear, 'at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.'

"Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty, of the United States."

In *Western Union Telegraph Company v. Ann Arbor Ry. Company*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052, it is said:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground." Citing *Gold Washing & Water Company v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Blackburn v. Portland Gold Mining Company*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276.

In *Defiance Water Company v. Defiance*, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140, the Chief Justice, in delivering the opinion of the court on this question, says:

"We have repeatedly held that 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the

construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground.'” See, also, *Bankers', etc., Co. v. Railway Co.*, 192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484.

There are many cases in the Circuit Court to the same effect. In *Fitzgerald v. Miss. Pacific Railroad Co.* (C. C.) 45 Fed. 812, Judge Caldwell says on this subject:

“If there is no dispute between the parties as to the meaning of an act of Congress, there is no federal controversy between them, and no cause for removal. The Supreme Court has settled the rule on this subject.”

See, also, *McFadden v. Robinson* (C. C.) 10 Sawy. 398, 22 Fed. 10, *Hambleton v. Duham* (C. C.) 10 Sawy. 489, 22 Fed. 465, and *Theurkauf v. Ireland* (C. C.) 11 Sawy. 512, 27 Fed. 769.

Now, taking the plaintiff's case as presented by his declaration, it does not appear that the construction of the act known as the “Employer's Liability Act” of Congress is in any way involved in this case. It seems to be a case where the decision will depend entirely upon the facts of the case as applied to the law. The mere application of the act of Congress to the case gives no right of removal. The decision of the case must depend upon its construction, and that in no way appears in the plaintiff's pleadings in this case.

If in the course of the trial of the case in the state court it should develop that the decision of the case depends upon the construction of the act of Congress, and the decision is against some right or privilege set up and claimed by the defendant thereunder, he is not remediless. The matter may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error to the highest court of the state. If any doubt should exist as to the right to remove a case from the state court to the Circuit Court of the United States, the case should be remanded, but this is not, to my mind, a doubtful case at all. I am thoroughly satisfied that it was not a removable case.

An order may be taken remanding this case to the city court of Atlanta.

As this case is to be remanded to the state court upon the ground that it was improperly removed, of course the question raised in the case here as to the sufficiency of the service should be left for determination in the state court.

RIVERSIDE MILLS v. ATLANTIC COAST LINE R. CO.

(Circuit Court, S. D. Georgia, N. E. D. January 14, 1909.)

1. CARRIERS (§ 177*)—INTERSTATE COMMERCE—LOSS OF FREIGHT—ACTION AGAINST INITIAL CARRIER—DEFENSE.

In an action by a shipper against an initial carrier for loss of goods shipped in interstate commerce, as authorized by Hepburn Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]) § 7, the carrier may make any proper defense which can be made in a court of law and which any connecting carrier on the line of which the goods were lost or injury occurred might make.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 177.*]

2. CARRIERS (§ 23*)—INTERSTATE COMMERCE—LOSS OF GOODS—HEPBURN ACT.
Hepburn Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]) § 7, authorizing an action by the holder of an interstate bill of lading for loss of goods on any part of the transit against the initial carrier is valid.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 23.*]

3. COMMERCE (§ 1*)—DEFINITION.

Commerce is an exchange of goods. The word also includes the subject, vehicle, agent, and various operations by which such exchange is effected.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 2; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1287-1298; vol. 8, pp. 7606-7607.]

Action for Damages, under "Interstate Commerce Act." Demurrer upon ground of violation of fifth amendment of Constitution, depriving of property without due process of law.

R. J. Southall and Alexander Akerman, for plaintiff.
Joseph Lamar, for defendant.

SPEER, District Judge (orally). So clear are my own convictions about this question, also in view of its immediate importance, that perhaps I should not, for the sake of attempting anything like a neat opinion, delay a decision of the case by taking it under advisement.

For a very long period of our history, Congress, although authorized by the organic law to regulate commerce between the states, failed to take any very valuable or substantial action relating to that great topic. The marvelous development of our interstate and foreign commerce, the multiplication of great railroads, the combinations of these railroads into vast systems, the enormous power which was thus accumulated by the railroads, and the helplessness of the shipper in his conflict with these systems, resulting from such accession of power, pressed upon the minds of the members of the national Legislature. Looking, then, to the letter of the organic law, they found the authority to enact legislation of this general character. The Interstate Commerce Commission was created. Numerous amendments to the original law were made. These were not, however, regarded as sufficient, and this bill, which because of the name of its distinguished author is called the "Hepburn Bill" (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), was enacted.

Under this provision the action is brought. It is an action in behalf of the Riverside Mills, a corporation of this city, against the Atlantic Coast Line Railroad. The complaint is that the plaintiff shipped a quantity of its product to points beyond the destination of this railroad, and that the goods were not delivered. No payment has been made for them by the consignee, and redress is sought by recourse to an action based upon the provisions of this clause of the "Hepburn Bill" (section 7), which is as follows:

"That any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

This is, as I understand it, but the converse proposition of what has long been the law in our own state. If a shipment comes to this state over the lines of connecting railways, and a default or loss is occasioned anywhere by the negligence of one of the railway connections of a line within our state, it may result, if I am not incorrect in my recollection, in an action against the railroad whose terminal is here, and which last received the goods as in good order. Instead of making the last railroad responsible, with equal force and justice, Congress has reversed the process, which the Legislature of Georgia long ago fixed, and which has been recognized as the law within this state since that statute was enacted.

Where is the wrong in it? It is said that the initial carrier is obliged to give a bill of lading in violation of due process of law. Why so? When suit is brought against him, he is entitled to his day in court. He can deny that the bill of lading was given, or that the freight was received. He can make any proper defense, which may be made in a court of law, and which any other connecting carrier might make, wherever the goods are transported, or wherever the loss or injury occurred. If the loss occurred from the act of God or from the country's enemies, for instance, on a section of these intercommunicating lines somewhere between here and the point of destination, or was otherwise capable of defense, this railroad would have the privilege of making such defense here.

By the act of Congress the shipper is afforded an inexpensive and convenient tribunal in which to seek enforcement of his rights. When we consider the great extension of railroad connections, and the thousands of miles of distance which they comprehend, in the absence of this provision, how helpless would be a shipper here if he should attempt to ship his products to the Pacific Coast, and they should be injured, or lost, for instance, on the Oregon Short Line. The railroads have every facility for deriving all the information in regard to the claim. They daily settle and determine thousands of claims between themselves. Where there is a controversy between a single individual and many corporations, with such power and such opportunities, how hopeless is he who is compelled to go to a foreign jurisdiction, when the railroad fare there might more than offset his profits. Congress has acted wisely. It has brought the courts to the door of the shipper. It has bent a listening ear, and heard his complaints. He is afforded the necessary protection of the law, a speedy and cheap trial.

What is the power "to regulate interstate commerce"? Commerce has been defined many times by the Supreme Court. Perhaps the definition by Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 230, 6 L. Ed. 78, is as good as any other. He said:

"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and vari-

ous mediums of exchange become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation."

We have seen that Congress can regulate the vehicle of commerce and the essentials of that vehicle. It can regulate the proof of the passage of possession, the bill of lading, and it requires that the bill of lading shall be delivered by the initial road to the shipper. What could be more obvious than this necessity? The initial carrier receives the goods from the shipper and inspects them. Best of all, it has the opportunity to speak as to their character, and the method of ascertaining their value. It charges freight on the entire transaction. It "gets the business," as is said, that might be sent over any other road. The common carriers have been given great privileges by the public—among others, the right of eminent domain. All the agencies of government are made for its protection. If undue reductions of rates are attempted by state authorities, the carrier at once resorts to the United States courts and obtains relief. That relief is ratified by the Supreme Court of the United States. The carrier is a great agent of society, and in the acceptance of that agency it has received such enormous benefits that it is compelled to submit to those restrictions which society finds it necessary to place around it for the protection of the public generally.

To my mind it is amazing that our government had so long failed to enact this law. I differ *toto cœlo* with my gifted friend, Judge Lamar, and must overrule the demurrer.

RIVERSIDE MILLS v. ATLANTIC COAST LINE R. CO.

(Circuit Court, S. D. Georgia, N. E. D. April 2, 1909.)

CARRIERS (§ 23*)—CONSTITUTIONAL LAW (§ 24S*)—INTERSTATE COMMERCE—LOSS OF GOODS—ACTION AGAINST INITIAL CARRIER—HEPBURN ACT—ATTORNEY'S FEES.

Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3159), allowing against an offending initial carrier, to a shipper, reasonable attorney's fees in an action for loss of goods, shipped in interstate trade, constitutes a valid regulation of interstate commerce.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 23; * Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 24S.*]

Action for Damages under "Hepburn Act." Claim of attorney's fees under section 8 of the act.

R. J. Southall and Alexander Akerman, for plaintiff.
Joseph R. Lamar, for defendant.

SPEER, District Judge. The question before the court is briefly this: Where connecting lines of railways, engaged in interstate commerce, shall fail properly to transport property which they have received and for the transportation of which they have been paid, and also fail and refuse for an unreasonable time to pay the shipper the loss thus sustained, is the court authorized by the provisions of the act of Congress approved June 29, 1906, known as the "Hepburn Act"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1907, p. 892]), to allow in its judgment reasonable attorney's fees to the shipper and against the offending companies?

The precise question in issue has not been determined by a court of paramount authority. In the case now under consideration the constitutionality of the entire act has been vigorously assailed, but the validity of the act and the liability of the defendant company have been sustained. A decree, directing a recovery of some \$300 for its goods shipped in interstate trade over the defendant's connecting lines, has been entered. The liability of the defendant company for the reasonable fee of the plaintiff's attorneys remains to be determined. The construction necessary for decision involves the following clauses of the act:

Section 20 (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169], as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1907, p. 909]) provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Section 8 of the act is as follows:

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

In the proper interpretation of these clauses we may utilize the familiar rule, and search for the old law, the mischief, and then for the remedy which Congress has attempted to provide. The liability of the common carrier (and this is not restricted to railroads) for the failure to deliver or pay for goods intrusted to it for transportation for hire was fixed by the common law. That law, however, was not sufficient to redress the wrongs of shippers sustained on modern lines conveying interstate commerce. The loss of the commodities belonging to "David Copperfield" and "Peggotty," carried by "Mr. Barkis" from Blunderstone to Yarmouth in his wagon, or "the red bag, the striped bag, brown paper parcel, and the leather hat box," transported by the elder "Weller" for "Mr. Peter Magnus" in the boot of the former gentleman's coach from the "Blue Inn," Whitechapel, to the "Great White Horse Inn," at Ipswich, might, perhaps have been readily recoverable. It is quite different, however, we may say, with regard to a shipment of cotton goods from the Riverside Mills in Au-

gusta to Seattle or San Francisco over the many connecting railways spanning the continent. The countless losses of such shipments, and their important values, became an incalculable injury to the shippers and a burden upon their business. The failure to speedily adjust such losses became the chief contributing cause of this injury to the shipper. Official reserve and official indifference, amounting at times to that "insolence of office," the chiefest of those "spurns which patient merit of the unworthy takes," often greeted the efforts of business men and others to obtain redress. Every shipper of consequence, every practicing attorney holding claims arising from such delinquencies, every judge trying such claims, can readily recall the circumlocution, and the consequent insufferable delay in the adjustment of liability of the plainest character. Each claim, it seems, must be apparently scrutinized often by more than one department of each successive railroad extending from the point of delivery to the point of destination. It did not matter how many such railroads there might have been, how great the distance, how long the time consumed, how unreasonable the delay, how injurious the loss. Each employé with relating duties must at his leisure contemplate the claim in every light of which it was capable, write the result of his discoveries thereon, and forward it to the agent of the connecting line, or to all of the agents of each of the connecting lines. In the meantime the shipper was suffering the accumulating injury resulting from the loss of his goods, the interruption of his business, the deprivation of interest on the sum involved, and possibly the loss of other business from the disappointed and exasperated customer, attending the slow return of the now bulky file. At length, after the obviously just demand had been leisurely scrutinized by all the "Tite Barnacles" of this unprecedented circumlocution, the shipper had usually to content himself with a curt refusal to pay anything. Happily for him, however, Congress has opened the national courts for his claim, no matter how small the amount, and, in order to impart some degree of celerity to the mental or meditative activities of the "Tite Barnacles" aforesaid, the penalty of reasonable attorney's fees, to be fixed by the court, is also granted by the law.

In the absence of such a penalty, the small shipper, notwithstanding the wise purposes of the national legislation, would have been helpless. Take a case like that before the court, which has been fought at every step here, and which we are now advised by the bill of exceptions presented will be carried to the Supreme Court of the United States in order to test the authority of Congress to enact such legislation. The amount involved is only \$300, and the Riverside Mills, although a prosperous factory, had ordinarily better suffer the loss rather than pay even the moderate amount of fees for attorneys or counsel proper in such a case. If, however, the railways, whose negligence under the agreed state of facts occasioned the loss and refused adjustment, must pay the attorney's fees, not only can the plaintiff safely and inexpensively press his remedies for righteous redress, but the result of litigation will have the most salutary effect on the officials of those corporations, who for hire transport in interstate commerce the products of the people. While this provision of the law may, there-

fore, encourage shippers to institute litigation, it will in a short time have the effect of preventing that negligence which renders such litigation possible.

The principle of the statute has been fully upheld by the Supreme Court of the United States in *Seaboard Air Line Railway v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108. There the state of South Carolina had attached a penalty of \$50 to each failure of a railroad company engaged in intrastate commerce to pay a claim for loss or damage within 40 days after the filing of the same, and where there was a recovery of the full amount claimed. The goods shipped in that case were a bunch of bananas, and the freight charges were only \$1.75, whereas the penalty sued for was \$50. This difference, says Mr. Justice Brewer, "naturally excites attention." But the learned justice added:

"We are of the opinion that this case comes within the limits of constitutionality. * * * The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust; but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in a court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary."

The learned justice further points out the fact that:

"The matter to be adjusted is peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed."

On the other hand, we may add that the shipper does not know what has become of his goods, and the consignee is equally uninformed.

"It may be stated as a general rule," said Justice Brewer, "that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification."

Holding that "the purpose of the legislation" was primarily "to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions," the Supreme Court of the United States sustained the validity of the South Carolina legislation upon this subject.

Now, what a state may do within the regulation of intrastate traffic, Congress may do in the regulation of that which is interstate. For the reason, then, that the mischief sought to be avoided was the unreasonable delay and the arbitrary refusal to pay just claims, we must conclude that Congress, when it authorized, in the case of a recovery under this great act to further regulate the vital business of transportation in interstate commerce, the taxation by the court of a reasonable attorney's fee as a part of the costs of litigation, was clearly within its authority.

For these reasons, the court will allow a fee of \$100 for the plaintiff's attorneys.

In re BURKE.

(District Court, S. D. Georgia, E. D. March 25, 1909.)

1. COURTS (§ 359*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—BANKRUPTCY.

Where a seller of goods to a bankrupt claims the right to retake them under a conditional sale made in Georgia, the validity of such contracts must be determined in accordance with the law of such state applicable thereto.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 359.*]

2. COURTS (§ 359*)—RULES OF DECISION—DECISIONS OF STATE COURTS.

Federal courts, in the exercise of bankruptcy jurisdiction, in determining property rights created by state statute, generally follow the rulings of the supreme appellate tribunal of the state.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 359.*]

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, and *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

3. SALES (§ 452*)—CONDITIONAL SALES—STATUTES—CONSTRUCTION.

State statutes providing for the enforcement of conditional sales are in derogation of the rights of general creditors, and must be strictly construed.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 452.*]

4. BANKRUPTCY (§ 303*)—PERSONAL PROPERTY—CLAIMANTS—BURDEN OF PROOF.

Presumptively possession of property by a bankrupt is vested in his trustee, so that a claimant, insisting on a latent or undisclosed title, must bear the burden of showing his superior right or privilege.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

5. BANKRUPTCY (§ 140*)—TITLE OF TRUSTEE—CONDITIONAL SALES—EXECUTION—RECORD.

Civ. Code Ga. § 2776, provides that every conditional sale, to be valid as against third persons, shall be evidenced by writing, and not otherwise, and executed and attested as a chattel mortgage; and section 2777 provides that such instruments must be recorded within 30 days from their date. *Held*, that the attestation of a conditional sale contract, except as between the parties, is essential, not only that it may be admitted to record, but to its actual validity, and that a contract not so witnessed or recorded was invalid as against the buyer's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

6. BANKRUPTCY (§ 140*)—RIGHTS OF TRUSTEE—PROPERTY CONDITIONALLY SOLD.

Under Bankr. Act July 1, 1898, c. 541, § 70, subd. 5, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting in the trustee the title of the bankrupt to all property which, prior to the filing of the petition, he could by any means have transferred, a conditional sale contract purporting to sell certain implements as merchandise, and contemplating that the buyer shall resell the same, in which case the proceeds should go to the seller, was invalid as against the buyer's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In Bankruptcy. Intervention of John Deere Plow Company. Petition to review referee's order by intervener.

Saussy & Saussy and E. K. Overstreet, for petitioner.
Albert S. Anderson, in pro. per.

SPEER, District Judge. This case is presented by a petition to review the findings of Hon. A. H. MacDonell, referee in bankruptcy,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and is brought by the John Deere Plow Company, who seek recaption of certain cultivators and farming implements, found among the bankrupt's assets. The petitioner claims title, and the right to retake these articles, by virtue of contracts which it is insisted are merely conditional sales. The contracts were in writing, but they were not recorded, nor were they attested by any witness. The questions here are whether such contracts are effective to retain the title in the vendor, and whether such vendor's lien or retention of title, in the absence of record and attestation also, should be maintained as a property right superior to the title of the trustee in bankruptcy, who claims for the benefit of general creditors. There is no proof that any actual notice of the alleged conditional character of the sales was given to any creditor, and the case must be determined upon the construction of the contracts themselves, in connection with the law of Georgia relating to conditional sales of personal property. This may be found in Civ. Code 1895, § 2776, and is as follows:

"Whenever personal property is sold and delivered with the condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid, and may be enforced whether evidenced in writing or not."

The provision making the record mandatory is expressed in section 2777, in the language following:

"Conditional bills of sale must be recorded within 30 days from their date, and in other respects shall be governed by the laws relating to registration of mortgages."

In the construction of state statutes defining property rights, the United States courts generally follow the rulings of the supreme appellate tribunal of the state. *Mutual Life Insurance Co. v. Lane* (C. C.) 151 Fed. 280. This is peculiarly true as to real property, but it is also true as to other property rights. A clear statement of this doctrine may be found in *Bates' Federal Equity Procedure*, vol. 1, par. 9. The doctrine is particularly valuable in the administration of the bankruptcy law, for the reason that it conserves the liens which are created and recognized by the laws of the states. Statutes creating such liens, however, are in derogation of the rights of the general creditor, which are common rights, and under the well-known general principle such statutes must be strictly construed. Presumptively the possession of property by the bankrupt is vested by operation of law in the trustee, and when a claimant thereto insists upon a latent or undisclosed title he must bear the burden of showing his superior right or privilege. It is then the duty of the court to regard critically the statutes of the state, as authoritatively construed by state courts, and determine each case accordingly.

The questions before the court have been discussed orally, and elucidated, also, by the able and elaborate briefs of counsel. No recent case has been cited, save *In re Atlanta News Publishing Co.* (D. C.)

160 Fed. 521, opinion by District Judge Newman. Counsel for the petitioner not unnaturally rely with great confidence upon the opinion of this experienced and eminent jurist, which is to the effect that unattested and unrecorded conditional sales are valid and superior to the claims of general creditors. On careful analysis of the opinion, with great deference to my learned Brother, it appears to me to be based upon earlier decisions of the Supreme Court of the state, in *Conder v. Holleman & Ballard*, 71 Ga. 93, *Mann v. Thompson*, 86 Ga. 347, 12 S. E. 746, *Cottrell v. Merchants' & Mechanics' Bank*, 89 Ga. 508, 15 S. E. 944, and *Rhode Island Locomotive Works v. Empire Lumber Co.*, 91 Ga. 639, 17 S. E. 1012. These bear only indirectly upon the questions at issue, and seem to have been departed from in the evolution of the state law on this important topic. Indeed, the more recent decisions of the Supreme Court, except the case of *Merchants' Bank v. Cottrell*, 96 Ga. 168, 23 S. E. 127, it appears, were not presented to the learned judge when the question was argued before him. In that case there was this explicit holding:

"It was argued by counsel for defendants in error that attestation is required, not in order to give the paper validity, but merely to entitle it to record. We do not concur in this view. We think the plain import of the statute is that attestation is essential to the validity of the contract as against third persons, as well as a condition to its being admitted to record. * * * The main object of the statute was to prevent frauds and perjury, which, in the absence of such a law, might be practiced by debtors and others in collusion with them to defeat creditors seeking to subject to their claims property apparently belonging to the debtor"—citing *Rhode Island Locomotive Works v. Empire Lumber Co.*, 91 Ga. 639, 17 S. E. 1012.

The court continued:

"This object could be very easily defeated, if nothing more were required than that the contract should be in writing. Parties colluding to defraud third persons could write and sign such a contract whenever it might suit their purpose to do so, making it bear date long prior to its actual execution, and establish it by their own testimony as easily as a pretended parol contract. Hence the importance of requiring, as the Legislature manifestly intended to do, that in order to be good as against third persons, it should not only be in writing, but should be executed in the presence of a witness and attested."

Other recent cases on this subject are equally explicit in support of this principle. In the case of *Rhode Island Locomotive Works v. Empire Lumber Co.*, cited above, it was held:

"Prior to the statute referred to, it was not required that such a reservation should be in writing, or that notice should be given, to render it valid as against third parties. A parol reservation was good, not only against the vendee, but against all persons dealing with him; and under the statute it is still good as between the parties themselves.

"But the statute protects all third persons to the extent of requiring the contract to be evidenced in writing and witnessed by an attesting officer, in order to be good as against them, thus preventing frauds and perjury, which might otherwise be practiced by debtors and others in collusion with them to defeat creditors who seek to subject to their claims property apparently belonging to the debtor."

In *Cunningham & Co. v. Cureton*, 96 Ga. 489, 23 S. E. 420, the court held:

"There could not be any reservation of title as against third persons, unless the contract was attested in the manner prescribed by the statute."

Again, the principle is stressed in *Harp v. Patapsco Guano Co.*, 99 Ga. 756, 27 S. E. 183, where it was said by Justice Lumpkin:

"* * * The statute provides, not merely that a contract of conditional sale be reduced to writing in order to operate as a reservation of title, but also that the contract must be attested as mortgages on personalty. The purpose of this requirement is obvious. A wide field for fraud would surely be opened, if the only requirement of the statute was that the contract should be in writing. * * * Providing for the attestation of such contracts, even if not entirely effectual to prevent fraud, at least renders its perpetration more difficult."

In *Penland v. Cathey*, 110 Ga. 432, 35 S. E. 659, there was a conflict as to priority between a *fi. fa.* issued upon an ordinary judgment and a claim made under a parol reservation of title. The court held:

"The reservation of title in the contract, not being effective against third parties unless evidenced in writing, title vested unconditionally in the defendant in *fi. fa.* by the terms of the verbal contract."

The property was held subject to the claim of the creditor. The most recent decision is that of *Hill v. Ludden & Bates*, 113 Ga. 320, 38 S. E. 752. This was made on a controversy between a vendor in a conditional sale and a purchaser of the property from the vendee. The court approved the previous rulings I have cited, and held that:

"A reservation of title embraced in a written contract for a sale of personalty is not, as against third persons, valid, unless the contract be attested by a subscribing witness."

It seems manifest from these rulings that the Supreme Court of the state has construed the language of the statutes upon conditional sales to mean the same thing as a statute against frauds and perjuries. See the language of Chief Justice Simmons in *Rhode Island Locomotive Works v. Empire Lumber Co.* and in *Merchants' Bank v. Cottrell*, *supra*. The attestation by a subscribing witness is essential, not only to its admission for record, but for the actual validity of the instrument itself, except as between the parties thereto, and, without strict compliance with the requisites of the statutes, such contracts are absolutely invalid to all third persons. That the general creditors of a bankrupt are third persons in the meaning of the law is scarcely open to question.

In the case of *General Fire Extinguisher Co. v. Lamar*, 141 Fed. 353, 72 C. C. A. 501, it was held in this court that, in the absence of notice to the general creditors of the reservation of title, such creditors were not bound by the contract of conditional sale, and the title to the property is vested in the trustee. This ruling was considered on appeal by the Circuit Court of Appeals of the Fifth Circuit; Judges Pardee, Shelby, and Maxey presiding. That elevated tribunal unhappily made no expression of its own views for the guidance of the profession and the public, but embodied in its opinion the full text of the ruling of the court below, and *per curiam* said:

"We find no error in the disposition of this case in the Circuit Court, and its judgment is therefore affirmed."

In the contracts upon which the petitioner here relies there is an additional feature, which discredits the alleged reservation of title. It is found in the clause relied upon, as follows:

"It is also agreed that the title to and ownership of, and the right to immediate and exclusive possession, upon demand, whether oral or written, to all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds, in case of sale, shall be the property of, the John Deere Plow Company, and subject to their order until full payment shall have been made for the same by the undersigned in money."

It would seem that the very essence of a reservation of title depends upon the fact that the property itself may not be conveyed by the vendee to an innocent third person. If the instrument expressly recognizes the possibility, and also the probability, of such sale, and provides for the apportionment of the proceeds, the transaction would seem to be a consignment for ordinary bargain and sale, rather than upon condition. Subdivision 5 of section 70 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), vests in the trustee the title of the bankrupt to "all property which prior to the filing of the petition he could by any means have transferred," etc. If, then, these cultivators and implements could have been the subject of transfer by the express authority of the instrument of sale, it seems clear that the title of the trustee is good as against the vendor.

For these reasons, the petition to review the decision of the referee will be denied, and his opinion affirmed.

In re LYNN CAMP COAL CO.

(Circuit Court, E. D. Kentucky. December 10, 1908.)

No. 612.

1. BANKRUPTCY (§ 192*)—LIENS UNDER STATE LAWS.

Ky. St. 1909, § 2487, gives the seller of mine materials an inchoate lien for the purchase price on the property sold, together with the entire mining plant, which becomes perfected on assignment of the mine, etc., for the benefit of creditors, as provided by section 2490. *Held* that, where a seller of mine material having a lien under such sections accepted a chattel mortgage from the buyer a short time before the owner became a bankrupt, the seller would be entitled to the statutory lien in case the mortgage was invalid for any reason.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. § 192.*]

2. BANKRUPTCY (§ 164*)—PAYMENT TO LIEN CREDITOR—"PREFERENCE."

A payment to a creditor having an inchoate lien cannot constitute a preference within the bankrupt act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

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

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. BANKRUPTCY (§ 164*)—"PREFERENCES"—PAYMENTS.

In order that a payment by a bankrupt should operate as a preference, it must be shown that the bankrupt was insolvent, and that the creditor had reasonable cause to believe the payment was intended as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

In Bankruptcy.

S. B. Dishman, for C. M. McClung & Co. and Geo. D. Whitcomb Co.
N. R. Patterson, for Southern Brass & Iron Co.
Thos. D. Tinsley, and J. M. Robsion, for trustee.

COCHRAN, District Judge. This cause is before me on the petition for review of the Southern Brass & Iron Company, a creditor. It seems to have filed two claims: One for \$209, an open account; and the other for \$1,600, a note. The former is designated as No. 2, and the other as No. 67. I do not find claim No. 2 in the papers, and I do not understand that any action has been taken by the referee in relation thereto of which complaint is made here. The complaint made is limited to his action in relation to claim No. 67, and also in reference to a payment of \$1,000 made by the bankrupt to the petitioner.

The bankrupt operates a mine in Knox county, in this state. The petitioner is engaged in the business of selling materials and supplies to be used in the construction and operation of mining plants. Prior to the execution of said note—mainly in the year 1907—the petitioner had sold the bankrupt a considerable amount of materials and supplies for the carrying on of its mine. On December 19, 1907, it executed its note to the petitioner for the sum of \$2,600, on account of amount then due, payable in 60 days. The note was not paid at maturity. On March 14, 1908, a payment of \$1,000 was made thereon, and it was renewed for the balance of \$1,600. It was dated back to February 19, 1908, date of maturity of the original note, and was made payable in 90 days. A few days subsequent the bankrupt gave the petitioner a mortgage. It is dated March 16, 1908, acknowledged March 25, 1908, and lodged for record April 1, 1908. It is rather indefinite both as to the property covered by it and as to the indebtedness intended to be secured thereby. I think, however, that a reasonable construction of it is that it was intended to cover the property sold by the petitioner to the bankrupt, and no more, and that it is sufficient to secure thereon said \$1,600 note. Palmer, the general manager of the bankrupt, testified that he told petitioner's salesman when the mortgage was given that he had no authority to execute the mortgage. But when he acknowledged it he stated that he had executed it by authority of the bankrupt's board of directors, as appears from clerk's certificate. I am inclined to believe that this statement must govern, in the absence of further evidence concerning the matter. No exception, however, is taken to the mortgage by the trustee on the ground of want of authority in Palmer to execute it. The sole

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ground of exception thereto was that it and the payment of the \$1,000 were preferences within the meaning of the bankrupt act. I do not understand the trustee to have filed any pleading seeking a recovery of the \$1,000 as a preference. He simply relied on said preference, as well as preference of the mortgage, as a ground of objection to the claim asserted under the mortgage. Possibly it is proper to say that he relied on the preference of \$1,000 as against the petitioner's right to share as a general creditor for the amount of said claim to the extent thereof. The referee held that the petitioner had no lien to secure its claim No. 67, and ordered both claims to be expunged unless the petitioner refunded said \$1,000, and ordered it to pay said sum to the trustee on or before September 1, 1908. It is of this action that the petitioner complains.

At the time of the payment of the \$1,000 and the giving of the mortgage, the petitioner had an inchoate lien under section 2487 of the Kentucky Statutes of 1909, which would become perfect upon the happening of any of the contingencies specified in said section or section 2490. Section 2494, on which counsel for trustee relies, had no bearing on petitioner's lien. In *re Bennett*, 153 Fed. 673, 678, 692, 82 C. C. A. 531. Had no mortgage been executed, this lien would have become perfect under the statute on the assignment to Robison for benefit of creditors. This lien would have covered not only the property sold by petitioner to the bankrupt, but the latter's entire mining plant. The subsequent proceeding in bankruptcy would have had no harmful effect upon this lien. I do not see how the taking of the mortgage can help the trustee. Its sole effect is to limit the lien to the property covered by it. If invalid for any reason, the effect is to remit the petitioner to its statutory lien. It cannot be treated as a waiver thereof, if invalid. I therefore hold that the petitioner has a valid lien for its claim No. 67 on the property specified in the mortgage.

Then as to the \$1,000. It is perhaps sufficient to say that the trustee has filed no pleading seeking to recover it. But I do not think a payment to a creditor having such an inchoate lien can be a preference within the meaning of the bankrupt act. Besides, I do not think the evidence brought the case within the requirements of the bankrupt act as to what is necessary to constitute a preference. It is essential that the bankrupt should have been insolvent when the \$1,000 was paid, and the petitioner should have had reasonable cause to believe that it was intended thereby to give a preference. Whatever may be said on the question as to the solvency of the bankrupt, I think the evidence comes short of establishing that the petitioner then had reasonable cause to believe that it was intended by the payment of the \$1,000 to give it a preference.

The action of the referee is reversed, and cause remanded for proceedings consistent herewith.

EVANSBERG v. INSURANCE STOVE, RANGE & FOUNDRY CO.

(Circuit Court, E. D. Kentucky. August 25, 1908.)

No. 2,571.

1. REMOVAL OF CAUSES (§ 86*)—PARTIES—FRAUDULENT JOINDER—PETITION TO REMOVE.

Where, in an action for injuries, the petition stated as a ground for liability against the resident defendant that he knew of the defective mold into which plaintiff was pouring molten iron at the time he was injured by such defect, and with such knowledge directed plaintiff so to do, a petition for removal on the ground of fraudulent joinder, alleging that such defendant had nothing to do with the accident, was not present, and did not construct the mold, but which failed to deny plaintiff's allegation and to allege that it was known by plaintiff to be untrue when made, and was made to prevent removal, was insufficient.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 86.*

Fraudulent joinder of parties to prevent removal, see note to *Offner v. Chicago, E. R. Co.*, 78 C. C. A. 362.]

2. REMOVAL OF CAUSES (§ 36*)—JOINDER OF PARTIES—INTENT.

A plaintiff in an action for injuries may join parties defendant for the sole purpose of preventing a removal of the cause, if he has a joint cause of action.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

3. REMOVAL OF CAUSES (§ 49*)—JOINDER OF PARTIES—SEPARABLE CONTROVERSY.

In an action for injuries to a servant, plaintiff sued defendant company, a nonresident, and B., a resident, who was plaintiff's superintendent. The corporation's liability, if any, was based on its negligence in providing a defective appliance, or because of B.'s negligence in directing plaintiff to pour iron into the mold known by him to be defective. *Held*, that the liability of B. and the corporation was not joint, but severable as to each, and that the cause was therefore removable.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 49.*

Separable controversy, see notes to *Robins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valletown Mineral Co.*, 35 C. C. A. 155.]

On Motion to Remand. Denied.

R. C. Simmons and Byrne & Read, for plaintiff.

Galvin & Galvin, for defendant.

COCHRAN, District Judge. The petition for removal does not present a good cause for removal on the ground of fraudulent joinder. The ground upon which the liability of the defendant Breiner is based in the petition is that he knew of the defective construction and condition of the mold into which plaintiff was pouring the molten iron at the time of the injury, and with such knowledge directed plaintiff to do so.

The petition for removal does not allege that this allegation was untrue, known to be untrue by plaintiff when made, and was made for the purpose of preventing a removal. Beyond the sweeping allegation that said defendant had nothing whatever to do with the accident complained of, it alleges specifically that said defendant was not personally present at the time thereof and did not construct the mold.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

These things are nowhere alleged in the petition or counted on therein. Said sweeping allegation is of no value. If removing defendant intended to controvert the specific allegation of the petition on which liability was based, he should have done so specifically. Nor is it helped out by the allegation of fraudulent joinder. The plaintiff in such cases as this has a right to join for the sole purpose of preventing a removal, if he has a joint cause of action. It is important, therefore, for the removing defendant, if he desires to secure a removal, to make a direct and specific attack on the fact alleged upon which the right to join is based, alleging that that fact was known to be untrue and made for the purpose of preventing a removal.

But the petition for removal does present a good ground of removal, in that the petition does not present a joint cause of action, but does present a separable controversy. This is so even if it be assumed that it presents a cause of action against defendant Breiner. The ground of removing defendants' liability, if any, is either that it negligently provided a defective appliance, or that it is liable for defendant Breiner's negligence in directing him to pour the iron into the mold, knowing that it was defective. The defendant Breiner is not liable to the plaintiff on the first ground, because he was under no duty to furnish plaintiff with a safe appliance. If it be conceded that he is liable on the second ground, the liability of both defendants because thereof is not joint. It is a separate liability as to each. *Warax v. C. N. O. & T. P. Ry. Co.* (C. C.) 72 Fed. 637; *Hukill v. M. & B. S. R. Co.* (C. C.) 72 Fed. 745. This is not a death case, and I do not understand that the authority of these cases in nondeath cases has yet been overthrown.

The motion to remand is overruled.

VILTER MFG. CO. v. TYGART'S VALLEY BREWING CO.

(Circuit Court, N. D. West Virginia. April 2, 1909.)

1. MECHANICS' LIENS (§ 158*)—VERIFICATION—NONRESIDENT NOTARY—CERTIFICATION OF AUTHORITY—AMENDMENT.

Where suit was brought to enforce a materialman's lien within 60 days after plaintiff ceased to furnish the material, and while the right to file a properly verified declaration of lien, if the one filed was defective, was still existing, plaintiff filed an amended pleading, supplying a proper court certificate of the authority of the nonresident officer taking the verification of the lien, the fact that the declaration of account and lien, when filed, was verified by a nonresident notary, whose authority was not authenticated by a clerk or other officer of a court of record, was not a fatal defect.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 278; Dec. Dig. § 158.*]

2. DAMAGES (§ 85*)—BUILDING CONTRACT—DELAY—PENALTIES—MUTUAL DEFAULT.

Where delays in constructing an ice plant and refrigerating machines were caused by the mutual default of the parties, contract penalties will

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be regarded as waived, and the court will not attempt to apportion the delays between the owner and the contractor.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 85.*]

In Equity.

Winkler, Flanders, Bottum & Fawsett and Cunningham & Stallings,
for plaintiff.

F. T. Martin, for defendant.

DAYTON, District Judge. This suit is brought to enforce an alleged mechanics' lien for the furnishing and erection of two 60-ton refrigerating machines and one 25-ton ice plant under contract. The contract required the plaintiff to furnish and erect these machines and plant in buildings and upon foundations furnished by the defendant, who was also to do all necessary masonry and carpenter work. The first machine was to be completed on the 5th day of June, 1906, and the second on or before the 1st day of July following, provided that the foundation and buildings were ready to receive the machines immediately upon arrival, and other delays were not caused by the defendant. In event of such delays a corresponding extension of time was to be given. In case either plant was not completed, under these conditions, within the time provided, the plaintiff was to allow "the sum of \$25 per day for each and every day beyond the dates fixed for the completion of either or both plants, which sum is to be considered as full compensation for such delay."

The defenses relied upon are two: First. That the plaintiff's claim for a lien does not comply with the statute, because the certificate of the nonresident notary, who took the affidavit to the declaration of account and lien, was not authenticated by a clerk or other officer of a court of record, and the lien, therefore, was not properly recorded. Second. That the work was not done by the plaintiff within the required time, and that the defendant is entitled to offset the liquidated damages at the rate of \$25 per day, as provided by the contract. The first defense was made by demurrer, and has already been passed upon by the overruling of the same; but as no written opinion was filed at the time, and this defense is still relied upon in the answer, a brief statement of the reasons for rejecting it may now be made.

In 1895 the Supreme Court of Appeals, in *Lockhead v. Berkeley Springs Water Works & Improvement Co.*, 40 W. Va. 553, 21 S. E. 1031, held that, where the affidavit for a mechanic's lien is made before an officer of another state, it is not duly authenticated for record until subscribed by such officer and certified by the clerk or other officer of court of record of such state, under official seal, as required by Code 1899, c. 130, § 31 (Code 1906, § 3953). Here the affidavit was made before and duly subscribed by an officer of another state; but no certificate of the clerk or other officer of a court of record of such other state, under official seal, was attached thereto. Under this decision, alone this technical defense is based. This decision was rendered some 14 years ago, when the trend of the courts of this state was to require strict compliance with the technical requirements of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the mechanic's lien law. This policy of the courts has been entirely changed, and in *West Virginia Building Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965, 72 Am. St. Rep. 822, and other similar cases, it has been held that, where a builder has completed his work according to contract in all material features, his mechanic's lien is not lost merely because there are omissions or defects. The courts of this state are uniformly and constantly upholding mortgages and equitable liens created by contracts verified by officers in other states, without the certificate of a court of record being attached thereto to show such officer's authority, and it is anomalous to say that the declaration of a mechanic's lien should be governed by a different and opposite ruling. It may be, therefore, doubted whether this decision of 14 years ago would be still insisted upon if the matter were again brought before the Supreme Court of Appeals.

Be that as it may, however, it seems to me clear that in this case there are conditions that entirely make this authority inapplicable. The statute provides that a builder or furnisher of machinery or material shall have a lien, provided he file and record his declaration and account, verified by affidavit, within 60 days from the date of his ceasing to labor or to furnish such machinery or material. It then provides that he shall lose his lien if he does not institute suit to enforce it within 6 months after filing it. In this case this suit was brought within 60 days after plaintiff ceased to furnish material, and while the right to file a properly verified declaration of lien, if the one filed was defective, was still existing. Inasmuch as equity abhors technicalities designed to destroy contractual rights, and will cut across lots to do justice according to the dictates of good conscience, it seemed very clear to me, as against the defendant alone, the right of no other creditors or lienors intervening, this court could well permit the plaintiff, by amended pleading, to show this nonresident officer's authority, at the time he did so, to verify the declaration of lien, and to supply such verification by a proper court certificate, which was done.

As to the second defense set up, it will be sufficient to say that my conclusions, reached after a careful consideration of the testimony filed in this cause, are that the plants were not erected within the periods prescribed by the contract, but their erection was retarded by delays that were created by mutual default of both plaintiff and defendant. Those for which the defendant were in a measure responsible were placing the foundations, having the reboiler moved at the instance of defendant's architect, failing to dig the trench or culvert in which to lay the ammonia and other pipes, in insulating the bottom of the freezing tank, in connecting steam pipes from boiler to machines, so ice plant could be operated, having the coils in the racking room set back from their original position to make room for the gas machines, in the removal of the coils in the beer storage, by reason of the floors being higher than specifications called for, and in not having the doors and windows placed in the building so that final test could be made under conditions of fixed temperature. The enforcement of penalties is not favored in equity, and they are so enforced only after the demandant therefor has shown that he himself has strictly complied on his part with all the contract requirements to such enforcement. This

is particularly so, as in this case, where the defendant, seeking to enforce such penalties or claim for liquidated damages, is shown to have accepted the work, is satisfied with it, has been placed in possession, and is deriving the uses and benefits thereof. Where delays are caused by mutual default, such penalties will be held to have been waived, and the courts will not attempt to apportion such delays between the two, and hold the contractor liable in penalty for those days that they in their judgment, deem he may be chargeable with. This rule has been well stated in such cases as *Stewart v. Keteltas*, 36 N. Y. 388, *Heckmann v. Pinkney*, 81 N. Y. 211, and *Weeks v. Little*, 89 N. Y. 566. The Circuit Court of Appeals for this Fourth Circuit, in the case of *Jefferson Hotel Co. v. Brumbaugh* (decided on the 12th of last month) 168 Fed. 867, has determined these very principles touching a contract similar in all respects, approving the decisions from New York above cited.

It therefore follows that both defenses set up against plaintiff's demand in this case must be overruled, and that plaintiff is entitled to a decree for the full amount of its debt, interest, and costs, to be enforced by a sale of the property covered by the mechanic's lien, in case the same shall not be paid within 60 days.

UNITED STATES v. NISBET.

(District Court, W. D. Washington, N. D. March 31, 1909.)

No. 3,779.

1. ALIENS (§ 68*)—NATURALIZATION—WITNESSES—DEPOSITIONS—STATUTES.

Act Cong. June 29, 1906, c. 3592, § 9, 34 Stat. 599 (U. S. Comp. St. Supp. 1907, p. 424), declares that the hearing of a naturalization petition shall be in open court, and that the applicant and his witnesses shall be examined on oath before and in the presence of the court. *Held* that, except as provided in section 10, permitting depositions only where the applicant's residence has been for a period less than five years, a court, in hearing a naturalization petition, has no authority to receive or consider evidence taken by depositions without its presence.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 68.*]

2. ALIENS (§ 70*)—NATURALIZATION—VACATION—JURISDICTION.

Act Cong. June 29, 1906, c. 3592, § 15, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 427), authorizes the institution of suits in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit to set aside and cancel the certificate of citizenship because illegally procured. The section also declares that, if the certificate is set aside, a copy of the order of cancellation shall be transmitted to the court from which the certificate of citizenship shall have originally issued, and the clerk of such court, on receiving the same, shall cancel the certificate on the records and notify the Bureau of Immigration and Naturalization. *Held* that, where a certificate of naturalization was illegally granted by a superior state court, a federal District Court in the district of the naturalized citizen's residence had jurisdiction of a suit by the United States to set it aside.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 70.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the United States to cancel a certificate of naturalization illegally granted by a court of the state of Washington. Prayer of the government's petition granted.

Elmer E. Todd, U. S. Dist. Atty., and Andrew J. Balliett, Special Asst. U. S. Atty.

HANFORD, District Judge. The following is a summary of the material facts to be considered in this case:

The defendant, Hugh Nisbet, an alien, became a resident of Pacific county, in this state, in the month of February, 1903, and remained there about two years, when he removed to Jefferson county, in this state, and since then has continued to reside in said county. In the month of March, 1908, he filed a petition for naturalization in the superior court of the state of Washington for Jefferson county, which upon its face appears to conform in every respect to the requirements of the naturalization law. The petition was acted upon and granted by the superior court, and a certificate of naturalization issued on the 7th day of July, 1908. The evidence upon which the court acted consisted of the testimony of the two witnesses who signed the petition and depositions of two other witnesses taken in Pacific county, which were necessary to supplement the testimony of the witnesses who signed the petition, for the reason that, contrary to the statement contained therein, they had not known the petitioner for the required period of five years and were not competent to testify from personal knowledge that he had resided within the United States previous to the time of becoming a resident of Jefferson county.

This suit has been instituted in behalf of the government under the fifteenth section of the naturalization law of June 29, 1906 (34 Stat. 601, c. 3592 [U. S. Comp. St. Supp. 1907, p. 427]). The specific grounds upon which the government prays for annulment of the proceedings of the superior court and cancellation of the certificate of naturalization, are: (a) That the petition filed by the defendant in the superior court was invalid, because not verified by competent witnesses. (b) The court was not authorized to receive depositions to prove residence within the United States for the required period of five years.

The ninth section of the act of Congress above referred to, under which the petition for naturalization was filed, is specific and mandatory in requiring that the hearing should be in open court, and that the applicant and witnesses should be examined under oath "before the court and in the presence of the court"; and, except as provided in the tenth section, the court was not authorized to receive or consider evidence taken by depositions out of the presence of the court. Without the depositions, there was a lack of evidence to establish the facts necessary to entitle the defendant to become a naturalized citizen of the United States. The manifest intention of Congress, in the enactment of the naturalization law of 1906, was to prescribe rigid rules to be observed by the courts in naturalization proceedings and to correct the abuse of laxity in such proceedings. Therefore a court may not, in the exercise of assumed discretionary power, admit an

alien to citizenship who has failed to establish his right by the kind of evidence which the statute demands. The tenth section permits depositions to prove the fact of five years' continuous residence in the United States only in the cases of applicants for naturalization whose residence in the state, territory, or district has been for a period less than five years. Therefore that section of the law was not applicable, and the superior court acted without legal authority in receiving and giving consideration to the depositions in support of this defendant's petition.

The peace of society depends in a large measure upon respect for the solemnity of judicial proceedings. For this reason I have hesitated and deliberated before assuming authority to declare an act of a court of co-ordinate jurisdiction to be illegal, for misinterpretation and misapplication of the law. It is my conclusion, however, that this court may not decline to exercise the power conferred upon it by the statute. The state courts have authority to naturalize aliens only by virtue of authority conferred upon them by Congress, and inasmuch as Congress has provided in the fifteenth section of the act above mentioned for the institution of suits in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship, on the ground that such certificate was illegally procured, every such certificate is subject to attack in either of the courts in which the government may elect to institute a suit for cancellation, and for cogent reasons the government may and should prefer to exert its judicial power through the medium of the courts ordained and established pursuant to the national Constitution, rather than the state tribunals. Although it is a wholesome rule which restrains courts from assuming authority to correct legal errors of courts of co-ordinate jurisdiction, that rule is subordinate to the legislative power of the government, and it may be modified or abrogated according to the wisdom of the legislative branch of the government, which has the power to prescribe the laws to which judicial procedure must conform. There can be no doubt or uncertainty as to the true interpretation of the statute with respect to the right of the government to invoke the jurisdiction of a court, other than the court which granted a certificate of naturalization, because it is provided in the fifteenth section that, whenever any certificate of citizenship shall be set aside or canceled, the court making the order for cancellation, if not the same court which granted the certificate of citizenship, shall direct its clerk to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued, "and it shall thereupon be the duty of the clerk of the court receiving such copy of the order and judgment of the court to enter the same upon the record, and to cancel such original certificate of citizenship upon the records, and to notify the Bureau of Immigration and Naturalization of such cancellation." This provision of the statute is an unmistakable expression of the legislative will on the subject, and a wise provision to prevent the possibility of confusion which might result from the preservation in the records of

one court of evidence of a right, after its annulment by a decree of a different court.

For the reasons above stated, I direct that a decree be entered as prayed for.

In re CASHMAN.

(District Court, S. D. New York. January, 1909.)

1. CONTEMPT (§ 60*)—EVIDENCE—REASONABLE DOUBT.
 Proceedings for contempt being criminal in their nature, the contempt must be proven beyond a reasonable doubt.
 [Ed. Note.—For other cases, see Contempt, Cent. Dig. § 185; Dec. Dig. § 60.*]
2. CONTEMPT (§ 60*)—DEFENSES—INSANITY—BURDEN OF PROOF.
 The burden of proof of insanity, pleaded as a defense to a criminal contempt, is on the defendant.
 [Ed. Note.—For other cases, see Contempt, Cent. Dig. § 183; Dec. Dig. § 60.*]
3. CONTEMPT (§ 60*)—DEFENSES—INSANITY—EVIDENCE.
 In a prosecution for criminal contempt, evidence *held* insufficient to sustain a defense of insanity.
 [Ed. Note.—For other cases, see Contempt, Cent. Dig. § 187; Dec. Dig. § 60.*]

Order to Show Cause why Jacob Cashman should Not be Punished for Contempt.

Julius Henry Cohen, J. N. Rosenberg, and Louis Lichtenberg, for petitioning creditors.

Block & Becher (Mr. Block, of counsel), for Cashman.

HOUGH, District Judge. This proceeding is singular, in that it is not doubted or denied that, if mere words can constitute contempt of court, Cashman is guilty thereof on the face of the record. The petition upon which the order to show cause was granted sets forth at length the more glaring instances of contempt, and to this petition no answer has been filed; nor has any attempt been made to deny the use of the words, or to explain away their effect in any other manner than by asserting that Cashman, at the time he used them, was mentally irresponsible.

Proceedings for contempt being criminal in their nature, it is, of course, necessary for those alleging contempt to prove the commission thereof beyond a reasonable doubt; but in this instance such proof is supplied by defendant's admissions. When, however, it is sought to escape the consequences of contempt by a plea in confession and avoidance, viz., an allegation of insanity, the burden of proof is on the defendant; for every man is presumed to be sane. The testimony or relevant facts regarding Cashman's mental condition may be stated under three heads: First, the nature of his testimony before the commissioner, by which beyond any doubt any sane man committed contempt; second, the evidence of the medical experts who have testified for and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against defendant; and third, the man's demeanor while testifying before the court and listening to the testimony of others.

First. Undoubtedly Cashman's examination before the commissioner has an important bearing on the issue of his sanity. It is a perfectly fair inquiry to ask (a) whether Cashman remembered anything at all; and (b) if he did so remember anything, was his testimony with regard to that thing coherent, plausibly put, and apparently indicative of mental activity and responsibility? I am compelled to conclude that there was one point concerning which Cashman remembered a great deal, and, indeed, assumed to remember every detail, to wit, his wife's real estate transactions. On this point his testimony is clear and sane—sane, because it is reasonably free from exaggeration and coherently stated. Whether it is entirely accurate or not is immaterial. Slips of memory are not indicative of mental irresponsibility. On every other subject touched on before the commissioner Cashman displayed a complete lack of memory, and (if he be sane) an impudent and incredible denial of memory.

The further inquiry, therefore, becomes entirely fair, whether there be any motive discoverable tending to explain an actual possession of memory regarding the point as to which he testified fully and an apparent absence of memory about every other portion of the inquiry. It is too plain to need explanation that motive exists for a man sane, but ignorant, to admit recollection of what he testified to fully (because it seemed immaterial to the bankrupt proceeding), and to deny memory regarding his partnership business, which any one would recognize as the principal subject of the bankruptcy investigation. It must, therefore, be found that as a matter of fact Cashman has answered those questions which seemed to give the creditors no valuable information, and denied all ability to answer those which were vital to knowledge of the bankrupt's estate. This line of demarcation between what he did know and what he did not know is not persuasive of mental irresponsibility.

Second. The question before the court is not whether Cashman is well or ill in body. It has been shown without contradiction, and I believe it to be true, that the man has suffered for a long time from a frequently acute condition of dyspepsia or gastritis, brought on largely, if not wholly, by his intemperate habits. The question is whether, from this or any other cause, he has been shown to have arrived at a state of mental disease which renders him morally irresponsible for the contempt which by words he manifested toward the power and authority of this court. I shall not enter into a prolonged discussion of the testimony of the four doctors who have appeared before me. Without impugning the integrity or ability of any of them, I am deeply impressed with and entirely convinced by the evidence of Dr. Kirby—not only by his clearness of statement and apparent impartiality, but by the circumstances under which his testimony was given. Cashman was submitted to him for examination. He made an examination, the record of which has been introduced in evidence, and he testified without having stated to any one, so far as this record shows or the court knows, what his conclusions had been from the examinations he had

made. I am of the opinion that, not only has defendant failed to sustain the burden of proof which is upon him, but that it is positively shown that he does not manifest the physical and mental symptoms indicative of brain disease from which his friends assert that he is suffering.

Third. Throughout the hearing before the court Cashman has exhibited profound apathy and apparent complete carelessness regarding his own fate. When questions were put to him, however, he has answered them coherently and with apparent intelligence. There is nothing in his appearance or demeanor before the court inconsistent with Dr. Mabon's direct evidence that the man is shamming, and if his apparent carelessness of consequences is not assumed there is nothing in such carelessness indicative (according to the balance of evidence) of mental irresponsibility.

Upon the whole, I am convinced that the man is sane, and must take the consequence of his refusal to answer, reasons for which refusal are not far to seek in this bankruptcy record. An order may be entered directing his imprisonment for eight months upon the deposit of the usual expenses, and further directing that he be fined the sum of \$750, and, if the same be not paid within the period of imprisonment above directed, that the defendant remain in jail until the further order of the court or the payment of the fine.

UNITED STATES v. 150 ⁷/₁₂ DOZEN LONG GLOVES.

(District Court, E. D. New York. April 5, 1909.)

1. CUSTOMS DUTIES (§ 132*)—FORFEITURE—REMISSION OF PENALTY.

No application for remission of the penalty of forfeiture of imported merchandise can be instituted, under Act June 22, 1874, c. 391, § 17, 18 Stat. 189 (U. S. Comp. St. 1901, p. 3606), until a forfeiture has been declared.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 335; Dec. Dig. § 132.*]

2. CUSTOMS DUTIES (§ 132*)—FORFEITURE—REMISSION.

An applicant, under Act June 22, 1874, c. 391, § 17, 18 Stat. 189 (U. S. Comp. St. 1901, p. 3606), for remission of the penalty of forfeiture, is not, though charged with due notice of the forfeiture proceedings, debarred from making such application by reason of failure to appear as claimant in those proceedings.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 132.*]

On Petition for Remission of Penalty.

These proceedings were initiated under Act June 22, 1874, c. 391, §§ 17, 18, 18 Stat. 189, 190 (U. S. Comp. St. 1901, p. 3606), reading as follows:

"Sec. 17. That whenever, for an alleged violation of the customs revenue laws, any person who shall be charged with having incurred any fine, penalty, forfeiture, * * * or shall be interested in any * * * merchandise seized, * * * when the appraised value of such vessel or merchandise is not less than one thousand dollars, shall present his petition to the judge of the district in which the alleged violation occurred, or in which the property

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is situated, setting forth truly and particularly, the facts and circumstances of the case, and praying for relief, such judge shall, if the case, in his judgment, requires, proceed to inquire, in a summary manner into the circumstances of the case, at such reasonable time as may be fixed by him for that purpose. * * *

"Sec. 18. That the summary investigation hereby provided for may be held before the judge to whom the petition is presented, * * * and the facts appearing thereon shall be stated and annexed to the petition, and, together with a certified copy of the evidence, transmitted to the Secretary of the Treasury, who shall thereupon have power to mitigate or remit such fine, penalty, or forfeiture, * * * if in his opinion the same shall have been incurred without willful negligence or any intention of fraud in the person or persons incurring the same. * * *"

Herman P. Goodstein, for petitioner.

William J. Youngs, U. S. Atty., and William P. Allen, Asst. U. S. Atty.

CHATFIELD, District Judge. Upon the 20th day of October, 1908, 150 ⁷/₁₂ dozen pairs of long kid gloves were seized in this district, and proceedings for their condemnation and forfeiture, on the ground that they had been smuggled into the country and the United States thereby defrauded, were begun in this court by the filing of an information, upon the 16th of November, 1908. The marshal duly attached the gloves, published the requisite notice, and a sale was finally had upon the 28th day of December, 1908, at which the gloves brought, less expenses, \$1,063.32, which is now in the registry of the court. The person in whose possession the gloves were at the time of seizure, one Marie De Louise, has since petitioned this court, under sections 17 and 18 of the act of June 22, 1874, which has superseded section 5293 of the Revised Statutes. It appeared from the record in the proceeding for condemnation and forfeiture that no one intervened as claimant or owner of the goods in response to the advertisement by the marshal, and the default in the condemnation proceedings was apparently properly taken.

The case of *The Princess of Orange*, 19 Fed. Cas. No. 11,431, seems to settle the first question which must be considered; that is, that in relation to certain proceedings for forfeiture, no application to remit can be instituted until a forfeiture has been declared. But in the present case the additional fact that the woman now asking to be relieved as owner of the gloves was the same individual from whose possession they were taken, and who therefore would seem to have admitted, by her failure to claim the property taken, that she had no title thereto, raises at once the question whether, as between all parties properly charged with notice by the condemnation proceedings, the decree of condemnation renders the issues involved *res adjudicata*, and prevents any application for remission of the forfeiture under the sections mentioned.

This point has been considered in a number of cases, especially from the standpoint of the United States, which might be called upon to pay an award for information leading to the seizure, and yet be deprived of the proceeds of the seizure if the forfeiture should be remitted. Such cases are cited below under the other question involved,

and the decision of the Supreme Court seems to be that after distribution or payment of the fund in the condemnation proceedings to the collector of customs, for the benefit of the United States, the rights of informers have been established to such an extent that a remission of forfeiture could not compel the repayment to the claimant of the informer's portion of the award, at least. But as long ago as the case of *United States v. Morris*, 23 U. S. 246, 6 L. Ed. 314, the Supreme Court said:

"It does not, in terms, give the power to the Commissioners of the Treasury to remit, after condemnation, and yet there can be no doubt the power extends to such cases."

In the case of *State of Maryland v. Baltimore & Ohio R. R. Co.*, 44 U. S. 534, 11 L. Ed. 714, the doctrine is expressly affirmed, and in the *Confiscation Cases*, 74 U. S. 454, 19 L. Ed. 196, the Supreme Court again said:

It has been decided "that the Secretary had authority, under that act, to remit a forfeiture, at any time before or after a final decree or judgment, until the money was actually paid over to the collector for distribution."

In the case of *The Laura* (C. C.) 8 Fed. 612, affirmed in 114 U. S. 411, 5 Sup. Ct. 881, 29 L. Ed. 147, proceedings upon a bond were pending; the bond having been given as security in a condemnation proceeding which had been determined, and the suit having been instituted for penalty incurred by the steam vessel. The same doctrine was reaffirmed, and it was held that the penalty incurred by the steam vessel for violation of the law relating to the carrying of passengers could be remitted, even after a suit had been brought by a private individual to recover the penalty provided.

In the case of *Peacock v. United States*, 125 Fed. 588, 60 C. C. A. 394, the court held that:

"The petition can be acted upon after the decree is entered, as well as before. The trial by the court in this case was no invasion of the right of the Secretary of the Treasury to grant the remission of the penalty after the judgment was rendered."

The present case might be distinguished from all of those cited, in that the claimant was in default, the decree of condemnation was entered, and the rights of all claimants as against the United States thereby determined, before the present petition was filed. The cases cited simply decide that the Secretary of the Treasury has the power to consider the petition after a decree; but it would seem that, if the Congress has protected individuals from the forfeiture of their property where an injustice may have been done, by allowing the forfeiture to be remitted at any time up to the covering of the money into the treasury (for that is what payment to the collector substantially implies), it would be a hardship to hold that the claimant must at his peril defend the action at law, as well as summarily petition the Secretary of the Treasury through the court for relief.

Substantial justice seems to require that the present petition be considered, and that the final decree of distribution in the action be withheld until the petition under the sections mentioned can be heard.

BAKKER v. GILSON.

(Circuit Court, D. New Jersey. April 12, 1909.)

1 LIMITATION OF ACTIONS (§ 3*)—SUSPENSION—PERSONS UNDER DISABILITY—STATUTES—REPEAL.

Act N. J. March 27, 1874, § 4 (Rev. St. 1874, p. 441; Gen. St. 1895, p. 1974 et seq.), providing that if any person entitled to any of the actions specified in the three preceding sections, at the time of the accrual thereof, is a minor, he may sue within the time limited after he becomes of age, was not repealed by Act N. J. March 24, 1896 (P. L. p. 119), amending section 3 of the original act, so as to shorten the period of limitation concerning certain causes of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 12; Dec. Dig. § 3.*]

2 LIMITATION OF ACTIONS (§ 3*)—STATUTES—AMENDMENT.

Act N. J. March 27, 1874, § 4 (Rev. St. 1874, p. 441), suspending limitations created by the act during the minority of persons entitled to sue, was not in conflict with section 3 of such act, as amended by Act March 24, 1896 (P. L. p. 119), reducing the limitation provided for in actions for assault and imprisonment from four to two years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 10; Dec. Dig. § 3.*]

In Tort. On demurrer to replication.

Richard J. Donovan, for plaintiff.

Michael Dunn, for defendant.

CROSS, District Judge. This action, which is in tort, is founded upon certain alleged negligent acts of the defendant, whereby the plaintiff, to whom he owed a duty, was injured. The pleas filed there-to are the general issue and the statute of limitations. To the second plea the plaintiff replied, in substance, that his action was not barred by the statute of limitations, because at the time of the accident he was an infant within the age of 21 years; that he still is an infant, and that the period of limitation, within which his action must be commenced, would not begin to run until he should have arrived at the full age of 21 years. To this replication the defendant demurred, alleging as ground therefor:

"That the alleged matters and things set forth in the said replication do not constitute under the law a legal and sufficient traverse of the second plea filed by the defendant in the above-entitled cause, by reason of section 4 of the act of the Legislature of the state of New Jersey approved March 27, 1874, entitled 'An act for the limitation of actions,' which provides that the time of limitation within which an action by an infant should be commenced shall not commence to run until the infant arrives at the age of 21 years, having been repealed by Laws 1896, c. 77, entitled 'An act to amend an act entitled 'An act for the limitation of actions,' approved March 27, 1874.'"

By an act entitled "An act for the limitation of actions," approved March 27, 1874 (Gen. St. N. J. 1895, p. 1974 et seq.), various periods of limitation were fixed by sections 1, 2, and 3 for different specified causes of action. Section 4 of said act is as follows:

"That if any person or persons who is, are, or shall be entitled to any of the actions specified in the three preceding sections of this act, is, are, or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index

shall be, at the time of any such cause of action accruing, within the age of twenty-one years, or insane that then such person or persons shall be at liberty to bring the said action so as he, she, or they institute or take the same within such time as is before limited after his, her, or their coming to or being of full age, or of sane memory, as by other person or persons having no such impediment might be done."

An amendment to the above-entitled act was passed March 24, 1896 (Laws 1896, p. 119). It specifically amended section 3 of the original act, so that it would read as follows:

"Every action upon the case for words shall be commenced and sued within two years next after the words spoken and not after, and that all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any person or persons, firm or firms, individual or individuals, corporation or corporations, within this state, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after."

The defendant claims that the amendment of 1896, just referred to, repealed section 4 of the original act. The supplement, however, contains no repealing clause, either general or special; hence, if section 4 is repealed thereby, it must be by implication. Repeals by implication are not favored. Furthermore, the act as amended must be construed and upheld as an entirety, if it reasonably can be. In my judgment section 4 of the original act was not repealed by the amendment of 1896, which, it will be noticed, in terms purported to amend section 3 only of that act. Its entire effect was to shorten the period of limitation in certain causes of action from four to two years. It is true it did this by general and comprehensive language, but which, after all, was not more general or comprehensive than that of the original section.

The question now presented has not been passed upon by the state courts, so far as I am aware. I have been referred, however, to the case of *Pike v. D., L. & W. R. R. Co.*, reported in 31 N. J. Law J., at page 81, in which Judge Adams, of the Circuit Court, construed section 58 of "An act concerning railroads" (Revision of 1903; P. L. 1903, p. 674), and held it to be independent of and not controlled by section 4 of "the act for the limitation of actions." Section 58, just referred to, reads in part as follows:

"All actions accruing from injuries to persons caused by the wrongful act, neglect or default of any railroad company owning or operating any railroad within this state, shall be commenced and sued within two years next after the cause of action accrued, and not after."

This section, it will be noticed, contains no saving clause in favor of infants and lunatics, but did contain, or rather the act of which it forms a part contained, a general repealer of all inconsistent acts. Judge Adams held that the railroad act and the limitation act could not, under the circumstances, be read together, but, on the contrary, they were independent acts, and not parts of one scheme. Hence he refused, in which refusal he was supported by authority, to incorporate or construe section 4 of the limitation act into section 58 of the railroad act. It is unnecessary to consider that case at greater length, since it is obvious that it does not in any wise control or affect the question now presented.

Another case to which I have been referred is *Tomlin v. Hildreth*, 65 N. J. Law, 438, 47 Atl. 649, in which the cause of action was for assault and imprisonment. The court held in that case that the supplement to the limitation act of 1896, above referred to, although professing to amend only section 3 of the limitation act of 1874, nevertheless amended section 2 of that act to the extent, at least, of requiring a cause of action, like the one then being considered, to be brought within two years, instead of four years, as originally provided by section 2. This construction, however, was obviously necessary in order to give effect to the amendatory act, since the first part of the amendatory section, relating to actions for words spoken, was but a verbatim re-enactment of the entire third section of the original act, and the balance of the amendment, which related to actions for injuries to persons by the wrongful act, neglect, or default of another, and the time within which such actions should be brought, found nothing in the third section upon which to operate, for the reason that causes of action of the character just referred to were dealt with by section 2 of the act of 1874. In brief, therefore, this decision went no farther necessarily than to hold that the act of 1874, as amended by the act of 1896, required an action for assault and imprisonment to be brought within two years, instead of within four, as originally provided. The decision had no relation to or bearing upon section 4 of the act of 1874, or to actions of the character referred to in sections 1, 2, and 3 brought by or in behalf of infants or lunatics.

Considering, then, as was held in *Tomlin v. Hildreth*, *supra*, that the purpose of the amendment of 1896 was to require the causes of action specified in section 2 to be brought within two years, instead of within four, it is apparent that the amendment did not repeal or modify section 4 of the original act. The rights of infants and lunatics were not affected by the amendment. Section 4 is still in force, and still controls causes of action specified in sections 1, 2, and 3, when brought in behalf of infants and lunatics. Section 4 of the act of 1874 does not conflict with section 2 of that act, as amended by the act of 1896, any more than it conflicted with that section before it was amended, since the change wrought by the amendment had reference to the period of limitation only. Construing the act as amended as a whole, as it must be, section 4 and the amendment may well stand together.

The demurrer is overruled, with costs.

In re BROCKMAN.

(District Court, W. D. Kentucky. October, 1908.)

1. BANKRUPTCY (§ 413*)—REFERENCE—JURISDICTION OF REFEREE.

Where objections to a bankrupt's discharge were referred under General Bankruptcy Order 12, cl. 3 (18 Sup. Ct. vi), authorizing a reference to ascertain and report the facts, the referee properly refused to pass on the sufficiency of the objections.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **BANKRUPTCY (§ 413*)—DISCHARGE—OBJECTIONS—RIGHT TO OBJECT.**

Where neither the referee nor the court had held that specifications of objection to a bankrupt's discharge were insufficient, the creditors who had made such specifications could not except to the referee's report on the ground that he did not pass on the bankrupt's exceptions to the sufficiency of the specifications.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

3. **BANKRUPTCY (§ 414*)—DISCHARGE—OBJECTIONS—BURDEN OF PROOF.**

A bankrupt, having otherwise complied with Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), must be discharged unless one or more of the objections thereto, within the statute, has been sustained by the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 414.*]

4. **BANKRUPTCY (§ 409*)—DISCHARGE—FAILURE TO KEEP BOOKS.**

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), providing that a discharge shall not be granted to a bankrupt who had destroyed, concealed, or failed to keep books with intent to conceal his financial condition, does not require that the bankrupt shall have kept books, nor fix any standard of bookkeeping; the intent not to keep books, to conceal his financial condition, or the destruction of books kept for that purpose, being the gist of the objection.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 409.*]

In Bankruptcy. Upon objections to the granting of a discharge.

Harry Robinson, for bankrupt.

Percy Booth, for creditors.

EVANS, District Judge. Certain creditors of the bankrupt who have proved and had their claims allowed have filed objections to the bankrupt's discharge. The grounds urged are: First. That the bankrupt, with intent to conceal his financial condition, failed to keep books or records from which such condition might be ascertained. Second. If he kept books at all, he destroyed or concealed them. Third. That within four months immediately preceding the filing of the petition he transferred to Logan Cravens a pistol, to Luther Brockman a pistol, to bankrupt's wife a pair of bracelets, and to a Mrs. Smith a hat, all and each of which transfers, it is alleged, were made with the intent to hinder, delay, or defraud his creditors. Fourth. That he transferred or permitted to be transferred to divers other persons whose names are unknown many different articles of goods, wares, and merchandise, with intent to hinder, delay, or defraud his creditors. Fifth. That within four months before filing the petition he concealed, removed, or destroyed, or permitted to be concealed, removed, or destroyed, certain moneys or property, the description of which the creditors cannot give. Sixth. That within four months of the filing of the petition he received several hundred dollars which he has not accounted for, which he has concealed or removed, or permitted to be concealed or removed, with intent to hinder, delay, or defraud his creditors.

Under the third clause of General Order in Bankruptcy No. 12, prescribed by the Supreme Court (18 Sup. Ct. vi), these objections were referred to the referee to "ascertain and report the facts." The bankrupt, upon that reference and before the referee, urged that some of the objections specified were too vague and indefinite, but the referee

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

held—and I am inclined to think correctly—that upon this particular ground of reference his duties were to “ascertain and report the facts” only. That was the only purpose for which the objections were referred to the referee. The creditors, who themselves made and filed those objections, now except to the referee’s report, and, among the grounds of exceptions, urge that he did not then pass upon the bankrupt’s exceptions to the sufficiency of their specifications in opposition to the discharge. In disposing of this phase of the case, it will suffice to say that the creditors cannot be heard to raise that question. It does not lie within their mouths to do so, particularly as neither the referee nor the court has held that the specifications are insufficient. The referee did not pass upon the question, and for the purposes of this case the court will treat them as sufficient. At all events, they are just as the creditors made them.

The referee, having taken the testimony, has reported his opinion and conclusions thereon to be that no one of the specified objections was sustained by the evidence. To this report the creditors have taken various other exceptions, which, together with all the testimony, have been carefully considered by the court, and the following conclusions have been reached: Having otherwise complied with the act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), the bankrupt must be discharged unless some one or more of the objections thereto (if they come within the statute) has been sustained by the evidence. The objecting creditors allege certain facts to exist. The law plainly puts upon them the burden of proving the truth of what they assert, and, whether or not they should prove those assertions to the exclusion of a reasonable doubt, they must certainly prove them to the satisfaction of the court. Insignificant amounts are involved in some of the objections, and the vague and conjectural character of others of them is noticeable, but I agree with the referee in his conclusion that no one of the objections has been shown to be true or well founded. A certain intent is essential under the act, and while intent may generally be presumed if acts intentionally done fairly authorize it, yet before the conclusion can be deduced the facts must be established which authorize it. I agree with the referee that this has not been done.

The argument of counsel was largely addressed to the failure of the bankrupt to keep books in a proper way, and it seemed to be supposed that the act requires every person who is authorized to petition for a discharge in bankruptcy to keep books and to keep them well. The act does not require anybody to keep books, nor fix any standard of bookkeeping. All it does in the premises is to provide that a discharge shall not be granted a bankrupt who has destroyed, concealed, or failed to keep books with intent thereby to conceal his financial condition. The intent must be shown to the satisfaction of the court to bring the case within the statute, and it would be a harsh and unjust construction to say that the intent must, as matter of law, be presumed from mere bad bookkeeping or from a mere failure to keep books. If that were the law, probably 9 out of every 10 country people, and a very large proportion of plain people everywhere, would be refused discharges if applied for, inasmuch as few of them can keep

books which are intelligible to anybody except themselves. It is a matter of common knowledge that a large proportion of the people do not keep books at all; for example, farmers, clerks, mechanics, and wage-earners generally, but this is either because they see no need for it, or else cannot do it satisfactorily. The ways of the people in the country are very different from those of great business concerns in cities and towns of the larger size. At all events, bad intent must be made to appear to the satisfaction of the court, and the testimony in this case does not, in my judgment, meet this requirement.

I have frequently had similar questions under consideration, and, among others, in the case of J. D. Stark, bankrupt, in 1905. In an opinion then delivered, this language was used:

"It certainly is true that the bankrupt's idea of bookkeeping was about as crude as could possibly be imagined, and one which, while consistent with his habits and motions of business, was about as far as possible from what are correct or tolerable business methods. * * * While common sense and good judgment require a merchant to keep books, yet, if he does not to so and fails in business, he is not denied a discharge for merely being a poor or even the poorest possible bookkeeper. Nor would such a provision of law be wise, for the greatest rascals may sometimes have the most perfectly kept books, so far at least as their face appearance may indicate. Under the bankruptcy act, therefore, the intent with which bad bookkeeping is done is the material thing. If that intent exist, it is immaterial whether, superficially considered, the books are ill kept or well kept. The evil intent alone will destroy the claim to a discharge in a case coming within the act. Here the bankrupt seems always to have kept books in the same absurd and almost unintelligible way. But as I find no satisfactory evidence of the intent thereby to conceal his financial condition, I have concluded that the finding of the referee * * * is not so against the evidence as to warrant the court in overruling that conclusion. Instead of any intent to conceal his financial condition, the bankrupt appears not to have had any idea that bookkeeping was needful to enable himself to understand it."

Other questions were also involved, but in affirming the judgment in that case (which was certainly on this point as strong as this one) the Circuit Court of Appeals did not deem it necessary to write an opinion.

Agreeing with the referee in the conclusions reached by him upon the testimony, the exceptions to his report will all be overruled, his report will be confirmed, and the discharge will be granted.

In re SWEETSER.

(Circuit Court, D. Massachusetts. March 16, 1909.)

No. 377.

BANKRUPTCY (§ 444*)—REVISORY POWER OF CIRCUIT COURT UNDER ACT 1867—PROCEDURE.

Under the rule of the Circuit Court for the District of Massachusetts, adopted September 15, 1870, relating to the exercise of its revisory power over the District Court under the then existing bankruptcy law, which requires notice of a petition to revise to be filed in the District Court within 10 days from the entry of the order sought to be reviewed, and the filing of the petition within 5 days thereafter, but which provides for de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lay by leave of court, a petition will not be dismissed because, through mistake, the notice was filed in the Circuit Court, nor because no formal order or decree was entered by the District Court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 922, 924, 927; Dec. Dig. § 444.*

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

In Equity. On petition of John C. Hammond to revise certain rulings, findings, and decrees of the District Court.

Hollis R. Bailey, for petitioner.

Warren O. Kyle, for Dowse, Joy & Kyle.

M. E. S. Clemons, for Linscott.

PUTNAM, Circuit Judge. This is the same matter which came before us on demurrer in accordance with our opinion passed down November 22, 1907. 157 Fed. 567. That opinion sustained the petition, so far as its substantial merits were concerned, but required some amendments in detail, which amendments have been made, so that now the case comes before us on final hearing.

We, however, discover nothing which substantially affects the result in favor of the petitioner as before indicated.

Our previous opinion has reference to a point made by the respondent with regard to the rule entered in this court on September 15, 1870, in regard to exercises of the revisory power of the Circuit Court under the statutes in bankruptcy then existing. By error we then assumed that the notice of intention to proceed by a revisory petition was to be filed in the Circuit Court within 10 days from the entry of the order in the District Court. The rule requires this notice to be filed in the District Court, and also requires that within 5 days thereafter the petition to the Circuit Court should be filed with its clerk. But the rule, however, provides for delay by leave of the court on good cause shown. It appears that the required notice was filed in the Circuit Court by mistake, and not in the District Court; but everything was filed in the Circuit Court within the 10-day period. Under the circumstances any court would excuse the delay as the rule permits; and, moreover, a search of the record here would show enough which would enable us to hold that any jurisdictional question of this class had been waived, within the broad rules of waiver in removal cases, and in *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. —.

We are asked to review the rulings of Judge Lowell in *Re Sweetser* (D. C.) 131 Fed. 567, concerning the alleged priority of Mr. Dolliver; but for the reasons stated by him we agree with his conclusion.

At the time the demurrer was heard, the petition failed to contain any proper allegation that an order or decree had been entered in the District Court. This deficiency has been supplied; but it is still maintained that the record of the District Court produced to support that allegation is defective. It is true that there is here no formal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

order or decree, but proceedings on these revisory petitions have never been strict in this respect.

Let there be judgment for the petitioner, for an amount to be agreed on, or to be ascertained by a master, and with costs.

MEMORANDUM DECISIONS.

THE ABRAM P. SKIDMORE. THE CRESCENT. THE L. T. WHITMAN. (Circuit Court of Appeals. Second Circuit. March 16, 1909.) Nos. 177, 178. Appeals from the District Court of the United States for the Southern District of New York. Hyland & Zabriskie (Nelson Zabriskie, of counsel), for appellants. James J. Macklin (De Lagnel Berier, of counsel), for appellees Slater and others. MacFarland, Taylor & Costello (Willard W. Taylor, of counsel), for appellee Haskell. Before LACOMBE, WARD, and NOYES, Circuit Judges.

For opinion below, see 160 Fed. 265.

PER CURIAM. Decree affirmed, with single bill of costs.

GILL v. PARRISH. (Circuit Court of Appeals, First Circuit. April 22, 1909.) No. 817. Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. This case is affirmed, on the authority of Gill v. Austin, 157 Fed. 234, 84 C. C. A. 677, and Kinney v. Conant (C. C. A.) 166 Fed. 720. The judgment of the Circuit Court is affirmed, with interest.

HELLER v. NATIONAL WAISTBAND CO. (Circuit Court of Appeals, Second Circuit. April 8, 1909.) In Error to the Circuit Court of the United States for the Southern District of New York. See 168 Fed. 249. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We see no reason to order a rehearing, nor to certify the question to the Supreme Court. The decisions in Bessette v. W. B. Conkey Co., 194 U. S. 334, 24 Sup. Ct. 665, 48 L. Ed. 997, and Matter of Christensen Eng. Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072, cover the case now presented. The decision of the Circuit Court of Appeals in the First Circuit (Wilson v. Calculagraph Co., 153 Fed. 961, 83 C. C. A. 77) indicates that this order at the heel of the final decree might be reviewed by appeal.

HELVETIA SWISS FIRE INS. CO. v. BRANDENSTEIN et al. (Circuit Court of Appeals. Second Circuit. March 16, 1909.) No. 207. In Error to the Circuit Court of the United States for the Southern District of New York. Wallace, Butler & Brown (Frederick B. Campbell and Charles M. Turell, of counsel), for plaintiff in error. Sullivan & Cromwell (Royall Victor, of counsel), for defendants in error. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Judgment affirmed, on opinion of Judge Holt. 159 Fed. 589.

THE HENDRICK HUDSON. (Circuit Court of Appeals, Second Circuit. March 16, 1909.) No. 206. Appeal from the District Court of the United State for the Southern District of New York. Olcott, Gruber, Bonyng & McManus (Harrington Putman, of counsel), for appellant. Foley & Martin, for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. A majority of the court are of the opinion that there is not sufficient in the record to warrant a reversal of the decision of the District Court. 163 Fed. 862. Decree is affirmed, with interest and costs.

THE JOHN BOSSERT. (Circuit Court of Appeals, Second Circuit. February 16, 1909.) Nos. 162, 163. Appeals from the District Court of the United States for the Southern District of New York. For opinion below, see 148 Fed. 903. James J. Macklin and De Lagnel Berier, for appellants. Butler, Notman & Mynderse, for appellee Eddy Lake Cypress Co. Horace L. Cheyney, for appellee Insurance Co. of North America. Hyland & Zabriskie, for appellee Bromwell. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decrees of District Court affirmed, with interest and costs.

In re **KUFFLER** (two cases). (Circuit Court of Appeals. Second Circuit. March 16, 1909.) Nos. 15, 22. Petition to Review Order of, and Appeal from, the District Court of the United States for the Eastern District of New York. For opinion below, see 155 Fed. 1018. Max J. Kohler and Saul S. Myers, for appellant. Page, Crawford & Tuska (Benjamin Tuska and Abraham Tullin, of counsel), for respondent. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The order of the bankruptcy court (Eastern district of New York) now sought to be reviewed is in the precise form which this court approved upon the former appeal. In re Kuffler, 151 Fed. 12, 80 C. C. A. 508. It is "limited to a stay of any application for a discharge from the debts scheduled in the former proceeding." We see no reason to modify our former decision. The debts due to Hinsdale, Smith & Co. and to Joseph Mayer's Sons were included in the former schedule, and did not become new and different debts because judgment has been entered upon them in the interim. Boynton v. Ball, 121 U. S. 465, 7 Sup. Ct. 981, 30 L. Ed. 985. The order of the District Court is affirmed.

METROPOLITAN TRUST CO. OF CITY OF NEW YORK et al. v. CENTRAL TRUST CO. OF NEW YORK et al. (Circuit Court of Appeals, Fourth Circuit. March 3, 1909.) No. 881. Cross-Appeals from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond. Carl Taylor and James Byrne (L. L. Lewis and R. B. Davis, on the brief), for Metropolitan Trust Co. of City of New York. D. C. O'Flaherty (O'Flaherty & Fulton, on the brief), for Frank E. Howe and others. Henry W. Anderson (Thompson, Vanderpoel & Freedman and Munford, Hunton, Williams & Anderson, on the brief), for Bowling Green Trust Co. John Pickrell, for Equitable Trust Co. of New York. Arthur H. Van Brunt (Hill Carter and Joline, Larkin & Rathborne, on the brief), for Central Trust Co. of New York. Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PER CURIAM. The decree appealed from was entered by the court below under circumstances that fully justified the judicial discretion then exercised in directing a sale of the property involved in this litigation, and in our opinion due regard for the conflicting interests of the parties has been observed, and the rights of all have been fully protected. The assignments of error in the cross-appeal taken by the Central Trust Company of New York and the Bowling Green Trust Company, Trustee, are without merit, as

the reservations complained of in the decree of sale of October 24, 1908, are incidental and necessary to an order of sale in advance of the ascertainment of liens and the determination of the rights of the parties concerning the questions involved. The appellants in the cross-appeal, wishing a sale of the property, could only secure it by the court first passing upon such matters or reserving the same. A sale being in the interest of all parties, it was entirely proper to reserve such questions for the future consideration and decree of the court. Affirmed.

NORFOLK COLD STORAGE & ICE CO. v. NORFOLK & W. RY. CO. (Circuit Court of Appeals, Fourth Circuit. March 3, 1909.) No. 867. In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk. J. L. Jeffries (Jeffries & Lawless and Menalcus Lankford, on the brief), for plaintiff in error. John H. Holt (Robert M. Hughes and Theodore W. Reath, on the brief), for defendant in error. Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PER CURIAM. The judgment complained of is without error. Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. Affirmed.

PETERS et al. v. BROWARD et al. (Circuit Court of Appeals, Fifth Circuit. March 30, 1909.) No. 1,890. Appeal from the Circuit Court of the United States for the Northern District of Florida. E. C. Maxwell, L. J. Reeves, and H. Bisbee, for appellants. W. A. Blount, A. C. Blount, Jr., W. A. Blount, Jr., F. B. Carter, Park M. Trammell, and W. S. Jennings, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the suggestion of counsel for the appellant that the jurisdiction of the lower court is based entirely upon the impairment by the state of Florida of the contract under which complainant claims, and therefore this court has no jurisdiction of this appeal, and counsel for appellees acquiescing in this view, the appeal herein is dismissed, with costs.

UNITED STATES v. FREEMAN et al. (Circuit Court of Appeals, Fourth Circuit. March 10, 1909.) No. 863. In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville. A. L. Coble, Asst. U. S. Atty. (A. E. Holton, U. S. Atty., on the brief), for the United States. Mark W. Brown, for defendants in error. Before GOFF and PRITCHARD, Circuit Judges.

PER CURIAM. This case having been before the court on a former occasion, at which time the questions involved in this controversy were determined as reported in the case of Authel H. Freeman et al. v. United States, 157 Fed. 195, 84 C. C. A. 643, we do not deem it now necessary to add to or subtract from anything that was said in the opinion filed by the court at that time. For the reasons therein stated, the judgment of the lower court is affirmed. Affirmed.

W. K. SYSON TIMBER CO. v. STONEHOUSE. (Circuit Court of Appeals, Fifth Circuit. March 30, 1909.) No. 1,866. Appeal from the District Court of the United States for the Southern District of Alabama. T. M. Stevens, for appellant. H. Pillans, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This case is affirmed. See Southerland-Innes Company v. Thynas, 128 Fed. 42, 64 C. C. A. 116.

PARSONS NON-SKID CO. et al. v. TIMES SQUARE AUTOMOBILE CO. (Circuit Court, S. D. New York. February 9, 1909.) Howard P. Demson, for complainant. William Paul Buchler, for defendant.

LACOMBE, Circuit Judge. The trial of this suit is suspended until the hearing and determination of the suit against the manufacturer in the New Hampshire district upon the following conditions: (1) All testimony taken in the New Hampshire case to be considered as taken in this case. (2) Defendant in New Hampshire case to raise no objection to the taking of testimony by the plaintiff in New York City, and itself to take its expert testimony in this city if plaintiff so requests. (3) Complainant in this case may move to vacate this order at any time, upon proof tending to show unreasonable delay on the part of the defendant in the New Hampshire case.

PENNSYLVANIA SUGAR REFINING CO. v. AMERICAN SUGAR REFINING CO. et al. (Circuit Court, S. D. New York. January 21, 1909.) Upon motion for production of books. See, also, 160 Fed. 144. Battle & Marshall, for plaintiff. Parsons, Closson & McIlvaine, for defendants.

NOYES, Circuit Judge. Without passing upon any of the questions relating to damages presented upon the argument and brief, it is sufficient to say that, in my opinion, a case is not presented calling for an order for the production of the books described in the motion. The motion for the production of books for inspection is denied.

VAILE v. MOFFAT. (Circuit Court, S. D. New York. January 27, 1909.) Upon Motion to Remand. Barbour, Rush, Hare & Haller, for plaintiff. Alexander & Green, for defendant.

NOYES, Circuit Judge. While regarding the question raised upon this motion as a doubtful one, I have concluded to follow the decision in Barlow v. Chicago, etc., R. Co. (C. C.) 164 Fed. 765, and to deny the motion to remand. An order may be entered accordingly.

WHITMAN v. TAUBEL. (Circuit Court, S. D. New York. January 27, 1909.) Upon Motion to Remand. Hyman & Campbell, for plaintiff. Jas. W. & Chas. J. McDermott, for defendant.

NOYES, Circuit Judge. The motion to remand is denied, upon the authority of Stimson v. United Wrapping Machine Co. (C. C.) 156 Fed. 298, and Bolles v. Lehigh Valley R. Co. (C. C.) 127 Fed. 884. An order may be entered accordingly.

INDEX-DIGEST.

ABATEMENT AND REVIVAL.

Election of remedy, see Election of Remedies.
Judgment as bar to another action, see Judgment, § 585.

ABUTTING OWNERS.

Rights in streets in cities, see Municipal Corporations, §§ 705, 706.

ACCIDENT.

Cause of death, see Death, § 31.

ACCOUNT.

See Account Stated.

ACCOUNT STATED.

§ 6. "Account stated" defined.—Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co. (C. C.) 770.

§ 6. An account of railroad construction expense rendered by plaintiff to defendant railroad company held an "account stated."—Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co. (C. C.) 770.

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Operation and effect of admissions as ground of estoppel, see Estoppel, § 72.
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Injuries at railroad crossings, see Railroads, §§ 327, 328.

Injuries to licensees or trespassers caused by operation of railroad, see Railroads, § 277.

Injuries to servant, see Master and Servant, §§ 264-296.

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Negligence of tug, see Towage, § 15.

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Particular proceedings in actions.

See Costs; Damages; Depositions; Evidence; Execution; Judgment; Jury; Limitation of Actions; Pleading; Removal of Causes; Stipulations; Trial.

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See Discovery; Injunction; Receivers.

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Proceedings in exercise of special or limited jurisdictions.

Criminal prosecutions, see Criminal Law.

Suits in admiralty, see Admiralty.

Suits in equity, see Equity.

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See Appeal and Error; Exceptions, Bill of.

I. GROUNDS AND CONDITIONS PRECEDENT.

§ 4. Plaintiff, paying for license to carry on pool selling in a city in violation of the laws of Kansas (Sess. Laws 1895, p. 294, c. 155), could not recover from the city the amount paid where the second day after he commenced his business the city stopped him.—Levy v. Kansas City (C. C. A.) 524.

§ 4. That plaintiff was induced by misleading acts of defendant to part with his money or

property in the belief that defendant would continue to violate the law and would perform the illegal contract will not sustain his action.—*Levy v. Kansas City* (C. C. A.) 524.

§ 4. Actions to recover losses or damages through contracts wherein plaintiffs were guilty of moral turpitude, or violated public policy, held not maintainable.—*Levy v. Kansas City* (C. C. A.) 524.

§ 4. No action can be maintained arising out of the moral turpitude of the plaintiff, or out of his violation of the public policy, of a state or nation.—*Levy v. Kansas City* (C. C. A.) 524.

II. NATURE AND FORM.

§ 22. A suit which involves the recognizing and marshaling of privileges under the laws of Louisiana should be prosecuted on the equity side in a federal court.—*Iberville Planting & Mfg. Co. v. Monongahela Coal Co.* (C. C. A.) 12.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 44. Causes of action to recover penalties for infringement of copyright and for damages for a tort not connected with copyright cannot be joined in the same complaint under Code Civ. Proc. N. Y. § 484, which governs the practice in the federal courts within that state.—*Ohman v. City of New York* (C. C.) 953.

ADJUDICATION.

Of courts in general, see Courts, §§ 90, 91.
Operation and effect of former adjudication, see Judgment, §§ 585, 675, 736.

ADMINISTRATION.

Of estate of bankrupt, see Bankruptcy, §§ 223, 250.
Of estate of decedent, see Executors and Administrators.

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See Collision; Maritime Liens; Seamen; Shipping; Towage.
Right of proctor in suit brought in forma pauperis to protection against settlement by his client, see Attorney and Client, § 189.

II. REMEDIES IN PERSONAM AND IN REM.

§ 34. Defense of laches in an action to recover for collision held not sustained.—*The Little* (D. C.) 393; *The Mars*, Id.

IV. PLEADING, PETITIONS, AND MOTIONS.

§ 60. Amendment of libel held to overcome defects therein.—*Gans v. Auchincloss* (D. C.) 460.

VII. COMMISSIONERS AND PROCEEDINGS BEFORE THEM.

§ 86. Where the court by consent has appointed a commissioner to determine the issues,

the court is without power to rule on the findings.—*Luckenbach v. Delaware, L. & W. R. Co.* (D. C.) 560.

IX. APPEAL.

§ 119. Where, on appeal, petitioner's right to limit her liability has been decided in her favor, on remand the court can only determine whether the claimant is entitled to recover, and, if so, to what extent.—*The Tommy* (D. C.) 563.

X. COSTS.

§ 124. A docket fee is not taxable in favor of a libellant in admiralty, unless the court has in some way passed on the merits of the controversy involved in the suit.—*O'Flaherty v. Hamburg-American Packet Co.* (D. C.) 411.

ADMISSIONS.

As evidence in civil actions, see Evidence, § 219.

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See Food.

ADVERSE POSSESSION.

See Limitation of Actions.

I. NATURE AND REQUISITES.

(A) ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.

§ 7. No part of the right of way granted by Congress to a railroad company over public lands can be alienated without the consent of Congress, nor lost by laches or acquiescence, and private persons encroaching thereon can acquire no right by lapse of time.—*Kindred v. Union Pac. R. Co.* (C. C. A.) 648.

AFFIDAVITS.

See Depositions.

AFFREIGHTMENT.

Contracts, see Shipping, §§ 132, 141.

AGENCY.

See Principal and Agent.

AGREEMENT.

See Contracts.

AGRICULTURE.

Subrogation of lienor, see Subrogation, § 23.

§ 11. Although a contract for the sale and purchase of coal was made in another state, where it was delivered in Louisiana, and notes taken for the purchase price were there made, and recite that the coal was purchased and furnished for use on a Louisiana plantation, and was so used in harvesting and manufacturing a crop thereon, the seller is within Rev. Civ. Code La. art. 3217, which gives the furnisher

of supplies to any farm or plantation a privilege on the crop of the year.—*Iberville Planting & Mfg. Co. v. Monongahela Coal Co.* (C. C. A.) 12.

§ 11. Act No. 66, p. 114, Laws La. 1874, providing for the making and recording of contracts, giving a lien or privilege on the crop of a farm or plantation for advances or supplies furnished for the planting, cultivating, and harvesting of such crop, covers no further sum than that named in the contract, and for additional advances or supplies furnished the creditor stands on the same footing as other furnishers of supplies, and must look to Rev. Civ. Code La. art. 3217, for a privilege.—*Iberville Planting & Mfg. Co. v. Monongahela Coal Co.* (C. C. A.) 12.

AIDER BY VERDICT.

In criminal prosecutions, see Indictment and Information, § 202.

ALIENS.

See Indians.

Removal of suits by or against aliens to United States court, see Removal of Causes, §§ 36-61.

II. EXCLUSION OR EXPULSION.

Due process of law in proceedings to determine right of entry, see Constitutional Law, § 318. Negating exceptions in statute for offense against exclusion act, see Indictment and Information, § 111.

Review of deportation proceedings by habeas corpus, see Habeas Corpus, § 23.

§ 21. Sections 2 and 3 of the Chinese exclusion act of May 6, 1882, c. 126, 22 Stat. 59, as amended in 1884, Act July 5, 1884, c. 220, 23 Stat. 115 (U. S. Comp. St. 1901, p. 1306), were repealed by implication by sections 9 and 10 of Act Sept. 13, 1888, c. 1015, 25 Stat. 478 (U. S. Comp. St. 1901, p. 1316).—*United States v. Wood* (D. C.) 438.

IV. NATURALIZATION.

§ 68. Under Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329), a minor held entitled to declare his intention to become a citizen, which is ratified by his subsequent application for citizenship after majority.—*In re Symanowsski* (C. C.) 978.

§ 68. Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329), does not require an alien, on making a declaration of intention to become a citizen, to renounce his allegiance to the foreign sovereign, or to make a declaration of allegiance to the United States.—*In re Symanowsski* (C. C.) 978.

§ 68. Declaration of alien, applying for citizenship under Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420), held insufficient.—*In re Poirot* (D. C.) 456.

§ 68. A court, in hearing a naturalization petition under Act Cong. June 29, 1906, c. 3592, §§ 9, 10, 34 Stat. 599 (U. S. Comp. St. Supp.

1907, p. 424), has no authority to consider depositions, except where the applicant's residence has been for less than five years.—*United States v. Nisbet* (D. C.) 1005.

§ 69. A naturalization record need not show compliance with legal requisites, nor contain the alien's previous declaration of intention, in order to import validity.—*In re Symanowsski* (C. C.) 978.

§ 70. Courts, in admitting aliens to citizenship, act judicially; every intendment being in their favor.—*In re Symanowsski* (C. C.) 978.

§ 70. Under Act Cong. June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427), a federal District Court in the district of the residence of a citizen naturalized by a superior court of the state had jurisdiction of a suit by the United States to set aside the certificate.—*United States v. Nisbet* (D. C.) 1005.

ALLOWANCE.

To surviving wife, husband, or children of decedent, see Executors and Administrators, § 181.

AMENDMENT.

Of application for patent, see Patents, § 109. Of libel in admiralty, see Admiralty, § 60. Of specifications of objections to discharge of bankrupt, see Bankruptcy, § 415.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see Courts, §§ 326-329.

ANTICIPATION.

Of patent, see Patents, §§ 35-66.

APPEAL AND ERROR.

See Exceptions, Bill of.

Conformity in United States court to practice in state court, see Courts, § 356.

Review in action for penalties, see Penalties, § 40.

Review in admiralty, see Admiralty, § 119.

Review in bankruptcy, see Bankruptcy, §§ 306, 440-467.

Review in habeas corpus, see Habeas Corpus, § 113.

Review in proceedings for infringement of patent, see Patents, § 324.

Review of criminal prosecutions, see Criminal Law, §§ 1056-1172.

I. NATURE AND FORM OF REMEDY.

Mode of review in contempt proceedings, see Contempt, § 66.

§ 5. Where intervening petitions were filed in mortgage foreclosure proceedings against a street railway company for an allowance of damages for personal injuries, judgment on the awards were reviewable only by appeal, and not by writ of error under Rev. St. §§ 691, 692

(U. S. Comp. St. 1901, p. 566).—Nashville Ry. & Light Co. v. Bunn (C. C. A.) 862.

§ 5. Where a judgment creditor of a street railway company, whose property was in the hands of a receiver, intervened to have the judgment paid out of the fund in preference to claims of mortgagees, the determination was reviewable on appeal, and not on a writ of error.—Shook v. Dozier (C. C. A.) 867; Nashville Ry. & Light Co. v. Bunn, 168 F. 862.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(C) EXCEPTIONS.

§ 256. A ruling on a motion to strike out portions of the answer is not open to review where no exception thereto was taken.—Ghost v. United States (C. C. A.) 841.

VI. PARTIES.

§ 324. It is essential to the maintenance of an appeal from an order granting a preliminary injunction that a party directly affected by such order should be made a party to the appeal, or detached by summons and severance, or equivalent proceedings; and it is not sufficient that the appeal was allowed in open court, unless the record shows that such party was in fact present and had actual notice.—City of Detroit v. Guaranty Trust Co. of New York (C. C. A.) 608.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

§ 458. A Circuit Court, on the dismissal of a bill and dissolution of a temporary injunction, granted at suit of a telegraph company, restraining the collection of taxes levied against it by a state, has power in its discretion to grant a supersedeas continuing the status quo pending an appeal, on the giving of a bond to protect the state.—Western Union Telegraph Co. v. Wright (C. C.) 558.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) MATTERS TO BE SHOWN BY RECORD.

§ 518. A motion to strike out portions of the answer and the ruling thereon are not a part of the record on a writ of error unless made so by bill of exceptions.—Ghost v. United States (C. C. A.) 841.

XI. ASSIGNMENT OF ERRORS.

§ 728. An assignment that the court erred in ruling out evidence offered on behalf of plaintiff over the exceptions of plaintiff is fatally defective for failure to quote the full substance of the evidence ruled out, as required by Circuit Court of Appeals rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), and will not be reviewed.—Garrett v. Pope Motor Car Co. (C. C. A.) 905.

§ 730. Assignments that the court erred in its charge to the jury and in refusing to charge as requested held fatally defective, under Cir-

cuit Court of Appeals rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii).—Garrett v. Pope Motor Car Co. (C. C. A.) 905.

§ 731. An assignment that the verdict "is not justified by the evidence and is contrary to law" is too general and indefinite to raise a question for the consideration of the appellate court.—Chicago, M. & St. P. Ry. Co. v. Anderson (C. C. A.) 901.

XVI. REVIEW.

(B) INTERLOCUTORY, COLLATERAL, AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS.

§ 874. An appeal from an order granting an injunction pendente lite does not involve the merits of the suit, but the only questions for determination are whether the court had jurisdiction to entertain the motion, and, if so, whether the relief was improvidently granted.—Harding v. Corn Products Refining Co. (C. C. A.) 658.

(G) QUESTIONS OF FACT, VERDICTS, AND FINDINGS.

§ 997. Where the evidence was conflicting, and there was substantial proof supporting a verdict for plaintiff, the denial at defendant's request of a directed verdict would not be reviewed.—Chicago, M. & St. P. Ry. Co. v. Anderson (C. C. A.) 901.

§ 1004. Objections that the damages are excessive, and that the verdict is against the law and the evidence, cannot be reviewed by the Circuit Court of Appeals.—Toledo, St. L. & W. R. Co. v. Kountz (C. C. A.) 832.

§ 1022. A master's findings and conclusions concurred in by the trial court will be presumed correct on appeal, unless some obvious error has intervened or some serious or important mistake has been made.—Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, Id.

(H) HARMLESS ERROR.

§ 1040. Rulings on pleadings will be regarded as nonprejudicial, where the counts and pleas which remained were sufficient to justify all the evidence reasonably bearing on the case.—Stewart v. Southern Ry. Co. (C. C. A.) 685.

§ 1051. Where the jury upon the undisputed evidence must have reached the same conclusion as an expert witness, or where his evidence is on a point on which the jury are entirely competent to decide in accordance with the general experience, the admission of expert testimony will not be regarded on appeal as ground for reversing the judgment.—Puget Sound Electric Ry. v. Van Pelt (C. C. A.) 206.

APPLIANCES.

Liability of employer for defects, see Master and Servant, §§ 102-124.

APPLICATION.

For remission of forfeiture under customs laws, see Customs Duties, § 132.

APPORTIONMENT.

Of costs, see Costs, § 60.

APPRAISAL.

Of merchandise subject to duty, see Customs Duties, § 85.

APPROVAL.

Of Secretary of the Interior to conveyance of Indian lands by allottee, see Indians, § 15.

ARCHITECTS.

Approval of performance of contract, see Contracts, § 287.

ARMY AND NAVY.

Jurisdiction of United States over places acquired for military purposes, see United States, § 3.

Power of courts to determine validity of title to land occupied by United States as a military fort, see Constitutional Law, § 72.

ARREST.

Illegal arrest, see False Imprisonment.

I. IN CIVIL ACTIONS.

Imprisonment of defaulting United States officer under distress warrant as violating federal statutes forbidding imprisonment for debt, see United States, § 44.

ARREST OF JUDGMENT.

In criminal prosecutions, see Criminal Law, § 970.

ASSAULT AND BATTERY.**II. CRIMINAL RESPONSIBILITY.****(A) OFFENSES.**

§ 64. On the trial of a defendant charged with assault with a dangerous weapon, in attempting by force to remove the person assaulted from a mining claim of which he was in possession, evidence that defendant was the owner of the claim did not tend to establish any defense and was properly excluded.—Hickey v. United States (C. C. A.) 536.

(B) PROSECUTION AND PUNISHMENT.

§ 96. The refusal of the court to instruct that defendant, charged with assault with a dangerous weapon, might be convicted of a lesser offense, held proper under the evidence.—Hickey v. United States (C. C. A.) 536.

ASSESSMENT.

Of damages, see Damages, § 26.
Of tax, see Taxation, § 309.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 728-731; Criminal Law, § 1129.

ASSIGNMENTS.

Fraud as to creditors, see Fraudulent Conveyances.

In bankruptcy, see Bankruptcy, §§ 139, 140.

Of patent, see Patents, § 196.

Of policy, see Insurance, §§ 199-212, 593.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 139-363.

Assent to by creditors as affecting right to join in petition in involuntary bankruptcy, see Bankruptcy, §§ 60, 76.

ASSUMPSIT, ACTION OF.

See Account Stated.

ASSUMPTION.

Of risk by employé, see Master and Servant, §§ 217, 219.

ATTACHMENT.

See Execution.

Effect of proceedings in bankruptcy, see Bankruptcy, §§ 164-207.

ATTORNEY AND CLIENT.

Attorneys in fact, see Principal and Agent.

IV. COMPENSATION AND LIEN OF ATTORNEY.**(A) FEES AND OTHER REMUNERATION.**

In action for loss of or injuries of goods shipped, see Carriers, § 23.

(B) LIEN.

§ 182. Where certain attorneys for a non-resident insolvent contractor established a disputed debt against a solvent owner which inured to the benefit of the contractor's subcontractors and creditors, in a suit to enforce mechanics' liens the attorneys were entitled to an allowance for services out of the fund.—Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, Id.

§ 189. The proctor for libellant in a suit in admiralty brought in forma pauperis is not entitled to a judgment in his favor for a share of a sum paid under a settlement made by his client under Code Civ. Proc. N. Y. § 66.—O'Flaherty v. Hamburg-American Packet Co. (D. C.) 411.

AUTOMOBILES.

Duties on tires, see Customs Duties, § 26.

Injuries to occupants at railroad crossing, contributory negligence, see Railroads, § 328.

On streets, liabilities for injuries, see Municipal Corporations, § 706.

AVERAGE.

General average, see Shipping, § 193.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

Distress warrant against defaulting federal officer indicted for embezzlement and released on bail, see United States, § 44.

BAILMENT.

See Carriers, §§ 177, 186.

Rights of trustee in bankruptcy as to property held by bankrupt as payee, see Bankruptcy, § 140.

BANKRUPTCY.

State laws as rules of decision in federal courts in bankruptcy proceedings, see Courts, § 359.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(B) VOLUNTARY PROCEEDINGS.

§ 49. Recital of absence of the judge from the district in an order of reference in a voluntary bankruptcy proceeding *held* not subject to collateral attack.—Gilbertson v. United States (C. C. A.) 672.

§ 49. Under Rev. St. § 558 (U. S. Comp. St. 1901, p. 452), a deputy clerk of a federal District Court has power to make an order of reference on the filing of a voluntary bankruptcy petition.—Gilbertson v. United States (C. C. A.) 672.

§ 51. Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420), a voluntary bankrupt having filed a petition stating a cause for adjudication, a reference to and adjudication by the referee is not void, nor subject to collateral attack by contradiction or impeachment of the record.—Gilbertson v. United States (C. C. A.) 672.

(C) INVOLUNTARY PROCEEDINGS.

§ 57. A conveyance or transfer of property by a debtor with intent to hinder, delay, or defraud his creditors, or any of them, constitutes an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a (1), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), although he may have been solvent when the conveyance or transfer was made.—In re Larkin (D. C.) 100.

§ 60. Under Bankr. Act. July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), the making of a general assignment by a debtor constitutes an act of bankruptcy, although it is not valid for all purposes.—Canner v. Webster Tapper Co. (C. C. A.) 519.

§ 61. A corporate officer, such as a treasurer, cannot create an act of bankruptcy on the part of the corporation through admission, nor can his unauthorized admission be made effective by ratification by the board of directors.—In re Burbank Co. (D. C.) 719.

§ 76. The rule that creditors, who assent to a general assignment by their debtor, are in general estopped to join in a petition in bankruptcy against him, does not apply where they are induced to assent by his fraud or misrepresentation, and in such case they may repudiate the assignment and allege it as an act of bankruptcy.—Canner v. Webster Tapper Co. (C. C. A.) 519.

(D) WARRANT AND CUSTODY OF PROPERTY.

§ 114. Under Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), a federal District Court has power to appoint an ancillary receiver pending adjudication in another district in aid of such proceedings in order to preserve assets in the district of such ancillary appointment.—In re Dunseath & Son Co. (D. C.) 973.

§ 115. A federal District Court has no jurisdiction to stay the officers of the state court and order them to surrender a bankrupt's assets within the district to a receiver appointed in bankruptcy proceedings in another district, where the estate is being administered.—In re Dunseath & Son Co. (D. C.) 973.

§ 116. Where property which has come into the possession of a receiver in bankruptcy as a part of the bankrupt's estate has been taken from his possession by an adverse claimant either with or without his consent, the court of bankruptcy has power to protect its possession by summary order requiring the return of the property, or its proceeds if sold, and jurisdiction to adjudicate with respect to all claims thereto.—In re Rose Shoe Mfg. Co. (C. C. A.) 39.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF TRUSTEE IN GENERAL.

§ 139. Possession of a trustee in bankruptcy under an oil lessee pending a suit to cancel the lease, in which the lessors were successful, *held* that of a trespasser under claim of title.—In re St. Louis & Kansas Oil & Gas Co. (D. C.) 934.

§ 140. Sellers of merchandise to a bankrupt *held* not entitled to rescind the sale and recover the property because of the bankrupt's false financial statement, on which the sellers did not entirely rely in making the sale.—In re Sweeney (C. C. A.) 612.

§ 140. A contract under which goods were shipped by a manufacturer to a bankrupt for sale *held* one of bailment, and not of conditional sale, on which the manufacturer was entitled to reclaim the goods unsold from the bankrupt's

trustee.—*Franklin v. Stoughton Wagon Co.* (C. C. A.) 857; *In re Franklin, Id.*

§ 140. The trustee of a bankrupt, who held patented articles which he was authorized to sell only under the terms of a license contract, held also bound by such contract.—*In re S. Spitzel & Co.* (D. C.) 156.

§ 140. Where the trustee of a bankrupt oil lessee operated the wells pending a suit by the lessors to cancel the lease in which they were successful, the lessors held not entitled to the balance of the proceeds of the oil extracted by the trustee.—*In re St. Louis & Kansas Oil & Gas Co.* (D. C.) 934.

§ 140. Under Civ. Code Ga. §§ 2776, 2777, a conditional contract of sale, neither witnessed nor recorded, held invalid as against the buyer's trustee in bankruptcy.—*In re Burke* (D. C.) 994.

§ 140. A conditional sale contract, contemplating that the buyer should resell the property and be accountable for the proceeds to the seller, held invalid as against the buyer's trustee in bankruptcy.—*In re Burke* (D. C.) 994.

(C) PREFERENCES AND TRANSFERS BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS.

§ 164. Payment to a creditor having an inchoate lien cannot operate as a preference.—*In re Lynn Camp Coal Co.* (C. C.) 998.

§ 164. A payment by a bankrupt, in order to constitute a preference, must have been made while the bankrupt was insolvent, and the creditor must have had reasonable cause to believe it was so intended.—*In re Lynn Camp Coal Co.* (C. C.) 998.

§ 188. The trustee of a bankrupt corporation, which took title to property expressly subject to certain chattel mortgages thereon, cannot attack the validity of such mortgages on the ground that they were not recorded in a county where one of the original mortgagors resided, as required by the state statute; his rights being measured by those of the bankrupt.—*In re Columbia Fireproof Door & Trim Co.* (D. C.) 159.

§ 192. Where a seller of mine material having a statutory lien under Ky. St. 1909, §§ 2487, 2490 (Russell's St. §§ 2399, 2402), received a chattel mortgage from the buyer shortly before its bankruptcy, the seller would be remitted to the statutory lien if the mortgage was invalid for any reason.—*In re Lynn Camp Coal Co.* (C. C.) 998.

§ 196. Whether a lien was obtained on personal property in the hands of a bankrupt on delivery of executions to the sheriff, and whether such lien was applicable to property held under conditional sale, was governed by the law of Illinois.—*Reardon v. Rock Island Plow Co.* (C. C. A.) 654.

§ 207. Under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564, 565 [U. S. Comp. St. 1901, pp. 3449, 3450]) § 67 b, c, f, execution liens rendered inoperative by the intervention of bankruptcy proceedings are retained for the

benefit of the trustee to obtain distribution among the whole body of creditors.—*Reardon v. Rock Island Plow Co.* (C. C. A.) 654.

(D) ADMINISTRATION OF ESTATE.

§ 223. Where a bankruptcy proceeding is referred to a referee, there is no authority for converting the referee into a special master nor for allowing him compensation as such under Bankr. Amend. Act, Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 (U. S. Comp. St. Supp. 1907, p. 1033).—*In re Sweeney* (C. C. A.) 612.

§ 250. The bankruptcy court has jurisdiction to make a call on the stockholders of a bankrupt corporation; but the hearing before the referee to take evidence on such question should be expressly limited to the question: Should there be a call on the shareholders of unpaid stock, and, if so, to what amount?—*In re Munger Vehicle Tire Co.* (C. C. A.) 910.

(E) ACTIONS BY OR AGAINST TRUSTEE.

§ 303. The burden is on a claimant of property, possession of which has passed from a bankrupt to his trustee, to establish his superior right thereto.—*In re Burke* (D. C.) 994.

§ 306. The decision of a District Court on the petition of an adverse claimant to reclaim property taken possession of by a trustee in bankruptcy is reviewable by the Circuit Court of Appeals on appeal under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431).—*Franklin v. Stoughton Wagon Co.* (C. C. A.) 857; *In re Franklin, Id.*

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 308. A surety for a bankrupt, who pays the debt after it has been proved in bankruptcy, is legally subrogated under Rev. Civ. Code La. art. 2162, to the rights of the original creditor, and may in the latter's name assert his claim to a privilege under the state statutes.—*Sessler v. Paducah Distilleries Co.* (C. C. A.) 44.

§ 328. Under Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), a court has no power to extend the time for proving claims beyond the year limited, merely because creditors were misled as to the value of assets and neglected to prove their claims.—*In re Peck* (C. C. A.) 48.

§ 345. The fact that a creditor of a bankrupt, having a claim entitled to priority, by mistake votes on the election of a trustee, in violation of Bankr. Act July 1, 1898, c. 541, § 56b, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), is not a waiver of his right to priority; nor does it estop him to assert it, where other creditors were not prejudiced.—*In re Ashland Steel Co.* (C. C. A.) 679.

§ 350. Claims proved against the estate of a bankrupt, which from their nature are entitled to priority under a state statute, may be allowed such priority, although it is not claimed until more than a year after the date of the adjudication, when the question of distribution of assets first arises.—*In re Ashland Steel Co.* (C. C. A.) 679.

§ 355. The rights of a chattel mortgagee of a bankrupt determined in the proceeds of property sold by the trustee, where the proceeds of the mortgaged and unmortgaged property, respectively, could not be definitely ascertained.—In re Goldsmith (D. C.) 779.

§ 363. A creditor of a bankrupt for the price of goods sold, by proving his debt as one without security, does not waive his right to assert a vendor's privilege against the goods, under Rev. Civ. Code La. art. 3227.—Sessler v. Paducah Distilleries Co. (C. O. A.) 44.

IV. COMPOSITION.

§ 387. A creditor of a bankrupt, who refused to accept securities tendered pursuant to a composition agreement confirmed by the court, and brought suit to establish a lien, held not entitled to have such securities impounded to await the result of the suit.—York Mfg. Co. v. Merchants' Refrigerating Co. (C. C.) 108.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 404. Failure of a bankrupt to apply for discharge in former proceedings held conclusive against his right to a discharge in a subsequent voluntary proceeding, except as to subsequent debts.—In re Von Borries (D. C.) 718.

§ 407. To debar a bankrupt from a discharge under Bankr. Act July 1, 1898, c. 541, § 14b(3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), on the ground of having obtained property on credit by means of a materially false statement in writing, it is not necessary that the property should have been obtained for himself or for his benefit, but if it was obtained on his credit as principal or surety, and such credit was induced by his materially false statement in writing made for the purpose, the case is within the statute.—In re Aldridge (D. C.) 93.

§ 407. A false statement in writing by means of which a bankrupt obtained property on credit, in order to be within Bankr. Act July 1, 1898, c. 541, § 14b(3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), need not necessarily have been written nor signed by the bankrupt himself nor by one who knew it to be false, but if the bankrupt obtained such statement from another with the design of so using it, and knowing, it to be materially false, used it for the purpose and with the effect of obtaining the property on credit, he is within the statute, and not entitled to a discharge, although the statement may have been made and signed in good faith by one who believed it to be true.—In re Aldridge (D. C.) 93.

§ 409. Under Bankr. Act July 1, 1898, c. 541, 14b (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), the failure of a bankrupt to keep correct books of account, "with intent to conceal his financial condition," debars him from the right to a discharge, whether his in-

tent was fraudulent or not.—In re Hanna (C. C. A.) 238.

§ 409. The failure of a partnership to enter in the books of the business indebtedness for money borrowed held to justify the refusal of a discharge to the partners for failure to keep proper books of account under Bankr. Act July 1, 1898, c. 541, § 14b (2) 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026).—In re Pomerantz & Hopkins (D. C.) 444.

§ 409. The gist of an objection to a bankrupt's discharge under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), that he destroyed his books or that he failed to keep books is the intent thereby to conceal his financial condition.—In re Brockman (D. C.) 1015.

§ 410. In view of the provisions of Bankr. Act July 1, 1898, c. 541, § 14a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), a bankruptcy court has no power to open an adjudication in a case to permit the filing of an application for discharge by the bankrupt, who neglected to make it within the time prescribed.—In re Morse (D. C.) 157.

§ 413. Creditors held not entitled to object to a referee's report on the ground that he did not pass on the bankrupt's exceptions in opposition to the bankrupt's discharge.—In re Brockman (D. C.) 1015.

§ 413. Where objections to a bankrupt's discharge are referred under General Bankruptcy Order 12, cl. 3 (18 Sup. Ct. vi), the referee properly refused to determine the sufficiency of the objections.—In re Brockman (D. C.) 1015.

§ 414. A bankrupt, having otherwise complied with the act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), must be discharged unless some one of the objections is sustained by the evidence.—In re Brockman (D. C.) 1015.

§ 415. A special master, to whom was referred a bankrupt's application for discharge, had power to permit the amendment of specifications of objection filed on behalf of a number of creditors, but signed and verified only by an agent of one, by allowing the same to be signed and verified by one of the other creditors.—In re Hanna (C. C. A.) 238.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) SUPERINTENDENCE AND REVISION.

§ 440. An order of a court of bankruptcy directing the turning over of money or property by a third person to a trustee cannot be reviewed by appeal under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), a petition for revision under section 24b being the only remedy.—In re Rose Shoe Mfg. Co. (C. C. A.) 39.

§ 444. A mistake in filing notice of a petition to revise under the bankruptcy act of 1867 in the Circuit instead of the District Court, as required

by the rules of the court, *held* not ground for dismissal.—In re Sweetser (C. C.) 1018.

(B) APPEAL.

§ 467. Findings of fact, made by a referee in bankruptcy and confirmed by the District Judge, are to be accepted by an appellate court, unless clearly erroneous.—Canner v. Webster Tapper Co. (C. C. A.) 519.

§ 467. Conclusion and report of a referee in bankruptcy on questions of fact concurred in by the trial court should not be set aside on appeal unless it plainly appears that the finding or conclusion was based on some error of law or plain mistake of fact.—In re Sweeney (C. C. A.) 612.

VIII. OFFENSES AGAINST BANKRUPT LAWS.

§ 491. A conviction of a bankrupt for concealing property from his trustee cannot be sustained without a bankruptcy adjudication.—Gilbertson v. United States (C. C. A.) 672.

BAR.

Of action by former adjudication, see Judgment, § 585.

BATTERY.

See Assault and Battery.

BELT LINE RAILROADS.

Construction of statutory requirements as to safety appliances on trains, see Railroads, § 229.

BENEFITS.

Acceptance of, as ground of estoppel, see Estoppel, § 72.

Acceptance of, as ground of ratification, see Principal and Agent, § 171.

BEQUESTS.

See Wills.

For instructions in civil actions, see Trial, § 260.

BILL OF DISCOVERY.

See Discovery, § 3.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF LADING.

Subject of insurance, see Insurance, § 159.

BILLS AND NOTES.**V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.****(D) BONA FIDE PURCHASERS.**

§ 358. One who takes commercial paper in payment of a debt due or past due or as collateral security is a purchaser for value in the ordinary course of business.—H. Scherer & Co. v. Everest (C. C. A.) 822.

§ 363. Bona fide holder of commercial paper obtained by the indorser to him by fraud from the maker can recover the amount paid for it under Code Iowa, § 3070.—H. Scherer & Co. v. Everest (C. C. A.) 822.

BONA FIDE PURCHASERS.

From buyer under conditional sale, see Sales, § 473.

Of bill of exchange or promissory note, see Bills and Notes, §§ 358, 363.

BONDS.

Bonds in legal proceedings, see Appeal and Error, § 458; Injunction, § 239.

Importers' bonds, see Customs Duties, § 85.

Of postmasters, see Post Office, § 7.

Sureties on bonds, see Principal and Surety.

BOOK MAKING.

Illegality of business of authorized by city ordinance but prohibited by state law as affecting right of recovery of license fees paid, see Action, § 4.

BOTTLES.

Duties on, see Customs Duties, § 25.

BRAKES.

On railroad trains, statutory regulations in general, see Railroads, § 229.

BRANDS.

Of foods, see Food, § 12.

BREACH.

Of contract, see Contracts, § 287.

BROKERS.

See Principal and Agent.

Insurance brokers, see Insurance, §§ 85, 103.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

§ 106. A shipper of coal *held* entitled to recover for breach of contract to transport certain coal, with right of recovery over on the latter's part against the transportation company agreeing to carrying out the contract.—Flannery v. New England Transp. Co. (D. C.) 897.

BUILDING CONTRACTS.

Compensation for extra work under, see Contracts, § 232.
Liability of surety, see Principal and Surety, § 82.

BURGLARY.

Breaking and entering post office, see Post Office, § 46.

II. PROSECUTION AND PUNISHMENT.

§ 41. To warrant a conviction for burglary, the evidence must be sufficient to prove affirmatively and beyond a reasonable doubt that there was such a breaking and entry as are necessary to constitute burglary, and evidence which leaves it wholly to conjecture as to the manner in which an entry was effected into a building in which a larceny was committed is insufficient.—*Sorenson v. United States* (C. C. A.) 785.

§ 42. The fact that a watch claimed to have been stolen at the time of a burglary and larceny for which defendant was on trial was found in a house occupied by his wife after his arrest and confinement in jail *held* not admissible against him.—*Sorenson v. United States* (C. C. A.) 785.

CANCELLATION OF INSTRUMENTS.

Setting aside fraudulent conveyances, see Fraudulent Conveyances, § 298.

CARGO.

See Shipping.

CARRIERS.

Carriage of goods by vessels, see Shipping, §§ 132, 141.

Carriage of passengers by vessels, see Shipping, § 167.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) IN GENERAL.

Act regulating charges as encroachment on judicial power, see Constitutional Law, § 55.

Encroachment of judiciary on Legislature, see Constitutional Law, § 70.

§ 12. Act Mo. Feb. 27, 1907 (Laws 1907, p. 170), fixing freight rates, and Act March 19, 1907 (Laws 1907, p. 171), known as the "two cent passenger fare act," *held* confiscatory and unconstitutional.—*St. Louis & S. F. R. Co. v. Hadley* (C. C.) 317.

§ 12. The true basis determined for dividing expenses of a railroad in handling state and interstate business.—*St. Louis & S. F. R. Co. v. Hadley* (C. C.) 317.

§ 12. Railroad property, properly built and properly managed, is entitled to earn an annual income of 6 per cent. on its fair valuation, and a statute fixing rates under which it cannot make such income is confiscatory and unconsti-

tutional.—*St. Louis & S. F. R. Co. v. Hadley* (C. C.) 317.

§ 12. It is not a ground for holding state statutes fixing maximum railroad rates invalid that they have been the cause of the discharge of a large number of railroad employes.—*St. Louis & S. F. R. Co. v. Hadley* (C. C.) 317.

§ 12. The fact that state statutes fixing railroad rates are not enforceable as to particular railroads because the rates as applied to such roads are not compensatory does not render them invalid as to other roads.—*St. Louis & S. F. R. Co. v. Hadley* (C. C.) 317.

§ 12. A railroad company *held* not entitled to charge rates on intrastate traffic sufficiently high to enable it to earn a specific rate on investments within the state in branch lines.—*In re Arkansas Railroad Rates* (C. C.) 720.

§ 18. A preliminary injunction having restrained the two-cent passenger rate enacted by Act Ark. Feb. 9, 1907 (Acts 1907, p. 10), and the Railroad Commission freight rates *pendente lite*, the court, as a condition to continuing the injunction, would permit the railroads to charge a three-cent passenger rate, and require a freight tariff not exceeding 33 $\frac{1}{3}$ per cent. higher than the rates enjoined.—*In re Arkansas Railroad Rates* (C. C.) 720.

§ 18. The effect of the preliminary injunction against the Arkansas freight rates and the two-cent passenger rate enacted by Act Ark. Feb. 9, 1907 (Acts 1907, p. 10), was to leave the railroads without any limitation as to freight rates, and to place in force again the three-cent passenger rate.—*In re Arkansas Railroad Rates* (C. C.) 720.

(B) INTERSTATE AND INTERNATIONAL TRANSPORTATION.

Denial of equal protection of the laws, see Constitutional Law, § 248.

Right of government to review by writ of error in action for penalties for violation of regulations by carrier, see Penalties, § 40.

§ 23. Hepburn Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]) § 7, authorizing an action by the holder of an interstate bill of lading for loss of goods against the initial carrier, *held* valid.—*Riverside Mills v. Atlantic Coast Line R. Co.* (C. C.) 987.

§ 26. Under the provision of section 15 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]), an order of the Interstate Commerce Commission relating to rates is not invalid because it fails to prescribe the time it shall remain in force, but in such case it remains in force for two years.—*New York Cent. & H. R. R. Co. v. Interstate Commerce Commission* (C. C.) 131.

§ 26. In determining whether a state statute regulating railroad rates is confiscatory with respect to a given railroad company doing both interstate and intrastate business, the only

question is whether its earnings under such rates from its intrastate business, after deducting the expenses properly chargeable thereto, are remunerative, taking its property within the state at a fair valuation, and its earnings from interstate or outside business are immaterial.—*St. Louis & S. F. R. Co. v. Hadley* (C. C.) 317.

§ 32. The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) held not to prohibit the giving of all preferences and advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable.—*Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.* (C. C. A.) 161.

§ 32. That a carrier to injure the business of a consignee subjects it to a prejudice or disadvantage which is neither undue nor unreasonable, does not create any cause of action therefor.—*Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.* (C. C. A.) 161.

§ 32. Evidence held insufficient to show acts of carrier compelling plaintiff to pay freight charges in advance subjected plaintiff to undue or unreasonable prejudice within the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).—*Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.* (C. C. A.) 161.

§ 32. A common carrier has the right under the common law to demand the prepayment of charges for freight of one and to give credit to another, and such right is not made unlawful by the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).—*Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.* (C. C. A.) 161.

§ 32. An interstate carrier held not to subject a consignee to an undue prejudice under Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) § 3, by exacting prepayment of charges for transportation.—*Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.* (C. C. A.) 161.

§ 32. An order of the Interstate Commerce Commission designed to remove a discrimination in rates is not invalid or inoperative because it does not go as far as it might, and fails to correct other discriminations found to exist.—*New York Cent. & H. R. R. Co. v. Interstate Commerce Commission* (C. C.) 131.

§ 32. The Interstate Commerce Commission in inserting in an order commanding carriers to desist from a discrimination, a condition for the carriers' benefit cannot be said to have acted outside of its province, even though the subject-matter of the condition be regarded as something subsequent to transportation.—*New York Cent. & H. R. R. Co. v. Interstate Commerce Commission* (C. C.) 131.

§ 32. An order of the Interstate Commerce Commission requiring railroad companies to cease and desist from according to flour milled in transit at interior points a lower rate for export than was imposed upon grain brought from interior points by a milling company to

New York City, and there ground into flour and other grain products and exported, held within the powers of the commission and valid on a motion for a preliminary injunction to restrain its enforcement.—*New York Cent. & H. R. R. Co. v. Interstate Commerce Commission* (C. C.) 131.

§ 32. Under the general powers given the Interstate Commerce Commission by the interstate commerce law (Act Feb. 4, 1887, c. 104, § 12, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3162]), and section 15 as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]), where it has found discrimination in rates to exist, it may prescribe a relative rate, instead of an absolute maximum rate of carriage.—*New York Cent. & H. R. R. Co. v. Interstate Commerce Commission* (C. C.) 131.

§ 32. Section 15 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]), does not require the commission, on a finding that a discrimination in rates exists and the making of an order prohibiting the same, to prescribe in detail regulations not necessary to remove the discrimination.—*New York Cent. & H. R. R. Co. v. Interstate Commerce Commission* (C. C.) 131.

§ 37. Where several shipments of live stock belonging to different owners are contained in the same train, and the stock is confined in violation of Act Cong. June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), each shipment, and not the train load, constitutes a separate offense.—*United States v. New York, C. & St. L. R. Co.* (C. C. A.) 699.

§ 37. Under Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), failure to publish and file rates by a carrier is subject to as severe penalty as failure to observe such rates after filing.—*United States v. Illinois Terminal R. Co.* (D. C.) 546.

§ 38. In an action against a carrier for violating the food and rest law, a request to charge that if the jury found certain conditions to exist they should find for defendant held properly refused.—*Houston & T. C. R. Co. v. United States* (C. C. A.) 895.

§ 38. By 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), transportation by rail of property moving in interstate commerce by a carrier which has not filed its rates for such service is a misdemeanor.—*United States v. Illinois Terminal R. Co.* (D. C.) 546.

II. CARRIAGE OF GOODS.

(I) CONNECTING CARRIERS.

Act authorizing recovery of attorney's fees as denying equal protection of the laws in action against connecting carrier, see Constitutional Law, § 248.

Concurrent jurisdiction of state and United States court in action against connecting carrier, see Courts, § 489.

§ 177. In an action by a shipper against an initial carrier for loss of freight shipped in interstate traffic under Hepburn Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]) § 7, the carrier may make any proper defense available to itself or the connecting carrier on whose road the loss occurred.—*Riverside Mills v. Atlantic Coast Line R. Co.* (C. C.) 987.

§ 186. Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), allowing to a shipper a reasonable attorney's fee against an initial carrier violating such act, in an action for loss of freight shipped in interstate commerce, *held valid*.—*Riverside Mills v. Atlantic Coast Line R. Co.* (C. C.) 990.

IV. CARRIAGE OF PASSENGERS.

(D) PERSONAL INJURIES.

§ 298. The mere fact that an electric street car started with a jerk after taking up a passenger, and that the passenger fell and was hurt, does not make out a case of negligence in starting the car, but the proof must go further and show that the start was unusually sudden or violent.—*Boston Elevated Ry. Co. v. Smith* (C. C. A.) 628.

§ 298. The giving of the starting signal by the conductor of an electric street car after a passenger had fully and fairly entered the vestibule *held* not negligence which rendered the company liable for the injury of the passenger by falling when the car started.—*Boston Elevated Ry. Co. v. Smith* (C. C. A.) 628.

(G) PASSENGERS' EFFECTS.

Limitation of liability in carriage by vessel, see Shipping, § 167.

CAUSE OF ACTION.

See Action.

CERTIFICATE.

Certified copies, see Evidence, § 348.
Of naturalization, see Aliens, § 68.

CHAMPERTY AND MAINTENANCE.

§ 1. Advising a minor to ignore a settlement of a cause of action which was not binding on him and to bring suit, or aiding him financially in doing so, does not constitute maintenance, where it does not appear that the person so aiding has any financial interest in the action.—*Champagne Lumber Co. v. Jahn* (C. C. A.) 510.

CHANCERY.

See Equity.

CHARGE.

By carrier, see Carriers, §§ 12, 26.
To jury in civil actions, see Trial, §§ 191–296.

CHARTER PARTIES.

See Shipping, §§ 49–58.

CHATTEL MORTGAGES.

III. CONSTRUCTION AND OPERATION.

(D) LIEN AND PRIORITY.

Rights of trustee in bankruptcy of corporation taking title to property subject to chattel mortgage, see Bankruptcy, § 188.

CHECKS.

See Bills and Notes.

Larceny of blank checks, see Larceny, § 5.

CHILDREN.

See Infants.

CHINESE.

Exclusion or expulsion, see Aliens, § 21.

CIRCUIT COURTS OF APPEALS.

See Courts, §§ 405, 407.

CITIES.

See Municipal Corporations.

CITIZENS.

See Aliens; Indians.

Citizenship ground of jurisdiction of United States courts, see Courts, §§ 315, 321; Removal of Causes, §§ 36–61.

Equal protection of laws, see Constitutional Law, §§ 213–248.

CIVIL RIGHTS.

See Constitutional Law, §§ 213–248.

CLAIMS.

Against estate of bankrupt, see Bankruptcy, §§ 308–363.

Mining claims, see Mines and Minerals, § 29.
Of patent, see Patents, §§ 165–178.

CLERKS OF COURTS.

Authority of deputy district court clerk to order reference in bankruptcy proceedings, see Bankruptcy, § 49.

COLLATERAL ATTACK.

On adjudication in bankruptcy, see Bankruptcy, § 51.

COLLATERAL UNDERTAKING.

See Guaranty.

COLLISION.

Laches affecting action to recover for, see Admiralty, § 34.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

§ 7. Rule 9 of the board of United States inspectors, approved by the Secretary of Commerce and Labor February 25, 1907, is invalid, as repugnant to the starboard hand rule.—The Pawnee (D. C.) 371; The Edgar F. Luckenbach, Id.

II. SAIL VESSELS MEETING OR CROSSING.

§ 34. A collision at night off the New Jersey coast between two meeting schooners on nearly parallel courses held, on conflicting evidence, due solely to the fault of one in changing her course so as to cross that of the other, when they were near together.—The Benjamin A. Van Brunt (D. C.) 103; The Alicia B. Crosby, Id.

IV. STEAM VESSELS AND SAIL VESSELS.

§ 43. In libel for a collision between a steamer and a schooner, where the evidence showed that the schooner held her course, but the steamer kept on and struck her near the stern, the usual rule requiring a steamer to avoid a sailing vessel should be applied.—The Bulgaria (D. C.) 457.

VI. VESSELS IN TOW.

§ 61. In a collision between a tug and tow, the tug held liable because not navigating on the starboard side of the channel.—The Little (D. C.) 393; The Mars, Id.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

§ 93. Where a tug, bound from Jersey City to Brooklyn, was struck on her port side by a steamer bound to sea from her port on the Manhattan side of East River, and the vessels were on crossing courses, the tug being the privileged and the steamer the burdened vessel, the steamer had no right to expect the tug would turn into the East River because a starboard hand situation existed, which was not changed by signals.—The Pawnee (D. C.) 371; The Edgar F. Luckenbach, Id.

COLOR OF TITLE.

To sustain adverse possession, see Adverse Possession.

COMBINATIONS.

See Conspiracy.

COMITY.

Between courts, see Courts, §§ 489, 508.

COMMERCE.

Carriage of goods and passengers, see Carriers; Shipping.

I. POWER TO REGULATE IN GENERAL.

Construction of regulations as to equipment of trains, see Railroads, § 229.

§ 1. "Commerce defined."—Riverside Mills v. Atlantic Coast Line R. Co. (C. C.) 937.

II. SUBJECTS OF REGULATION.

§ 27. Safety Appliance Act as amended March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885) held to apply to all cars and trains operated by a carrier of interstate commerce over an interstate highway.—Wabash R. Co. v. United States (C. C. A.) 1; Elgin, J. & E. Ry. Co. v. Same, Id.

§ 27. Where a car set apart for intrastate traffic is hauled in connection with interstate cars on interstate lines, it must be equipped in compliance with the safety appliance act (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]).—Wabash R. Co. v. United States (C. C. A.) 1; Elgin, J. & E. Ry. Co. v. Same, Id.

§ 34. A line of railway entirely within a state transporting property moving wholly by railroads from one state to another is within Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), regulating interstate commerce.—United States v. Illinois Terminal R. Co. (D. C.) 546.

III. MEANS AND METHODS OF REGULATION.

§ 61. State statutes fixing railroad rates are not unconstitutional, as regulations of interstate commerce, merely because indirectly, as through the effect of competition, they compel interstate railroad lines to reduce their charges.—St. Louis & S. F. R. Co. v. Hadley (C. C.) 317.

IV. INTERSTATE COMMERCE COMMISSION.

§ 88. The Interstate Commerce Commission is an administrative tribunal dealing with practical problems, and, so long as parties affected by its orders appear and are fully heard, it has power to grant such relief as the facts shown upon the investigation call for, even though such facts may be presented by evidence technically outside of the issues raised by the pleadings, but which were germane to the subject-matter of the investigation.—New York Cent. & H. R. R. Co. v. Interstate Commerce Commission (C. C.) 131.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

Interstate commerce commission, see Commerce, § 88.
To take testimony, see Depositions.

COMMISSIONERS.

In admiralty, see Admiralty, § 86.
In equity, see Equity, §§ 399-409.

COMMON CARRIERS.

See Carriers.

COMPENSATION.

For performance of contract, see Contracts, § 232.
Of corporate officers, see Corporations, § 308.
Of owner of tug for towage, see Towage, § 6.

COMPETENCY.

Of evidence in criminal prosecutions, see Criminal Law, § 394.
Of experts as witnesses, see Evidence, § 539½.
Of witnesses in general, see Witnesses, §§ 140, 159.

COMPETITION.

Unfair competition, see Trade-Marks and Trade-Names, § 73.

COMPLAINT.

In criminal prosecutions, see Indictment and Information.

COMPOSITIONS WITH CREDITORS.

In bankruptcy proceedings, see Bankruptcy, § 387.

COMPUTATION.

Of period of limitation, see Limitation of Actions, § 100.

CONCEALMENT.

Effect on limitation, see Limitation of Actions, § 100.

CONCURRENT JURISDICTION.

Of courts, see Courts, §§ 489, 508.

CONDITIONAL SALES.

See Sales, §§ 452-476.

CONDITIONS.

On granting or refusing injunction, see Injunction, §§ 153-154.
Precedent to action, see Action, § 4.

CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see Courts, §§ 489, 508.

CONNECTING CARRIERS.

See Carriers, §§ 177, 186.

CONSIDERATION.

Of guaranty, see Guaranty, § 16.
Right to question inadequacy of consideration for assignment of judgment in creditors' suit by assignee, see Creditors' Suit, § 18.

CONSPIRACY.

Evidence of acts and declarations of conspirators, see Criminal Law, § 424.

II. CRIMINAL RESPONSIBILITY.**(B) PROSECUTION AND PUNISHMENT.**

Proof of venue, see Criminal Law, § 564.

§ 47. Conspiracy to defraud the United States, under section 5440, Rev. St. (U. S. Comp. St. 1901, p. 3676), may be established circumstantially, without direct evidence or proof of a formal agreement.—Marrash v. United States (C. C. A.) 225.

§ 47. Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not sufficient to involve him; nor is mere suspicion that he was a party to the conspiracy.—Marrash v. United States (C. C. A.) 225.

§ 48. The questions whether a conspiracy existed, as charged in an indictment, and whether an act was done to effect the object of the conspiracy, are questions for the jury.—Marrash v. United States (C. C. A.) 225.

CONSTITUTIONAL LAW.

Provisions relating to commerce, see Commerce, § 1.

Provisions relating to jury, see Jury, § 14.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 47. In the determination by a court of the constitutionality and validity of railroad rate statutes of a state, the question of the consideration given to the subject by the Legislature before their passage is wholly immaterial.—St. Louis & S. F. R. Co. v. Hadley (C. C.) 317.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(A) LEGISLATIVE POWERS AND DELEGATION THEREOF.**

§ 55. The penalty provision of the Missouri two-cent passenger fare statute of February 27, 1907 (Laws 1907, p. 170), and of the freight rate statute of March 19, 1907 (Laws 1907, p. 171), are both void on the ground that the penalties fixed are excessive; but, being separable from the remainder of the statute in each case, their invalidity does not render the other provision invalid.—St. Louis & S. F. R. Co. v. Hadley (C. C.) 317.

(B) JUDICIAL POWERS AND FUNCTIONS.

§ 70. A court, though not authorized to make carrier's rates, can fix a maximum beyond which complainants, having obtained a preliminary injunction against alleged confiscatory rates, could not go during the pendency of the action, as a condition to the continuance of the injunction.—*In re Arkansas Railroad Rates* (C. C.) 720.

§ 72. The validity of the title of the United States to land purchased and occupied by it as a military fort, and the identification and definite boundaries of the land, are matters within the scope of the powers and duties of the executive department of the government to determine, and not subject to judicial scrutiny on the trial of a criminal case.—*United States v. Holt* (C. C.) 141.

X. EQUAL PROTECTION OF LAWS.

§ 213. The prohibition of the fourteenth amendment of the federal Constitution applies to every person who, by virtue of a public position under the state government, deprives another of any right protected by such amendment.—*Risley v. City of Utica* (C. C.) 737.

§ 229. A city ordinance imposing on a property owner a water and fire tax, without any corresponding benefit or an opportunity to be heard in resistance of such tax, was a violation of the fourteenth amendment of the federal Constitution.—*Risley v. City of Utica* (C. C.) 737.

§ 248. Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), allowing to a shipper a reasonable attorney's fee against an initial carrier violating such act, in an action for loss of freight shipped in interstate commerce, held valid.—*Riverside Mills v. Atlantic Coast Line R. Co.* (C. C.) 900.

XI. DUE PROCESS OF LAW.

§ 254. The prohibition of the fourteenth amendment of the federal Constitution applies to every person who, by virtue of a public position under the state government, deprives another of any right protected by such amendment.—*Risley v. City of Utica* (C. C.) 737.

§ 283. A city ordinance imposing on a property owner a water and fire tax, without any corresponding benefit or an opportunity to be heard in resistance of such tax, was a violation of the fourteenth amendment of the federal Constitution.—*Risley v. City of Utica* (C. C.) 737.

§ 306. A warrant of distress issued by the Treasury Department against the property and person of a defaulting public officer, under Rev. St. § 3625 et seq. (U. S. Comp. St. 1901, pp. 2418, 2419), upon which he is imprisoned, does not deprive him of his liberty without due process of law.—*United States v. Dillin* (C. C. A.) 813.

§ 318. The fact that an application to enter the United States by a person of Chinese de-

scent, but who claims citizenship by birth, is heard before officers of the Immigration Department, does not deprive him of due process of law, but such hearing must be conducted in good faith and the opportunity given him to produce evidence.—*In re Can Pon* (C. C. A.) 479.

CONSTRUCTION.

Of contracts, instruments or judicial acts and proceeding.

See Contracts, § 232; Guaranty, § 42; Statutes, §§ 184-241, 538; Stipulations, § 14.

Contract of sale, see Sales, § 77.

Instructions, see Trial, § 296.

Insurance policy, see Insurance, §§ 147, 159, 171.

Letters patent, see Patents, §§ 165-178.

CONTEMPT.

Disobedience of injunction against infringement of patent, see Patents, § 326.

II. POWER TO PUNISH AND PROCEEDINGS THEREFOR.

§ 60. The commission of a criminal contempt must be proven beyond a reasonable doubt.—*In re Cashman* (D. C.) 1008.

§ 60. The burden of proof of insanity, pleaded as a defense to a criminal contempt, is on the defendant.—*In re Cashman* (D. C.) 1008.

§ 60. In a prosecution for criminal contempt, evidence held insufficient to sustain a defense of insanity.—*In re Cashman* (D. C.) 1008.

§ 66. Where an order imposing a fine for violating an injunction is to reimburse the party injured, it can be reviewed only by appeal.—*Heller v. National Waistband Co.* (C. C. A.) 249.

CONTRACTS.

Liquidated damages or penalties, see Damages, § 85.

Operation and effect of champerty, see Champerty and Maintenance.

Operation and effect of customs or usages, see Customs and Usages.

Subrogation to rights or remedies of creditors, see Subrogation.

Contracts of particular classes of persons.

See Corporations, §§ 450, 482; Municipal Corporations, § 365.

Contracts relating to particular subjects.

See Patents, § 218.

Patented articles, see Patents, § 222.

Particular classes of express contracts.

See Bills and Notes; Deeds; Guaranty; Insurance; Mortgages; Partnership; Sales, § 77.

Affreightment, see Shipping, §§ 132, 141.

Agency, see Principal and Agent.

Charter parties, see Shipping, §§ 49-58.

Employment, see Master and Servant.

Stipulations in actions, see Stipulations.
Suretyship, see Principal and Surety.

Particular classes of implied contracts.

See Account Stated.

II. CONSTRUCTION AND OPERATION.

(F) COMPENSATION.

Estoppel of owner of building to deny authority of supervising architects to contract for extras, see Principal and Agent, § 171.

§ 232. A provision of a building contract requiring extras to be written in writing *held* waived.—Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, Id.

V. PERFORMANCE OR BREACH.

§ 287. An architect's final certificate *held* only prima facie evidence of performance by the contractor, so as to shift the burden on the owner to show that the certificate was untrue, and in what particulars.—Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, Id.

§ 287. Deductions from the amount due a contractor for the reconstruction of part of a hotel *held* insufficient to show that the contractor had not substantially performed.—Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, Id.

VI. ACTIONS FOR BREACH.

§ 329. Right of action for anticipatory breach of a contract, where one party to the agreement disables himself to perform, *held* not to govern actions on notes or contracts for the payment of money at times specified.—Moore v. Security Trust & Life Ins. Co. (C. C. A.) 496.

CONVEYANCES.

See Deeds; Mortgages.

By or to infants, see Infants, § 31.

In fraud of creditors, see Fraudulent Conveyances.

COPYRIGHTS.

III. INFRINGEMENT.

(B) ACTIONS.

Joinder of action to recover penalty with action for tort not connected with copyright, see Action, § 44.

Jurisdiction of federal court as dependent on amount in controversy, see Courts, § 329.

§ 69. The remedies provided by Rev. St. §§ 4965, 4970 (U. S. Comp. St. 1901, pp. 3414, 3416), for infringement of copyright of a map, etc., by injunction, and by the recovery of a penalty of \$1 from the infringer "for every copy of the same found in his possession," are exclusive, and an action for damages for infringement cannot be maintained other than one under such penalty provision, in which it must be alleged that copies were found in defendant's possession.—Ohman v. City of New York (C. C.) 953.

§ 85. A preliminary injunction denied in a suit for infringement of copyright.—Nixon v. Doran (C. C.) 575.

CORPORATIONS.

Injunctions affecting, see Injunction, § 72.

Particular classes of corporations.

See Municipal Corporations; Railroads; Street Railroads.

Insurance companies, see Insurance.

I. INCORPORATION AND ORGANIZATION.

§ 22. Where incorporators failed to file their articles in the places required by statute, they did not become a corporation de jure.—Harrill v. Davis (C. C. A.) 187.

§ 30. Projectors of a corporation *held* not individually liable to third parties for services and property purchased for the benefit of the corporation, with notice, where the corporation is subsequently organized and takes the benefit of such contracts.—Harrill v. Davis (C. C. A.) 187.

II. CORPORATE EXISTENCE AND FRANCHISE.

§ 34. One dealing with a corporation de facto may be estopped from denying its existence as a corporation de jure.—Harrill v. Davis (C. C. A.) 187.

§ 34. A person dealing with parties as a corporation, when they have no charter and no color of legal organization, *held* not estopped to deny that they constitute the corporation.—Harrill v. Davis (C. C. A.) 187.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) SUBSCRIPTION TO STOCK.

Jurisdiction of bankruptcy court, see Bankruptcy, § 250.

V. MEMBERS AND STOCKHOLDERS.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

§ 221. A charter or the filing of articles of incorporation under some law and user of the corporate franchise in good faith are indispensable to a de facto corporation exempting corporations from individual liability.—Harrill v. Davis (C. C. A.) 187.

§ 221. Liability of persons conducting business under an assumed name of a nonexistent corporation for debts incurred determined.—Harrill v. Davis (C. C. A.) 187.

§ 221. A corporation *held* not a corporation de facto so as to exempt the incorporators, before filing their articles, from individual liability.—Harrill v. Davis (C. C. A.) 187.

§ 225. Compliance by persons associating themselves together to conduct a business under a corporate name with the statutes exempts them from other individual liability than that prescribed by law for debts incurred after they

become a corporation authorized to do business as such.—Harrill v. Davis (C. C. A.) 187.

§ 253. Stockholders of a corporation between whom its property has been divided cannot set up as a defense to a creditors' suit brought to enforce a judgment against the corporation a matter which was litigated in the action or which would not be ground for setting aside the judgment in equity.—Champagne Lumber Co. v. Jahn (C. C. A.) 510.

VI. OFFICERS AND AGENTS.

(C) RIGHTS, DUTIES, AND LIABILITIES AS TO CORPORATION AND ITS MEMBERS.

§ 308. A binding contract by a corporation to pay a salary to an officer or director for services not incidental to his office may be made without any formal resolution of the board of directors.—In re Gouverneur Pub. Co. (D. C.) 113.

§ 309. Advances of money made to pay debts of a corporation by an officer *held* with implied authority from the directors, and the claim therefor provable against its estate in bankruptcy.—In re Gouverneur Pub. Co. (D. C.) 113.

§ 312. A purchaser of bonds of a corporation which had been pledged by the corporation for a debt and were sold by the pledgee at auction and bought for less than one-fourth their face value *held* not a bona fide holder and entitled to enforce the same against the corporation at par, where he was associated in the purchase with an officer of the corporation who was to share in the profits of the transaction.—Canton Roll & Machine Co. v. Rolling Mill Co. of America (C. C. A.) 465; Sturgiss v. Corbin, Id.; Farmers' Deposit Nat. Bank of Pittsburgh, Pa., v. Logan, Id.

VII. CORPORATE POWERS AND LIABILITIES.

(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.

§ 372. Corporation organized to buy and sell lands and securities and general merchandise *held* to have no power to build and operate cotton gins, or to subscribe for stock in another corporation for that purpose.—Harrill v. Davis (C. C. A.) 187.

§ 388. A corporation authorized to issue commercial paper *held* estopped from denying liability as against a purchaser for value of paper issued to a second corporation to sell, but which the second corporation indorsed in payment of its just debt or for cash.—H. Scherer & Co. v. Everest (C. C. A.) 822.

(D) CONTRACTS AND INDEBTEDNESS.

§ 450. A corporation issuing commercial paper in excess of its statutory limit *held* liable thereon.—H. Scherer & Co. v. Everest (C. C. A.) 822.

§ 482. Leave to intervene in a suit to foreclose a corporate mortgage denied to another corporation, whose bonds were included in the security *held* by the mortgagee, but whose rights

could not be prejudiced by their sale.—Morton Trust Co. v. Metropolitan St. Ry. Co. (C. C.) 941.

VIII. INSOLVENCY AND RECEIVERS.

Bankruptcy proceedings against corporations, see Bankruptcy, § 61.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 599. Where a corporation issues commercial paper in excess of the statutory limit, the remedy is ouster of the corporation, and not relief from liability on such paper.—H. Scherer & Co. v. Everest (C. C. A.) 822.

XII. FOREIGN CORPORATIONS.

§ 642. Sale of goods by solicitor, and delivery in state or territory by foreign corporation, *held* not doing business therein.—Bruner v. Kansas Moline Plow Co. (C. C. A.) 218.

COSTS.

In particular actions or proceedings.

See Admiralty, § 124.

Foreclosure, see Mortgages, § 581.

For infringement of patent, see Patents, § 325.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

In suit for infringement of patent, see Patents, § 325.

§ 40. Costs will be allowed on an offer of judgment, where the offer did not definitely state to whom the amount of the judgment is due.—Flannery v. New England Transp. Co. (D. C.) 397.

§ 60. In an equity suit the award of costs is discretionary, and where, through the faults of both parties, unnecessarily large and expensive record has been made, the costs will be divided as seems equitable.—St. Louis & S. F. R. Co. v. Hadley (C. C.) 317.

IV. SECURITY FOR PAYMENT.

Right of attorney to lien on cause of action brought in forma pauperis, see Attorney and Client, § 189.

V. AMOUNT, RATE, AND ITEMS.

§ 184. Army officers in the service of the United States, when attending court as witnesses for the government, are entitled to their expenses under Rev. St. § 850 (U. S. Comp. St. 1901, p. 655), and if the United States recovers judgment it is entitled to tax as costs the necessary expenses of such witnesses, regardless of whether the distance traveled was more or less than 100 miles.—United States v. National Surety Co. (D. C.) 314.

COUNTIES.

See Municipal Corporations.

COURTS.

Contempt of court, see Contempt.
 Judicial power, see Constitutional Law, §§ 70, 72.
 Province of court and jury, see Trial, § 191.
 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, § 14.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) RULES OF DECISION, ADJUDICATIONS, OPINIONS, AND RECORDS.

§ 90. A judgment of affirmance by an equally divided appellate court conclusively settles the rights of the parties in the particular litigation, but does not establish a precedent in the court which renders it, and does not control inferior tribunals in other cases.—*Westhus v. Union Trust Co. of St. Louis* (C. C. A.) 617.

§ 91. A judgment of affirmance by an equally divided appellate court conclusively settles the rights of the parties in the particular litigation, but does not establish a precedent in the court which renders it, and does not control inferior tribunals in other cases.—*Westhus v. Union Trust Co. of St. Louis* (C. C. A.) 617.

V. COURTS OF PROBATE JURISDICTION.

§ 200¼. A probate court has no plenary equitable jurisdiction to grant a widow relief from an election to take under her husband's will procured from her by one of the executors by an alleged fraudulent concealment.—*Eddy v. Eddy* (C. C. A.) 590.

VII. UNITED STATES COURTS.

(A) JURISDICTION AND POWERS IN GENERAL.

§ 255. United States Circuit Courts have only such jurisdiction as Congress has conferred on them, and, in addition, such as necessarily inheres in a court.—*Risley v. City of Utica* (C. C.) 737.

§ 280. A jurisdictional issue *held* presented in a suit in a federal court, which the court should determine before granting an injunction or a cross-bill between defendants restraining proceedings in a state court.—*National Hollow Brake Beam Co. v. Chicago Ry. Equipment Co.* (C. C. A.) 666.

§ 280. Federal court is bound to examine the case and refuse relief, unless jurisdictional elements affirmatively appear.—*A. B. Andrews Co. v. Puncture Proof Footwear Co.* (C. C.) 762.

(B) JURISDICTION DEPENDENT ON NATURE OF SUBJECT-MATTER.

§ 292. Where a trade-name was not registered under Act Cong. March 3, 1881, c. 138, 21

Stat. 502 (U. S. Comp. St. 1901, p. 3401), federal jurisdiction of a suit for unfair competition existed only in accordance with the rules governing ordinary suits at law or in equity.—*A. B. Andrews Co. v. Puncture Proof Footwear Co.* (C. C.) 762.

§ 292. Where a bill for unfair competition in the use of a trade-name did not allege its intended use in interstate commerce, the federal Circuit Court acquired no jurisdiction under Act Cong. March 3, 1881, c. 138, § 7, 21 Stat. 503 (U. S. Comp. St. 1901, p. 3403).—*A. B. Andrews Co. v. Puncture Proof Footwear Co.* (C. C.) 762.

(C) JURISDICTION DEPENDENT ON CITIZENSHIP, RESIDENCE, OR CHARACTER OF PARTIES.

§ 315. In a suit for unlawful competition, facts *held* insufficient to show the requisite diversity of citizenship, in order to sustain federal jurisdiction.—*A. B. Andrews Co. v. Puncture Proof Footwear Co.* (C. C.) 762.

§ 315. Sellers of the trade-name in controversy, prior to the payment of the price by way of royalty, *held* to have an actual interest in a suit by the buyer for alleged unfair competition.—*A. B. Andrews Co. v. Puncture Proof Footwear Co.* (C. C.) 762.

§ 321. An action for malicious prosecution by a citizen of Illinois against an alien insurance company was within the original jurisdiction of the federal Circuit Court sitting in Missouri.—*Carp v. Queen Ins. Co.* (C. C.) 782.

(D) JURISDICTION DEPENDENT ON AMOUNT OR VALUE IN CONTROVERSY.

§ 326. Under Act March 3, 1875, c. 137, § 1, 18 Stat. 470, Act March 3, 1887, c. 373, § 1, 24 Stat. 552, Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), diversity of citizenship is not required to establish federal jurisdiction, where the case arises under the Constitution or laws of the United States and the amount in controversy is over \$2,000; but if the case does not arise under such Constitution and laws, there must be both diversity of citizenship and the requisite jurisdictional amount.—*Risley v. City of Utica* (C. C.) 737.

§ 328. Where one sues on behalf of himself and all others of a class similarly situated, the aggregate interest of those who join in the suit, and not those of the whole class, constitute the matter in dispute.—*Risley v. City of Utica* (C. C.) 737.

§ 328. In a suit to restrain the collection of a city tax, the matter in dispute *held* the amount of the tax levied against complainant, which being less than \$2,000, the case was not within the jurisdiction of the federal court.—*Risley v. City of Utica* (C. C.) 737.

§ 329. A complaint in an action of tort *held* to state a cause of action for nominal damages only which was not within the jurisdiction of a federal court.—*Ohman v. City of New York* (C. C.) 953.

(E) PROCEDURE, AND ADOPTION OF PRACTICE OF STATE COURTS.

§ 341. Under the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), a federal court may, in its discretion, reject collateral or subordinate provisions of the state practice, pleadings, or forms, which tend to obstruct the administration of justice in a particular case presenting unusual features, without making any standing rule.—*Hein v. Westinghouse Air Brake Co.* (C. C.) 766.

§ 343. The North Carolina statute expressly permitting a pendente lite assignee to continue the litigation in the name of his assignor will be followed in the federal court sitting in that state.—*City of Greensboro v. Southern Pav. & Const. Co.* (C. C. A.) 880.

§ 343. Leave cannot be granted by a federal court to amend a bill by bringing in a new party, which, whether nominally made a complainant or defendant, must be aligned for jurisdictional purposes in opposition to a citizen of the same state, and whose joinder would defeat the jurisdiction of the court, which rests alone on diversity of citizenship.—*Delaware, L. & W. R. Co. v. Jersey City* (C. C.) 128.

§ 347. Pleadings in a federal court in an action at law, which are not in the form of those required by the state practice, but which are substantially a compliance with it, are good.—*Hein v. Westinghouse Air Brake Co.* (C. C.) 766.

§ 352. Under the conformity act (Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684]), it was error for a federal court sitting in Illinois, in an action tried to a jury, after announcing its decision sustaining a motion for a directed verdict, to refuse plaintiff's application for leave to take a nonsuit.—*Meyer v. National Biscuit Co.* (C. C. A.) 906.

§ 354. The Pennsylvania practice act of April 22, 1905 (P. L. 286), relating to the entry of judgment non obstante veredicto, is adaptable to the federal courts, and Circuit Courts within the state are required to follow it by Rev. St. § 914 (U. S. Comp. St. 1901, p. 684).—*Fries-Breslin Co. v. Bergen* (C. C.) 360.

§ 356. Proceedings preparatory to obtaining review of rulings of United States courts are regulated by the statutes of the United States, and, if they are silent, by the common law.—*Ghost v. United States* (C. C. A.) 841.

(F) STATE LAWS AS RULES OF DECISION.

§ 359. The validity of conditional sales, under which a seller of goods to a bankrupt claims the right to retake the same, must be determined in accordance with the law of the state where the sales are made.—*In re Burke* (D. C.) 994.

§ 359. Federal courts, in the exercise of bankruptcy jurisdiction, in determining property rights created by state statute, generally follow the rulings of the highest state court.—*In re Burke* (D. C.) 994.

§ 371. Where a federal court has jurisdiction of the parties and subject-matter, it cannot re-

fuse to exercise such jurisdiction because plaintiff's right depends solely on the construction or validity of a state statute.—*F. W. Cook Brewing Co. v. Garber* (C. C.) 942.

§ 372. Rev. St. § 721 (Judiciary Act Sept. 24, 1789, c. 20, § 34, 1 Stat. 92 [U. S. Comp. St. 1901, p. 581]), making the laws of the several states rules of decision in common-law trials in the United States courts, is limited to local statutes and usages.—*Russell v. Grigsby* (C. C. A.) 577.

§ 372. Where the validity of a Tennessee assignment of a life insurance policy to be determined by a federal court sitting in that state does not depend on local statute or usage, the court must exercise an independent judgment, though leading to a different conclusion than that reached by a state court.—*Russell v. Grigsby* (C. C. A.) 577.

§ 372. Federal courts must exercise their independent judgment on questions of general jurisprudence, of commercial law, and those arising under the Constitution and laws of the United States.—*H. Scherer & Co. v. Everest* (C. C. A.) 822.

§ 372. The right of a party to an executory contract, on the refusal of the other party to perform, to sue for and recover his entire damages for the breach, without waiting for the expiration of the time for performance, is a question of general law, upon which the federal courts are not bound by the rule of the state courts.—*H. T. Smith Co. v. Minetto-Meriden Co.* (C. C.) 777.

(G) SUPREME COURT.

§ 394. Where the decision of a case in the state court depends on the construction of an act of Congress, and the decision is against some right claimed thereunder, it may be reviewed on a writ of error by the Supreme Court of the United States.—*Miller v. Illinois Cent. R. Co.* (C. C.) 932.

(H) CIRCUIT COURTS OF APPEALS.

§ 405. The fact that constitutional questions were involved in a case in a Circuit or District Court does not deprive the Circuit Court of Appeals of jurisdiction to entertain an appeal therein, where other questions also were involved and determined.—*In re Can Pon* (C. C. A.) 479.

§ 407. An application to modify an ex parte interlocutory order appointing a receiver held to constitute a hearing on such order, within Act Cong. April 14, 1906, c. 1627, § 7, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 209); and hence defendant's appeal, not applied for until more than 30 days after the denial of such application, was too late.—*Root v. Mills* (C. C. A.) 688.

(J) DISTRICT COURTS.

Jurisdiction to set aside certificate of naturalization illegally granted by state court, see *Aliens*, § 68.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) STATE COURTS AND UNITED STATES COURTS.

§ 489. A federal court will take jurisdiction of a suit by a widow, a citizen of one state, against the executors of her husband's estate located in another state, to set aside an election to take under the husband's will, and for an award of her statutory distributive share.—*Eddy v. Eddy* (C. C. A.) 590.

§ 489. Where the federal court had jurisdiction to set aside a widow's election to take under her husband's will and allow her statutory estate, it would also take an account and determine the exact amount the widow was entitled to receive.—*Eddy v. Eddy* (C. C. A.) 590.

§ 489. The federal courts should not decline on the ground of comity to take jurisdiction of a suit in equity involving rights under the Constitution of the United States, where its determination depends upon questions of fact, since, if brought in a state court, the case can only be reviewed by the Supreme Court of the United States on writ of error, where findings of fact made by the state court are conclusive.—*St. Louis & S. F. R. Co. v. Hadley* (C. C.) 317.

§ 489. An action under section 20 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), as amended by the Hepburn Act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]), by the holder of a through bill of lading, issued in compliance with such act, to recover for loss or damage to a shipment, may be brought in a state court.—*Smeltzer v. St. Louis & S. F. R. Co.* (C. C.) 420.

§ 489. Federal Circuit Courts in the exercise of their concurrent jurisdiction for practical purposes are courts of the state in which they sit to enforce the laws of the state as well as the laws of the United States.—*F. W. Cook Brewing Co. v. Garber* (C. C.) 942.

§ 508. A bill in a stockholder's suit in a federal court held to give such court exclusive jurisdiction over the property of the corporation, which it could protect by injunction restraining a subsequent suit in a state court by the parties or their privies.—*Harding v. Corn Products Re-Co.* (C. C. A.) 658.

CREDITORS.

See Bankruptcy; Creditors' Suit; Fraudulent Conveyances.

Subrogation to rights of creditor, see Subrogation.

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see Fraudulent Conveyances, § 298.

§ 18. In a creditors' suit by an assignee of a judgment, the adequacy of the consideration paid by him for the same cannot be questioned

by the defendants.—*Champagne Lumber Co. v. Jahn* (C. C. A.) 510.

CRIMINAL LAW.

Indictment, information, or complaint, see Indictment and Information.
Penalties, see Penalties.

Offenses by particular classes of persons.

United States officers, see United States, § 52.

Particular offenses.

See Assault and Battery, §§ 64, 96; Burglary; Conspiracy, §§ 47, 48; Contempt; Larceny.

Against bankrupt laws, see Bankruptcy, § 491.
Against customs laws, see Customs Duties, § 132.

Against internal revenue laws, see Internal Revenue, § 47.

Against postal laws, see Post Office, §§ 46-51.
Failure of carrier to file rates, see Carriers, § 38.

X. EVIDENCE.

In contempt proceedings, see Contempt, § 60.

(A) JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.

Burden of proof in prosecution for criminal contempt, see Contempt, § 60.

§ 304. Conspiracy to defraud the customs revenue may be established, without proof that the imports involved were dutiable. The courts can take judicial notice of the fact that the laws make such imports dutiable.—*Marrash v. United States* (C. C. A.) 225.

(B) FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTÆ.

§ 338. The rule allowing a wide range of inquiry in criminal cases dependent on circumstantial evidence does not render unrelated incompetent incidents and circumstances admissible, nor authorize a conviction thereon because of their number.—*Sorenson v. United States* (C. C. A.) 785.

§ 348. The mental tendency of a person to commit a crime, as evidenced by weapons or tools in his possession, cannot be shown to convict him of a prior crime.—*Sorenson v. United States* (C. C. A.) 785.

(D) MATERIALITY AND COMPETENCY IN GENERAL.

§ 394. It is no objection to the admissibility of evidence in a criminal case that it was obtained by means of a search warrant illegally issued or executed.—*Hartman v. United States* (C. C. A.) 30.

(E) BEST AND SECONDARY AND DEMONSTRATIVE EVIDENCE.

§ 404. On the trial of a defendant charged with breaking and entering a building used in part as a post office, weapons and implements found on his person when arrested, 18 days after the burglary and 19 miles distant from the place, were not admissible in evidence

against him, where it was not shown that such articles were used when the burglary was committed, nor that defendant was in the vicinity at or near the time of its commission.—*Sorenson v. United States* (C. C. A.) 785.

(F) ADMISSIONS, DECLARATIONS, AND HEARSAY.

§ 417. On the trial of a criminal case, where conspiracy is not charged, testimony is not competent against the defendant to show a statement made by some one of a party which included defendant, where the witness admits that he does not know which one made the statement, or whether it was heard by or assented to by defendant.—*Sorenson v. United States* (C. C. A.) 785.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

§ 424. Letters written by one of two persons charged with crime, while they were confined in jail, held not admissible against his codefendant, not shown to have seen or assented to the same.—*Sorenson v. United States* (C. C. A.) 785.

(M) WEIGHT AND SUFFICIENCY.

In particular criminal prosecutions.

See Burglary, §§ 41–42; Conspiracy, § 47; Contempt, § 60.

For breaking and entering post office, see Post Office, § 49.

For offense against internal revenue laws, see Internal Revenue, § 47.

In prosecution for criminal contempt, see Contempt, § 60.

§ 561. The rule that, to warrant conviction, the evidence must exclude every reasonable hypothesis of innocence, is the same as that guilt must be shown beyond a reasonable doubt. Without such hypothesis, there cannot be such doubt.—*Marrash v. United States* (C. C. A.) 225.

§ 564. Conspirators may be found to have conspired in the judicial district in which they were tried, when shown to have been in the district prior to and at the time of the crime, without evidence that they had been together outside of the district.—*Marrash v. United States* (C. C. A.) 225.

XII. TRIAL.

(F) PROVINCE OF COURT AND JURY IN GENERAL.

In prosecution for contempt, see Conspiracy, § 48.

§ 762. It is not error for a federal judge to express his opinion on the facts, if he instructs that the decision of questions of fact is for the jury.—*Keller v. United States* (C. C. A.) 697.

(G) NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS.

Sufficiency of instructions in prosecution for assault, see Assault and Battery, § 96.

(J) CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 853. The verdict of a jury in a criminal case in a federal court cannot be impeached on the ground that the court, in accordance with its settled practice, permitted the jurors to separate during adjournments and recesses while the trial was proceeding, or refused to exclude the jurors from the courtroom during the argument and decision of motions and questions of law.—*United States v. Holt* (C. C.) 141.

§ 854. The verdict of a jury in a criminal case in a federal court cannot be impeached on the ground that the court, in accordance with its settled practice, permitted the jurors to separate during adjournments and recesses while the trial was proceeding, or refused to exclude the jurors from the courtroom during the argument and decision of motions and questions of law.—*United States v. Holt* (C. C.) 141.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 957. Where the jurors on the trial of a criminal case on each adjournment were properly admonished against receiving outside impressions of the case, and there is no reason to suppose they failed to observe these instructions, the court will not, on motion of a defendant after conviction, institute an inquisition against them by bringing them into court to be examined for the purpose of eliciting facts to impeach their verdict.—*United States v. Holt* (C. C.) 141.

§ 970. While objections to an indictment should be raised by demurrer in advance of the trial, they may nevertheless be raised by motion in arrest of judgment.—*Morris v. United States* (C. C. A.) 682.

§ 970. The fact that incompetent evidence which was excluded on the trial of a criminal case may have been considered by the grand jury, which found the indictment, is not ground for arrest of judgment on a verdict of guilty which is amply supported by competent evidence.—*United States v. Holt* (C. C.) 141.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

§ 1056. Where there were no exceptions to the charge of the court in a criminal case, and no error is assigned thereon, the charge will not be considered by the appellate court.—*Hardesty v. United States* (C. C. A.) 25.

§ 1059. An assignment that the court erred in peremptorily directing a verdict against defendant could not be reviewed, in the absence of an exception to the whole charge.—*Houston & T. C. R. Co. v. United States* (C. C. A.) 895.

§ 1059. An assignment charging error in the whole charge cannot be reviewed on an exception to a single instruction.—*Houtson & T. C. R. Co. v. United States* (C. C. A.) 895.

(E) ASSIGNMENT OF ERRORS AND BRIEFS.

§ 1129. An assignment that the trial court refused to permit defendant's motion for a new trial to be set for argument, but overruled it without any consideration, *held* not sustained.—*Keller v. United States* (C. C. A.) 697.

(F) DISMISSAL, HEARING, AND RE-HEARING.

§ 1132. The hearing on a writ of error in a criminal case expedited by dispensing with the printing of the record and briefs, where serious objection was made to the enlargement of the defendant on bail.—*Morse v. United States* (C. C. A.) 49.

(G) REVIEW.

§ 1144. On a writ of error, when there is a general verdict and judgment upon an indictment containing several counts, the presumption is that the judgment was rendered on the good counts, if any, unless something to the contrary appears in the record.—*Hardesty v. United States* (C. C. A.) 25.

§ 1144. On a writ of error, when there is a general verdict and judgment upon an indictment containing several counts, the presumption is that the judgment was rendered on the good counts, if any, unless something to the contrary appears on the record.—*Hartman v. United States* (C. C. A.) 30.

§ 1172. Defendants, convicted on a number of counts of violations of Oleomargarine Act Aug. 2, 1886, c. 840, § 6, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230), and given a sentence less than might have been imposed under either count, *held* not prejudiced by instructions relating solely to other counts of the indictment.—*Hartman v. United States* (C. C. A.) 30.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1218. Under Rev. St. §§ 1042, 5296 (U. S. Comp. St. 1901, pp. 724, 3608), a federal prisoner sentenced to imprisonment and to the payment of a fine, or a fine and costs, may be retained after completion of his imprisonment term in the same institution where the sentence was served until the fine assessed is paid, or he applied to take the poor debtor's oath after serving 30 days' additional time.—*Haddox v. Richardson* (C. C. A.) 635.

CROPS.

See Agriculture.

CROSS-EXAMINATION.

See Witnesses, § 268.

CUSTODY.

Of jury, see Criminal Law, §§ 853, 854.

CUSTOMS AND USAGES.

§ 15. In an action on a marine insurance contract consisting in writing only of a certificate

and rider, parol evidence *held* admissible to show that by custom such certificate was understood to refer to a policy of the standard form in use by the company which was considered a part of the contract.—*St. Paul Fire & Marine Ins. Co. v. Balfour* (C. C. A.) 212.

CUSTOMS DUTIES.**I. VALIDITY, CONSTRUCTION, AND OPERATION OF CUSTOMS LAWS IN GENERAL.**

Legislative adoption of judicial construction of statutes, see Statutes, § 225¾.

§ 19. A tariff enumeration of an article according to its use as "saw plates" includes articles that, though intended for other uses, have the characteristics of the article designated.—*Hermann Boker & Co. v. United States* (C. C.) 573.

II. GOODS SUBJECT TO DUTY, RATE, AND AMOUNT.

§ 25. Under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, pars. 99, 100, 30 Stat. 156, 157 (U. S. Comp. St. 1901, p. 1633), relating to "bottles" and "blown glassware," respectively, blown glass chemical flasks are dutiable under the latter provision.—*Eimer & Amend v. United States* (C. C. A.) 240.

§ 25. Earthenware, to which a single color glaze has been added, is "decorated" and "stained," within the meaning of Tariff Act July 24, 1897, c. 11, sec. 1, Schedule B, par. 96, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633).—*United States v. L. Straus & Co.* (C. C.) 569.

§ 25. Mexican onyx is dutiable as "onyx," rather than as "marble," under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635).—*Blochman Banking Co. v. Blake* (C. C.) 572.

§ 26. Automobile tires, imported in the same crate with an automobile car, though unattached, and perhaps never to be attached, are dutiable as a part of the automobile.—*United States v. Auto Import Co.* (C. C. A.) 242; *United States v. Archer & Co.*, Id.

§ 26. The provision for "tubes finished," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641), includes steel cylinders, 19 feet long and 4 feet in diameter and 35 feet long and 8 feet in diameter, respectively, used for storing gas.—*United States v. Knauth, Nachod & Kuhne* (C. C. A.) 539.

§ 26. Wire, made by inserting an iron wire in a hollow tube of nickel and drawing the whole down until the nickel becomes welded to the iron core, is "coated" wire, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1639).—*Hermann Boker & Co. v. United States* (C. C.) 464.

§ 26. Circular plates, which, though imported for other uses, have the same characteristics as saw plates, are dutiable as "circular saw plates," under Tariff Act July 24, 1897, c. 11, §

1, Schedule C, par. 141, 30 Stat. 162 (U. S. Comp. St. 1901, p. 1640).—Hermann Boker & Co. v. United States (C. C.) 573.

§ 27. In Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 (U. S. Comp. St. 1901, p. 1647), providing for "furniture of wood, * * * and manufactures of wood, or of which wood is the component material of chief value," the provision for "furniture of wood" is not qualified by the chief value clause, and includes furniture whose framework and principal bulk are of wood, though not of chief value.—O. G. Hempstead & Son v. United States (C. C.) 450.

§ 27. The provision for "furniture of wood" in Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 (U. S. Comp. St. 1901, p. 1647), does not require that wood shall be the component of chief value; and upholstered furniture, whose frames are of wood, but which is not composed in chief value of wood, is dutiable under that provision.—A. J. Woodruff & Co. v. United States (C. C.) 452.

§ 30. Truffles are not "vegetables," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649).—Von Bremen, MacMonnies & Co. v. United States (C. C. A.) 889; Mouquin Wine & Restaurant Co. v. United States, Id.

§ 30. In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 275, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), the provision for "meats of all kinds, prepared or preserved," includes cooked canned poultry and game, as well as goose livers prepared as *pâté de foie gras*.—James P. Smith & Co. v. United States (C. C.) 462.

§ 30. The cooked canned meat of poultry and game, and goose livers prepared as *pâté de foie gras*, are not dutiable, either directly or by similitude, as "poultry * * * dressed," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652).—James P. Smith & Co. v. United States (C. C.) 462.

§ 33. Embroidery is ornamental, rather than merely useful, needlework; and articles stitched on the edge with needlework of the plainest kind, to prevent raveling, are not dutiable under Tariff Act July 24, 1897, c. 11, sec. 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), relating to "embroidery" and articles "embroidered."—United States v. Waentig (C. C.) 570.

§ 35. The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670), that manufactures containing wool shall be classified as manufactures of wool is restricted to that paragraph, or at most to the schedule, and does not apply to furniture enumerated in another schedule, though it is in part of wool.—A. J. Woodruff & Co. v. United States (C. C.) 452.

§ 37. Hand-painted panels, with a calendar of trifling value affixed, are "paintings," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U.

S. Comp. St. 1901, p. 1678).—A. A. Vantine & Co. v. United States (C. C.) 562.

§ 38. Equinine, which, though not chemically a salt, is a derivative of cinchona bark that preserves its essential medicinal element, is free of duty under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 647, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1687), relating to "salts of cinchona bark."—United States v. Merck & Co. (C. C. A.) 244.

§ 38. Carnauba wax substitute, compounded of a vegetable and a mineral wax, and being apparently a waxy substance used as other waxes are used, is classifiable as "wax, vegetable or mineral," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 695, 30 Stat. 202 (U. S. Comp. St. 1901, p. 1689).—United States v. Charles Morningstar & Co. (C. C. A.) 541.

§ 38. So-called mineral waxes, not being waxes in the chemical sense, the term "wax, * * * mineral," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 695, 30 Stat. 202 (U. S. Comp. St. 1901, p. 1689), must have been used in its popular sense.—United States v. Charles Morningstar & Co. (C. C. A.) 541.

§ 38. An article composed of a vegetable and a mineral wax may be classified as "wax, vegetable or mineral."—United States v. Charles Morningstar & Co. (C. C. A.) 541.

§ 38. In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 545, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683), relating to "diamonds * * * not advanced, * * * including miners' * * * diamonds," the provision for miners' diamonds is not qualified by the preceding language.—Sullivan Mach. Co. v. United States (C. C.) 561.

§ 38. "Including" is used as a term of addition, and not of specification, in Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683).—Sullivan Mach. Co. v. United States (C. C.) 561.

§ 44. Truffles in tins are dutiable as mushrooms in tins, by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649).—Von Bremen, MacMonnies & Co. v. United States (C. C. A.) 889; Mouquin Wine & Restaurant Co. v. United States, Id.

IV. ENTRY AND APPRAISAL OF GOODS, BONDS, AND WAREHOUSES.

§ 85. If he introduced evidence before the Board of General Appraisers, an importer is not precluded from introducing new evidence on appeal, under Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 (U. S. Comp. St. 1901, § 1933).—Wm. Wolf & Co. v. United States (C. C.) 970.

VII. VIOLATIONS OF CUSTOMS LAWS.

Judicial notice of customs laws, see Criminal Law, § 304.

Proof of venue in prosecution for offense against customs laws, see Criminal Law, § 564.

§ 132. Until the penalty of forfeiture has been declared, no application for remission of that penalty can be instituted, under Act June 22, 1874, c. 391, § 17, 18 Stat. 189 (U. S. Comp. St. 1901, p. 3606).—United States v. 1507¹/₁₂ Dozen Long Gloves (D. C.) 1010.

§ 132. Though charged with notice of proceedings for forfeiture, a person is not debarred from applying for remission of the penalty, under Act June 22, 1874, c. 391, § 17, 18 Stat. 189 (U. S. Comp. St. 1901, p. 3606), through failure to appear at the forfeiture proceedings.—United States v. 1507¹/₁₂ Dozen Long Gloves (D. C.) 1010.

DAMAGES.

For injuries to trespasser on train, see Railroads, § 277.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) DIRECT OR REMOTE, CONTINGENT, OR PROSPECTIVE, CONSEQUENCES OR LOSSES.

§ 22. In an action for breach of an executory contract for the hiring of teams from plaintiff for a stated term, an excessive price alleged to have been paid by plaintiff to defendant for a teaming outfit in reliance on such contract does not constitute an element of the damages recoverable.—H. T. Smith Co. v. Minetto-Meriden Co. (C. C.) 777.

§ 28. It is the rule of the federal courts that, upon the absolute refusal of one party to an executory contract to perform, the other party may at once sue for and recover the damages which he has already sustained, and also such as he can show by competent evidence with reasonable certainty will result to him thereafter by reason of the breach.—H. T. Smith Co. v. Minetto-Meriden Co. (C. C.) 777.

(B) AGGRAVATION, MITIGATION, AND REDUCTION OF LOSS.

Bill of lading giving carrier, in case of loss, the benefit of insurance on property, see Shipping, § 132.

(C) INTEREST, COSTS, AND EXPENSES OF LITIGATION.

Element of damages in actions against carrier for loss of goods, see Carriers, § 23.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 85. Where a general contractor was delayed in part by independent contractors from the owner for part of the work, the general contractor would be relieved from liability for a contract penalty for delay.—Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, Id.

§ 85. Where delays in installing certain machinery, etc., were caused by mutual default, the penalties will be regarded as waived.—Vilter Mfg. Co. v. Tygart's Valley Brewing Co. (C. C.) 1002.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132. A verdict of \$7,500 for loss of a limb, amputated near the hip joint, held not so excessive as to indicate passion or prejudice.—Corn Products Refining Co. v. King (C. C. A.) 892.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(C) PROCEEDINGS FOR ASSESSMENT.

§ 216. In an action by a servant for a personal injury resulting in the loss of an eye, an instruction which permitted the jury, in estimating plaintiff's damages, to consider "humiliation resulting from the disfigurement from the loss of the eye" was not erroneous.—United States Express Co. v. Wahl (C. C. A.) 848.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(A) RIGHT OF ACTION AND DEFENSES.

§ 31. An administrator appointed in another state cannot maintain an action in New York to recover damages for the wrongful death of his intestate without taking out ancillary letters in that state, there being no statute of the state authorizing foreign administrators as such to sue therein.—J. B. & J. M. Cornell Co. v. Ward (C. C. A.) 51.

DEBTOR AND CREDITOR.

See Bankruptcy; Creditors' Suit; Fraudulent Conveyances.

DECEDENTS.

Estates, see Executors and Administrators. Testimony as to transactions with persons since deceased, see Witnesses, §§ 140, 159.

DECLARATION.

Of intention to become citizen, see Aliens, § 68.

DECLARATIONS.

As evidence in criminal prosecutions, see Criminal Law, § 417.

DECREE.

In equity, see Equity, § 427.

DEEDS.

By or to infant, see Infants, § 31. In fraud of creditors, see Fraudulent Conveyances. Of trust, see Mortgages.

IV. PLEADING AND EVIDENCE.

§ 211. Evidence held insufficient to impeach a conveyance made in Georgia of land there situated, on the ground of the mental incapacity

of the grantor, under the settled rule of the Supreme Court of that state that to constitute such incapacity as will avoid a contract there must be an entire loss of understanding.—*British & American Mortgage Co. v. Worrill* (C. C.) 120.

DEMONSTRATIVE EVIDENCE.

In criminal prosecutions, see *Criminal Law*, § 404.

DEPOSITIONS.

See *Witnesses*.

In naturalization proceeding, see *Aliens*, § 68.

§ 8. Depositions of witnesses who cannot be compelled to respond to a subpoena may be taken at any time, by the entry of an appropriate rule in the Circuit Court.—*Miller v. Moise* (C. C.) 940.

§ 83. Suppression of deposition is not remedy for refusal of witness to answer or produce material evidence, but an enforced order that he do so.—*H. Scherer & Co. v. Everest* (C. C. A.) 822.

§ 101. Where taker of deposition refuses to introduce it, the opposing party may introduce any part of it, and the other may put in evidence any part not introduced.—*H. Scherer & Co. v. Everest* (C. C. A.) 822.

DESCENT AND DISTRIBUTION.

See *Executors and Administrators*; *Wills*.

DEVISES.

See *Wills*.

DIAMONDS.

Customs duties, see *Customs Duties*, § 38.

DISCHARGE.

From indebtedness, see *Bankruptcy*, §§ 404–415.
From liability as surety, see *Principal and Surety*, §§ 100, 109.

DISCOVERY.

I. IN EQUITY.

§ 3. Bills for discovery will not be sustained, where the information desired can be obtained either by taking depositions, by cross-examination of the opposite party, before or at the trial, by an examination of public records, or by notice to produce documents.—*Miller v. Moise* (C. C.) 940.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see *Criminal Law*, § 1132.

Dismissal of suit in equity, see *Equity*, § 359.

DISSOLUTION.

Of corporation, see *Corporations*, § 599.
Of injunction, see *Injunction*, §§ 163, 167.

DISTRESS WARRANT.

Against defaulting federal officer, see *United States*, § 44.

Against defaulting federal officer, constitutionality of statute, see *Constitutional Law*, § 306.

DISTRIBUTION.

Of estate of bankrupt, see *Bankruptcy*, §§ 308–363.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see *Courts*, §§ 315, 321; *Removal of Causes*, §§ 36–61.

DOCKET FEES.

In admiralty, see *Admiralty*, § 124.

DOCUMENTS.

As evidence in civil actions, see *Evidence*, § 348.

DOMICILE.

Residence as ground of jurisdiction, see *Courts*, §§ 315, 321.

DONATIONS.

See *Gifts*.

DUE PROCESS OF LAW.

See *Constitutional Law*, §§ 254–318.

DUTIES.

Customs duties, see *Customs Duties*.
Excise duties, see *Internal Revenue*.

ELECTION.

Between counts in indictment, see *Indictment and Information*, § 132.

Between testamentary provisions and other rights, see *Wills*, § 797.

ELECTION OF REMEDIES.

§ 12. Choice of remedy that never existed held no defense to an action to enforce an actual remedy inconsistent with that first invoked.—*Harrill v. Davis* (C. C. A.) 187.

EMBROIDERY.

Customs duties, see *Customs Duties*, § 33.

EMINENT DOMAIN.

Public improvements by municipalities, see *Municipal Corporations*, § 365.

EMPLOYÉS.

See Master and Servant.

ENDOWMENT POLICIES.

See Insurance, § 171.

ENTRY.

Of imported goods, see Customs Duties, § 85.

EQUITABLE ESTOPPEL.

See Estoppel, § 72.

EQUITY.

Equitable estoppel, see Estoppel, § 72.
Equitable mortgage, see Mortgages, § 27.
Nature of action as legal or equitable, see Action, § 22.

Particular subjects of equitable jurisdiction and equitable remedies.

See Creditors' Suit; Discovery, § 3; Fraudulent Conveyances; Injunction; Receivers.
Suits for infringement of patents, see Patents, §§ 283-326.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.**(A) NATURE, GROUNDS, SUBJECTS, AND EXTENT OF JURISDICTION. IN GENERAL.**

§ 41. The general rule that a court of equity which has once obtained jurisdiction will retain it for all purposes applies only when that part of the cause which gave the court jurisdiction is sustained, and not when it fails.—Lewis Pub. Co. v. Wyman (C. C.) 756.

III. PARTIES AND PROCESS.

Mode of review of intervention proceedings by judgment creditors of street railroad whose property is in custody of receiver, see Appeal and Error, § 5.

IV. PLEADING.**(D) REPLICATION.**

§ 212. Under equity rule 66, the interposition of a general replication is taken as denying every allegation in the answer or plea not responsive to the bill, and these allegations must be proved by the party making them.—Lewis Pub. Co. v. Wyman (C. C.) 756.

VII. DISMISSAL BEFORE HEARING.

§ 359. The refusal to grant leave to a complainant to dismiss his suit without prejudice before a hearing on the merits, and the granting of an injunction to restrain the prosecution of a second suit in a state court, *held* error.—

Harding v. Corn Products Refining Co. (C. C. A.) 658.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

§ 377. A "feigned issue" is an issue submitted to a jury in an equity case for the assistance and advice of the court.—Nashville Ry. & Light Co. v. Bunn (C. C. A.) 862.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

Effect of stipulations as to reference to master, see Stipulations, § 14.
In suit for unfair competition, see Trade-Marks and Trade-Names, § 99.

§ 399. Parties in equity by a consent decree may constitute a special master an arbiter to settle specified matters in dispute.—Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, *Id.*

§ 404. Where evidence in equity is taken before a master, questions claimed to be objectionable should be answered after objection noted, and the sufficiency of such objections retained for consideration at the hearing.—Eddy v. Eddy (C. C. A.) 590.

§ 409. The conclusions of a master on matters of fact have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part.—Cimiotti Unhairing Co. v. American Fur Refining Co. (C. C. A.) 529; American Fur Refining Co. v. Cimiotti Unhairing Co., *Id.*

§ 409. Reference to a master in equity *held* to have been directed by the court, which did not therefore err on the filing of the master's report in reviewing his findings of fact, and law.—Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, *Id.*

X. DECREE AND ENFORCEMENT THEREOF.

§ 427. While, under a prayer for general relief, a court of equity may grant a relief not specifically prayed for, such relief must be within the case made by the bill.—Lewis Pub. Co. v. Wyman (C. C.) 756.

ERROR, WRIT OF.

See Appeal and Error.

ESTABLISHMENT.

Of courts, see Courts, §§ 90, 91.
Of railroads, see Railroads, § 110.

ESTATES.

Decedents' estates, see Executors and Administrators.

ESTOPPEL.

By judgment, see Judgment, §§ 585, 675, 736.

III. EQUITABLE ESTOPPEL.

To assert or deny particular facts, rights, claims, or liabilities.

Right to file mechanics' lien statement, see Mechanics' Liens, § 159.

To deny corporate existence, see Corporations, § 34.

To deny corporate powers, see Corporations, § 338.

To maintain or oppose particular remedies or defenses.

Joinder in petition in involuntary bankruptcy proceedings, see Bankruptcy, § 76.

(B) GROUNDS OF ESTOPPEL.

§ 72. Where one of two parties must suffer from the fault of the third, he who culpably clothed the third party with power to cause the loss must bear it.—*H. Scherer & Co. v. Everest* (C. C. A.) 822.

EVIDENCE.

See Depositions; Discovery; Witnesses.

Admissibility of evidence under pleading, see Pleading, § 376.

Applicability of instructions to evidence, see Trial, § 251.

Questions of fact for jury, see Trial, § 143.

As to particular facts or issues.

See Deeds, § 211; Fraudulent Conveyances, § 298; Partnership, § 44.

In particular civil actions or proceedings.

See Negligence, § 122.

For injuries from fire caused by operation of railroad, see Railroads, § 481.

For injuries to chartered derrick, see Shipping, § 58.

For unfair competition in trade, see Trade-Marks and Trade-Names, § 93.

In criminal prosecutions.

See Criminal Law, §§ 304-564.

Review and procedure thereon in appellate courts.

See Appeal and Error, §§ 997-1022.

Harmless error in rulings on, see Appeal and Error, § 1051.

I. JUDICIAL NOTICE.

§ 20. Courts will take judicial notice that protection of the rights of a railroad company against trespassers on trains is within the general scope of the authority of conductors.—*Chicago, M. & St. P. Ry. Co. v. Anderson* (C. C. A.) 901.

§ 28. United States courts take judicial notice of the laws of every state in the Union.—*Bohlander v. Heikes* (C. C. A.) 886.

III. BURDEN OF PROOF.

As to contributory negligence, see Negligence, § 122.

As to existence of partnership, see Partnership, § 44.

In action by claimant of property of bankrupt, see Bankruptcy, § 303.

VII. ADMISSIONS.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 219. Evidence to prove admissions by plaintiff *held* properly excluded in an action by a servant for personal injury.—*Puget Sound Electric Ry. v. Van Pelt* (C. C. A.) 206.

X. DOCUMENTARY EVIDENCE.

(B) EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.

§ 348. Certificates to a transcript of a foreign judgment *held* in accordance with the requirements of Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677).—*Bohlander v. Heikes* (C. C. A.) 886.

§ 348. The superior court of Montgomery county, Ohio, having been abolished and pending proceedings transferred to the common pleas court by Act Ohio March 19, 1885 (S2 Ohio Laws, p. 84) it was no objection to a certified judgment transcript that part of the proceedings appeared to be in one court and part in the other.—*Bohlander v. Heikes* (C. C. A.) 886.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

Evidence of custom to explain contract, see Customs and Usages, § 15.

XII. OPINION EVIDENCE.

(B) SUBJECTS OF EXPERT TESTIMONY.

§ 514. On trial for violation of Safety Appliance Act (Act March 3, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), expert trainman may be asked as to condition of car coupler in question.—*Wabash R. Co. v. United States* (C. C. A.) 1; *Elgin, J. & E. Ry. Co. v. Same*, Id.

(C) COMPETENCY OF EXPERTS.

§ 539½. A question, asked of a witness testifying as an expert, *held* properly excluded, as not relating to a subject-matter on which the witness was shown to have special knowledge.—*Hitchner Wall Paper Co. v. Pennsylvania R. Co.* (C. C. A.) 602.

XIV. WEIGHT AND SUFFICIENCY.

As to validity of deed, see Deeds, § 211.

In action for injuries to servant, see Master and Servant, §§ 276, 278.

In action for negligence, of tug, see Towage, § 15.

EXAMINATION.

Of witnesses in general, see Witnesses, § 268.

EXCEPTIONS.

Necessity for purpose of review, see Appeal and Error, § 256.

EXCEPTIONS, BILL OF.**I. NATURE, FORM, AND CONTENTS IN GENERAL.**

§ 15. Where a bill of exceptions recites that a transcript of a judgment or other paper introduced in evidence is attached to and made a part thereof, such paper must be identified by some mark or number referred to in the bill.—Weaver v. Schumpert (C. C. A.) 43.

EXCESSIVE DAMAGES.

See Damages, § 132.

EXCISE.

Duties, see Internal Revenue.
Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXECUTION.**II. PROPERTY SUBJECT TO EXECUTION.**

§ 26. A patent right cannot be sold on execution.—Ball v. Coker (C. C.) 304.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

Delivery to sheriff as commencement of lien, see Execution, § 110.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

§ 110. Ill. Rev. St. c. 77, § 9, declaring that the lien of an execution shall date from its delivery to the sheriff, is a modification of the common law dating the lien from the issuance of the writ.—Reardon v. Rock Island Plow Co. (C. C. A.) 654.

EXECUTORS AND ADMINISTRATORS.

See Wills.
Courts of probate, see Courts, § 200¼.
Testimony as to transactions with decedents, see Witnesses, §§ 140, 159.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§ 181. A conveyance of property to secure a debt, with bond for reconveyance made in conformity to Civ. Code Ga. 1895, § 2771, which provides that such conveyance shall vest the title in the grantee, does not lose such character because the grantee brings a suit in a federal

court to foreclose the same as a mortgage, so as to let in the claim of the grantor's widow to an allowance for support out of the property.—British & American Mortgage Co. v. Worrill (C. C.) 120.

X. ACTIONS.

Right to maintain action for death, see Death, § 31.

EXEMPLIFICATIONS.

As evidence, see Evidence, § 348.

EXPERT TESTIMONY.

In civil actions, see Evidence, §§ 514, 539½.

EXPLOSIVES.

Regulation of gasoline vessels, see Shipping, § 10.

FACTORS.

See Brokers; Principal and Agent.

FALSE IMPRISONMENT.**I. CIVIL LIABILITY.****(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.**

§ 7. The master of a vessel, who procured the arrest of a seaman without a warrant, for which no legal justification is shown, is liable in damages for false imprisonment.—The Tillie Baker (D. C.) 941.

FAULT.

Of vessel in collision, see Collision, §§ 34, 61.

FEDERAL COURTS.

See Courts, §§ 255-407.

FEDERAL QUESTIONS.

Grounds for jurisdiction, see Courts, § 292.
Ground for removal of cause, see Removal of Causes, §§ 23, 25.

FEEES.

In foreclosure, see Mortgages, § 581.

FEIGNED ISSUES.

See Equity, § 377.

FILING.

Railroad rates, penalties for failure to file, see Carriers, § 37.
Railroad rates, transportation of property without rates as constituting misdemeanor, see Carriers, § 38.

FINDINGS.

Review on appeal or writ of error, see Appeal and Error, § 1022.

FIRE INSURANCE.

See Insurance, § 103.

FIRES.

Caused by operation of railroad, see Railroads, §§ 481, 485.

FOOD.

§ 12. Bottles of syrup *held* not to be misbranded, so that their shipment in interstate commerce constituted a misdemeanor, under Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928).—In re Wilson (C. C.) 566.

§ 20. Act Cong. Aug. 2, 1886, c. 840, § 6, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230), regulating the sale of oleomargarine, *held* referable to manufacturers and dealers only, so that indictment for violating such section, failing to charge that defendant was a manufacturer or dealer, was fatally defective.—Morris v. United States (C. C. A.) 682.

FORBEARANCE.

As consideration for contract of guaranty, see Guaranty, § 16.

FOREIGN CORPORATIONS.

See Corporations, § 642.

FORESTS.

See Woods and Forests.

FORFEITURES.

Of franchise, see Corporations, § 599.

FORMER ADJUDICATION.

See Judgment, §§ 585, 675, 736.

FORMS OF ACTION.

See Action, § 22.

FORTS.

Power of courts to determine validity of title to land occupied by United States as a military fort, see Constitutional Law, § 72.

FRANCHISES.

Corporate franchises, see Corporations, § 34. Forfeiture, see Corporations, § 599.

FRAUD.

See Fraudulent Conveyances.

Effect on limitation, see Limitation of Actions, § 100.

FRAUDULENT CONVEYANCES.

By bankrupt, see Bankruptcy, §§ 57, 164-207.

III. REMEDIES OF CREDITORS AND PURCHASERS.**(G) EVIDENCE.**

§ 298. Where a debtor transfers or conveys his property to one or more of his creditors, all the surrounding circumstances and conditions are to be considered in determining whether or not it was done with intent to hinder, delay, or defraud his other creditors, and such an intent may be inferred from the acts done and surrounding circumstances, notwithstanding his denial.—In re Larkin (D. C.) 100.

FROGS.

Liability of railroad company for injuries to employes through failure to block frogs, see Master and Servant, §§ 112, 278, 285, 289, 296.

GAMING.

Pool selling and bookmaking authorized by city ordinance but prohibited by state law, as constituting an illegal business effecting right of recovery of license fees paid, see Action, § 4.

GARNISHMENT.

See Execution.

GASOLINE VESSELS.

Regulations, see Shipping, § 10.

GENERAL AVERAGE.

See Shipping, § 193.

GIFTS.**I. INTER VIVOS.**

§ 19. Gift *held* one in presenti, which became complete when the donee reduced the bonds to possession, and was not affected by a subsequent attempt of the donor to give them to another.—Muir v. Gregory (C. C. A.) 641.

GOOD FAITH.

Of purchaser, see Bills and Notes, §§ 358, 363.

GRAB IRONS.

On railroad cars, statutory regulations in general, see Railroads, §§ 229, 254. On railroad trains, regulation of interstate commerce, see Commerce, § 27.

GRAND JURY.

See Indictment and Information.

GRANTS.

Of public lands, see Public Lands.

GUARANTY.

See Principal and Surety.

I. REQUISITES AND VALIDITY.

§ 16. A creditor's agreement to forbear pressing a debt for a definite time or for a reasonable time, or to grant a renewal or extension, is a detriment to the creditor, and a good consideration for a stranger's contract to pay the debt.—*Jones v. Britt* (C. C. A.) 852.

§ 16. A contract of guaranty in the form of a proposal to the creditor for an extension held a bilateral contract based on a sufficient consideration.—*Jones v. Britt* (C. C. A.) 852.

II. CONSTRUCTION AND OPERATION.

§ 42. A contract of guaranty held not conditional on the debtor requesting an extension of time, which the creditor had agreed to grant as the consideration for the guaranty, and hence the creditor was entitled, in the absence of request, to sue after the maturity of the debt.—*Jones v. Britt* (C. C. A.) 852.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

§ 23. Where an applicant for admission to the United States of Chinese descent, but claiming citizenship, is detained for deportation and takes an appeal from the decision of the trial officers to the Secretary of Commerce and Labor, the failure of such officers to include in the record on the appeal material evidence is a substantial denial of the right of appeal given by statute, and entitles the applicant to invoke the jurisdiction of the courts by a habeas corpus proceeding.—*In re Can Pon* (C. C. A.) 479.

§ 23. Where a person of Chinese descent asks admission to the United States upon the ground that he is a native-born citizen thereof, and the lawfully designated executive officers find that he is not, such action should be treated by the courts as having been by a competent tribunal, with due process of law, and as final and conclusive, in the absence of a showing that there was abuse of discretion on the part of such executive officers; and, unless such abuse of discretion is shown, a court cannot entertain habeas corpus proceedings based solely on the ground of applicant's alleged citizenship.—*In re Tang Tun* (C. C. A.) 488; *In re Gang Gong, Id.*

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 113. On an appeal in a habeas corpus proceeding in a federal court, all questions of fact upon the evidence are open to consideration, and the findings of the court below are not conclusive upon the appellate court, but they should not be set aside, unless the court is convinced that they are erroneous.—*In re Can Pon* (C. C. A.) 479.

§ 117. Where a federal prisoner had been erroneously discharged on habeas corpus, the

United States, on reversal of such order, may retake and return him to the penitentiary from which he had been discharged, and hold him until he is lawfully discharged, under Rev. St. §§ 1042, 5296 (U. S. Comp. St. 1901, pp. 724, 3608).—*Haddox v. Richardson* (C. C. A.) 635.

HANDHOLDS.

On railroad cars, statutory regulations in general, see Railroads, §§ 229, 254.

HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 1040, 1051.

In criminal prosecutions, see Criminal Law, § 1172.

HEALTH.

See Food.

Restraining enforcement of ordinance, see Injunction, §§ 85, 114.

HEARING.

In equity, see Equity, § 377.

On appeal or writ of error, see Criminal Law, § 1132.

HIGHWAYS.

See Municipal Corporations, §§ 705, 706.

Accidents at railroad crossings, see Railroads, §§ 327, 328.

HOUSEBREAKING.

See Burglary.

HUSBAND AND WIFE.

Rights of survivor, see Executors and Administrators, § 181.

IMPLIED CONTRACTS.

See Account Stated.

IMPORTS.

Duties, see Customs Duties.

IMPRISONMENT.

See False Imprisonment.

Habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Liens, see Mechanics' Liens.

Public improvements, see Municipal Corporations, § 365.

INCORPORATION.

See Corporations, §§ 22, 30.

INDEMNITY.

See Guaranty; Principal and Surety.

INDEPENDENT CONTRACTORS.

Delay of independent contractor as relieving general contractor from liability for penalty fixed by building contract, see Damages, § 85.

INDIANS.

Criminal responsibility of clerk of commissioner to the Five Civilized Tribes for withdrawing records from office of commissioner, see United States, § 52.

§ 15. The words "alienable" and "inalienable," used to restrict the disposition of lands in the Supplemental Agreement with the Chickasaws and the Choctaws, by Act July 1, 1902, c. 1362, 32 Stat. 642, 643, §§ 12, 15, 16, include disposition by will.—Hayes v. Barringer (C. C. A.) 221.

§ 15. The right of an enrolled Chickasaw Indian, who died testate in 1903 before receiving an allotment, was not devisable.—Hayes v. Barringer (C. C. A.) 221.

§ 15. Prior to March 4, 1906, the Chickasaw Indians had the right to dispose of their devisable property by wills made under the laws of the Chickasaws, and a judgment of the proper Chickasaw probate court probating a will was not subject to collateral attack.—Hayes v. Barringer (C. C. A.) 221.

§ 15. Evidence held to sustain a decree canceling two deeds made by an Indian allottee, on the ground that when the first was made he was a minor, and was also at the time and when the second confirmatory deed was executed illiterate and of weak mind, and incapable of caring for his interests, and that the consideration paid was not over one-fourth of the actual value of the property.—Alfrey v. Colbert (C. C. A.) 231; Colbert v. Alfrey, Id.

§ 15. Under Act June 30, 1902, c. 1323, § 16, 32 Stat. 503, construed in connection with Act April 21, 1904, c. 1402, 33 Stat. 189, 204, a conveyance of land made by a Creek Indian allottee, although not of Indian blood, while a minor and without the approval of the Secretary of the Interior, is void, and cannot be ratified after he attains his majority.—Alfrey v. Colbert (C. C. A.) 231; Colbert v. Alfrey, Id.

INDICTMENT AND INFORMATION.**V. REQUISITES AND SUFFICIENCY OF ACCUSATION.**

§ 63. Allegation in indictment held insufficient to charge the offense of fraudulently taking away or removing a document or record, under Rev. St. § 5408 (U. S. Comp. St. 1901, p. 3658).—Martin v. United States (C. C. A.) 198.

§ 108. An indictment charging an offense against the United States will be upheld if there is any act of Congress in force which can sustain it, whether or not such act is specifically mentioned.—United States v. Wood (D. C.) 438.

§ 110. An indictment considered, and held sufficient, under Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St.

1901, p. 2234).—Hardesty v. United States (C. C. A.) 25.

§ 110. An indictment in the words of a statute is insufficient where the statute does not fully, without any uncertainty, set forth all the elements necessary to constitute the offense.—Martin v. United States (C. C. A.) 198.

§ 111. An indictment under the Chinese exclusion act of September 13, 1888, c. 1015, § 9, 25 Stat. 478 (U. S. Comp. St. 1901, p. 1316), against the master of a vessel for landing Chinese in contravention of the provisions of the act, must negative the exceptions stated in section 10 of the act.—United States v. Wood (D. C.) 438.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 132. The government cannot be required to elect between counts of an indictment which charge misdemeanors of the same class, although under some of the counts the punishment may be imprisonment in the penitentiary; but under Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720), such counts may be joined and tried together.—Hartman v. United States (C. C. A.) 30.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT.

§ 202. By failure to demur to an indictment, or enter a motion to quash, the defendant waives the right to object after verdict to matters which go merely to the form in which the offense is stated; but if some element of the offense has been omitted, which is necessary to constitute the crime attempted to be charged, advantage may be taken of it, even after verdict.—Hardesty v. United States (C. C. A.) 25.

INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, §§ 358, 363.

INFANTS.**III. PROPERTY AND CONVEYANCES.**

§ 31. If a conveyance made by a minor be disaffirmed, he will be required to restore such of the consideration as remains in his hands; but repayment of the consideration will not be required, where it has been wasted, disposed of, or consumed during minority and his estate has not benefited thereby.—Alfrey v. Colbert (C. C. A.) 231; Colbert v. Alfrey, Id.

INFORMATION.

Criminal accusation, see Indictment and Information.

INFRINGEMENT.

Of patent, see Patents, §§ 235-326.
Of trade-mark, see Trade-Marks and Trade-Names, §§ 73-99.

INJUNCTION.

Parties on appeal, see Appeal and Error, § 324. Restraining infringement of copyright, see Copyrights, § 85. Restraining interference by adjoining landowner with railroad's use of right of way, see Railroads, § 73.

I. NATURE AND GROUNDS IN GENERAL.

(B) GROUNDS OF RELIEF.

§ 9. Complainant, a nonresident manufacturer and seller of beer, not having otherwise qualified itself to sell in Alabama except in interstate transactions, and complainant's customers also not being qualified to sell complainant's product, complainant could not sue to restrain the enforcement of the Alabama prohibitory law.—*F. W. Cook Brewing Co. v. Garber (C. C.) 942.*

II. SUBJECTS OF PROTECTION AND RELIEF.

(D) CORPORATE FRANCHISES, MANAGEMENT, AND DEALINGS.

§ 72. An injunction restraining a mining company from extracting and selling the ore from its mine pending an action against it for damages held authorized by Code Civ. Proc. Mont. 1895, § 871 (Rev. Codes, § 6643).—*Montana Mining Co. v. St. Louis Min. & Mill. Co. of Montana (C. C. A.) 514.*

(E) PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

§ 85. Pending a proceeding by certiorari in the Supreme Court of New Jersey to test the validity of an ordinance passed by a local board of health, in which the court has made an order staying the enforcement of the ordinance until final decision, the petitioner cannot maintain a suit in equity in a federal court to enjoin such enforcement.—*Borden's Condensed Milk Co. v. Baker (C. C.) 111.*

III. ACTIONS FOR INJUNCTIONS.

§ 114. A local board of health in New Jersey is an agency of the state, independent of municipal control; and to a suit to enjoin the enforcement of an ordinance passed by such a board the town in which the board has jurisdiction is not a proper party.—*Borden's Condensed Milk Co. v. Baker (C. C.) 111.*

§ 114. A water company, for whose benefit a pipe line was being laid on a railroad right of way, held to be an indispensable party to a suit to enjoin the city from interfering with the work of laying the same.—*Delaware, L. & W. R. Co. v. Jersey City (C. C.) 128.*

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

Review of decisions, see Appeal and Error, § 324.

(A) GROUNDS AND PROCEEDINGS TO PROCURE.

§ 132. The office of a preliminary injunction is to maintain a status quo existing at the time of filing the bill.—*F. W. Cook Brewing Co. v. Garber (C. C.) 942.*

§ 137. In a suit to enjoin the enforcement of a prohibitory law, the court might properly refuse a preliminary injunction because of the public interest.—*F. W. Cook Brewing Co. v. Garber (C. C.) 942.*

§ 137. Where, in a suit in a federal court to restrain the enforcement of a state law for invalidity, it appeared that the question would soon be determined by the Supreme Court of the state, the case would be held by the federal court pending the determination of the question in the state court.—*F. W. Cook Brewing Co. v. Garber (C. C.) 942.*

§ 153. In granting or refusing a preliminary injunction, the court in its discretion may impose terms and conditions on the parties at whose instance it proposes to act.—*In re Arkansas Railroad Rates (C. C.) 720.*

§ 154. In granting or refusing a preliminary injunction, the court in its discretion may impose terms and conditions on the parties at whose instance it proposes to act.—*In re Arkansas Railroad Rates (C. C.) 720.*

(B) CONTINUING, MODIFYING, VACATING, OR DISSOLVING.

§ 163. Where a temporary injunction has been granted, but before final hearing the cause for which it was granted has been removed, it will not be continued or made perpetual.—*Lewis Pub. Co. v. Wyman (C. O.) 756.*

§ 163. A bill in equity will not be entertained after it has become impossible because of a change in conditions to grant any substantial relief.—*Lewis Pub. Co. v. Wyman (C. C.) 756.*

§ 167. A preliminary injunction may be modified as justice requires, either by the trial court or the appellate tribunal.—*In re Arkansas Railroad Rates (C. C.) 720.*

VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 239. Where a federal court, as a condition to the granting of a preliminary injunction, required complainant to give a bond in a stated sum to indemnify the defendant against loss or injury due to the improvident or erroneous grant of such injunction, the liability of the complainant as well as the surety is limited to the amount of such bond, and neither further damages, interest, nor costs can be awarded in addition thereto.—*Cimiotti Unhairing Co. v. American Fur Refining Co. (C. C. A.) 529; American Fur Refining Co. v. Cimiotti Unhairing Co., Id.*

IN PAIS.

Estoppel, see Estoppel, § 72.

IN REM.

Remedies in admiralty, see Admiralty, § 34.

INSANE PERSONS.

Evidence of incompetency in prosecution for criminal contempt, see Contempt, § 60.

INSOLVENCY.

See Bankruptcy.

INSPECTION.

Of vessels, see Shipping, § 10.

INSTRUCTIONS.

In civil actions, see Trial, §§ 191-296.

INSURANCE.**I. CONTROL AND REGULATION IN GENERAL.**

Jurisdiction of federal circuit court in action against alien insurance company for malicious prosecution, see Courts, § 321.

III. INSURANCE AGENTS AND BROKERS.**(A) AGENCY FOR INSURER.**

§ 85. Contract by life insurance company, turning its business over to a rival company, held not a breach of a contract of agency.—*Moore v. Security Trust & Life Ins. Co.* (C. C. A.) 496.

§ 85. Contract by a life insurance company, after conclusion of term of an agency, turning over all of its business to a rival company, held not an anticipatory breach of a contract with agents as to renewal premiums.—*Moore v. Security Trust & Life Ins. Co.* (C. C. A.) 496.

§ 85. The right of an insurance company to turn over its business to another held impliedly reserved in contracts of agency containing no agreements to the contrary.—*Moore v. Security Trust & Life Ins. Co.* (C. C. A.) 496.

§ 85. Where an insurance company turns over its business to another company, it is no breach of a contract of agency not forbidding the exercise of such right.—*Moore v. Security Trust & Life Ins. Co.* (C. C. A.) 496.

§ 85. Presumption of the reservation of a right of an insurance company to turn over its business to another held implied in a contract of agency.—*Moore v. Security Trust & Life Ins. Co.* (C. C. A.) 496.

(B) AGENCY FOR APPLICANT OR INSURED.

§ 103. Insurance brokers employed to keep the property of a corporation insured held not

chargeable with negligence in keeping or renewing policies after chattel mortgages had been placed on property covered thereby which under their terms avoided such policies, where they were not advised of the character of such mortgages.—*Fries-Breslin Co. v. Bergen* (C. C.) 360.

V. THE CONTRACT IN GENERAL.**(B) CONSTRUCTION AND OPERATION.**

Evidence of custom, see Customs and Usages, § 15.

§ 147. Where a life insurance contract provided that the place should be the state of Pennsylvania, it would be construed according to the laws of that state.—*Russell v. Grigsby* (C. C. A.) 577.

§ 147. In the absence of a provision in an insurance contract as to the law by which it is to be construed, its construction is a question of general and not local law.—*Russell v. Grigsby* (C. C. A.) 577.

§ 159. A bill of lading freight may be the subject of insurance.—*Tweedie Trading Co. v. Western Assur. Co. of Toronto* (D. C.) 962; *Same v. Higgins, Id.*

§ 171. An insurance policy construed, and held, that the amount indicated as the surrender value at the end of the 10-year endowment period was the surrender value of the entire policy, and not the value of each \$1,000 thereof.—*Assmann v. Travelers' Ins. Co.* (C. C. A.) 694.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

§ 199. A life insurance policy payable to insured's executors, administrators, or assigns is assignable, unless the assignment is forbidden by settled principles of public policy.—*Russell v. Grigsby* (C. C. A.) 577.

§ 200. A provision in a life insurance policy that the place of the contract should be the state of Pennsylvania did not govern assignments of the policy made in Tennessee.—*Russell v. Grigsby* (C. C. A.) 577.

§ 212. Shannon's Tenn. Code, § 3516, does not qualify one to take by assignment a policy of life insurance who is disqualified by public policy.—*Russell v. Grigsby* (C. C. A.) 577.

XII. RISKS AND CAUSES OF LOSS.**(A) MARINE INSURANCE.**

§ 415. Insurance company held liable for cattle lost while on ship from New Orleans to South Africa.—*Tweedie Trading Co. v. Western Assur. Co. of Toronto* (D. C.) 962; *Same v. Higgins, Id.*

§ 415. A vessel is not unseaworthy, within the meaning of a marine policy, because there may have been a deficiency in kinds of fodder supplied for animals, a portion of its cargo.—*Tweedie Trading Co. v. Western Assur. Co. of Toronto* (D. C.) 962; *Same v. Higgins, Id.*

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.**(A) MARINE INSURANCE.**

§ 489. Where there was a mutiny among cattle men, putting the cattle in their charge in danger, a deviation to nearest port to obtain new men was justified.—*Tweedie Trading Co. v. Western Assur. Co. of Toronto (D. C.) 962*; *Same v. Higgins, Id.*

XVI. RIGHT TO PROCEEDS.

Bill of lading giving carrier in case of loss, the benefit of insurance on property, see *Shipping*, § 132.

§ 593. Where a life insurance policy was valid when issued, the insurer's liability thereon was not affected by the invalidity of an assignment to one having no insurable interest.—*Russell v. Grigsby (C. C. A.) 577*.

§ 593. Assignment of an insurance policy by assured to a stranger held void for want of an insurable interest in the assignee, who was entitled to receive out of the proceeds only the amount of his advances.—*Russell v. Grigsby (C. C. A.) 577*.

XVIII. ACTIONS ON POLICIES.

Parol evidence of custom to construe contract, see *Customs and Usages*, § 15.

§ 669. In an action on a marine insurance policy, the instructions, taken as a whole, held to state the correct rule as to concealment by the insured which would avoid the contract.—*St. Paul Fire & Marine Ins. Co. v. Balfour (C. C. A.) 212*.

INTERLOCUTORY INJUNCTION.

See *Injunction*, §§ 132-167.

INTERLOCUTORY JUDGMENT.

Review on appeal or writ of error, see *Appeal and Error*, § 874.

INTERNAL REVENUE.

Indictment following language of statute, in prosecution for offense against internal revenue law, see *Indictment and Information*, § 110.

§ 47. Evidence held sufficient to sustain an indictment for attempting to defraud the United States of the tax on oleomargarine manufactured by defendants.—*Hardesty v. United States (C. C. A.) 25*.

INTERNATIONAL LAW.

See *Aliens*.

INTERPRETATION.

Of contracts, instruments or judicial acts and proceedings.

See *Contracts*, § 232; *Guaranty*, § 42; *Statutes*, §§ 184-241, 538; *Stipulations*, § 14.

Contract of sale, see *Sales*, § 77.
Insurance policy, see *Insurance*, §§ 147, 159, 171.
Letters patent, see *Patents*, §§ 165-178.

INTERROGATORIES.

To witnesses, see *Depositions*.

INTERSTATE COMMERCE.

Regulation, see *Carriers*, §§ 23-38; *Commerce*.

INTERVENTION.

In action to foreclose corporate mortgage, see *Corporations*, § 482.

INTER VIVOS.

Gifts inter vivos, see *Gifts*, § 19.

INTOXICATING LIQUORS.

Restraining enforcement of prohibitory law, see *Injunction*, §§ 9, 137.

I. POWER TO CONTROL TRAFFIC.

§ 6. There is no property right in the business of manufacturing and selling intoxicating liquors which is protected against state legislative interference by the Constitution and laws either of the state or of the United States.—*F. W. Cook Brewing Co. v. Garber (C. C.) 942*.

INVENTION.

See *Patents*.

INVENTORY.

Provision for inventory of property in decree of foreclosure of street railroad mortgage, see *Street Railroads*, § 55.

ISSUES.

In civil actions, see *Pleading*, § 376.
Trial by jury of issues in equity, see *Equity*, § 377.

JOINDER.

Of causes of action, see *Action*, § 44.

JUDGES.

See *Courts*.

JUDGMENT.

Conformity in United States court to practice in state court in entry, see *Courts*, § 354.
Decisions of courts in general, see *Courts*, §§ 90, 91.
Decree in equity, see *Equity*, § 427.
Enforcement by creditors' suit, see *Creditors' Suit*.
Review, see *Appeal and Error*.

XI. COLLATERAL ATTACK.

On adjudication in bankruptcy, see Bankruptcy, § 51.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

§ 538. A decree canceling an oil lease held to relate to the commencement of the action and was a conclusive determination of the rights of all of the parties in interest as of that date.—In re St. Louis & Kansas Oil & Gas Co. (D. C.) 934.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) CAUSES OF ACTION AND DEFENSES MERGED, BARRED, OR CONCLUDED.

§ 585. Where, in an action for the price of goods sold, a breach of warranty is unsuccessfully relied upon as a defense, it cannot subsequently afford a cause of action for damages.—Drevet Mfg. Co. v. Moore Bros. Glass Co. (C. C. A.) 246.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) PERSONS CONCLUDED.

§ 675. The fact that a manufacturing company paid the attorney who defended a suit against a customer for infringement of a patent, a part or all of the costs, did not make it a party, so as to be concluded by the decree, where it did not appear that the attorney was not under the exclusive direction and control of the defendant.—General Electric Co. v. Morgan-Gardner Electric Co. (C. C. A.) 52.

(C) MATTERS CONCLUDED.

§ 736. A judgment in a state court canceling an oil lease held not a conclusive adjudication that the lessors were entitled to a fund derived pendente lite from the operation of the oil wells.—In re St. Louis & Kansas Oil & Gas Co. (D. C.) 934.

XVIII. ASSIGNMENT.

Right to question inadequacy of consideration of assignment in creditor's suit by assignee, see Creditors' Suit, § 18.

JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 20, 28.
In criminal prosecutions, see Criminal Law, § 304.

JUDICIAL POWER.

See Constitutional Law, §§ 70, 72.

JURISDICTION.

Amount in controversy, see Courts, §§ 326-329.
Of equity, see Equity, § 41.
Of habeas corpus, see Habeas Corpus, §§ 113, 117.
Of particular courts, see Courts.

JURY.

Custody and conduct, see Criminal Law, §§ 853, 854.

Instructions in civil actions, see Trial, §§ 191-296.

Questions for jury in civil actions, see Trial, § 143.

Questions for jury in criminal prosecutions, see Criminal Law, § 762.

Taking case or question from jury at trial, see Trial, § 143.

Trial by jury of issues in equity, see Equity, § 377.

II. RIGHT TO TRIAL BY JURY.

§ 14. Where persons injured by the operation of a street railroad by a receiver intervened for an allowance of damages, the court, though authorized to submit the question of negligence and damages to a jury, was not bound to do so.—Nashville Ry. & Light Co. v. Bunn (C. C. A.) 862.

KNOWLEDGE.

Effect of ignorance of cause of action on limitation, see Limitation of Actions, § 100.

LACHES.

Affecting suit to recover for collision, see Admiralty, § 34.

LANDS.

See Public Lands.

LARCENY.**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 5. Six blank checks, each of the value of one cent, belonging to the United States, held proper subjects of larceny, within Rev. St. § 5456 (U. S. Comp. St. 1901, p. 3683), making it a felony to steal any property belonging to the United States.—Keller v. United States (C. C. A.) 697.

LEAVE OF COURT.

To sue receivers, see Receivers, § 174.

LEGACIES.

See Wills.

LEGISLATIVE POWER.

See Constitutional Law, § 55.

LETTERS PATENT.

For inventions, see Patents.

LEVY.

Of execution, see Execution, § 110.

LICENSES.

For making, use, or sale of patented articles, see Patents, § 218.

I. FOR OCCUPATIONS AND PRIVILEGES.

Illegality of right of action to recover license fees paid for transacting illegal business, see Action, § 4.

LIENS.

Effect of proceedings in bankruptcy, see Bankruptcy, §§ 164-207.

Liens acquired by particular remedies or proceedings.

See Execution, § 110.

Particular classes of liens.

See Maritime Liens; Mechanics' Liens.

Against vessel, see Shipping, § 87.

Agricultural liens, see Agriculture, § 11.

Attorney's lien, see Attorney and Client, § 182.

Proceeding to marshal liens as equitable suit, see Action, § 22.

Railroad lien, see Railroads, § 165.

LIFE INSURANCE.

See Insurance.

LIMITATION.

Of claim of patent, see Patents, §§ 165-178.

LIMITATION OF ACTIONS.

See Adverse Possession.

In action for breach of contract, see Contracts, § 329.

I. STATUTES OF LIMITATION.**(A) NATURE, VALIDITY, AND CONSTRUCTION IN GENERAL.**

§ 3. Act N. J. March 27, 1874, § 4 (Rev. St. 1874, p. 441; Gen. St. 1895, p. 1974 et seq.), held not repealed by Act March 24, 1896 (P. L. p. 119).—*Bakker v. Gilson* (C. C.) 1013.

§ 3. Act N. J. March 27, 1874, § 4 (Rev. St. 1874, p. 441), suspending limitations during minority, held not in conflict with section 3 of such act, as amended by Act March 24, 1896 (P. L. p. 119).—*Bakker v. Gilson* (C. C.) 1013.

II. COMPUTATION OF PERIOD OF LIMITATION.**(F) IGNORANCE, MISTAKE, TRUST, FRAUD, AND CONCEALMENT OF CAUSE OF ACTION.**

§ 100. In a widow's suit to set aside an election to take under her husband's will as procured by misrepresentation, evidence held admissible as bearing on the difference between what she received and what she lost by her election.—*Eddy v. Eddy* (C. C. A.) 590.

§ 100. Where a widow was induced by fraudulent concealment to elect to take under

her husband's will, and brought suit to set aside such election within two months after discovering the fraud, the suit was not barred by Comp. Laws Mich. § 9301.—*Eddy v. Eddy* (C. C. A.) 590.

LIMITATION OF LIABILITY.

Of steamship company as to baggage of passenger, see Shipping, § 167.

Of vessel, see Shipping, § 141.

LIQUIDATED DAMAGES.

See Damages, § 85.

LIQUOR SELLING.

See Intoxicating Liquors.

LITERARY PROPERTY.

See Copyrights.

LOCATION.

Of mining claim, see Mines and Minerals, § 29.

MACHINERY.

Liability of employer for defects, see Master and Servant, §§ 102-124.

MAIL.

See Post Office, § 15.

MAINTENANCE.

See Champerty and Maintenance.

MALICIOUS PROSECUTION.

See False Imprisonment.

Jurisdiction of federal circuit court in action against alien insurance company, see Courts, § 321.

Removal to federal court of joint action in state court against several corporations, see Removal of Causes, § 11.

MARINE INSURANCE.

See Insurance, §§ 415, 489, 669.

MARITIME LIENS.**I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.****(A) UNDER MARITIME LAW.**

§ 9. A hired scow, on which a dredge was temporarily mounted while being used to unload material from boats and deposit the same in the space behind a private bulkhead, which was being filled in, was not employed in a maritime service, nor was the contract of hiring maritime; and the owner, in the absence of a contract therefor, has no lien upon the dredge or its

proceeds for the hire.—*Bouker Contracting Co. v. Proceeds of Sale of Dredging Machine (D. C.)* 423.

III. ENFORCEMENT.

(A) IN ADMIRALTY.

§ 69. Where a court of admiralty has seized and sold a vessel in proceedings in rem, any surplus proceeds remaining after lien claims have been paid belongs to the owner of the vessel, and the court has no power to distribute the same to general creditors having no liens.—*Bouker Contracting Co. v. Proceeds of Sale of Dredging Machine (D. C.)* 423.

MASTER AND SERVANT.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(B) TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.

§ 102. A master is bound to use reasonable care to secure the employé a reasonably safe place and to give warning concerning particular dangers.—*Co-Operant Telephone Co. v. St. Clair (C. C. A.)* 645.

§ 102. A master's duty to exercise ordinary care for the safety of his servants extends to provisions for reasonably safe working places, machinery, and appliances.—*Simmons Mfg. Co. v. Eskridge (C. C. A.)* 675.

§ 112. Rev. St. Ohio § 3365—18, requiring the blocking of railroad frogs, is for the protection of employés dragged or pushed into them by an engine, as well as those who step into them; the railroad's failure to comply constituting negligence as a matter of law.—*Toledo, St. L. & W. R. Co. v. Kountz (C. C. A.)* 832.

§ 112. Rev. St. Ohio § 3365—18, requiring railroads within the state to block all angles in frogs, switches, and crossings, is expressly limited to frogs in yards, divisional and terminal stations, where trains are made up.—*Toledo, St. L. & W. R. Co. v. Kountz (C. C. A.)* 832.

§ 124. An elevator inspector, on finding one of the cables defective where it was wound around the drum, was bound to inspect all the cables on the drum, and had no right to presume that the part of the cable exposed to the air was less rust-eaten and defective than the part wound around the drum.—*Corn Products Refining Co. v. King (C. C. A.)* 892.

(F) RISKS ASSUMED BY SERVANT.

§ 217. An electric lineman did not assume the risk, of which he was ignorant, that, by the act or with the assent of those in charge of wires carrying a heavy charge of electricity, insulation had been intentionally removed and never replaced.—*Co-Operant Telephone Co. v. St. Clair (C. C. A.)* 645.

§ 217. In an action for injuries to a servant caused by a defect in a platform on which he was working, plaintiff held not to have assumed the risk.—*Stewart v. Southern Ry. Co. (C. C. A.)* 685.

§ 219. A servant does not assume the risk of his work being made more hazardous by the master's negligence in a matter not obvious, and in fact unknown, to such servant.—*Corn Products Refining Co. v. King (C. C. A.)* 892.

§ 219. In an action for injuries to a servant by falling down an elevator shaft, plaintiff held to have assumed the risk.—*Olesky v. Midland Linseed Co. (C. C. A.)* 896.

(H) ACTIONS.

Admission of service of notice of intention to sue as dispensing with proof of such intention, see Pleading, § 376.

Assumptions by judge as to facts, see Trial, § 191.

Removal of cause from state to federal court, see Removal of Causes, §§ 23, 36, 49, 86.

§ 264. The admission of evidence in an action by a servant for personal injury held not erroneous as a variance by showing an act of negligence different from that alleged.—*Puget Sound Electric Ry. v. Van Pelt (C. C. A.)* 206.

§ 264. In an action by a servant for a personal injury, where plaintiff alleged generally that a machine which he was ordered to operate was defective and dangerous, which condition caused the injury, the fact that he incidentally specified particular defects does not limit him to proof of such specific defects.—*United States Express Co. v. Wahl (C. C. A.)* 848.

§ 276. Evidence held to support a verdict finding that an elevator counterbalance cable was defective, and that defendant knew or should have known of the defect in time to have remedied it prior to the accident.—*Corn Products Refining Co. v. King (C. C. A.)* 892.

§ 278. Evidence held to show that an unblocked frog in which decedent was caught, prior to being struck and killed by a train, was in a railroad yard where trains are made up, within Rev. St. Ohio, § 3365—18.—*Toledo, St. L. & W. R. Co. v. Kountz (C. C. A.)* 832.

§ 285. In an action for death of a switchman, whether his foot was caught in an unblocked frog as he was leaving a switch in the course of his duty, or was jammed into the frog after he was struck by a train, held for the jury.—*Toledo, St. L. & W. R. Co. v. Kountz (C. C. A.)* 832.

§ 286. The question whether the failure of a railroad company to inspect a defective brake on a car was negligence which rendered it liable for the resulting death of an employé held one for the jury under the evidence.—*Pennsylvania R. Co. v. Kirk (C. C. A.)* 42.

§ 236. Whether a master was negligent in failing to provide a "speed governor" as an additional safety appliance for an elevator by the fall of which a servant was injured held for the jury.—*Simmons Mfg. Co. v. Eskridge (C. C. A.)* 675.

§ 237. In an action for injuries to a servant by the fall of an elevator counterbalance weight, whether the accident was caused by a defective cable or by a sudden starting of the elevator by plaintiff's fellow servant was for the jury.—*Corn Products Refining Co. v. King (C. C. A.)* 892.

§ 289. In an action for the death of an electric lineman by coming in contact with a heavily charged wire, whether he was negligent in failing to discover that the insulation had been removed from the wire *held* for the jury.—*Co-Operant Telephone Co. v. St. Clair* (C. C. A.) 645.

§ 289. In an action for injuries to a servant by the fall of an elevator, whether his act was the proximate or a contributing cause of the injury *held* for the jury.—*Simmons Mfg. Co. v. Eskridge* (C. C. A.) 675.

§ 289. In an action for death of a switchman, whether his foot was caught in an unblocked frog as he was leaving a switch in the course of his duty, or was jammed into the frog after he was struck by a train, *held* for the jury.—*Toledo, St. L. & W. R. Co. v. Kountz* (C. C. A.) 832.

§ 289. Whether a servant, injured by the fall of an elevator counterbalance weight, was negligent, was for the jury.—*Corn Products Refining Co. v. King* (C. C. A.) 892.

§ 291. In an action for death of a servant, a request defining proximate cause *held* properly refused.—*Toledo, St. L. & W. R. Co. v. Kountz* (C. C. A.) 832.

§ 291. In an action for death of a switchman, a request defining proximate cause *held* properly refused as eliminating the proposition that an unblocked frog could have been an independent cause of the accident, regardless of decedent's negligence.—*Toledo, St. L. & W. R. Co. v. Kountz* (C. C. A.) 832.

§ 291. In an action for death of a switchman, a request to charge that if decedent attempted to cross the tracks knowing of the rapid approach of the train by which he was struck, and that this was the proximate cause of his death, plaintiff could not recover, *held* properly refused.—*Toledo, St. L. & W. R. Co. v. Kountz* (C. C. A.) 832.

§ 295. Instructions, in an action by an employé against the master for a personal injury, on the issue of assumption of risk, considered as a whole, *held* not erroneous.—*Puget Sound Electric Ry. v. Van Pelt* (C. C. A.) 206.

§ 296. In an action for death of a railroad switchman, the court did not err in omitting to charge that if decedent, in the exercise of ordinary care, could have discovered that the frog in which he was caught was unblocked, he was charged with knowledge of its actual condition.—*Toledo, St. L. & W. R. Co. v. Kountz* (C. C. A.) 832.

§ 296. An instruction requiring that contributory negligence, in order to defeat a recovery, be "substantial," *held* not error.—*Toledo, St. L. & W. R. Co. v. Kountz* (C. C. A.) 832.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(C) ACTIONS.

§ 332. In an action for injuries to a servant of certain machinery movers, whether plaintiff's employers were engaged by defendant to do the work in question as independent contractors

held for the jury.—*Ellsworth v. Hunt* (C. C. A.) 506.

§ 332. Where, in an action for injuries, the only allegation of defendant's negligence related to the weakness or insufficiency of an elevator, the court erred in charging that, if plaintiff in the work he was engaged in was defendant's servant, defendant was required to furnish a safe place and reasonably safe appliances.—*Ellsworth v. Hunt* (C. C. A.) 506.

MASTERS IN CHANCERY.

See Equity, §§ 399-409.

MATERIALITY.

Of evidence in criminal prosecutions, see Criminal Law, § 394.

MECHANICS' LIENS.

II. RIGHT TO LIEN.

(A) NATURE OF IMPROVEMENT.

§ 32. Code W. Va. 1906, § 3111, gives a right to a mechanic's lien for machinery furnished for the equipment of a mill, although it is not intended to be permanently attached to the freehold, and covers the price of spare rolls furnished for a tin-plate mill shown to be a necessary part of the equipment.—*Canton Roll & Machine Co. v. Rolling Mill Co. of America* (C. C. A.) 465; *Sturgiss v. Corbin, Id.*; *Farmers' Deposit Nat. Bank of Pittsburgh, Pa., v. Logan, Id.*

III. PROCEEDINGS TO PERFECT.

§ 132. One furnishing machinery for a mill under a contract *held* entitled to file a claim for a mechanic's lien within the statutory time after shipment of parts which were withheld on request of the purchaser.—*Canton Roll & Machine Co. v. Rolling Mill Co. of America* (C. C. A.) 465; *Sturgiss v. Corbin, Id.*; *Farmers' Deposit Nat. Bank of Pittsburgh, Pa., v. Logan, Id.*

§ 158. Where a materialman's lien declaration and account was verified before a nonresident officer, the absence of an authentication of the officer's authority *held* not a fatal defect.—*Vilter Mfg. Co. v. Tygart's Falley Brewing Co.* (C. C.) 1002.

§ 159. The filing of a claim for a mechanic's lien which is afterward abandoned does not estop the claimant to file another including the same indebtedness, where the second claim is filed within the time allowed by the statute.—*Canton Roll & Machine Co. v. Rolling Mill Co. of America* (C. C. A.) 465; *Sturgiss v. Corbin, Id.*; *Farmers' Deposit Nat. Bank of Pittsburgh, Pa., v. Logan, Id.*

MERGER.

Of cause of action in judgment, see Judgment.

MINERAL WAX.

Customs duties, see Customs Duties, § 38.

MINERS' DIAMONDS.

Customs duties, see Customs Duties, § 38.

MINES AND MINERALS.**I. PUBLIC MINERAL LANDS.**

Right to timber on unpatented mining claim, see Woods and Forests, § 8.

(A) RESERVATION AND DISPOSAL IN GENERAL.

§ 7. A person or association who, under Rev. St. §§ 2347-2352 (U. S. Comp. St. 1901, pp. 1440, 1441), enters on public lands in search of coal deposits, is not a trespasser, and is entitled to such coal as is extracted and removed as an incident to the reasonable prosecution of the work.—*Ghost v. United States* (C. C. A.) 841.

(B) LOCATION AND ACQUISITION OF CLAIMS.

§ 29. Where the location of an association placer mining claim is invalid for fraud on the part of some of the locators, if the work has been kept up and the law and district regulations complied with, locators who were not implicated in the fraud, but acted in good faith, may individually select and hold their proportionate part of the land within the limits of the association claim.—*Cook v. Klonos* (C. C. A.) 700.

II. TITLE, CONVEYANCES, AND CONTRACTS.**(C) LEASES, LICENSES, AND CONTRACTS.**

Possession of property by lessee's trustee in bankruptcy pending suit to cancel oil lease, see Bankruptcy, § 139.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

Restraining removal of ores, see Injunction, § 72.

MINORS.

See Infants.

MISBRANDING.

Food, see Food, § 12

MODIFICATION.

Of injunction, see Injunction, §§ 163, 167.

MONEY ORDERS.

See Post Office, § 15.

MORTGAGES.

Of railroads, see Railroads, § 165.

Of street railroad, see Street Railroads, § 55.

I. REQUISITES AND VALIDITY.**(A) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY.**

Right of grantor's widow to allowance for support out of property conveyed as security, see Executors and Administrators, § 181.

§ 27. An agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to mortgage, or to appropriate specific property to a particular debt, will create an equitable mortgage.—*Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co.* (C. C.) 770.

X. FORECLOSURE BY ACTION.**(N) FEES AND COSTS.**

§ 581. A provision in promissory notes for the payment of attorney's fees in case of collection by suit, valid under Laws Ga. 1900, p. 53, is enforceable although the holder brings a suit in equity to foreclose a mortgage securing the notes, instead of suing thereon at law, the attorney's fees being a part of the debt secured.—*British & American Mortgage Co. v. Worrill* (C. C.) 120.

MOTIONS.

For arrest of judgment in criminal prosecutions, see Criminal Law, § 970.

For new trial in criminal prosecutions, see Criminal Law, § 957.

MOTOR VEHICLES.

Duties on tires, see Customs Duties, § 26.

Injuries to occupants at railroad crossing, contributory negligence, see Railroads, § 328.

On streets, liabilities for injuries, see Municipal Corporations, § 706.

MUNICIPAL CORPORATIONS.

Injunctions affecting, see Injunction, § 85.

Ordinances relating to intoxicating liquors, see Intoxicating Liquors.

Regulation of railroads, see Railroads, §§ 223-254.

Street railroads, see Street Railroads.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.**(B) ORDINANCES AND BY-LAWS IN GENERAL.**

Ordinances imposing tax as denying due process of law, see Constitutional Law, § 283.

Ordinances imposing tax as denying equal protection of laws, see Constitutional Law, § 229.

IX. PUBLIC IMPROVEMENTS.**(C) CONTRACTS.**

Separate trials in same cause, see Trial, § 3.

§ 365. Acceptance of sections of a street improvement by the city engineer and the issuance of approximate estimates on which partial abatements had been made *held* no bar to the city's right to defend in an action for the balance on the ground that the work done had constituted a compliance with the specifications.—City of Greensboro v. Southern Pav. & Const. Co. (C. C. A.) 880.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) STREETS AND OTHER PUBLIC WAYS.

§ 705. The rule that a person before crossing a steam railroad track is bound, as matter of law, to stop, look, and listen, does not apply to one passing over an ordinary street crossing in a city.—Tiffany & Co. v. Drummond (C. C. A.) 47.

§ 706. In an action to recover for an injury to a person struck by an automobile while walking across a street, the question of plaintiff's contributory negligence *held* properly submitted to the jury.—Tiffany & Co. v. Drummond (C. C. A.) 47.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Jurisdiction of federal court as dependent on amount in dispute, see Courts, § 328.

NAMES.

See Trade-Marks and Trade-Names.

NATURALIZATION.

See Aliens, §§ 68-70.

NAVIGATION.

Rules for preventing collisions, see Collision, § 7.

NEGLIGENCE.

Causing death, see Death, § 31.

By particular classes of persons.

See Carriers, §§ 177, 186, 298; Railroads, §§ 223-485.

Employers, see Master and Servant, §§ 102-296.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Railroads, §§ 223-485.

III. CONTRIBUTORY NEGLIGENCE.

Of person injured by operation of railroad, see Railroads, §§ 327-328.

Of servant, see Master and Servant, §§ 289, 296.

IV. ACTIONS.

(A) RIGHT OF ACTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 119. In an action for injuries to a servant by the fall of an elevator, plaintiff *held* not entitled to complain of defendant's negligence in the manner of loading a motor onto the elevator.—Ellsworth v. Hunt (C. C. A.) 506.

(B) EVIDENCE.

§ 122. The burden of proving contributory negligence is on the defendant.—Ellsworth v. Hunt (C. C. A.) 506.

(C) TRIAL, JUDGMENT, AND REVIEW.

§ 136. Evidence *held* to warrant the submission of defendant's negligence in permitting an elevator, by the fall of which plaintiff was injured, to be overloaded, to the jury.—Ellsworth v. Hunt (C. C. A.) 506.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

In criminal prosecutions, see Criminal Law, § 957.

NOTES.

Promissory notes, see Bills and Notes.

NOTICE.

Of petition to revise in bankruptcy proceedings, see Bankruptcy, § 444.
Of trial, see Trial, § 3.

OFFICERS.

Injunctions affecting, see Injunction, § 85.

Particular classes of officers.

See Receivers.

Corporate officers, see Corporations, §§ 308-312.
Postmasters, see Post Office, § 7.

United States officers, see United States, §§ 3-52.

OLEOMARGARINE.

See Food, § 20.

ONYX.

Customs duties, see Customs Duties, § 25

OPINION EVIDENCE.

In civil actions, see Evidence, §§ 514, 539½.

OPINIONS.

Of courts, see Courts, §§ 90, 91.

ORDERS.

Of interstate commerce commission, see Commerce, § 88.
Review of appealable orders, see Appeal and Error.

ORES.

Restraining removal, see Injunction, § 72.

PAINTINGS.

Customs duties, see Customs Duties, § 37.

PARENT AND CHILD.

See Infants.

PARTIES.

Character ground of jurisdiction, see Courts, §§ 315, 321.

In suit for injunction, see Injunction, § 114.
On appeal or writ of error, see Appeal and Error, § 324.

Persons concluded by judgment, see Judgment, § 675.

III. NEW PARTIES AND CHANGE OF PARTIES.

Following in federal court, state statute authorizing prosecution of action by pendent lite assignee, see Courts, § 343.

In action to foreclose corporate mortgage, see Corporations, § 482.

In federal courts, see Courts, § 343.

PARTNERSHIP.**I. THE RELATION.****(B) AS TO THIRD PERSONS.**

§ 41. Parties using a name of a supposed corporation which they have attempted but failed to organize according to law are liable for the debts as partners.—Harrill v. Davis (C. C. A.) 187.

§ 41. Projectors of a corporation failing to legally organize are not individually liable as to third parties dealing with them after they become a de facto corporation.—Harrill v. Davis (C. C. A.) 187.

(C) EVIDENCE.

§ 44. Parties associating and incurring liability under a corporate name have the burden to prove that they are duly incorporated, or that they fall under some exception to the general rule making them liable as partners.—Harrill v. Davis (C. C. A.) 187.

PATENTS.

Sale under execution of rights under patent, see Execution, § 26.

Title of receiver of property of owner of patent, see Receivers, § 67.

I. SUBJECTS OF PATENTS.

§ 1. The right to a patent monopoly exists only by virtue of the laws of the United States, and cannot be affected by state laws.—Ball v. Coker (C. C.) 304.

II. PATENTABILITY.**(A) INVENTION.**

§ 18. A simple device or improvement may involve patentable invention, where it converts failure into success or accomplishes what others had tried to accomplish and failed.—Hall Signal Co. v. General Ry. Signal Co. (C. C.) 62.

§ 19. Where no pioneer patent exists, and inventors construct machines with improvements thereon, each inventor is entitled to his machine and improvement so long as it differs from those of his competitors.—Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co. (C. C. A.) 271.

§ 21. The mere selection of one substance from among a number as the active agent in a chemical process may involve patentable invention.—Naylor v. Alsop Process Co. (C. C. A.) 911.

§ 27. The application of an old machine, combination, or device, without substantial modification, to a new use, is not invention nor patentable.—Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co. (C. C. A.) 271.

§ 27. Application of old machine or device to new use held patentable, where it is incapable of performing the new function without substantial modification.—Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co. (C. C. A.) 271.

(D) ANTICIPATION.

§ 55. An expert cannot take a process patent, which has never been applied industrially, and work the process in his laboratory, and discover therefrom something which is not disclosed on the face of the patent, and then transfer that experience back to the time of the patent and make it a part of the prior art, for the purpose of defeating a subsequent patent for a meritorious invention.—Naylor v. Alsop Process Co. (C. C. A.) 911.

§ 64. It constitutes no anticipation and no defense to a claim of infringement that one or more elements of a patented combination or one or more parts of a patented improvement, may be found in one old patent, and others in another, and still others in a third.—J. L. Owens Co. v. Twin City Separator Co. (C. C. A.) 259.

§ 66. When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. They cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art.—Naylor v. Alsop Process Co. (C. C. A.) 911.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

§ 102. An applicant for a patent may properly file new claims in the Patent Office without

verification, where they are within the invention as disclosed in the specification and drawings, and narrower than the original claims.—General Electric Co. v. Morgan-Gardner Electric Co. (C. C. A.) 52.

§ 109. Patentee acquiescing in rejection of claim held not estopped from claiming by an amended claim every improvement not disclosed by the references on which his original claim was rejected.—J. L. Owens Co. v. Twin City Separator Co. (C. C. A.) 259.

§ 109. Where a patentee acquiesces in the rejection of his claim, he is estopped from maintaining that an amended claim covers the combinations and devices shown in the first claim, or that it has the breadth of the rejected claim.—Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co. (C. C. A.) 271.

§ 109. A patentee is not estopped from maintaining and securing by an amended claim every improvement that he has invented that was not disclosed by the references on which his original claim was rejected.—Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co. (C. C. A.) 271.

§ 112. The decision of the patent office on the question of fact as to priority of invention between two contesting parties in interference proceedings is conclusive in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction.—Roth v. Harris (C. C. A.) 279.

§ 114. The fact that pending a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), between two applicants for patents, the interests of the two litigants is united, does not deprive the court of jurisdiction to proceed to a decree adjudging the right of the prior inventor to a patent.—Schmertz Wire Glass Co. v. Pittsburgh Plate Glass Co. (C. C.) 73.

§ 114. Mere delay in the prosecution of a suit brought under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent, incident to the death of the complainant, and which is acquiesced in by the adverse party, will not operate as an abandonment or preclude the court from reviving and proceeding with the suit on application of complainant's administrator.—Schmertz Wire Glass Co. v. Pittsburgh Plate Glass Co. (C. C.) 73.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(B) LIMITATION OF CLAIMS.

§ 165. Courts will go far to save a patent for a meritorious invention, but they cannot reconstruct claims and disregard their very terms, and add or substitute material words not found therein, but necessary if the true invention is to be covered.—Sharp v. Bellinger (C. C.) 295.

§ 167. A claim of a patent calling in general terms for a "noncombustible and nonconducting material" cannot be limited by construction to a particular noncombustible nonconducting material named in the specification, either to avoid anticipation or infringement.—Empire Circuit Co. v. Channon (C. C. A.) 705.

§ 174. When the invention of a patent is not a pioneer invention, the inventor is held to a rigid construction of his claims, and is not entitled to any considerable range of equivalents, and when, in a patent for a mere improvement, which in view of the prior art is extremely narrow, he has limited his claims by specific words to a specific form of device or element, he is bound thereby.—Sharp v. Bellinger (C. C.) 295.

§ 177. General claim of a patent held not limited by specific claim in the same patent.—J. L. Owens Co. v. Twin City Separator Co. (C. C. A.) 259.

§ 178. Description in specification or drawing of a form or construction of a mechanical element under Rev. St. § 4888 (U. S. Comp. St. 1901, p. 3383), held not to deprive patentee of protection against mechanical equivalents.—J. L. Owens Co. v. Twin City Separator Co. (C. C. A.) 259.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(B) ASSIGNMENTS AND OTHER TRANSFERS.

§ 196. A patent monopoly can only be transferred in the manner prescribed by Rev. St. § 4898 [U. S. Comp. St. 1901, p. 3387], namely, by a written instrument signed by the owner of the patent and duly recorded.—Ball v. Coker (C. C.) 304.

(C) LICENSES AND CONTRACTS.

Duties of trustee in bankruptcy of licensee, see Bankruptcy, § 140.

§ 218. In an action for license fees for the use of patented machines, in which the defense was the failure of the machines to fulfill a warranty, instructions as to the waiver of the warranty by defendant held erroneous.—Columbia Chemical Co. v. Duff (C. C. A.) 57.

XI. REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES.

§ 222. Notice of a design patent for a hatband on women's sailor hats is not sufficiently given under Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), by printing the words "Lichtenstein Penant Sailor, Pat. Jan. 15th, 1907," upon the lining in the inside of the hats, there being nothing to indicate that such notice refers to the band.—Lichtenstein v. Phipps (C. C. A.) 61.

XII. INFRINGEMENT.

(A) WHAT CONSTITUTES INFRINGEMENT.

§ 235. Changes of form of a patent or combination will not avoid infringement, where the principle of the invention is taken, unless the form is the distinguishing characteristic of the invention.—Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co. (C. C. A.) 271.

§ 237. The substitution, for two rows of teeth which mesh around and engage with the cogs of a pinion in a patented device, of a single

row of two-faced teeth which performs the same function, will not avoid infringement.—Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co. (C. C. A.) 271.

§ 243. Material changes of form, composition, or construction will not avoid infringement.—J. L. Owens Co. v. Twin City Separator Co. (C. C. A.) 259.

§ 259. The fact alone that a majority of the stock of a corporation charged with infringement of a patent is owned by another corporation, which exercises such control only as is incident to such stock ownership by the election of its own officers as directors, etc., does not render the latter corporation chargeable as a contributory infringer.—Westinghouse Electric & Mfg. Co. v. Allis-Chalmers Co. (C. C.) 91.

§ 259. A preliminary injunction granted to restrain defendants from contributory infringement of a patent for a mimeograph by selling ink to owners of machines to be used therewith in violation of the license contracts under which the machines were sold.—A. B. Dick Co. v. Milwaukee Office Specialty Co. (C. C.) 930.

(B) ACTIONS AT LAW.

§ 265. The mere appointment of a receiver to take charge of, manage, and control a patent does not vest in him title to the patent which will enable him to maintain a suit for its infringement in his own name, Rev. St. § 4919 (U. S. Comp. St. 1901, p. 3394), giving the right to recover damages only "in the name of the party interested either as patentee, assignee, or grantee."—Ball v. Coker (C. C.) 304.

(C) SUITS IN EQUITY.

§ 283. A plea held to state a defense to a suit in equity for infringement of a patent.—Cutler v. Maryland Hotel Co. (C. C.) 931.

§ 289. A preliminary injunction will not be granted restraining a defendant from the manufacture and sale of an article alleged to infringe a patent, where the patentee, with knowledge that such article was being made and sold by defendant, delayed several years before bringing suit.—L. H. Gilmer Co. v. Geisel (C. C.) 313.

§ 310. An unpleaded patent issued after the patent in suit cannot be used to defeat the latter because the specification states that the application was filed on a date prior to that of the filing of the application for the patent in suit, especially in the absence of proof that no changes were made in the application after such filing.—Roth v. Harris (C. C. A.) 279.

§ 324. The ruling of a Circuit Court adjudging one or more claims of a patent invalid as too broad, while others were held valid and infringed, does not require complainant to file a disclaimer as to the claims adjudged invalid, under Rev. St. § 4922 (U. S. Comp. St. 1901, p. 3396), until a final decree has been entered which he may have reviewed on appeal.—Page Mach. Co. v. Dow, Jones & Co. (C. C. A.) 703.

§ 325. Where a suit is brought on several claims of one or more patents, and complainant

obtains relief on some of the claims and fails to recover on the others, an equitable division of the costs should be made.—J. L. Owens Co. v. Twin City Separator Co. (C. C. A.) 259.

§ 325. In a suit for infringement of two patents, where defendant prevails as to one, he is entitled to the same costs as though there had been a separate suit thereon.—Roth v. Harris (C. C. A.) 279.

§ 326. The refusal of the court in contempt proceedings in an infringement suit to permit the complainant to prove and recover damages on account of the new infringement adjudged to be a violation of a prior injunction held a matter of procedure, within the discretion of the court, and not reviewable by appeal.—Cazier v. Mackie-Lovejoy Mfg. Co. (C. C. A.) 701.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

CANADIAN.

45,090. Grain drill, cited..... 925

ENGLISH.

1876.

2,940. Means for operating washing machines, held not to anticipate patent No. 535,465.....271, 274

1883.

2,601. Fire-proof screen, cited..... 707

1884.

597. Temporary binder, cited..... 295

FRENCH.

608,096. Process and mechanism for making wire-glass, cited..79, 80, 81, 87

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DESIGN.

38,412. Hatband, decree as to granting of perpetual injunction against infringement affirmed and as to awarding statutory penalty reversed 61

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6,996. Grain drill, cited..... 924
 12,895. Seed planters, cited....924, 928, 929
 18,698. Gang ploughs, cited..... 924
 21,349. Seeding machine, cited..... 924
 30,183. Grain separator, cited..... 264
 31,428. Grain separator, cited..... 263
 33,617. Grain separator, cited..... 264
 35,360. Grain separator, cited..... 263
 37,753. Seeding machine, cited..... 924, 928
 39,090. Grain separator, cited..... 264
 41,872. Grain separator, cited..... 264
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 44,810. Corn planter, cited..... 924, 928
 51,687. Grain separator, cited..... 262

58,052.	Grain separator, cited.....	262	465,220.	Grain drill, cited.....	925, 928
59,638.	Wheat drill, cited.....	924	470,813.	Electric railway signal apparatus, held not anticipated and infringed	62
61,903.	Grain drill, cited.....	928	476,056.	Seed planter, cited.....	925
77,490.	Grain separator, cited.....	263	483,020.	Process and mechanism for making wire-glass, cited.....	88
100,032.	Corn planter, cited.....	924	483,021.	Process and mechanism for making wire-glass, cited.....	88
130,661.	Electric railway signal apparatus, cited	66	486,035.	Grain drill, cited.....	925, 928
137,026.	Seeding-machine, cited.....	928	488,846.	Seed planting machine, cited....	925
139,484.	Fire-escape, cited.....	298	489,353.	Attachment for grain drill, cited	925, 928, 929
150,148.	Temporary binder, cited.....	290	495,120.	Disk harrow seeder, cited... 925,	928
161,445.	Grain drill teeth, cited.... 924,	928	496,782.	Seeder, cited.....	925
164,227.	Electric railway signal apparatus, cited	68	497,864.	Grain drill, cited.....	925
187,140.	Fire-proof roofing, cited.....	707	500,725.	Grain drill, cited.....	925, 928
191,054.	Corn-planter and grain drill, cited	924	502,832.	Planter, cited.....	925
197,551.	Corn-planter, cited..... 924,	928	522,232.	Electrical safety fuse, cited....	312
212,669.	Corn-planter, cited.....	928	527,621.	Grain drill, cited..... 925,	926
222,042.	Corn-planter, cited..... 924,	928	530,962.	Seeding machine, cited.....	925
223,401.	Fire-proof shutter or screen, cited	707	534,305.	Seed drill, cited.....	925
228,548.	Furnace-shield, cited.....	707	535,465.	Means for operating washing ma- chines. Claim 1, held not an- ticipated, valid and infringed.	271, 273
235,029.	Combined seed drill and rolling cutter, cited..... 924,	928	535,544.	Disk harrow with grain drill at- tachment, cited..... 925,	928
237,001.	Grain-drill, cited.....	928	540,758.	Grain drill, cited..... 925,	928
237,278.	Corn planter, cited.....	928	551,704.	Protecting-shield for heating, smelting or other furnaces, cit- ed	707
238,182.	Shield for furnace doors, cited....	707	553,503.	Electric circuit controller, cited..	258
243,498.	Elastic seam drawers, cited.....	622	557,868.	Grain drill, cited 928; construed, and held not infringed.... 923,	925
251,528.	Fire-proof shutter, cited.....	707	558,643.	Oil burner, cited.....	717
251,867.	Electric railway signal apparatus, cited	67, 68	568,088.	Electric circuit controller, cited..	258
272,238.	Combined seed drill and rolling- cutter, cited..... 924,	928	570,803.	Temporary binder, cited.....	295
277,982.	Combined agricultural machine, cited	924	573,416.	Grain drill, cited..... 925,	928
286,306.	Fire-escape, cited.....	298	578,941.	Disk furrow-opener, cited.....	925
298,281.	Asbestos compound and articles made therefrom, cited.....	707	586,107.	Furrow-opening device for seed- ing-machines, cited.....	925
304,549.	Means for operating washing ma- chine, held not to anticipate patent No. 535,465..... 271,	274	587,441.	Electrical controller, held valid and infringed.....	53
312,791.	Seeding-machine, cited.....	924	587,442.	Electrical controller, held valid and infringed..... 53,	54
321,273.	Grain-drill, cited.....	924	591,354.	Seeding machine, cited..... 925,	928
325,512.	Grain-drill, cited.....	924	593,817.	Electric circuit controller, cited..	258
331,753.	Seeding-machine, cited.....	924	595,231.	Oil burner, construed and limited and as so limited held valid and not infringed.....	712
337,543.	Grain drill, cited.....	924	601,477.	Furrow-opener for seeding imple- ments, cited..... 925,	928
340,190.	Grain-drill, cited.....	924	602,827.	Seeding machine, cited..... 928,	929
345,403.	Seeding machine, cited.....	924	603,428.	Temporary binder, construed and limited and as so limited held valid and not infringed.....	284
347,863.	Grain-drill, cited.....	924	603,863.	Seed-drill-disk shoe, cited.....	928
347,982.	Grain-drill, cited.....	924	605,348.	Seeding machine, cited.....	928
354,163.	Seeding machine, cited..... 924,	928	606,015.	Electrical distribution and regula- tion system bill for an injunc- tion and for an accounting be- cause of alleged infringement dismissed	91
358,246.	Cutting disk for seeding machine, cited	924	607,914.	Seeding machine, cited.....	928
358,248.	Seeding-machine, cited..... 924,	928	612,602.	Grain drill, cited.....	928
359,832.	Seeding-machine, cited.....	924	622,511.	Electrical safety fuse, cited.....	313
360,638.	Normal safety home and distant signal system, cited.....	72	626,746.	Grain separator, claim 1, held not infringed..... 260,	261, 271
363,905.	Fire-proof paper or board, cited..	707	639,751.	Fire-escape, cited.....	299
370,177.	Process and mechanism for mak- ing wire-glass, cited.....	88			
386,484.	Grain drill, cited..... 924,	928			
388,491.	Fire-escape, cited.....	298			
406,147.	Seeding attachment for disk har- rows, cited.....	928			
410,346.	Temporary binder, cited.....	290			
443,643.	Seeding machine, cited..... 924,	928			
443,954.	Temporary binder, cited.... 288,	293			
446,230.	Grain drill, cited.....	924			
448,349.	Seed drill, cited.....	924			
448,943.	Disk corn planter, cited.... 924,	928			
460,366.	Seeding attachment for disk culti- vators, cited.....	924			

653,893. Oil burners, construed and limited and as so limited held valid and not infringed..... 712
 653,976. Fireproof shutter, cited..... 707
 659,880. Grain drill, cited.....925, 928
 659,881. Grain drill, cited 924, 925; construed, held not anticipated, valid and infringed.....927, 928
 660,341. Electrical safety fuse, construed, and held not infringed..... 311
 668,175. Grain separator, claim 1 held valid and infringed.....260, 261, 271
 673,274. Electric circuit-controllers, claims 1, 6, 7, and 11, held void for lack of invention; claim 10, if given a narrow construction to save it from invalidity held not infringed.....249, 250
 675,955. Fireproof blind, cited..... 707
 676,824. Hook and eye package, held void for lack of invention..... 900
 684,751. Grain separator, claims 1, 2, and 3, held infringed, and decree for injunction and an accounting ordered.....260, 261, 271
 693,207. Process for aging and bleaching flour held not anticipated, valid and infringed..... 912
 695,001. Fire-escape, cited.....297, 298
 711,626. Furrow-opener for seeding machines, cited..... 925
 715,691. Fire-escape, cited..... 299
 717,155. Furrow-opener for seeding machines, cited..... 925
 718,460. Electrical panel switch, cited..... 710
 718,513. Bearing for disk furrow-openers of grain drills, cited..... 925
 722,212. Current controlling device for telephone circuit held not infringed by No. 818,807.....549, 550
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 724,754. Process for the preservation of perishable food products, cited.. 921
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 758,128. Mail chute, bill for alleged infringement dismissed..... 931
 765,240. Tune sheet attachment for auto-pneumatic pianos, held not anticipated, valid and infringed..... 279, 280
 769,202. Disk drill, cited..... 928
 769,788. Fireproof drop curtain for theaters, held void for lack of invention.....705, 706
 780,664. Printing telegraph instrument, as to all claims except claim 12, held valid and infringed..... 703
 780,687. Attachment for piano player held not to anticipate No. 765,240.. 282
 791,216. Process and mechanism for making wire-glass, held not anticipated, valid and infringed..... 73, 78, 79, 80, 82, 83
 791,217. Process and mechanism for making wire-glass, held not anticipated, valid and infringed..... 73, 78, 79, 80, 82, 85, 87

800,131. Machine for making wire-glass, held void for lack of patentable novelty.....90, 91
 807,990. Double-hulling process, proceedings for infringement and an accounting ordered stayed..... 304, 305, 306
 818,526. Fire-escape, held not to infringe patent No. 835,985..... 296, 300
 818,897. Current controlling device for telephone circuit held not to infringe No. 722,212....549, 550, 552
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 830,644. Grain drill, cited.....925, 928
 830,645. Grain drill, cited.....925, 928
 832,896. Amplifying horn for talking machine, held void for lack of invention.....554, 555
 835,985. Fire-escape, construed and limited and as so limited, held not infringed by patent No. 818,526 296
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11,905. Oil burner, construed and limited and as so limited held valid and not infringed..... 712
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Construction in general, see Statutes, § 241.

PENALTIES.

For failure to publish rates, see Carriers, § 37.
 For violation of regulations by railroad company, see Railroads, § 254.
 Under contracts, see Damages, § 85.

II. ACTIONS AND OTHER PROCEEDINGS.

§ 40. An action to recover penalties for violation of Food and Rest Act Cong. June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), held civil, so that the government was entitled to have a judgment therein reviewed on a writ of error.—United States v. New York, C. & St. L. R. Co. (C. C. A.) 699.

PERFORMANCE.

Of contracts, see Contracts, § 287.

PERSONAL INJURIES.*Particular causes or means of injury.*

See Negligence.

Operation of railroads, see Railroads, §§ 277, 327, 328.

Particular classes of persons injured.

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Passenger, see Carriers, § 298.

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In bankruptcy, see Bankruptcy, §§ 49-116.

PLEADING.

Allegations affecting right to remove cause, see Removal of Causes, § 25.

Applicability of instructions to pleadings, see Trial, § 251.

Conformity in United States courts to practice in state court, see Courts, § 347.

Petition for removal of cause to United States court, see Removal of Causes, § 86.

In particular actions or proceedings.

See Admiralty, § 60; Equity, § 212; Negligence, § 119.

For infringement of patent, see Patents, § 310.

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Indictment or criminal information or complaint, see Indictment and Information.

Review of decisions and pleading in appellate courts.

Harmless error in rulings on, see Appeal and Error, § 1040.

XII. ISSUES, PROOF, AND VARIANCE.§ 376. Proof of service of notice of plaintiff's intention to sue under New York employer's liability act (Laws 1902, p. 1748, c. 600) held not required, where defendant admitted service of such notice both in its answer and bill of exceptions.—*La Compagnie Générale Transatlantique v. Hayes* (C. C. A.) 903.**POLICY.**

Of insurance, see Insurance.

POOL.

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POST OFFICE.**I. POST-OFFICE DEPARTMENT, POST OFFICES, POSTMASTERS, AND OTHER OFFICERS.**§ 7. A postmaster is liable on his bond for the salary of a clerk allowed and paid in his accounts, where such clerk performed no service in his office, but was employed in the department at Washington in violation of Act March 15, 1898, c. 68, § 9, 30 Stat. 317 (U. S. Comp. St. 1901, p. 2630).—*United States v. Moore* (C. C. A.) 36.**II. MAILABLE MATTER, TRANSMISSION AND DELIVERY OF MAIL, AND MONEY ORDERS.**

Restraining postmaster from refusing to admit a magazine to the mails at second-class rates, see Injunction, § 163.

§ 15. Mere delay on the part of the officers of the Post Office Department in acting on an application for the admission of a publication to the mails as second-class matter, and its admission in the meantime under a temporary permit as authorized by section 282 of the Postal Regulations of 1893, does not give the applicant the right to a hearing before action is taken on his application.—*Lewis Pub. Co. v. Wyman* (C. C.) 752.**III. OFFENSES AGAINST POSTAL LAWS.**

Demonstrative evidence in prosecution for offense against postal laws, see Criminal Law, § 404.

§ 46. Under Rev. St. § 5478 (U. S. Comp. St. 1901, p. 3696), it is an essential element of the offense of breaking into a building used in part as a post office with intent to commit therein larceny or other depredation that the intent should be to commit the larceny in the part of the building so used as a post office.—*Sorenson v. United States* (C. C. A.) 785.§ 49. The competent evidence on the trial of a defendant charged with breaking and entering a building used in part as a post office, and for stealing property therein, considered, and held insufficient to sustain a conviction.—*Sorenson v. United States* (C. C. A.) 785.§ 51. A sentence under Rev. St. § 5475 (U. S. Comp. St. 1901, p. 3694), for stealing post office property, or under section 5478 (U. S. Comp. St. 1901, p. 3696), for breaking and entering a post office, is fatally defective unless it imposes imprisonment "at hard labor" as required by each section.—*Sorenson v. United States* (C. C. A.) 785.**POULTRY.**

Duties on dressed poultry, see Customs Duties, § 30.

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Procedure in criminal prosecutions.

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In bankruptcy, see Bankruptcy, §§ 49-116.
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Procedure in or by particular courts or tribunals.
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Corporate agents, see Corporations, §§ 308-312.
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I. THE RELATION.**(B) TERMINATION.**

§ 33. A principal may revoke and an agent renounce his appointment, in the absence of an agreement for a specified term.—*Moore v. Security Trust & Life Ins. Co. (C. C. A.) 496.*

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(D) RATIFICATION.**

§ 171. Where the owners permitted supervising agents to contract for extras without protest, and, after the extras had been inserted, continued in possession thereof, they could not deny the agents' general authority to order the extras.—*Jefferson Hotel Co. v. Brumbaugh (C. C. A.) 867; Arents v. Meredith & Cocke, Id.*

PRINCIPAL AND SURETY.

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Liabilities of sureties or bonds in legal proceedings, see Injunction, § 239.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 82. A bond given to secure performance of a building operation construed, and the scope of the surety's liability determined.—*Equitable Trust Co. v. Aetna Indemnity Co. (C. C.) 433.*

III. DISCHARGE OF SURETY.

§ 100. The surety on a bond given by a builder to indemnify an insurer of the title of the property against loss because of his defaults or on account of liens held not discharged from liability because of the acts of its principal.—*Equitable Trust Co. v. Aetna Indemnity Co. (C. C.) 433.*

§ 109. The liability of the surety on a bond held not affected by the failure of the obligee to collect an additional security taken by it, but not contemplated by the contract.—*Equitable Trust Co. v. Aetna Indemnity Co. (C. C.) 433.*

PRIORITIES.

Between claims against estate of bankrupt, see Bankruptcy, §§ 345-350.
Of liens against vessel for damages resulting from collision, see Shipping, § 87.

PRISONS.

Place of imprisonment, see Criminal Law, § 1218.

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See Courts, § 200¼.

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See Execution; Injunction.

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Of traffic in intoxicating liquors, see Intoxicating Liquors.

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See Bills and Notes.

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Acts of corporators and promoters, see Corporations, § 30.

PROPERTY.

Constitutional guaranties of rights of property, see Constitutional Law, §§ 254-318.

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See Copyrights; Mines and Minerals; Trade-Marks and Trade-Names.

Vessels, see Shipping.

Transfers and other matters affecting title.

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PROVINCE OF COURT AND JURY.

In civil actions, see Trial, § 191.

In criminal prosecutions, see Criminal Law, § 762.

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Direct or remote consequences of injury, see Damages, §§ 22, 28.

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Of railroad rates, penalties for failure to publish, see Carriers, § 37.

PUBLIC IMPROVEMENTS.

By municipalities, see Municipal Corporations, § 365.

PUBLIC LANDS.

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II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.**(H) GRANTS IN AID OF RAILROADS.**

Adverse possession of right of way granted by Congress, see Adverse Possession, § 7.

§ 92. The grant of right of way over public lands to the Leavenworth, Pawnee & Western Railroad Company by Act July 1, 1862, c. 120, 12 Stat. 489, included the right of way over the lands within the Delaware Diminished Reservation in Kansas.—*Kindred v. Union Pac. R. Co.* (C. C. A.) 648.

§ 92. The assignment of lands in severalty to Delaware Indians in the Delaware Diminished Reservation in Kansas, under the treaty of May 30, 1860 (12 Stat. 1129), merely converted the prior communal right of occupancy into one in severalty, and did not vest title in the assignees, nor deprive Congress of the power to grant a right of way over such lands to a railroad company.—*Kindred v. Union Pac. R. Co.* (C. C. A.) 648.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads.

PUNISHMENT.

See Criminal Law, § 1218; Penalties.

QUALIFICATIONS.

By postmaster, see Post Office, § 7.

QUESTIONS FOR JURY.

In civil actions, see Trial, § 143.

In criminal prosecutions, see Criminal Law, § 762.

QUI TAM ACTIONS.

See Penalties, § 40.

RAILROADS.

See Street Railroads.

As employers, see Master and Servant.

Carriage of goods and passengers, see Carriers.

Grants of land in aid, see Public Lands, § 92.

Judicial notice of mode of operating railroads, see Evidence, § 20.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 73. Equity has jurisdiction of a suit by a railroad company to enjoin owners of adjoining lands from encroaching upon or interfering with its use of its right of way.—*Kindred v. Union Pac. R. Co.* (C. C. A.) 648.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 110. Plaintiff, in a suit to compel defendant railroad company to execute certain bonds and a mortgage pursuant to a recorded construction contract, held not chargeable with laches.—*Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co.* (C. C.) 770.

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.**(A) NATURE AND EXTENT OF LIABILITIES.**

§ 165. Code W. Va. 1899, c. 54, § 50, par. 11 (Code 1906, § 2343) requiring two-thirds of the stock of a railroad company to authorize a railroad mortgage, does not apply to expense for original construction to be secured by bond and mortgage under the original construction contract.—*Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co.* (C. C.) 770.

§ 165. Stockholders of a railroad company held estopped to assert that a provision for a mortgage in a construction contract was invalid because two-thirds of the stock had not authorized it as required by Code W. Va. 1899, c. 54, § 50, par. 11 (Code 1906, § 2343).—*Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co.* (C. C.) 770.

X. OPERATION.**(B) STATUTORY, MUNICIPAL, AND OFFICIAL REGULATIONS.**

Expert testimony in respect to safety appliances, see Evidence, § 514.

Regulation of interstate commerce, see Commerce, § 27.

§ 223. It is not an unreasonable provision to require railroad companies to manage their trains so as to minimize the risk to travel and employment.—Atlantic Coast Line R. Co. v. United States (C. C. A.) 175.

§ 229. From the title, and from every part of the safety appliance act (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), it is clear that the purpose was to promote the safety of interstate passengers and freight, and to protect the lives and limbs of railroad employes while engaged in interstate transportation.—Wabash R. Co. v. United States (C. C. A.) 1; Elgin, J. & E. Ry. Co. v. Same, Id.

§ 229. A carrier may move empty cars by themselves to repair shops, in order to comply with the safety appliance act (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 886]), without being guilty of a violation of those acts.—Chicago & N. W. Ry. Co. v. United States (C. C. A.) 236.

§ 229. The federal safety appliance act (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 886]), applies to cars that are transported solely for the purpose of repair, if in trains whose vehicles are moving interstate traffic, or, though empty, are moving to points to receive interstate traffic.—Chicago & N. W. Ry. Co. v. United States (C. C. A.) 236.

§ 229. The belt railway of Chicago in transferring a car of freight held engaged in interstate commerce, and therefore within the safety appliance acts relating to power brakes. Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act Cong. April 1, 1896, c. 87, 29 Stat. 85; Act Cong. March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885).—Belt Ry. Co. of Chicago v. United States (C. C. A.) 542.

§ 229. The federal safety appliance law (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as to grabiron or handhold on car held not violated where some other appliance affording equal security is furnished.—United States v. Boston & M. R. Co. (D. C.) 148.

§ 229. A man engaged in connecting and disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]).—United States v. Boston & M. R. Co. (D. C.) 148.

§ 229. Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901,

p. 3174]) § 4, requires grabirons or handholds in the end of each car where necessary to afford greater security to men coupling and uncoupling cars.—United States v. Boston & M. R. Co. (D. C.) 148.

§ 229. A train is an aggregation of cars drawn by the same engine, but if the engine is changed, then there is a different train.—United States v. Boston & M. R. Co. (D. C.) 148.

§ 254. Any failure on the part of a railroad company to comply with the requirements of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) subjects the railroad company to the penalty imposed thereunder.—Atlantic Coast Line R. Co. v. United States (C. C. A.) 175.

§ 254. An action under the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), to recover penalties for its violation is an action for debt.—Atlantic Coast Line R. Co. v. United States (C. C. A.) 175.

§ 254. A complaint under the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), alleging that the violation occurred "on or about" a particular date is not vague and indefinite.—Atlantic Coast Line R. Co. v. United States (C. C. A.) 175.

§ 254. Moving a defective empty car for purposes of repair, and not in connection with cars commercially used, does not subject a carrier to the penalties of the safety appliance act (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 886]).—Chicago & N. W. Ry. Co. v. United States (C. C. A.) 236.

§ 254. In a prosecution of a railroad for not furnishing a grabiron or handhold on a car, the jury must be satisfied by a preponderance of evidence that there was none where there should have been one.—United States v. Boston & M. R. Co. (D. C.) 148.

§ 254. Where a car is not properly provided with grabiron on a given day, and the train stops and then goes on again, there is only one violation of the law.—United States v. Boston & M. R. Co. (D. C.) 148.

(D) INJURIES TO LICENSEES OR TRESPASSERS IN GENERAL.

Judicial notice as to authority of conductor to remove trespassers, see Evidence, § 20.

§ 277. A railroad company is liable for compensatory damages for a misuse of a conductor's authority in the ejection of a trespasser.—Chicago, M. & St. P. Ry. Co. v. Anderson (C. C. A.) 901.

(F) ACCIDENTS AT CROSSINGS.

§ 327. It is the duty of a driver of an automobile, on approaching a railroad crossing, where the view is obstructed, to stop, look and listen, and to do so at a time and place where looking

and listening will be effective.—New York Cent. & H. R. R. Co. v. Maidment (C. C. A.) 21.

§ 327. Decedent, killed in a railroad crossing accident, *held* culpably negligent in failing to stop before going on the track.—Chicago, B. & Q. R. Co. v. Munger (C. C. A.) 690.

§ 328. A driver of an automobile, who was struck and injured at a railroad crossing, upon which he drove without stopping to look and listen after reaching a point where he could see along the track in the direction from which the train approached, *held* guilty of contributory negligence, which precluded a recovery for his injury.—New York Cent. & H. R. R. Co. v. Maidment (C. C. A.) 21.

(I) FIRES.

Expert testimony in action for injuries from fires caused by operation of, see Evidence, § 539½.

§ 481. Testimony *held* properly stricken out, as not relevant to any issue in the case.—Hitchner Wall Paper Co. v. Pennsylvania R. Co. (C. C. A.) 602.

§ 485. An instruction, in an action against a railroad company for injury by fire, considered and approved.—Hitchner Wall Paper Co. v. Pennsylvania R. Co. (C. C. A.) 602.

RATIFICATION.

Of act of agent, see Principal and Agent, § 171.

REAL ESTATE AGENTS.

See Brokers.

RECEIVERS.

III. TITLE TO AND POSSESSION OF PROPERTY.

Title to support suit by receiver for infringement of patent, see Patents, § 265.

§ 67. A patent right does not pass to a general assignee or receiver of property of the owner.—Ball v. Coker (C. C.) 304.

VI. ACTIONS.

Right of action by receiver for infringement of patent, see Patents, § 265.

§ 174. Under Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 554, as corrected by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (218 Comp. St. 1901, p. 582), persons injured by the operation of a street railroad by a receiver appointed in federal court could at their election sue the receiver and have their claim reduced to judgment in the state court.—Nashville Ry. & Light Co. v. Bunn (C. C. A.) 862.

RECORDS.

Criminal responsibility of United States officers for removal or secreting, see United States, § 52.

Transcript on appeal or writ of error, see Appeal and Error, § 500.

§ 14. The contents of a public record office are always at the service of a person desiring to examine the same, on due application to the official in charge.—Miller v. Moise (C. C.) 940.

REFERENCE.

In bankruptcy, see Bankruptcy, § 223.

In suit for unfair competition, see Trade-Marks and Trade-Names, § 99.

To commissioner in admiralty, see Admiralty, § 86.

To master or commissioner in equity, see Equity, §§ 399-409.

REGISTRATION.

See Records.

RELEVANCY.

Of evidence in criminal prosecutions, see Criminal Law, §§ 338, 348.

REMOVAL OF CAUSES.

I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.

§ 11. A cause in order to be removable must have been such as could have been originally brought by the plaintiff in the federal court to which it is sought to remove it.—Carp v. Queen Ins. Co. (C. C.) 782.

§ 11. A joint action against several insurance companies, some of which were aliens and others citizens of states other than Missouri, *held* not removable to the federal Circuit Court sitting in Missouri.—Carp v. Queen Ins. Co. (C. C.) 782.

§ 12. The written consent by counsel for a plaintiff to the filing of a general demurrer out of time by the defendant in a federal court after removal of the cause was such a recognition of the jurisdiction of the court over the person of plaintiff as to constitute a waiver of a subsequent plea to the jurisdiction on the ground that neither party was a citizen of the state of suit.—Moyer v. Chicago, M. & St. P. Ry. Co. (C. C.) 105.

§ 12. Where an action is brought against a corporation in a court of a state whereof it is not a citizen by a citizen of another state, such action may not be removed into a federal Circuit Court unless the plaintiff expressly or impliedly assents to such Circuit Court entertaining jurisdiction.—Moyer v. Chicago, M. & St. P. Ry. Co. (C. C.) 105.

§ 12. Where an action in a state court against a foreign corporation, commenced in a federal district other than that in which plaintiff resided, was removed on change of venue into such district, the defendant had the right at the first term thereafter to remove the same into the federal court, when the amount involved was such as to give that court jurisdiction.—Roberts v. Chicago, B. & Q. R. Co. (C. C.) 316.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 23. An action for injuries to a servant under the employers' liability act (Act Cong. April 23, 1908, c. 149, 35 Stat. 65) *held* not removable as an action arising under the laws of the United States.—*Miller v. Illinois Cent. R. Co.* (C. C.) 982.

§ 23. A cause is not removable as arising under the Constitution, laws, or treaties of the United States, unless the decision of the case depends on the federal Constitution or laws.—*Miller v. Illinois Cent. R. Co.* (C. C.) 982.

§ 25. In order to justify a removal of a cause on the ground that it is one arising under the Constitution, laws, or treaties of the United States under Act Cong. March 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), such fact must appear from plaintiff's statement of his own claim.—*Miller v. Illinois Cent. R. Co.* (C. C.) 982.

III. CITIZENSHIP OR ALIENAGE OF PARTIES.**(A) DIVERSE CITIZENSHIP OR ALIENAGE IN GENERAL.**

§ 36. Parties may be joined to prevent a removal of the cause if plaintiff has a joint cause of action.—*Evansberg v. Insurance Stove, Range & Foundry Co.* (C. C.) 1001.

(B) SEPARABLE CONTROVERSIES.

§ 49. Liability of a nonresident corporation and its resident superintendent for injuries to plaintiff *held* separable and not joint, so that a joinder of both did not prevent a removal of the cause.—*Evansberg v. Insurance Stove, Range & Foundry Co.* (C. C.) 1001.

§ 61. The nature of a cause of action for purposes of removal from a state to a federal court is that made by plaintiff's petition.—*Carp v. Queen Ins. Co.* (C. C.) 782.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

§ 86. A petition for removal alleging fraudulent joinder of parties defendant *held* insufficient.—*Evansberg v. Insurance Stove, Range & Foundry Co.* (C. C.) 1001.

RENUNCIATION.

Of allegiance to foreign powers by alien on application for admission to citizenship, see Aliens, § 68.

REPLICATION.

In pleading, see Equity, § 212.

REPORT.

Of master in chancery, see Equity, § 409.

RES GESTÆ.

In criminal prosecutions, see Criminal Law, §§ 338, 348.

RES JUDICATA.

See Judgment, §§ 675, 736.

REVENUE.

See Customs Duties; Internal Revenue; Taxation.

REVIEW.

See Appeal and Error; Criminal Law, §§ 1056-1172.

Of action of post-office department on an application for admission of matter at second-class postage rates, see Post Office, § 15.

RIGHT OF WAY.

Of railroads, see Railroads, § 73.

RISKS.

Assumed by employé, see Master and Servant, §§ 217, 219.

Within insurance policy, see Insurance, § 415.

ROADS.

Streets in cities, see Municipal Corporations, §§ 705, 706.

ROYALTIES.

Under patent, see Patents, § 218.

RULES OF NAVIGATION.

See Collision, § 7.

SAFETY APPLIANCES.

Expert testimony in respect to, see Evidence, § 514.

On railroad trains, penalties for violation of regulations, see Railroads, § 254.

On railroad trains, regulation of interstate commerce, see Commerce, § 27.

On railroad trains, statutory regulations in general, see Railroads, § 229.

SALES.

Of intoxicating liquors, see Intoxicating Liquors.

Of patent rights or patented articles, see Patents, § 222.

I. REQUISITES AND VALIDITY OF CONTRACT.

Obtaining credit by means of false statements as ground for refusal of discharge in bankruptcy, see Bankruptcy, § 407.

II. CONSTRUCTION OF CONTRACT.

§ 77. A contract for the sale and delivery of dried curd during a term of years, the price to be fixed each year and to be equal to the highest price paid by the purchaser to any other party for like product, construed after an assignment of the contract by the purchaser to a large concern doing business in several states, and held to entitle the seller only to the highest price paid at the place of business of the original purchaser to which the assignee succeeded.—*Casein Co. of America v. Van Dam* (C. C. A.) 45.

VII. REMEDIES OF SELLER.**(B) LIEN.**

Waiver of right by proving debt in bankruptcy as one without security, see *Bankruptcy*, § 363.

VIII. REMEDIES OF BUYER.**(D) ACTIONS AND COUNTERCLAIMS FOR BREACH OF WARRANTY.**

Judgment where breach of warranty is unsuccessfully relied on as a defense as bar to subsequent action to recover damages for breach, see *Judgment*, § 535.

IX. CONDITIONAL SALES.

Rights of buyer's trustee in bankruptcy, see *Bankruptcy*, § 140.
State laws as rules of decision in federal courts, see *Courts*, § 359.

§ 452. State statutes relating to conditional sales are in derogation of the rights of general creditors, and must be strictly construed.—*In re Burke* (D. C.) 994.

§ 473. A bona fide purchaser or execution creditor of a buyer under a conditional sale clothed with possession and apparent ownership is entitled to protection as against the original seller.—*Reardon v. Rock Island Plow Co.* (C. C. A.) 654.

§ 476. Provisions of a contract of sale held to entitle the seller to retake the property on the bankruptcy of the buyer as between them.—*Reardon v. Rock Island Plow Co.* (C. C. A.) 654.

SEAMEN.

Liability of master of vessel for false imprisonment in procuring arrest of seamen without a warrant, see *False Imprisonment*, § 7.

§ 19. Where the cook of a ship was lawfully discharged, in settling his wages the master could not deduct a sum paid by him to obtain advice for his guidance in connection with such discharge.—*The Tillie Baker* (D. C.) 942.

SEARCHES AND SEIZURES.

Competency of evidence obtained by means of search warrant illegally issued or executed, see *Criminal Law*, § 394.

SECRETARY OF THE INTERIOR.

Approval of conveyance of Indian lands by allottee, see *Indians*, § 15.

SEPARABLE CONTROVERSY.

Removal from state court, see *Removal of Causes*, §§ 49, 61.

SETTING ASIDE.

Certificate of naturalization, see *Aliens*, § 68.

SETTLEMENT.

See *Account Stated*.

SHIPPING.

See *Admiralty*; *Collision*; *Maritime Liens*; *Seamen*; *Towage*.

I. REGULATION IN GENERAL.

§ 10. The superstructure of a cabin in a gasolene boat extending above the deck held not a closed-in space which was to be added to the space below the deck in computing the tonnage, under Rev. St. § 4153 (U. S. Comp. St. 1901, p. 2812), to ascertain whether the boat is of more than 15 tons burden and subject to inspection, etc., under Rev. St. § 4426 (U. S. Comp. St. 1901, p. 3029).—*The Messenger* (C. C. A.) 908.

III. CHARTERS.

§ 49. Where a charter party expressly provides the time when lay days for discharging shall commence, such provision governs in the computation of dispatch money.—*Elder Dempster S. S. Co. v. Earn Line S. S. Co.* (C. C. A.) 50.

§ 52. Evidence held to show that before actual withdrawal of steamer for nonpayment of hire the hire in arrears was tendered.—*Luckenbach v. Pierson* (D. C.) 403.

§ 56. The charterer of a vessel, thereafter assigning the charter to a third person and agreeing to furnish proper fittings, held liable for the loss to the assignee of the vessel, where it was taken from him by the owner on failure of charterer to furnish such fittings.—*J. M. Guffey Petroleum Co. v. Coastwise Transportation Co.* (D. C.) 379; *Coastwise Transportation Co. v. J. M. Guffey Petroleum Co.*, Id.

§ 58. In a suit to recover for injury to a derrick chartered by libelant to respondent, and which sank while in the exclusive possession and control of respondent, the burden rested upon respondent, as bailee in possession, to avoid liability, to show how the injury occurred and that it was free from negligence.—*Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co.* (C. C. A.) 533.

§ 58. Where the withdrawal of a steamer for nonpayment of hire was wrongful, the charterers could set off the damages they suffered

thereby against the hire due.—*Luckenbach v. Pierson* (D. C.) 403.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

§ 81. A claim against a steamer for damages alleged to have been caused to a schooner by her swells, in a channel, dismissed, where it did not clearly appear that the steamer created the swells, and, if she did, they were not more than ordinary under reduced speed, and there was no negligence on her part.—*The Providence* (D. C.) 564.

§ 84. A hatch cover on the second deck of a vessel which when in place constituted part of the gangway over which employes were required to move cargo in loading the vessel constituted a "way" within the meaning of the New York employer's liability act (Laws 1902, p. 1748, c. 600), which makes employers liable under certain conditions for injuries resulting from defects in the condition of "ways, works, and machinery."—*La Compagnie Generale Transatlantique v. Maguire* (C. C. A.) 34.

§ 86. The question of a master's negligence in the manner of constructing a hatch cover on a vessel by reason of which an employe was injured held for the jury in an action to recover for the injury.—*La Compagnie Generale Transatlantique v. Maguire* (C. C. A.) 34.

§ 86. In an action for injuries to a longshoreman while stowing cargo, whether defendant's foreman and assistant foreman of longshoremen were negligent held for the jury.—*La Compagnie Generale Transatlantique v. Hayes* (C. C. A.) 903.

§ 87. Claims against a vessel for damages resulting from collisions occurring on different dates are entitled to priority in the inverse order of such dates, upon the theory that the first claimant by virtue of his lien acquires a proprietary interest in the vessel, which is subject to the risks of her subsequent navigation, including liability for subsequent torts.—*The America* (D. C.) 424.

VII. CARRIAGE OF GOODS.

§ 132. Under a provision of a bill of lading giving the carrier, in case of loss or damage to the property for which it is liable, the benefit of "any insurance that may have been effected upon or on account of such property," the burden rests upon the carrier, when sued for a loss, to prove that there was insurance, to the benefit of which it was entitled.—*Walter Baker & Co. v. New York, N. H. & H. R. Co.* (C. C. A.) 248.

§ 141. Clause in bill of lading that ship should not be responsible for strikes held defense to action for damages for delay in discharging cargo.—*The Toronto* (D. C.) 336.

VIII. CARRIAGE OF PASSENGERS.

§ 167. A limitation in a ticket sold by a steamship company of the recovery on damage to passenger's baggage to \$100 was valid.—*The Morro Castle* (D. C.) 555.

X. GENERAL AVERAGE.

§ 193. Where spontaneous combustion of a cargo of garbage tankage was due to the inherent quality thereof, the owner of the cargo is entitled to contribution from the shipowner.—*The Wm. J. Quillan* (D. C.) 407.

SMUGGLING.

See Customs Duties, § 132.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

SPONTANEOUS COMBUSTION.

Right of owner of cargo to contribution from shipowner for spontaneous combustion of cargo, see Shipping, § 193.

STARE DECISIS.

See Courts, §§ 90, 91.

STATES.

See United States.

Courts, see Courts.

Judicial notice by United States courts of laws of states, see Evidence, § 28.

Legislative power, see Constitutional Law, § 55.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

Adoption by United States courts of state laws as rules of decision, see Courts, §§ 359-372.

Statutes denying due process of law, see Constitutional Law, §§ 254-318.

Statutes denying equal protection of laws, see Constitutional Law, §§ 213-248.

Statutes of limitation, see Limitation of Actions, § 3.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

Repeal of Chinese exclusion acts, see Aliens, § 21.

VI. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 184. The courts have not the power to read an exception into a statute so as to modify or change the nature of the same and thus defeat the purposes for which the law was intended.—*Atlantic Coast Line R. Co. v. United States* (C. C. A.) 175.

§ 199. The term "paragraph," in an act of Congress, will be construed to mean "section," whenever to do so accords with the legislative intent.—*Alfrey v. Colbert* (C. C. A.) 231; *Colbert v. Alfrey*, Id.

§ 225½. In the re-enactment of the term "vegetables" in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), it must be presumed to have been intended to have the meaning given it by the Supreme Court, rather than a contrary meaning later given it by a Circuit Court.—*Von Bremen, MacMonnies & Co. v. United States* (C. C. A.) 889; *Mouquin Wine & Restaurant Co. v. United States, Id.*

§ 226. Adoption of statute previously in force in some other jurisdiction held subject to the interpretation placed upon it by the judicial tribunal of the other jurisdiction.—*Harrill v. Davis* (C. C. A.) 187.

(B) PARTICULAR CLASSES OF STATUTES.

Statutes providing for enforcement of conditional sales, see Sales, § 452.

§ 241. Ex post facto law by judicial construction is as pernicious as ex post facto legislation.—*Martin v. United States* (C. C. A.) 198.

§ 241. One who was not beyond reasonable doubt within the class by whom an offense may be committed by the express terms of the statute may not be brought within it after the event by interpretation.—*Martin v. United States* (C. C. A.) 198.

§ 241. A penal statute which creates and prescribes punishment for an offense committed by a specific class must be strictly construed.—*Martin v. United States* (C. C. A.) 198.

§ 241. Though penal laws are to be strictly construed, they cannot be given a construction so strict as to render them ineffective and defeat the manifest purpose of their enactment.—*United States v. Dillin* (C. C. A.) 813.

VII. PLEADING AND EVIDENCE.

Judicial notice, see Criminal Law, § 304.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

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